p–ISSN: 2723 - 6609 e-ISSN: 2745-5254
Vol. 5, No. 4 April 2024 http://jist.publikasiindonesia.id/

Fiduciary in Civil Law and Bankruptcy Law Perspective

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Keywords: Fiduciary; Civil law; Insolvency Law.

ABSTRACT

The fiduciary gives the creditor the right to pledge his property to the debtor as security for the debt given. In practice, there are often disputes between creditors and debtors related to fiduciaries. This dispute can occur due to various factors, such as the default of the debtor or the bankruptcy of the debtor. The purpose of this study is to identify and analyze the regulation and practice of fiduciaries from the perspective of civil law and bankruptcy law. This study used normative research methods. Data collection techniques are carried out by literature study. The data that has been collected is then analyzed in three stages, namely data reduction, data presentation, and conclusions. The results showed that fiduciaries, in the perspective of civil law and bankruptcy law, are a type of guarantee provided by fiduciaries to other parties regarding collateral transactions. Fiduciaries are generally included in the fiduciary guarantee, a guarantee received by the party applying for financing to guarantee payments made by the fiduciary to the party applying for financing. From a civil law perspective, legal liability is for a fiduciary who transfers or leases the object of a fiduciary guarantee to another party without the written consent of the fiduciary beneficiary. In financial law, a fiduciary assigns or leases the object of fiduciary guarantees to another party without the written consent of the fiduciary recipient.

Introduction

As a developing country, Indonesia is committed to improving its country's condition and moving in a better direction. The government actively strives to advance various economic, social, and cultural sectors, with a concrete example being national development. The rapid national development in Indonesia requires massive investment. One of the crucial funding sources is financial institutions, including banks, which have an essential role in collecting funds from the public and flowing them back to support economic growth and development through lending (Nugraha, 2019). One of the material guarantees that can be guaranteed in a debt receivable agreement is a Fiduciary Guarantee.

According to Law Number 42 of 1999, a fiduciary guarantee is a security right to movable property, whether tangible or not, related to the debt-receivable relationship between debtors and creditors. The debtor provides a fiduciary guarantee to the creditor as collateral for the payment of his debt. Fiduciary guarantees give a fiduciary a privileged position compared to other creditors. Fiduciary guarantees must be supported by a certificate that a notary will notarise for a valid agreement. The certificate provides for transferring ownership rights of objects based on trust between creditors and debtors. In addition, fiduciary certificates provide executory rights, allowing fiduciary recipients to confiscate objects without a court decision if the debtor violates the agreement (Kanwil Babel, 2022).

The application of fiduciary guarantees has become common in lending and borrowing transactions because the process is simple, easy, and fast. The current fiduciary guarantee system allows fiduciary guarantors to control the pledged assets and use them to run or support business activities funded through fiduciary secured loans (MUHYIDIN, 2019). In practice, there are often disputes between creditors and debtors related to fiduciary guarantees. Such conflicts can arise due to various factors, such as breach of contract (default) from a debtor that fails to fulfill its obligations or, in more extreme cases, when the debtor is declared bankrupt. The provisions of the law in the field of bankruptcy and the Fiduciary Law in force today lack legal protection for creditors holding fiduciary guarantees in the settlement of bankruptcy assets.

Previous research (Nugraha, 2019) examined the legal principles of fiduciary guarantees from the perspective of Law Number 42 of 1999 concerning fiduciary guarantees. The results of the study showed that Law Number 42 of 1999 concerning Fiduciary Guarantees, the process of occurrence of fiduciary guarantees by passing property rights from the owner (debtor) based on the principal agreement (receivable debt agreement) to creditors, but only the rights were handed over. Still, the goods remain in the debtor's possession, or in other words, the ownership rights to the collateral object are transferred to the Creditor/Fiduciary while the collateral is still physically under the control of the Debtor/Fiduciary. In principle, Law No. 42 of 1999 concerning Fiduciary Guarantees has regulated Fiduciary Guarantees in terms of material law has been fulfilled, where the principles contained in fiduciary guarantees include: a. Elements of transfer of property rights; b. Elements in trust from the fiduciary's point of view; c. An element of trust from the fiduciary's point of view; d. Fixed elements in the possession of the owner of the object.

Another study (Susilowati & Suharto, 2016) examined the legal consequences for separatist creditors holding fiduciary security rights in the bankruptcy of limited liability companies; the results of the study showed that the legal implications for separatist creditors in the bankruptcy of limited liability companies are the waiting period to execute the object of guarantee held by separatist creditors. The rights and obligations of separatist creditors are that they are obliged to wait for a period of stay to execute the collateral object, in addition to which separatist creditors are obliged to report the results of the auction of the collateral object to the curator. The right received by separatist creditors is

to take precedence over repayment of receivables compared to other creditors; then, in the secessionist creditors undergoing a period of stay, the curator must provide reasonable protection as stipulated in Law No. 37 of 2004 concerning Bankruptcy and PKPU.

The novelty of this research is the object of his study on fiduciary yaki from the perspective of civil law and bankruptcy law, which has never been studied before. This research can contribute to developing civil law theory and bankruptcy law, particularly in broadening the understanding of the concept and implementation of fiduciaries. The study results can be the basis for legal researchers and academics to conduct further research and develop more complex fiduciary theories. This study aims to identify and analyze the regulation and practice of fiduciaries from the perspective of civil law and bankruptcy law.

Research Methods

This study used normative research methods. A normative research method is used to study and analyze law by studying existing legal regulations. This method focuses on learning theories, concepts, principles, and legal rules in legal documents such as laws, government regulations, court decisions, and other legal documents (Yanova, Komarudin, & Hadi, 2023). Data collection techniques are carried out by literature study. This process involves searching, collecting, and analyzing various documents, scientific journals, books, articles, and other publications related to the research subject. The data that has been collected is then analyzed in three stages, namely data reduction, data presentation, and conclusions.

Results and Discussion

In business, business capital is fundamental for business actors to run their business operations. Although, ideally, business actors have enough capital to operate a business, this is not always the case. Therefore, they often have to find additional sources of funding through business capital lending activities as a solution to run their business operations. Business actors get additional capital by being willing to pay back, along with interest or other benefits, to lenders within a certain period. The business capital lending and borrowing activity is then referred to as debt.

Talking about accounts receivable is not something new because, in fact, we often encounter accounts receivable, especially in the business world. Receivables payable is a lending and borrowing agreement in which one party gives money to the other, usually in a written agreement. By definition, receivable debt is a lending and borrowing agreement involving two parties, namely creditors who provide loans and debtors who receive loans, with the object of the agreement being money (Bandem, Wisadnya, & Mordan, 2020). Regarding receivable debt agreements, rights and obligations involving both parties are reflected. In essence, the debtor's right is to get additional capital provided by the creditor; on the other hand, the creditor has the right to receive commission or interest from the agreement. This commission or interest is in return for the use of the capital provided to the debtor and is usually stipulated in the terms of the agreement. In addition to rights,

there are also obligations that each party must fulfill. The first obligation is for the creditor, who is obliged to provide his loan to the debtor by the provisions in the agreement. Meanwhile, the debtor must return the loan amount per what has been agreed upon within the predetermined time limit.

Receivables payable activities are carried out by individuals with weak economies and those whose economies are relatively well-off. Debt depends on the debtor's integrity or personality, which creates confidence in the creditor that the debtor will fulfill the payment obligation well. However, despite the good intentions of the debtor, it does not guarantee that the loan will be fully repaid when due. This condition encourages the need for additional agreements in accounts receivable transactions. The additional agreement aims to provide a sense of security for creditors and enable debtors to carry out payment obligations properly; these agreements guarantee the return of debts that have been given by creditors (Koto & Faisal, 2021).

According to (Mulyati & Dwiputri, 2018), a guarantee is a dependant given by the debtor and a third party to the creditor because the creditor has an interest that the debtor must fulfill his obligations in an agreement. The functions of guarantees, according to the opinion (Lawalata, 2017), are as follows:

1. Give the creditor the right and power to get repayment from collateral if the debtor fails to fulfill the debt payment obligation at the time stipulated in the agreement.
2. Ensure that the debtor remains involved in transactions to fund his business so that the risk of leaving his business or project that could harm himself or his company can be prevented or minimized.
3. Encourage debtors to comply with their promises, especially in terms of repayment by agreed terms, so that debtors and third parties who provide guarantees do not suffer losses on the pledged wealth.

Based on this function, guarantees are fundamental in building trust among business people and can improve compliance and stability of relationships between creditors and debtors. One form of material guarantee is a fiduciary guarantee; fiduciary comes from the Latin word "fiduciary," which means trust. This term indicates that the guarantor entrusts his property rights to creditors as collateral for debt repayment without the intention to transfer ownership of the object. If the debt is repaid, the collateral object will again belong to the guarantor (Yasir, 2016).

According to the definition presented by (Jadidah, 2022), the fiduciary guarantee is a conventional product used to protect creditors in a lend-loan agreement. Suppose the debtor cannot fulfill his obligations at any time (default). In that case, the creditor has the right to seek compensation from the debtor by executing fiduciary guarantees. Objects used as objects of fiduciary guarantee can be tangible or intangible movable objects and immovable objects that cannot be burdened with liability. The object of the fiduciary guarantee must be clearly described in the deed, including the identification of the object and an explanation of the proof of ownership. For objects that are in inventory and tend to change or remain, their type, brand, and quality must be explained in detail (Silitonga, 2020).

In Indonesia, the provisions regarding fiduciary guarantees stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantee, which was enacted on September 30, 1999, have the purpose of serving as a solid legal basis for binding movable objects, both tangible and intangible, as well as immovable objects that cannot be encumbered with the right of dependent, which are used as collateral for the repayment of certain debts. This law has a broad scope in terms of guaranteed objects and transactions to be guaranteed, aiming to meet the needs of the growing and complex business world. The existence of these regulations has several vital points in the arrangement of fiduciary guarantees comprehensively, such as:

1. The position of precedence for the fiduciary beneficiary creditor, which indicates that in the case of debt repayment, the fiduciary beneficiary creditor has priority over the pledged object
2. Guaranteeing existing and future debts indicates that fiduciary guarantees can be provided for debts that existed at the time the agreement was made and for debts that may arise in the future.
3. Fiduciary guarantees must be registered, which requires the registration of fiduciary guarantees into registers established by the government.
4. The fiduciary guarantee certificate has executory power, indicating that in case of default by the debtor, the fiduciary beneficiary creditor can directly execute the collateral without going through judicial proceedings.
5. The imposition of a fiduciary guarantee cannot be recharged, indicating that the fiduciary guarantee can only be given once and cannot be used as collateral for another debt without prior release.
6. The fiduciary guarantee follows its object in the hands of anyone, indicating that ownership of the pledged thing may change hands. However, the fiduciary guarantee will still apply to the object.

Such guarantees provide a solid legal basis for protecting creditors and debtors and ensure legal certainty in fiduciary guarantee transactions. Meanwhile, fluctuations are expected in a business environment. When companies upgrade, they may be able to pay creditors and meet their obligations. However, when companies experience a downturn, they may have difficulty repaying credit to creditors, thus unable to fulfill their promises. Conflicts often arise in the relationship between creditors and debtors, such as default or bankruptcy.

By definition, default is non-compliance with the agreement's implementation. This can occur because the deal is not carried out on time, followed by the proper standards, or even implemented at all. Generally, a person can be considered in default if they do not fulfill the agreed obligation if the obligation implemented is not perfect if the obligation is carried out late, or if they perform actions prohibited by the agreement (Sinaga & Darwis, 2020). Bankruptcy is a condition in which a company or individual cannot pay its debts, and the company's activities must be stopped for that reason. This condition occurs due to financial incapacity caused by financial stress or business

setbacks. Bankruptcy occurs when the debtor cannot fulfill his obligation to pay debts to creditors (YOGISWARA, Prathama, & Hutama, 2023).

When there is a conflict between debtors and creditors, fiduciary guarantees become crucial for both parties. The importance of fiduciary guarantees is outlined in civil law and bankruptcy law. According to civil law, article 1131 of the Civil Code states that all debtor assets, both movable and fixed objects, existing and new ones that will exist in the future, become collateral for all debt engagements. This means that the provisions of the article are the basis for the provision of guarantees by a debtor to creditors by using all his wealth. Furthermore, article 1132 of the Civil Code affirms that property is a standard guarantee for all creditors who have bills against debtors. Revenue from the sale of these objects is divided proportionally, according to the size of each creditor's receivables, unless there is a valid reason to give priority to several creditors. One creditor that can be given priority is a creditor who has a fiduciary guarantee.

This provision is in line with what is contained in bankruptcy law or contained in Law 37 of 2004; Article 55 states that every creditor holding a lien, fiduciary guarantee, lien, mortgage, or other collateral rights on the property can execute his rights as if the bankruptcy had not occurred. This means that certain creditors, one of which is a fiduciary guarantee, have the right to exercise their rights even if the debtor is in bankruptcy proceedings. These creditors have precedence and can be separated from other creditors. As mentioned by Munir Fuady, this concept refers to separatist creditors who have collateral debts on property, such as holders of liens, mortgages, liens, fiduciaries, and the like (Royke, 2014). These separatist creditors have a preferred position in the regulation of bail law and bankruptcy law,

Furthermore, Article 56 (1) of the bankruptcy law states that the right of execution of creditors mentioned in Article 55, together with the right of third parties to claim assets that are in the control of the bankrupt debtor or receiver, will be suspended for a maximum of 90 (ninety) days from the date of the court decision declaring the debtor bankrupt. The fiduciary guarantor can execute his rights after the court pronounces a judgment declaring the debtor bankrupt. However, the execution will be delayed for a maximum period of 90 days. So, based on the perspective of civil law and bankruptcy law, it can be concluded that a fiduciary is a form of guarantee provided by a fiduciary to another party as part of a guarantee transaction.

Fiduciaries are generally included in fiduciary guarantees, which are forms of guarantee received by the party providing financing to guarantee payments that the fiduciary beneficiary will make to the lender. The material guarantee ensures that the debtor's debt will be repaid if the debtor fails to fulfill its obligations. In the existence of this guarantee, the creditor is protected because the loan is given to the debtor as collateral. In addition, fiduciary guarantees give creditors the right and power to obtain returns from collateral if the debtor cannot fulfill its obligations, i.e., fails to pay off its debt as agreed. It also ensures that the debtor remains involved in the transaction to finance his business, thus preventing the possibility of leaving his business or project

without accountability or at least reducing such risks (Shania, Sanusi, & Darmawan, 2022)

In general, in the law of security whose object is movable property, the debtor cannot transfer, mortgage, or lease to another party the object that is the object of fiduciary guarantee unless the object is an inventory object. However, in the context of fiduciary guarantees, the transfer of such objects may be permissible, provided there must be notice to or consent from the creditor. This is not allowed if the debtor transfers the object of the fiduciary guarantee without being known or without the creditor's consent (Hamka, 2023).

Suppose the creditor transfers the object of the fiduciary guarantee without the written consent of the fiduciary recipient. In that case, it will violate the legal provisions stipulated in Law No. 42 of 1999 concerning Fiduciary Guarantee. Article 23, paragraph 2 of the law states that a fiduciary is prohibited from transferring, mortgaging, or leasing to another party the object of the fiduciary guarantee unless it is an object of stock, and even for that, the prior written consent of the fiduciary beneficiary is required. Furthermore, Article 36, paragraph 2 of the same law states that if the fiduciary violates the provision by transferring, mortgaging, or leasing the object of the fiduciary guarantee without the written consent of the fiduciary recipient, then the fiduciary may be subject to imprisonment for a maximum of 2 years and a maximum fine of Rp.50,000,000,-.

A legal provision provides criminal sanctions against fiduciaries who violate the rules regarding the transfer of fiduciary guarantee objects without the written consent of the fiduciary recipient. This aims to maintain integrity and trust in the relationship between fiduciaries and recipients and maintain legal certainty in fiduciary guarantee transactions. Meanwhile, from a civil law perspective, the debtor is legally liable if it transfers or leases the object of the fiduciary guarantee to another party without the written consent of the fiduciary beneficiary. Based on the debtor's actions, this can be considered a violation of the previously agreed agreement. According to Article 1243 of the Civil Code, debtors must reimburse costs, losses, and interest arising from non-fulfillment of an agreement. This obligation applies when the debtor, despite being declared negligent, does not fulfill the obligations stipulated in the contract. The same applies if the agreement can be executed only after the deadline.

Article 1234 of the Civil Code contains legal elements such as the existence of an agreement, there is one party who breaks the promise or violates the terms of the agreement, and even though it has been declared negligent, it still does not implement the contents of the agreement. Then, according to Article 1267 of the Civil Code, the party that suffers a loss has the right to choose between two actions. First, they can force the other party to comply with the agreement made if it is still possible. Second, they can also file a claim for cancellation of the agreement while demanding reimbursement of costs, losses, and interest that may arise due to the breach of the agreement.

The study results concluded that the provision of fiduciaries from the perspective of civil law and bankruptcy law provides a clear legal basis for fulfilling agreements and protecting the rights of parties involved in transactions. It can then increase trust among

parties involved in financial transactions, including creditors and debtors. This increase in trust can encourage lenders to provide loans on better terms and open the door for debtors to expand their business by gaining access to additional financing. As a result, it can support business sector growth by facilitating investment, project development, and business expansion, as well as the broad impact of increasing credit and encouraging overall business sector growth.

Conclusion

Fiduciary, in the perspective of civil law and bankruptcy law, is a form of guarantee provided by a fiduciary to another party in the context of a guarantee transaction. A fiduciary is generally included in a fiduciary guarantee that serves as a guarantee received by the party providing the financing to guarantee payments that the fiduciary will make to the party providing the funding. From a civil law perspective, there is a legal liability against a fiduciary who transfers or leases the object of a fiduciary guarantee to another party without the written consent of the fiduciary beneficiary. From a fiduciary law perspective, the fiduciary is also responsible if he transfers or leases the object of the fiduciary guarantee to another party without obtaining written consent from the fiduciary recipient.

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