LEGAL ANALYSIS OF THE ROLE OF FINANCING INSTITUTIONS IN APPLYING LAW FIDUSIA GUARANTEE IN INDONESIA.

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LEGAL ANALYSIS OF THE ROLE OF FINANCING INSTITUTIONS IN APPLYING LAW FIDUSIA GUARANTEE IN INDONESIA

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Abstract

Use of collateral institutions is very popular and already familiar in the community and guarantee institutions have an important role in the framework of Indonesia's economic development Guarantee institutions that are currently developing rapidly is a Fiduciary Guarantee. The role of fiduciary guarantee institutions as one of the potential alternative funding sources to support the growth of the national economy should be well accommodated as stipulated in Law Number. 42 of 1999 concerning Fiduciary Guarantee and OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of the Business of the Financing Company. Most of the Financing Companies still have not registered the fiduciary guarantee deed due to a misunderstanding in elaborating the regulations regarding the collection of fiduciary guarantees stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantee and OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Business of Financing Companies and Regulation of the Minister of Finance Number 130/PMK 010/2012.

Keyword: Financing Company; Law of Fiduciary Guarantee; National Development

INTRODUCTION

Community in fulfilling their daily needs is required a small number of funds or funds. In order to obtain these funds other than from their own savings, they can also go through the debt mechanism. In the aspect of business activities, the debt agreement made between the debtor and creditor should be a very common thing to do in business activities. Debt is a very important requirement in the business world. Debt is a form of funds that can support a community. Funds are blood for a company in carrying out its business activities, just as humans cannot live without blood, companies will also die without funds.(1) The funds obtained from the loan agreement are wrong, one of them is through a guarantee institution.

The use of guarantee institutions has been very popular and is already familiar in the community and guarantee institutions have an important role in the framework of Indonesia's economic development. To carry out development in all fields, a number of funds are needed and these funds are usually channeled through the banking sector which provides credit facilities to borrowing customers (debtors). The funds disbursed must certainly be protected and therefore a guarantee institution is required to bind the debtor as the recipient of the funds for the security of the credit. Credit is one of the financial services provided by financial institutions. Broadly speaking, financial institutions can be classified into 3 (three) large groups, namely Bank Financial Institutions, Non-Bank Financial Institutions, and Financing Institutions.(2)

The provision of a number of funds at this time is not only fixed on the existence of bank financial institutions

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but also develops in financial institutions. Communities always need funds to meet their needs and need an institution that is powerful enough to cope with the needs of funds in communities other than banks, and financial institutions are considered able to cope with these community needs.(3) This financing institution focuses on the financing function, in the form of providing funds or capital goods by not withdrawing funds directly from the community. Financing institutions provide financing facilities to debtors, who are customers of the finance company. According to Article 2 of the Presidential Regulation Number 9 of 2009 concerning Financing Institutions, financing institutions consist of: (1) Financing Companies, (2) Venture Capital Company, (3) Infrastructure Financing Company.

It is undeniable that finance companies are one of the financial institutions that have developed and are in demand by the people in the present. According to Article 3 of the Presidential Regulation Number 9 of 2009 concerning Financing Institutions, activities carried out by finance companies consist of: (1) Business Leases, (2) Factoring, (3) Credit Card Business; and/or (4) Consumer Financing.

In providing financing facilities, the finance company as a creditor will also ensure that the financing facilities provided to customers will be repaid in accordance with the agreed amount and time, both principal, interest and other costs. To guarantee this, then after considering several principles to assess the quality of prospective customers, the finance company will enter into a guarantee agreement with the customer. To provide a sense of security and to ensure the return of money, the creditor will of course also ask the debtor to enter into an additional agreement to guarantee the repayment of the debtor's liability at a predetermined time and agreed upon between the creditor and debtor. The guarantee can be provided by a third party outside the debtor in the form of a debt guarantee agreement which is a guarantee of general payment; or in the form of appointment of one or certain items that will be used as collateral for repayment of special debt.(4)

This guarantee agreement is carried out to provide protection to creditors who have given a sum of money to the debtor and to provide legal certainty for the return of a certain amount of money if the debtor does not carry out its obligations. The guarantee agreement contains contents that follow the provisions stipulated in the guarantee law. The guarantee law is one part of the material law stipulated in the Second Book of the Civil Law (KUH Perdata). The regulation regarding guarantee law is not only sourced from the Civil Code but also comes from other laws and regulations regulated outside the Civil Code, including Law Number 4 of 1996 concerning Underwriting Rights and Law Number 42 of 1999 concerning Fiduciary guarantee and several other laws and regulations relating to guarantee institutions. The principles of Guaranteed Law that need to be known as the basis laid the basis of one's civil liability for the collateral for their debts can be seen in Article 1131 of the Civil Code mentioning all the material of the debtor, both movable and immovable, both existing as well as those that will only be available in the future, will be borne by all individuals.

Guarantee institutions that are currently growing rapidly are Fiduciary Guarantees. Initially, this form of guarantee was not regulated in

legislation but developed on the basis of jurisprudence. In Indonesia, it was regulated in law in 1999 with the birth of the Fiduciary Guarantee Act. The fiduciary is the development of a pawnshop, therefore it is the object of collateral, namely movable goods, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights.(5) In fact, the binding of credit guarantee objects will secure the interests of creditors, as well as the binding of objects of Fiduciary Assurance, will secure the interests of the finance company as well as creditors or fiduciary recipients. As is known, there are four guarantee institutions that can be used to bind debt guarantees, namely Pawn, Mortgage, Mortgage, and Fiduciary Guarantees.(6)

At present, many customers are more interested in conducting business with finance companies that provide consumer finance facilities for both two-wheeled and four-wheeled transportation vehicles. As is known that to support the increasing mobility needs of the community, transportation vehicles are needed to support the mobility of these communities and can improve people's lives. The majority of finance companies in this field in realizing consumer financing activities use Fiduciary Assurance institutions as collateral agreements, where the object of collateral in the form of a vehicle is under the control of the customer, while the finance company holds a Motor Vehicle Ownership Book, which is proof of ownership for the transportation vehicle, as a guarantee of repayment of the debts of its customers. As for the use of Fiduciary Assurance institutions in consumer financing activities, the legal consequences for the parties and in practice experience certain obstacles in using the Fiduciary Guarantee Institution.

In connection with the above explanation, the problem here is (1) What is the role of financial institutions in implementing the law of imposition of fiduciary guarantees on customers?; (2) What obstacles are faced by financial institutions in applying the law for imposing fiduciary guarantees on customers?.

METDHOS

Nature of this study is normative legal research or it can be called library research. This type of legal research is legal research conducted by examining library materials or secondary data.(7) Secondary data sought in this study takes precedence over laws and regulations relating to Fiduciary Guarantee, documents and writings relating to the problem under study. In this study the data obtained from the study of documents and literature on secondary data, both primary and secondary legal materials were analyzed by qualitative methods.(8)

The term qualitative means that the data is described in quality in the form of regular, collusion, logical, non-overlapping, and effective sentences, so that the results of the analysis are easily understood and interpreted.(9) In this qualitative analysis data is presented descriptively, which is narrating and interpreting existing data, for example about situations experienced, one relationship, activities, views, attitudes that appear, or about the ongoing process of influences that are at work, abnormalities that are emerging , apparent tendencies, and tapering opposition.(10)

RESULT AND DISCUSSION

The Role of Financing Institutions in Implementing the Law of Imposing Fiduciary Guarantees against Customers

Article 1 number 1 of Presidential Regulation Number 9 of 2009 concerning Financing Institutions states that financing institutions are business entities that carry out financing activities in the form of providing funds or capital goods. In addition to the definition according to the law, financing institutions can also be defined as business entities that carry out financing activities in the form of providing funds or capital by not withdrawing funds directly from the public.(11)

From this understanding, there are several elements, including

a. Business entities, namely finance companies specifically established to carry out activities that are included in the business sector of financial institutions;
b. Financing activities, namely conducting activities or activities by means of financing the parties or business sectors in need;
c. Provision of funds, namely the act of providing funds for a purpose;
d. Capital goods, which are goods used to produce something;
e. Do not withdraw funds directly;
f. Society, namely a number of people who live together somewhere.

Funding institutions have an important role, namely as one of the potential alternative funding sources to support national economic growth. In addition to the above role, financing institutions also have an important role in terms of development, namely accommodating and channeling the aspirations and interests of the community, playing an active role in development where the financial institution is expected by the community or business actors to overcome one of the common factors, namely capital.(12) The relationship between the creditor (the costing company) and the consumer (the debtor as the party receiving the fee), is a contractual relationship, which means that it is based on a contract which in this case is a consumer financing contract. The costing company has the primary obligation to give a sum of money for the purchase of a consumer item, while the consumer as the recipient of the fee has the primary obligation to repay the money in installments to the costing party. So the contractual relationship between the provider of funds and the consumer is a kind of credit agreement set in the Civil Code. Thus it can be explained, that in the Consumer Financing Company (Creditors) after all contracts have been signed and the funds have been disbursed and the goods have been handed over by the supplier to the consumer, then the goods in question have already become the property of the consumer, even though the goods are usually guaranteed as collateral through a fiduciary agreement.

At the time of entering into an agreement with the imposition of fiduciary security, there are several documents that must be considered from the finance company, because of the documents required during the process of consumer financing as customers, since their initial financing until the process of loan repayment, including the documents below:

a. Document eligibility consumer
   Is a document needed by a consumer finance company to determine whether a consumer is worthy of funding or not.

b. Agreement
Document Is a document that shows agreements between the parties involved in the consumer financing process.
c. Document of ownership of financing object
Is a document that is proof of ownership of goods financed by consumer financing. This document includes the following: BPKB, invoice, certificate, proof of item infringement, proof of order for goods, and others.(12)
d. Guarantee ownership documents
Is a document related to guarantee ownership for fulfilling the obligations of prospective debtors. These documents include BPKB, certificates, invoices, land, etc(12)

The most important thing about the role of financial institutions in imposing fiduciary guarantees is ensuring that the object of fiduciary collateral has been registered and the fiduciary guarantee deed has been made in the fiduciary guarantee office within the authority of the Ministry of Law and Human Rights in each of Indonesia's provinces. As in Article 5 paragraph (1) of the the Law Number 42 of 1999 concerning Fiduciary guarantee states that the imposition of a Fiduciary Guarantee is made by a notary deed in the Indonesian language and is a Fiduciary Guarantee Deed.

The provisions of Article 1870 of the Civil Code state that a notary deed is an authentic deed that has the perfect proof of what is contained in it between the parties and their heirs, or substitutes for their rights. This is what causes the fiduciary guarantee law to stipulate that a fiduciary agreement must be made with a notary deed.(4) From the editorial of Article 5 paragraph (1) of the Law Number 42 of 1999 concerning Fiduciary guarantee, we cannot interpret that the provisions in the article are coercive. If it is indeed the intention of the legislators to require the pouring of fiduciary deeds in the form of notarial deeds, then he should pour out the formulation of Article 5 paragraph (1) the Law Number 42 of 1999 concerning Fiduciary guarantee in the form of compelling provisions, both by saying "must" or "obligatory" in front of the words "made with a notary deed", or by mentioning the legal consequences if not made by a notary deed. However, we can also interpret Article 5 paragraph (1) of the UUJF, that as of the enactment of the Law Number 42 of 1999 concerning Fiduciary guarantee, the implementation of the rights of Fiduciary Givers and Recipients as mentioned in Law Number 42 of 1999 concerning Fiduciary guarantee must meet the requirements that the Fiduciary Guarantee must be in the form notarial deed. This is not the same as saying, that all Fiduciary Assets which are not written in the form of notarial deeds, which are made after the enactment of the Law Number 42 of 1999 concerning Fiduciary guarantee do not apply, because it is possible for such Fiduciary Guarantees to apply unwritten and jurisprudential provisions that have been valid. The provisions in Article 37 sub-3 of Law Number 42 of 1999 concerning Fiduciary guarantee also say that within 60 days, the old Fiduciary Guarantee is not adjusted to the Law Number 42 of 1999 concerning Fiduciary guarantee, the guarantee is "not a collateral right for the material referred to in this law". Thus, the notary deed here is a material requirement for the enactment of the provisions of the Law Number 42 of 1999 concerning Fiduciary guarantee on the Fiduciary guarantee agreement which is closed by

the parties. Besides that, of course, it is also proof.(4)

A notary deed is an authentic deed and has the most perfect evidentiary power, therefore imposition of objects with a Fiduciary Guarantee is stated in the notary deed which is a Fiduciary Guarantee Deed . In Article 1870 of the Civil Code, it is stated, that an authentic deed gives a perfect proof of what is contained in it between the parties and their heirs or those who obtain their rights as their successor. For this reason, the Law Number 42 of 1999 concerning Fiduciary guarantee "requires" or "requires" the imposition of objects guaranteed by a Fiduciary Guarantee to be carried out by notarial deed.(4)

Provisions regarding the obligations of finance companies to register this fiduciary guarantee are also regulated in the regulations of financial services authorities. Precisely in Article 21 paragraph (1) and (2) OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Financing Business Enterprises, which states:

a. Financing Companies that carry out financing by imposing fiduciary guarantees are obliged to register the intended fiduciary collateral at the fiduciary registration office within the authority of the Ministry of Law and Human Rights in each province of Indonesia, in accordance with the law governing fiduciary guarantees The fiduciary collateral.
b. registration obligation as referred to in paragraph (1) also applies to Finance Companies that carry out financing by imposing fiduciary guarantees for which financing comes from *channeling* or *joint financing*.

Furthermore, regarding the registration of fiduciary guarantees that must be carried out by the finance company has a period of time, as stated in Article 22 of OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Business of a Financing Company, which states that a Financing Company must register a fiduciary guarantee at the fiduciary registration office no later than 1 (one) month from the date of the financing agreement.

Constraints experienced by financial institutions in implementing the law on fiduciary collateral against customer

According to Article 41 of Law Number 42 of 1999 concerning Fiduciary Assurance, what is meant by Fiduciary is the transfer of ownership rights to an object based on the belief that the object whose ownership rights are transferred remains in the possession of the owner of the object. The fiduciary agreement is a loan agreement to the debtor (consumer) which involves guarantee. The guarantee is still in the possession of the collateral owner. But to guarantee legal certainty for creditors, a notary deed is made and registered with the Fiduciary Registration Office. Furthermore, the creditor will obtain a fiduciary guarantee certificate that reads "For Justice Based on the One Godhead". Thus, it has direct executorial rights if the debtor violates the fiduciary agreement to the creditor (parate execution), according to Law Number 42 of 1999 concerning Fiduciary Guarantees.(13)

Creditors in this case the finance company as a fiduciary recipient will receive a fiduciary certificate and a copy will be given to the debtor. By obtaining a fiduciary guarantee

certificate, the creditor/fiduciary recipient immediately has the right of direct execution (part execution), as happens in lending and borrowing in banking. The legal strength of the certificate is the same as a court decision that has a permanent legal force. Fiduciary guarantees that are not made a fiduciary guarantee certificate, create complex legal consequences and are at risk. Creditors can exercise their rights because they are considered unilateral and can lead to arbitrariness from creditors. It could also be because considering that financing for goods of fiduciary objects is usually not full in accordance with the value of goods. Or the debtor has carried out part of the obligations of the agreement made so that it can be said that above the item stands a partial right owned by the debtor and partly belongs to the creditor or finance company. Especially if the execution is not through an official price appraisal body or a public auction agency. Such actions can be categorized as Unlawful Acts as stipulated in Article 1365 of the Civil Code and can be sued for compensation.

Financial institutions that do not register fiduciary collateral actually lose themselves because they do not have legal rights that are legal. Business problems that require speed and excellent customer service are always not in line with the existing legal logic. Maybe because of a legal or legal vacuum that is not always as fast as the times. Imagine, fiduciary guarantees must be made before a notary, while financial institutions enter into agreements and fiduciary transactions in the field in a relatively fast time. At present many financial institutions carry out execution on objects loaded with fiduciary collateral that is not registered. In addition, the urgency of the obligation of finance companies to register this fiduciary guarantee is related to the executive power of fiduciary objects. This is as stipulated in Article 22 of OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of a Financing Company Business, which states that a Financing Company is prohibited from executing collateral if the fiduciary registration office has not issued a fiduciary guarantee certificate and submitted it to the Financing Company.

Fiduciary guarantee registration is indeed often a debate in some circles, especially among finance companies. Some consider it not mandatory, some say otherwise. Even though it refers to OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Business of Financing Companies, Minister of Finance Regulation Number 130/PMK/010/2012 has clearly stated that the non-mandatory is to include a fiduciary clause in the agreement, if the clause is entered, registration must be carried out. This misunderstanding of the finance company over the financial accounting regulations has made controversy about whether or not to register the fiduciary guarantee. Based on data released by the OJK, that finance companies that are registered and under the supervision of the OJK at this time, as many as 99 percents of them have recorded fiduciary charges so that based on the provisions of Article 21 and 22 OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Business of a Financing Company, which mentions a Financing Company, the said fiduciary guarantee must be registered.

CONCLUSION

a. Funding institutions have an important role, namely as one of

the potential alternative funding sources to support national economic growth in addition to the aforementioned role, financial institutions also have an important role in terms of development, namely accommodating and channeling aspirations and interests the community, plays an active role in development where the financial institution is expected by the community or business actors to overcome one of the common factors experienced, namely the capital factor. The role of financial institutions in implementing this fiduciary guarantee should have been well accommodated as stated in Law Number 42 of 1999 concerning Fiduciary Guarantee and OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of the Business of the Financing Company.

b. Most of the Financing Companies still have not registered the fiduciary guarantee deed due to a misunderstanding in elaborating the regulations regarding the collection of fiduciary guarantees stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantee and OJK Regulation Number 29/POJK.05/2014 concerning the Implementation of Business of Financing Companies and Regulation of the Minister of Finance Number 130/PMK 010/2012.

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