

EXECUTORIAL STRENGTH IN EXECUTION OF WARRANTY OBJECT OF DEBTOR'S DEBT IN FIDUSIAN AGREEMENTS IN THE ERA OF COVID -19

Nelly Azwarni Sinaga¹, Humala Sitinjak², Mukidi³ Rudy Pramono⁴

¹ STIE Al-Washliyah Sibolga

² Universitas Simalungun, Indonesia

³ Universitas Islam Sumatera Utara

⁴ Universitas Pelita Harapan, Indonesia

¹ nellyazwarnisinaga@stiealwashliyahsibolga.ac.id

² sitinjakhumala@gmail.com

³ mukidi@fh.uisu.ac.id

⁴ rudy.pramono@uph.edu

Abstract : *The period of the Covid 19 pandemic that has hit the world including Indonesia, which started the spread of this virus since the end of 2019, where the impact was tremendous for all human life, including the aspects of health, the economy including also affecting the implementation of agreements in legal aspects. The Fiduciary Agreement is a form of anonymous agreement that was born along with the development of business practices in Indonesia. The parties to the fiduciary agreement have mutually agreed to regulate their respective rights and obligations as well as legal sanctions if a party breaks the promise. This paper limits the problem regarding debtors who do not fulfill the agreement / break promises on the agreements that have been bound and the consequences for the object of the agreement. Consequences of debtors who break their promises result in Default. Problems arise when the fiduciary object is executed because the Debtor is in Default and the execution procedure is not properly carried out. This study aims to determine the legality of the execution of fiduciary collateral objects for debtors who are defaulting during the Covid 19 pandemic. auctions in public or can be carried out by selling under the hands of the agreement of both parties, but the implementation often still does not fulfill the mandate of the law or the agreement is not carried out properly. others that: 1. Communities who are not affected by economic constraints and other constraints in fulfilling their achievements 2. Communities who are affected by the economy and other constraints in fulfilling their achievements. Banks can provide credit / financing to obtain special treatment in accordance with applicable regulations.*

Keywords : Execution, default, Fiduciary, Covid-19.

I. INTRODUCTION

At the beginning of 2020 there has been the spread of the Covid -19 Pandemic Virus which resulted in the world community in general and in particular being disrupted in terms of the economy including in the business world based on the Financial Services Authority Regulation Number 11 / POJK.03 / 2020 concerning National Economic Stimulus as a policy of the impact of the spread of coronavirus disease 2019, which gives banks the authority to establish policies that support economic growth stimulus for debtors.

As a result of the Covid-19 pandemic through Presidential Decree No. 12/2020 stipulates that the Corona virus is a National disaster that has affected all aspects of people's lives, especially economic aspects where there has been a decrease in the economic capacity of a person, a result of a decrease in income due to loneliness. Consequently, the consumer influences the person to carry out the agreement for that person because he has made a sale and purchase transaction of goods related to Fiduciary before the Covid -19 Pandemic.

The company's marketing strategy, in terms of business competition in the global economy, makes it easier for consumers to get the goods / objects they want in an easy way, whether it's moving objects or immovable objects. Bank financial institutions and non-bank consumer finance companies in collaboration with merchants selling goods will finance consumers to get a product. Banks and Consumer Financing Institutions function to provide funds or capital to the public or consumers to obtain certain goods.

The discussion in the writing is limited only to the object of collateral for movable objects, in particular motorized vehicles bound with Fiduciary security. Objects that can be used as objects of Fiduciary security include cars, motorbikes, ships with gross contents under 20 M3, merchandise, and so on.

Problems will arise if the achievement is not fulfilled by one of the parties, causing default. In general, default is committed by the Fiduciary / Debtor so that it will cause legal problems between the two. This is closely related to objects that are used as objects of Fiduciary security. Of course, the execution of the Fiduciary Guarantee object which is under the control of the debtor should also be carried out according to applicable regulations. However, in practice, the execution of the object of the Fiduciary Guarantee has not fulfilled the statutory provisions.

With the background of the things described above, the author wrote this article with the title: Execution of Collateral Objects for Default Debtors in the Fiduciary Agreement. This research aims to :

1. Knowing the execution of the execution of fiduciary collateral as a result of the Debtor's default against the fiduciary agreement made between the Fiduciary Giver (Debtor) and the Fiduciary Receiving Party (Creditor).
2. Knowing the rights and obligations of each party as a result of the law arising from the agreement made by both parties.
3. Procedures for executing collateral that are used as objects of fiduciary security...

II. LITERATURE REVIEW

Fiduciary (Fiduciare Eigendom Overdrach) according to article 1 of Law number 42 of 1999, concerning Fiduciary Guarantee:

(1) Fiduciary is a transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains in the hands of the owner.

(2) Fiduciary Security is a security right over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with Mortgage Rights as referred to in Law number 4 of 1996 concerning Mortgage Rights, which remain under the control of the Giver. Fiduciary, as collateral for the settlement of certain debts, which gives priority to the Fiduciary's position over other creditors.

In practice, the Bank or financing institution as the party providing the funds (Fund lender) will make an agreement with the party using the fund (User fund) by fulfilling the terms agreed by both parties and in accordance with the legal terms of the agreement according to statutory provisions. applicable.

The birth of the Fiduciary Agreement begins with the agreement between the parties giving the Fiducia as the owner of the goods with the Fiduciary Recipient as the party having the receivables whose payment is guaranteed by Fiduciary security (article 1 paragraph 6 of Law number 42 of 1999). The Fiduciary Guarantee is a follow-up agreement of a principal agreement that creates an obligation for the parties to fulfill an achievement.

Furthermore, in order to comply with statutory provisions, the agreement of the two parties is stated in the Fiduciary Guarantee Deed which is drawn up and signed by the parties before the Notary as the competent official (Article 5 of Law Number 42 of 1999). The agreement states the terms and conditions that contain the rights and obligations of each party for the mutually agreed upon achievements which are obliged to be obeyed by both parties. Furthermore, the Fiduciary Agreement deed is registered with the Fiduciary Institution, in this case the Ministry of Law and Human Rights of the Republic of Indonesia, the Directorate General of General Legal Administration. So since then fiduciary has been born which binds the parties making the Fiduciary Agreement.).

III. METHOD

This research method is a descriptive normative legal research. The types of data used are primary data and secondary data. The data collection techniques used were literature study and document study.

IV. RESULT AND DISCUSSION

1. The birth of the Fiduciary Agreement

Fiduciary is the transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains under the control of the owner of the object. A Fiduciary Agreement is an agreement between two or more parties regarding movable property or certain goods that can be used as objects of fiduciary security that remain under control of the owner given on the basis of trust.

Fiduciary Security is a security right for movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with the Mortgage Rights as referred to in Law number 4 of 1996 concerning Mortgage Rights, as collateral for the settlement of certain debts, which gives a position which prioritizes the Fiduciary Recipient of other creditors (Article 1 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Security).

The parties to the Fiduciary Guarantee agreement are:

- 1) Giver of Fiduciary is an individual or corporation owning an Object which is the object of Fiduciary Security.
- 2) A Fiduciary Recipient is an individual or corporation that has receivables whose payment is guaranteed by a Fiduciary Guarantee

Example: Individuals, Banks and Non-Bank Financing Institutions

The Fiduciary Guarantee is a follow-up agreement of an agreement that creates an obligation for the parties to fulfill an achievement (Article 4 of Law number 42 of 1999 concerning Fiduciary Security). Just like agreements in general, a Fiduciary agreement is valid if it has met the provisions regarding the validity of an agreement as required in the statutory provisions. The legal terms of an agreement according to the provisions of Article 1320 of the Civil Code, namely:

- a. There is an agreement between the parties
- b. The skill of the person making the agreement
- c. The existence of a certain object
- d. There are causes / causes that are lawful

A legal agreement made by the parties will result in the birth of rights and obligations for those who make it which binds them to one another in accordance with what was agreed. This is in accordance with the principle of Pacta Sunt Servanda or also known as the principle of legal certainty, which is in line with article 1338 of the Civil Code which reads: "Agreements made legally are valid as laws".

This means that every person / entity that makes an agreement, then that person or entity has binded himself to another person / entity and is obliged to comply with the agreement he made which is a law for the parties.

Regarding the material of an agreement, every person / body can agree on anything as long as it does not conflict with statutory regulations, public order and morals. Indonesian law recognizes the principle of freedom of contract, which is a principle that gives freedom to everyone who is capable of acting / agency to:

- a. Make arrangements with anyone who can make arrangements

The agreement can be made by anyone as long as the person or entity doing the agreement is those who have the ability to take legal actions, not people who are not competent (Onwardig) to do so.

- b. Regarding the agreement about anything with a halal causa

The cause of the agreement is causa that is lawful, not causa that is prohibited because it is contrary to legislation, public order and morality.

- c. Determine the material / content and terms of the agreement

The material or content of the agreement must be clear and accommodate the interests of both parties.

- d. Determine the time and procedure for the implementation

The deadline for the agreement must be clearly defined in order to avoid the implementation of the agreement with no clear deadline. Likewise, the procedure for implementing the agreement must also be arranged so that the agreement can be carried out according to the wishes of the parties.

- e. Determine the form written or unwritten.

The form of the agreement should be done in writing in order to ensure legal certainty because it can be used as a clear basis for evidence and provisions should problems arise between the parties in the future.

Likewise with the Fiduciary Agreement, the parties have mutually agreed to make a written agreement as outlined in a credit agreement made under hand and followed by making a Fiduciary Agreement Deed which is drawn up and signed before a Notary as the public official with the authority to do so. Article 5 paragraph (1) Law number 42 of 1999 concerning Fiduciary Security (UUJF) reads: "The imposition of objects with Fiduciary guarantees is made with a Notary deed in Indonesian and is a Fiduciary Guarantee Deed".

Likewise with the Fiduciary Agreement, the parties have mutually agreed to make a written agreement as outlined in a credit agreement made under hand and followed by making a Fiduciary Agreement Deed which is drawn up and signed before a Notary as the public official with the authority to do so. Article 5 paragraph (1) Law number 42 of 1999 concerning Fiduciary Security (UUJF) reads: "The imposition of objects with Fiduciary guarantees is made with a Notary deed in Indonesian and is a Fiduciary Guarantee Deed".

Furthermore, Article 11 paragraph (1) Law number 42 of 1999 concerning Fiduciary states that objects that are burdened by Fiduciary must be registered.

Registration of Fiduciary Security as referred to in Article 11 paragraph (1) above shall be carried out at the Fiduciary Registration Office (Article 12 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary).

Thus, the legality of a Fiduciary Agreement is carried out in 2 (two) stages, namely:

- a. The stage of making and signing the Fiduciary Agreement as outlined in the credit agreement and the Fiduciary Guarantee Deed
- b. Registration stage for Fiduciary security to the Directorate General of General Law Administration, Ministry of Law and Human Rights of the Republic of Indonesia.

According to article 6 UUJF, the Fiduciary Guarantee Deed as referred to in Article 5 paragraph (1) at least contains:

- a. Identity of the Fiduciary Giver and Recipient
- b. Basic agreement data guaranteed by Fiduciary
- c. A description of the objects that are the Fiduciary Guarantee
- d. Guarantee value, and
- e. Value of Objects which are the object of the Fiduciary Guarantee.

2. Rights and Obligations of Fiduciary Giver and Recipient

In the Fiduciary Guarantee agreement deed in more detail, the rights and obligations of each party will be described which must be obeyed as law for the parties. The rights and obligations of each party as outlined in the Fiduciary Agreement can be described as follows:

- 1) The rights of the Giver of Fiduciary include:
 - a. The Fiduciary Giver has the right to continue to control and manage the object of the Fiduciary Guarantee, but as the borrower uses it because the material rights over the object of the guarantee have acted on the Fiduciary Recipient (Creditor).
 - b. The Fiduciary Giver has the right to use and utilize the object of the Fiduciary Guarantee in accordance with its designation and there is no obligation to pay compensation in any form for the borrowing to use to the Fiduciary Recipient (Creditor).
- 2) Obligations of the Fiduciary include:
 - a. The Fiduciary Giver is obliged to maintain the object of the Fiduciary Guarantee as well as possible and take all necessary actions for the maintenance and repair of the Fiduciary Guarantee object at the expense and responsibility of the Fiduciary Giver, as well as to pay taxes and other expenses related to it.
 - b. The Fiduciary Giver is obliged to replace part of the object of the Fiduciary Guarantee if any part of the object of the Fiduciary Guarantee cannot be used anymore.
 - c. The Giver of Fiduciary promises to insure at his own expense the object of the Fiduciary Guarantee at an insurance company that is appointed and approved by the Fiduciary against fire and other hazards and for a certain amount of coverage and on terms deemed appropriate by the Fiduciary.
 - d. The Giver of Fiduciary is obliged to authorize the Power of Attorney to register the Fiduciary Agreement with the competent authority for this.
- 3) The rights of Fiduciary recipients include:
 - a. The Fiduciary Recipient at any time and is authorized by the Fiduciary Giver to examine the existence and condition of the Fiduciary Guarantee object
 - b. The recipient of the Fiduciary has the right to insure the object of the Fiduciary Guarantee if the Fiduciary is negligent to insure the object with the premium fee still being borne by the Fiduciary.
 - c. The Fiduciary Recipient has the right to and is authorized by the Fiduciary to make changes or adjustments to the provisions of the agreement in the event that such changes and adjustments are required in order to comply with statutory provisions.
 - d. If the Giver of Fiduciary does not carry out or fails to carry out his obligations, the Fiduciary has the right to sell or auction the object of the Fiduciary Guarantee.
- 4) Obligations of the Fiduciary, among others:
 - a. The Fiduciary Recipient with the power of attorney is obliged to register the Fiduciary Guarantee agreement with the Directorate General of General Law Administration of the Ministry of Law and Human Rights of the Republic of Indonesia as the authorized institution for this.

- b. The recipient of Fiduciary is obliged to keep the document of proof of ownership of the object of the Fiduciary Guarantee as well as possible and must return and submit the document of proof of ownership of the object of the Fiduciary Guarantee if all debts have been paid off.

The rights and obligations of each party are in principle balanced, but basically the Fiduciary Recipient has more rights and authority in the event of a default on the Fiduciary Agreement where the Fiduciary Recipient can carry out execution actions against the object of the Fiduciary Guarantee, namely:

- a. Have the right to sell the Fiduciary Guarantee object on the basis of the title of execution;
- b. The right to auction off the objects of the Fiduciary Guarantee through public tenders;
- c. The right to carry out sales under the hands of the Fiduciary based on the agreement between the Fiduciary and the Fiduciary if in this way the highest price that is favorable to the parties is obtained.

This executorial power is based on the power of the *irah-irah* title contained in the Fiduciary Guarantee Certificate which includes the words "For Justice Based on One Godhead" (Article 15 paragraph 1 UUJF).

Furthermore, in paragraph (2), it is stated that the Fiduciary Guarantee Certificate 11 as referred to in paragraph (1) has the same executorial power as a court decision which has obtained permanent legal force. Furthermore, article 15 paragraph 3 of the UUJF confirms that if the debtor fails to promise, the Fiduciary has the right to sell the object which is the object of the Fiduciary Guarantee in his own power. This gives the Fiduciary a power position to be able to carry out direct execution of the object of the Fiduciary Guarantee.

In addition, the Fiduciary Recipient has the position of Preferent Creditors or creditors that take precedence or priority. This is emphasized in article 27 of the UUJF which states that Fiduciary Recipients have precedence over other creditors. The prioritized right is the right to take the payment of the loan due to the execution of the object which becomes Fiduciary Security.

3. Execution of the Fiduciary Guarantee Object

Article 29 of the UUJF confirms that if the Debtor or Fiduciary fails, the execution of the object which is the object of the Fiduciary Guarantee can be carried out by:

- a. Implementation of the executorial title as referred to in article 15 paragraph (2) by Fiduciary.
- b. Sale of objects that are the object of the Fiduciary Guarantee under the authority of the Fiduciary Recipient through a public auction and collect the receivables from the sale proceeds
- c. Underhand sales are made based on the agreement between the Fiduciary and the Fiduciary if in this way the highest price that benefits the parties is obtained.

A person can be declared injured or in default if:

- a. Do not carry out the achievement at all;
- b. Implementing achievements but not in accordance with what was promised;
- c. Carry out achievements but not on time
- d. Carry out actions prohibited in the agreement (Muhammad Syaifuddin, 202: 338)

According to M. Yahya Harahap (1980: 60) Default is the implementation of an obligation that is not on time or is carried out inappropriately. According to Yahman (2014: 83), Default can occur because of errors, negligence and / or deliberate actions. In general, default occurs after the debtor is declared negligent (Ingebreeke) as stated in article 1243 of the Civil Code.

The power of the Fiduciary Recipient to carry out the act of execution is reinforced by, among others, the wrong terms and conditions in the Fiduciary Agreement which read as follows:

"In the event that the Fiduciary and / or Debtor does not implement or fulfill any of the provisions in this deed and / or one of the provisions in the Credit Agreement, especially in the case of the Fiduciary Giver and / or Debtor being negligent, the negligence is solely proven by the passage of time. that is determined, without which there is no need for a bailiff's warning letter or other similar letter, then in his own power the Fiduciary has the right to sell the object of the Fiduciary Guarantee based on the executorial title; or through public tenders; or through an under-hand sale made based on the agreement between the Fiduciary and the Fiduciary if in this way the highest price that is favorable to the parties is obtained".

Article 30 UUJF states that the Giver of Fiduciary is obliged to hand over the object which is the object of the Fiduciary Security in the context of the execution of the Fiduciary Guarantee. That is why in the Fiduciary Guarantee agreement, one of the articles in the agreement generally includes a clause which confirms that in the event that the Fiduciary Recipient uses the rights given to him as agreed, the Fiduciary Giver at the time of making the agreement is obliged and binds himself at that time to be able to used in the future at the time, submit in a well-preserved condition to the Fiduciary Recipient object of the Fiduciary Guarantee upon the notification or warning from the Fiduciary Recipient within the time determined by the Fiduciary Recipient. If the Giver of Fiduciary continues to fail to fulfill his obligations within the stipulated time limit, then with the

elapsed time without the need for a bailiff's warning letter or other similar letter, then the Fiduciary Recipient or his legal proxies are entitled to observe the applicable laws and regulations, to take or order to take the object of the Fiduciary Guarantee is in the hands of a third party who controls it.

Based on the above description, UUJF has explicitly stated that with *irah-irah* power the Fiduciary Certificate has given executorial power to Creditors to sell collateral objects by way of public auction or by selling under hand. Underhand selling is a way of avoiding public auctions. Through the sale under the agreed hand, both parties open the opportunity for the Debtor to be able to determine the selling price of the collateral object so that the selling value can be higher and the Debtor is not too disadvantaged.

However, in practice, the execution often creates problems, among others, because the Fiduciary Giver was negligent or deliberately did not fulfill his obligation to hand over the object of the Fiduciary Guarantee to the Fiduciary. The problem arises again when Fiduciary Recipients execute fiduciary objects by coercion and often use third parties such as Debt Collectors in carrying out forced confiscations. Sometimes this problem will lead to court.

The execution can be carried out persuasively if the Fiduciary Giver voluntarily hands over the object of the Fiduciary Guarantee to the Fiduciary. On the other hand, the Fiduciary Recipient in executing the Fiduciary Guarantee object persuasively, among others by:

- a. First, submit a notification letter and appeal to the Fiduciary to submit the Fiduciary Guarantee object within a certain period of time.
- b. Delivering a warning letter (Somasi) of taking the Fiduciary Guarantee object if the Fiduciary Giver does not submit the Fiduciary Guarantee object within the specified time.
- c. Notification of execution of the Fiduciary Guarantee object on the specified date.
- d. Making an official report of the handover of the Fiduciary Guarantee object which is executed by the Fiduciary Recipient between the Fiduciary Giver or his proxy and the Fiduciary Recipient or his proxy.

If the things mentioned above can be implemented, of course it will minimize problems that may arise between the parties and be dealt with from problems law in court which is costly, labor and time consuming. Because everyone who makes an agreement must be aware and understand and obey what he has agreed to do so that he knows and obeys his rights and obligations.

V. CONCLUSION

Execution of the debtor's default fiduciary guarantee object can be carried out based on an agreement made between the fiduciary party and the fiduciary recipient. In its execution, the execution of the debtor's fiduciary collateral object that is in default shall be carried out directly without going through the provisions of the execution regulated by laws and regulations that do not fulfill the good faith principle of the Debtor. During the Covid 19 pandemic, the implementation of the agreement can be grouped, among others, that: 1. Communities who are not affected by economic constraints and are not constrained by other constraints in fulfilling their achievements 2. Communities who are affected by the impact of the economy and other obstacles in fulfilling achievements Banks can provide credit / financing to obtain special treatment in accordance with applicable regulations.

The Fiduciary Agreement needs to be more explicit about the procedure for the execution of the debtor's default fiduciary security object in order to fulfill the principle of justice for the parties making the agreement.

There needs to be strict sanctions rules set out in the agreement against violations committed by the parties.

Consumer institutions as the authorities to protect consumer rights need to establish a consumer advocacy and assistance body that aims to help consumers who are facing default problems, especially consumers who do not understand the provisions of laws and regulations.

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