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## MODEL OF AGREEMENT EXECUTING FIDUCIARY COLLATERAL OBJECTS WITH UNDERHAND SELLING<sup>1</sup>

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### Abstrak

Jaminan fidusia memberikan kedudukan yang diutamakan terhadap kreditur penerima fidusia. Dalam hal debitur cidera janji maka sesuai ketentuan Pasal 29 ayat 1 huruf c UU No. 42 Tahun 1999 tentang Jaminan Fidusia, maka kreditur dapat langsung mengeksekusi objek fidusia dengan penjualan di bawah tangan berdasarkan kesepakatan para pihak. Penjualan ini dilakukan setelah debitur dinyatakan cidera janji dalam waktu 1 (satu) bulan sejak dinyatakan kreditur kepada debitur secara tertulis yang diumumkan paling sedikit 2 (dua) surat kabar di wilayah yang bersangkutan. Eksekusi objek dengan penjualan di bawah tangan tidak sesuai kesepakatan pihak kreditur dan debitur belum diatur secara jelas dalam undang-undang ini. Oleh sebab itu model kesepakatan harus dicantumkan pada saat dibuatnya perjanjian jaminan fidusia. Berdasarkan latar belakang tersebut maka perlu dilakukan penelitian dengan tujuan mendapatkan model kesepakatan debitur dan kreditur dalam penjualan di bawah tangan terhadap objek jaminan fidusia jika debitur cidera janji. Tipe penelitian secara normative dengan mengutamakan bahan hukum sekunder, yang dianalisis secara deskriptif kualitatif. Kreditur penerima fidusia sebagai kreditur preferens yang diutamakan karena mempunyai hak menjual atas objek benda fidusia dengan kekuasaan sendiri. Hal ini diatur dalam Pasal 15 ayat (3) UU No. 42 Tahun 1999 bahwa kreditur kekuasaan menjual benda objek jaminan fidusia atas kekuasaannya sendiri.

<sup>8</sup>

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### Abstract

Fiduciary Collateral gives priority to fiduciary recipient creditors. If <sup>11</sup> debtor defaults, then, complying with the provisions of Article 29 paragraph 1, sub-paragraph c, Law Number 42/1999 concerning Fiduciary Collateral, creditor may directly executes fiduciary objects with underhand selling based on the agreement of the parties. This selling is implemented after the debtor is declared default in 1 (one) <sup>27</sup> month after the written statement of the creditor to the debtor announced in at least 2 (two) newspapers in the relevant area. Execution of objects with underhand selling based on an agreement between the creditor and the debtor has not been clearly regulated in this law.

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<sup>1</sup> This paper is a summary of the results of competitive superior research Funded by: DIPA Budget of the Sriwijaya University Public Service Agency, Fiscal Year 2021, Number SP DIPA-023.17.2.677515/2021, complying with the Rector's Decree Number: 0010/UN9/SK.LP2M.PT/2021, 28 April 28 2021.

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Therefore, the model of agreement must be included at time on which the <sup>31</sup> fiduciary agreement is made. Based on this background, it is necessary to conduct research with objective to obtain a agreement model of debtor <sup>5</sup> and creditor in underhand selling of fiduciary collateral object if the debtor defaults. This study is normative research prioritizing secondary legal materials analyzed descriptively qualitatively. Creditor receiving Fiduciary Collateral is preferred and prioritized creditor because the creditor has <sup>54</sup> rights to sell fiduciary objects with personal power. It is regulated in Article 15 paragraph (3) <sup>22</sup> of Law Number 42/1999 suggesting that that creditor has power to sell fiduciary collateral object on his/her own personal power.

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## INTRODUCTION

The Fiduciary Collateral institution grows due to practical needs of the Indonesian people. It is due to obstacles facing the lien collateral, namely the lien object must be in power of the lien-receiving creditor. Fiduciary Collateral institutions have been known since the Dutch colonial era. However, these have not been regulated in legislation because these are based on jurisprudence. Currently, Fiduciary Collateral <sup>21</sup> is regulated in Law Number 42/1999 concerning Fiduciary Collateral (UUJF). Fiduciary as regulated in Article 1, point 1, of UUJF states that fiduciary is a form of transfer of ownership rights to an object based on trust if the object keeps in control of fiduciary debtor or owner of object. Transfer of object as object of Fiduciary Collateral is made with a notarial deed as a formal agreement because it is stated in a deed. It is regulated in Article 5, paragraph (1), of UUJF stating that the provisions of Fiduciary Collateral are made with a notarial deed in the Indonesian language. In order to make a Fiduciary Collateral agreement, a credit agreement or credit contract must firstly be created as the principal agreement. Then, a Fiduciary Collateral agreement is made. It is a follow-up to the main agreement, as stipulated in Article 4 of UUJF. It means that the Fiduciary Collateral agreement as a created and deleted agreement depends on the main agreement.<sup>2</sup>

The Fiduciary Collateral agreement is based on consensual principle, namely the principle based on agreement of two parties making an agreement. <sup>9</sup> It is regulated in Article 1320 of the Civil Code, specifically condition 1 (one), namely agreement. The consensual principle refers to all agreements binding to parties since an agreement is made regarding contents of the agreement.<sup>3</sup> The agreement is an agreement regarding the contents of achievement agreed by parties. Philosophically, the agreement is a set of rules or norms understandable through legal principles

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<sup>2</sup> Petra Kusuma, "Akibat Hukum Perjanjian Jaminan Fidusia Terhadap Benda Yang Dijaminkan," 2023, <https://pn-lembata.go.id/page/content/588/akibat-hukum-perjanjian-jaminan-fidusia-terhadap-benda-yang-dijaminkan>., accessed on 16<sup>9</sup> February 2023.

<sup>3</sup> Agus yudha Hernoko, "Urgensi Asas-Asas Hukum Kontrak Sebagai ;Landasan Hubungan Kontraktual Para Pihak," in Civil Law Development in Indonesia (Malang: Setara Press, 2022), 73.

contained therein. In practice, a Fiduciary Collateral agreement is made in form of a standard contract in which the contents and provisions are made unilaterally; in this case, the business actor. In principle, the agreement is made under a free agreement between two parties capable of implementing legal actions with objective to fulfill the achievement as agreed in the agreement. In a standard contract, almost all of the clauses are standardized, and the other party does not have opportunity to negotiate and ask for changes.<sup>4</sup>

Principle of publicity, in the Fiduciary Collateral agreement, has objective to provide a legal certainty to parties, both debtors and creditors. Based on the provisions of Article 11 of the UUJF, objects with Fiduciary Collateral must be registered in the Fiduciary Registration Office. The provision of fiduciary guarantees to give legal certainty and protection for the parties is made in a notarial deed, as stipulated in Article 5, paragraph (1), of UUJF. The Fiduciary Collateral has been binding to the parties since registration was done and recorded in the Fiduciary Registration Book. It aims at assuring a legal certainty when a debtor defaults. The creditor has executive power over objects of Fiduciary Collateral. After registration, a Fiduciary Collateral certificate will be issued reading *For the sake of Justice Based on Belief in the One and Almighty God* listed on the head of the certificate. Urgency of this statement indicates that creditors have power to sell fiduciary collateral objects directly if the debtor defaults without going through a court.<sup>5</sup>

The provisions of Article 4 of UUJF state that the parties shall fulfill the achievement as agreed in the Fiduciary Collateral agreement. If the debtor or creditor does not fulfill the performance obligation, then, in a *contrario*, one of them is declared in default or breaching a contract. If the debtor is declared in default, then, complying with the provisions of Article 29 of UUJF, execution of Fiduciary Collateral objects is carried out through: first, the creditor uses the executorial title stipulated in Article 15, paragraph (2), of the UUJF. Second, the creditor sells objects through a public auction and collects receivables from proceeds of the selling. Third, underhand selling is based on an agreement between debtor and creditor with objective to obtain highest price and benefit the parties. The underhand selling is carried out after 1 (one) month has passed since the default, notified by the creditor to the debtor in writing to the concerned parties.

Based on the above background, the legal protection provided to debtor and creditor is included in Fiduciary Collateral agreement as internal protection and form of legal protection provided through laws and regulations as external protection. If the debtor defaults, the creditor is given authority to carry out underhand selling of fiduciary collateral objects based on an agreement. The principle of agreement in a Fiduciary Collateral agreement is often suggested in form of a

<sup>4</sup> Muhammad Syaifuddin, *Hukum Kontrak, Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: Mandar Maju, 2012), p. 2018.

<sup>5</sup> Misnar Syam and Yussy Adelina Mannas, "Position of Parate Execution of Fiduciary Guarantees with Constitutional Court Decision Number 18/Puu-Xvii/2019," *ADHAPER Journal* 8, no. 1 (2022): 151.

standard agreement containing clauses consisting of rights and obligations of the parties. Of the description above, formulation of question is how to model an agreement between debtor and creditor in implementing fiduciary collateral objects with underhand selling.

## METHOD

This study is normative type also known as doctrinal research. Law is conceptualized as what is written in statutory regulations (*law in books*) or law is conceptualized as rules or norms that are standards of human behavior considered appropriate.<sup>6</sup> The legal materials used are primary, secondary and tertiary legal materials. The analysis used a qualitative descriptive method, namely the legal materials obtained in literature studies, statutory regulations and other legal materials described and linked in such method,<sup>7</sup> and presented in a more systematic writing to answer the question. Then, conclusion is made deductively, namely conclusion is made from faced general problem to concrete problem.<sup>8</sup>

## DISCUSSION AND ANALYSIS

### 1. Fiduciary Collateral Agreement as Additional Contract

Agreement is a legal act creating obligations and rights for the parties. Thus, in the Fiduciary Collateral agreement, the parties have mutual obligations and rights to achievements agreed in the agreement. Fiduciary Collateral agreement is an additional agreement to the debt or credit agreement. The credit agreement is principal agreement of the Fiduciary Collateral agreement. Credit agreement can be provided from banking financial institutions and non-bank financial institutions called financing institution. Credit is trust of the creditor to the debtor indicating that the debtor will definitely pay off his/her debt. It means that the credit given to the debtor shall definitely be repaid in mutually agreed time schedule.<sup>9</sup>

The credit agreement is a form of legal relationship bound by a loan agreement as stipulated in Book III of the Civil Code, specifically Article 1754 to Article 1769. In practice, the legal relationship between debtor and creditor is not only bound by a loan agreement but also by a collateral agreement such as Fiduciary Collateral agreement.<sup>10</sup> Article 1, point (2), of Law Number 42/1999 concerning Fiduciary Collateral (UUF) defines as a collateral rights with objects in movable objects, both tangible and intangible, as well as non-movable objects, namely buildings

<sup>6</sup> A.M. Sihombing Eka and Cynthia Hadita, *Penelitian Hukum* (Malang: Setara Press, 2022), p. 40.

<sup>7</sup> Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2010), p. 393.

<sup>8</sup> A.M. Sihombing Eka and Cynthia Hadita, *Penelitian Hukum*, Op.Cit., p. 140.

<sup>9</sup> Mansyah, *Hukum Perbankan Nasional Indonesia*, (Jakarta: Kencana Prenada Media, 2008), p. 43.

<sup>10</sup> Jefri Purnama, "Analisis Dampak Keabsahan Perjanjian Fidusia (Studi Kasus: Perjanjian Fidusia antara PT X dengan Bank B)". *Era of Law, Scientific Journal of Laws* 18, number 1 (2020), p. 140.

that are not objects of Mortgage Rights giving <sup>50</sup> priority position to fiduciary recipients as creditor to other creditors.

<sup>7</sup> The provisions of Article 1, point (1), of UUJF state that fiduciary as transfer of property rights is based on trust provided that the object with transfer of ownership rights <sup>2</sup> keeps belonging to the debtor giving the fiduciary. <sup>11</sup> Article 584 of the Civil Code regulates that one of the reasons for the transfer of property rights is due to the transfer by the party in charge of the object, namely the owner. Method to transfer property rights in a Fiduciary Collateral is classified as *constitutum possessorium*, <sup>32</sup> namely transfer of ownership rights to object in which control of the object keeps in the party who transfers, generally referred to as borrowing. The trust in delivery of object is done from debtor giving fiduciary to creditor receiving fiduciary. The purpose of delivery is only temporary so that the object will return to the owner as a fiduciary debtor if the debt guaranteed by the fiduciary has been repaid, not due to execution of the collateral object.<sup>11</sup> This trust is basis of transfer with *constitutum possessorium* and not to the transferring. It happens due to the follow-up of the obligator's relationship, namely the existence of a legal relationship causing birth of obligations of the parties.

Fiduciary and fiduciary collateral are two things different from one and another. Fiduciary means a method of delivery and fiduciary collateral means material things in collateral institutions. The existence of a fiduciary collateral institution must firstly exist as a fiduciary as a way to deliver objects. Therefore, fiduciary collateral cannot separate from fiduciary meaning that, with a fiduciary collateral agreement, there shall be fiduciary in the form of delivering fiduciary collateral objects. The fiduciary collateral agreement as a real agreement is an agreement only existing after there is an act following it, namely in the form of submission. It is called a material agreement, namely an agreement giving birth, transfer and abolishing material rights. <sup>37</sup> The provisions of Article 9, paragraph (1), of UUJF state, that fiduciary collateral can be placed on one or more objects and the existing and new receivables will exist or be obtainable later.

<sup>8</sup> Based on these provisions, object, as fiduciary collateral object, can be in form of existing objects or new objects that will exist either in no relative or absolute terms. The conclusion is that the fiduciary collateral agreement is a type of collateral already binding when an agreement is achieved between debtor and creditor. The fiduciary collateral agreement is a consensual agreement and it is obligatory; it means that, with agreement of <sup>1</sup> the parties, the agreement is binding. The parties agree the achievement of the agreement made formally by standard contract and made in notarial deed.<sup>12</sup>

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<sup>2</sup> Petra Kusuma, "Akibat Hukum Perjanjian Jaminan Fidusia Terhadap Benda Yang Dijaminkan." *Op.Cit.* <sup>39</sup>

<sup>11</sup> Muhammad Syaifuddin, *Hukum Kontrak, Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogantik Dan Praktik Hukum* (Series on Enrichment of Engagement Law. *Op.Cit.*, p. 77).

The fiduciary collateral agreement is an additional agreement as stipulated in Article 4 of the UUJF stating that fiduciary collateral is a follow-up agreement to the main agreement. Nature of the fiduciary collateral agreement is a follow-up agreement (*acesoir*) occurring due to the main agreement in the form of a credit or debt agreement.<sup>13</sup> After a credit agreement or debt-receipt, agreement is made with fiduciary collateral, and then object of the fiduciary collateral is made in a notary deed using Indonesian language. Then, the fiduciary collateral deed is registered in the Fiduciary Registration Office as stipulated in Article 11 of UUJF. After registration, a fiduciary collateral certificate shall be issued on the same date as the date of receipt of application for registration. It is emphasized in Article 15, paragraph (1), of the UUJF stating that a fiduciary collateral certificate has the same executive power as a court verdict having permanent legal force. This power gives authority to creditor; if debtor defaults, the creditor has rights to sell fiduciary collateral objects on his own power.

## 2. The model of agreement between debtor and creditor in executing fiduciary collateral object with underhand selling

UU Number 42/1999 concerning Fiduciary Collateral (UUJF) stipulates that fiduciary collateral object keeps belonging to debtor giving the fiduciary. It is intended so that the debtor in paying off his debt goes according to the agreed schedule, so that a fluent business climate is created and the business continues progressing and developing through fulfilling obligations to creditor. The characteristics of a fiduciary collateral registered to give a priority position to creditor with a fiduciary collateral certificate have executive power. Fiduciary collateral still follows the object wherever the object is. Through registration, fiduciary collateral fulfills principle of publicity and provides legal certainty to debtor and creditor. Fiduciary registration must be carried out in imposition, change or elimination of fiduciary collateral. The importance of registration is to provide legal certainty and legal protection to the parties, and creditor has a preference position.<sup>14</sup>

Fiduciary collateral agreements are generally made in writing with a notarial deed in Indonesian language aiming at providing legal protection and legal certainty to parties. The advantage of making a deed in writing is that the creditor can sue the debtor to prove the transfer of ownership rights to object that is the object of fiduciary collateral. In addition to a safeguard for creditors if the debtor defaults or dies, the creditor can easily execute it. If the agreement is only with an underhand deed, creditor will have difficulty in proving his rights to the heirs. Oral agreements will cause difficulties if problems arise in the future, so that it is difficult to prove. Therefore, if the provision of fiduciary collateral is carried out in writing or underhand, there must

<sup>13</sup> Fatma Paparang, "Implementasi Jaminan Fidusia Dalam Pemberian Kredit di Indonesia," LPPM Journal in sector of E-Business, number 2 (2014): 59.

<sup>14</sup> Marulak Pardede, "Implementasi Jaminan Fidusia Dalam Pemberian Kredit Di Indonesia," 2006. Report of Research Result, National Legal Guidance Board, p. 11.

be an agreement of both parties. Based on this agreement, rights and obligations will be born between debtor and creditor.

Fiduciary is process of transferring ownership rights to an object, while fiduciary collateral is collateral given in fiduciary form. The provision of fiduciary collateral is binding to an agreement for the provision of fiduciary collateral as a follow-up agreement/addition to the credit agreement as the main agreement.<sup>15</sup> A credit agreement is a provision of a bill occurring based on agreement of parties giving an obligation to the debtor to repay the debt in a specified schedule accompanied by interest, compensation or profit sharing.<sup>16</sup> Fiduciary collateral is often applied by financing institutions in credit agreements. Financing institutions are non-bank financial institutions aimed at collecting funds from the public and distributing them back to the community in credit facilities.

The provisions of Article 29 of UUJF state that, if the debtor giving the fiduciary defaults, then execution of object as the object of fiduciary collateral is carried out in the following ways: *First*, through the implementation of executorial title for creditor receiving the fiduciary. In the UUJF, it is known as *parate* execution, namely the creditor implements the execution himself without interference from the court or a third party. *Second*, creditor sells fiduciary collateral objects through public auctions and creditor takes payment of receivables from the proceeds of the selling. The selling of objects through public auctions is implemented with objective to obtain the highest selling price. If results of auction do not obtain the highest price, then it is permissible to execute underhand selling based on the agreement of debtor giving the fiduciary and the creditor receiving the fiduciary complying with the terms and schedule specified in the law. *Third*, based on agreement between debtor and creditor, an underhand selling is made. Underhand selling is executed complying with the agreement of debtor and creditor with objective to obtain highest price benefiting the parties. Underhand selling is executed after the expiration of 1 (one) month after the debtor and creditor notify the parties concerned in writing and published in at least 2 (two) newspapers in the territory of the parties. So, basically underhand selling is executed by the debtor giving the fiduciary himself and the proceeds of the selling are delivered to the creditor receiving the fiduciary in order to pay off the debtor's debt.<sup>17</sup>

Referring to the provisions of Article 29, paragraph (2), of Law Number 42/1999 concerning Fiduciary Collateral, underhand selling has several conditions. It aims at limiting creditors from arbitrarily execution of fiduciary collateral objects through underhand selling because they are not through underhand selling. The obligatory requirements are: a) there must be an agreement between two parties, namely debtor giving the fiduciary and the creditor receiving the fiduciary; b)

<sup>15</sup> Martha Eri Safira, "Analisis Perjanjian Jaminan Fidusia Terhadap Parate Eksekusi Dan Perlindungan Hukumnya Bagi Kreditur," *Justitia Islamica* 11, no. 1 (2014): 124.

<sup>16</sup> Safira., *Ibid.*

<sup>17</sup> Radisti Wensy Marwa and Heru Susetyo, "Eksekusi Objek Hak Tanggungan Yang Dijaminkan Kepada Pihak Ketiga Tanpa Persetujuan Kreditur," *AL-Manhaj Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (2023): 92.

there is objective to obtain highest price and provide benefits to both parties; c) underhand selling is executed after expiration of 1 (one) month from the written notification by the debtor giving the fiduciary or creditor receiving the fiduciary to the concerned parties; d) there must be announcement in at least 2 (two) newspapers circulating in the concerned area.<sup>18</sup>

The fiduciary collateral agreement between debtor and creditor is implemented in a standard contract. It is motivated in order that the objectives of the parties are achieved so that the contents of the agreement are able to accommodate all interests and provide legal protection for the parties. Standard contract is development in field of contract law having an effect on new forms of simple, practical and effective contract laws requiring a short time based on principle of freedom of contract. Therefore, business activity actors generally use standard contracts in their agreements by preparing them in a form.<sup>19</sup> The emergence of a standard agreement based on the principle of freedom of contract, in which the parties have freedom to make, determine the form and content and with whom the parties will make an agreement. It is called a standard agreement, namely an agreement containing clauses standardized by one of the parties. In a standard agreement, other parties who do not participate in determining the contents of the agreement only have the concept of *take it or leave it*. Therefore, the other party only gives an agreement whether to *take it or leave it*. The principle of *take it or leave it* as a model of the agreement of the parties to the agreement.<sup>20</sup>

The fiduciary collateral agreement begins with a credit or debt agreement. Debtor gives an object as a fiduciary collateral object to creditor as a collateral that the debtor's debt will definitely be repaid. If the debtor defaults, then the fiduciary collateral agreement contains a standard clause with the provisions that the fiduciary collateral object will be withdrawn by the creditor for selling. The selling is executed by means of underhand selling. Complying with the provisions of Article 29 of UUJF, if the debtor defaults, the creditor can execute the fiduciary collateral object carrying out execution *parates*, public auctions and underhand selling. In practice, creditor often takes advantage applying standard clauses difficult for debtor to understand. In fiduciary collateral agreement, debtor as a consumer gets legal protection if bad credit occurs; the financing company as a creditor cannot forcibly take the object of the fiduciary collateral. Then, the creditor must supervise the employees of the financing company that must have an assignment letter in terms of executing the fiduciary collateral objects.<sup>21</sup> Debt collectors or officers who will execute fiduciary

<sup>18</sup> Finka Saradila, "Eksekusi Objek Jaminan Fidusia Melalui Penjualan Dibawah Tangan Sebagai Penyelesaian Kredit Macet," Jatiswara, Journal of Laws 32, Number 3 (2017): 425.

<sup>19</sup> Fahdelika Mahendar and Christiana Tri Budhayati, "Konsep Take It Or Leave It Dalam Perjanjian Baku Sesuai dengan Asas Kebebasan Berkontrak," Journal of Laws, ALETHEA 2, number 2 (2019): 95.

<sup>20</sup> Fahdelika Mahendar and Christiana Tri Budhayati, *Ibid*.

<sup>21</sup> M. Agus Yozami, "Pentingnya Memahami Isi Klausula Baku Dalam Kontrak Jasa Pembiayaan," <https://www.hukumonline.com/berita/a/pentingnya-memahami-isi-klausula-baku-dalam-kontrak-jasa-pembiayaan-lt5fc5bda952b0>, 2012., accessed on 22 February 2023.

collateral objects are required to bring a fiduciary collateral certificate and the debtor as a consumer accepts the offer as the first party in the auction object.

Standard agreement, in practice, causes losses to consumers and only benefit creditors as financing institutions. The standard contains unbalanced rights and obligations so that it is unbalanced and only imposes responsibility on the debtor. It often results in disputes or conflicts leading to unlawful acts because one party feels that his/her rights have been violated. If a dispute occurs, it is possible for the parties to take legal action to claim their rights through the court and ask for legal certainty and legal protection.<sup>22</sup> In the current legal developments, business transaction ties are made in a standardized form, with the option of *take it or leave it* for debtor.

The basic standard with standard clauses binds the parties if they fulfill the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code, namely the existence of an agreement of the parties, legal competence, certain matters and valid causes. The conclusion is that the standard agreement in underhand selling of fiduciary collateral objects has fulfilled the principle of freedom to contract formally without any element of coercion by parties. Underhand selling of pawned goods are regulated in Article 1155 of the Civil Code stating that, if there is no agreement between parties, then the pawned goods can be executed by using a public auction. The conclusion is that the parties are given opportunity to execute underhand selling of fiduciary collateral objects if they have made an agreement. Starting from the provisions of Article 1155 of the Civil Code, underhand selling can be executed for pawn objects and other collateral objects such as fiduciary collateral.

Agreement regulated in Article 1313 of the Civil Code is an act committed by one or more parties binding themselves to one and another. Complying with these provisions, the meaning of the agreement is not clear because: *first*, every action can be called an agreement. *Second*, the principle of *consensualism* is invisible. *Third*, it has nature of dualism. Therefore, definition of an agreement in Article 1313 of the Civil Code is not clear, only acts are mentioned, so actions that are not legal actions can also be called agreements. Based on the doctrine in the old theory, the agreement is a legal act based on the agreement of the parties so that it can cause legal consequences.<sup>23</sup>

The fiduciary collateral agreement is generally in a standard agreement made by creditor in a standard clause agreed by the debtor. Therefore, contents of this agreement are made unilaterally so that there is no negotiation with debtor. Not infrequently, the contents of standard agreement are unbalanced, namely reducing obligations of creditor and reducing rights of debtor. It makes the debtor have a weak position possibly causing various problems for parties. Based on the provisions of Article 1320 of the Civil Code, an agreement is valid; there must be an agreement between

<sup>22</sup> Nelson Abednego Situmeang, Herdi Kuingo, and Moestar Arifin, "Kebebasan Berkontrak Dalam Perjanjian Kredit Baku Pbiayaan Konsumen," *DiH: Journal of Laws* 15, number 1 (2019): 48.

<sup>23</sup> 23 Salim HS, *Hukum Kontrak Teori Dan Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2019)., p. 25.

parties made in writing and orally. Agreement is a meeting or conformity of the parties' will. The agreement referred to is the conformity of statement of the parties' will, because other people cannot know and see the will. Statement conformity occurs in several ways, including: *First*, it is made in writing in language easy to understand and know. *Second*, it is made orally in language easy to understand. *Third*, language that is not perfect but accepted and understood by other parties. *Fourth*, a language sign that can be accepted by the other party. *Fifth*, silent but understood and accepted by the other party/opponent.<sup>24</sup> Based on these five ways, what is more widely applied by the parties is to use an easily understandable, perfect in the written and spoken. As an effort to provide legal certainty, it is made in writing and can be used as valid evidence if a dispute occurs later.

## CONCLUSION

In accordance with the principle of preference, creditor receiving the fiduciary has a priority position in terms of paying off his/her receivables. Therefore, if a debtor defaults, the creditor receiving fiduciary has rights to execute object of fiduciary collateral, one of which is through underhand selling. The fiduciary collateral agreement is an additional agreement to the main agreement in a credit agreement or debt agreement. If the debtor defaults, the creditor can execute the fiduciary collateral objects implementing executorial titles, selling objects through public auctions and selling fiduciary collateral objects using underhand selling. If the parties have agreed that the selling will be carried out underhand, Law Number 42/199 concerning Fiduciary Collateral requires that the underhand selling is carried out after expiration of 1 (one) month from notification in writing by the debtor giving the fiduciary and the creditor receiving the fiduciary to the concerned parties. After that, an announcement is made in at least 2 (two) newspapers circulating in the territory of the parties concerned. The objective of execution of an economical underhand selling is to obtain highest price and provide benefits to both parties. Therefore, there must be an agreement by both parties, especially the fiduciary debtor. The agreement model in underhand selling is that, basically, this selling is executed by the fiduciary debtor himself, then the proceeds of the selling are delivered to the creditor receiving the fiduciary in the amount of the debtor's unpaid debt. It is in accordance with the principle of freedom of contract and the principle of good faith as stipulated in Article 1338, paragraph (1) and paragraph (3), of the Civil Code. Another alternative can be done if debtor or creditor is looking for someone who wants to buy a fiduciary collateral object, then the proceeds deriving from the selling are delivered to the creditor in the amount of the remaining paid debt. If there is residual proceeds of the selling, the remaining is returned to the fiduciary debtor; if the proceeds from the selling are not sufficient for the debtor's debt, the debtor is still obliged and responsible for paying off the debt. In order not to cause harm to

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<sup>24</sup> *Ibid.*, p. 33

the parties, <sup>3</sup> the execution of fiduciary collateral objects is best through underhand selling, in presence of community leaders or local regional officials as witnesses, so that any fraud does not occur.

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