

The Legal Aspect in Trade of Fidusia Warranty in Indonesia

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Abstract: *Based on historical developments, this Fiduciary begins with an agreement based solely on trust. But over time in practice required a legal certainty that can protect the interests of the parties. Fiduciary by word of origin comes from the Roman language fides which means belief. Fidusia is a term that has long been known in the Indonesian language. Similarly, this term is used in Law No. 42 of 1999 on Fiduciary Guarantee. fiduciary institutions, as described by experts is because the provisions of the laws governing the institution (pawn) contain many shortcomings, do not meet the needs of society and can not keep up with the development of our society. The definition of fiduciary is the transfer of ownership of an object on the basis of trust with the provision that objects whose ownership rights are transferred remain in the possession of the object owner. Prior to the enactment of Law Number 42 Year 1999 on Fiduciary Guarantee there are various arrangements regarding fiduciary such as Law Number 16 Year 1985 on Flats has given fiduciary position as a recognized guarantee institution of law. In Article 12 of the Act it is stated that, the flats following the land where the building stands and other objects constituting a unity with the land can be used as collateral for debts with mortgages, if the land is property or HGB and encumbered with fiduciary, if the land is a right of use over state land. Mortgages or fiduciaries may also be levied on the land referred to in paragraph (1) along with the flats to be constructed as collateral for loan repayments which are intended to finance the construction of planned flats on the land concerned and whose granting is gradual in accordance with the implementation the development of the flats. Fiduciary Guaranty is a material assurance of tangible and intangible moving objects in connection with the debts between the debtor and the creditor. Fiduciary security is given by the debtor to the creditor to guarantee the repayment of its debt. Fiduciary security is regulated in Law no. 42 of 1999 on Fiduciary Guarantee. This fiduciary guarantee provides the fiduciary recipient with a priority position to the other creditor. From the definition it is clear to us that Fiduciary is distinguished from Fiduciary Collateral, where Fiduciary is a process of transferring ownership rights and Fiduciary Guarantee is a guarantee given in the fiduciary form.*

Keywords: Trade Law and Fiduciary Guarantee

1. Background

The emergence of fiduciary institutions, as expressed by experts is due to the provisions of the laws governing the institution (pawn) contains many shortcomings, do not meet the needs of the community and can not keep up with the development of our society. The definition of fiduciary is the transfer of ownership of an object on the basis of trust with the provision that objects whose ownership rights are transferred remain in the possession of the object owner. Prior to the enactment of Law Number 42 Year 1999 on Fiduciary Guarantee there are various arrangements regarding fiduciary such as Law Number 16 Year 1985 on Flats has given fiduciary position as a recognized guarantee institution of law. In Article 12 of the Act it is stated that, the flats following the land where the building stands and other objects constituting a unity with the land can be used as collateral for debts with mortgages, if the land is property or HGB and encumbered with fiduciary, if the land is a right of use over state land. Mortgages or fiduciaries may also be levied on the land referred to in paragraph (1) along with the flats to be constructed as collateral for loan repayments which are intended to finance the construction of planned flats on the land concerned and whose granting is gradual in accordance with the implementation the development of the flats. Fiduciary Guaranty is a material assurance of tangible and intangible moving objects in connection with the debts between the debtor and the creditor. Fiduciary security is given by the debtor to the creditor to guarantee the repayment of its debt. Fiduciary security is regulated in Law no. 42 of 1999 on Fiduciary Guarantee. This fiduciary guarantee provides the fiduciary recipient with a priority position to the other creditor. From the definition it is clear

to us that Fiduciary is distinguished from Fiduciary Collateral, where Fiduciary is a process of transferring ownership rights and Fiduciary Guarantee is a guarantee given in the fiduciary form. Based on historical developments, this Fiduciary begins with an agreement based solely on trust. However over time in practice required a legal certainty that can protect the interests of the parties. Fiduciary by word of origin comes from the Roman language fides which means belief. Fidusia is a term that has long been known in the Indonesian language. Similarly, this term is used in Law No. 42 of 1999 on Fiduciary Guarantee. B. Formulation of Problem Adapun that we discussed in our paper, among others: 1. Definition of fiduciary and fiduciary guarantees. 2. The Difference Between Pawn And Fiduciary. 3. The properties of the Fiduciary Guarantee. 4. Fiduciary Guarantee Act. 5. Legal Effects of Fiduciary Security. 6. Execution Process of Fiduciary Guarantee. Chapter II DISCUSSION. Understanding Fiduciary and Fiduciary Guidance Background The occurrence of Fiduciary guarantee. The background of the emergence of fiduciary institutions, as expressed by the experts is because the provisions of the law that regulates the pawn institution (pawn) contains many shortcomings, do not meet the needs of the community and can not keep up with the development of society. Based on historical developments, this Fiduciary begins with an agreement based solely on trust. But over time in practice required a legal certainty that can protect the interests of the parties. The definition of Fiduciary in Fiduciary according to its origin comes from the Roman language fides which means belief. Fidusia is a term that has long been known in the Indonesian language. Similarly, this term is used in Law No. 42 of 1999 on Fiduciary Guarantee. In Dutch

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terminology this term is often called complete Fiduciary Eigendom Overdracht (F.E.O.) which is the transfer of ownership in trust. Whereas in English terms is called Fiduciary Transfer of Ownership. The definition of fiduciary is the transfer of ownership of an object on the basis of trust with the provision that objects whose ownership rights are transferred remain in the possession of the object owner. Prior to the enactment of Law Number 42 Year 1999 on Fiduciary Guarantee there are various arrangements regarding fiduciary such as Law Number 16 Year 1985 on Flats has given fiduciary position as a recognized guarantee institution of law. According to Law number 42 Year 1999, the definition of Fiduciary is the transfer of ownership rights of an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the object owner. The definition of FIDUSIA article 1 paragraph 1 fiduciary is: "transfer of ownership rights of an object on the basis of trust with the provision that the object of which the rights of ownership held are still in control of the owner of the object. Dr. A. Hamzah and Senjun Manulang mean fiduciary is: "A way of transferring ownership of the owner (debtor) based on a principal agreement (debt agreement) to the creditor, but only the right is given by juridise-levering and only owned by the creditor in trust only (as collateral for debtors), while the goods are still controlled by the debtor, but no longer as eigenaar or bezitter, but only as detentor or houder and on behalf of creditor-eigenaar "(A. Hamzah and Senjun Manulang, 1987). Understanding of Fiduciary Guarantee. Fiduciary Guaranty is the right of guarantee of tangible and non-material moving objects and immovable property, especially Buildings which can not be burdened with dependent rights as meant in Law Number 4 Year 1996 concerning Mortgage Rights which remain in the control of Fiduciary Giver (debtor), as collateral for the settlement of certain money, which gives priority to the Fiduciary Receiver (creditors) to other creditors. Fiduciary security is a creditor debt payable agreement to the debtor involving the guarantee. The assurance of his position is still in the possession of the owner of the guarantee. But to ensure legal certainty for creditors then made a deed made by a notary and registered to the Fiduciary Registration Office. Later creditor will get fiduciary guarantee certificate in "Justice for Justice based on the One Godhead". From the definitions given it is clear to us that Fidusia is distinguished from Fiduciary Collateral, where Fiduciary is a process of transferring ownership rights and Fiduciary Guarantee is a guarantee given in the fiduciary form. The Difference Between Pawn and Fiduciary Being Reviewed In terms of Understanding. A pawn is a right earned by a creditor of a moving good which is handed over to him by the debtor, or by another on his behalf, and which authorizes the creditor to take the repayment of the goods precedence over the creditor- other lenders, with the exception of fees for auctioning the goods and the fees already inremove it to save it after the item is mortgaged, which expenses should take precedence. Fiduciary is the transfer of ownership of an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner of the object. Fiduciary Guaranty is the right of guarantee of tangible and intangible moving objects and immovable property especially Buildings which can not be burdened with dependent rights as referred to in Law no. 4

of 1996 concerning Dependent Rights which remain within the control of the Fiduciary Giver, as collateral for the settlement of certain money, which gives priority to the Fiduciary Receiver to the other creditor. In terms of legal sources Pawn: Article 1150 s.d. Article 1160 Civil Code Law (Civil Code). Fiduciary Guarantee: (1). Law no. 42 Year 1999 regarding Fiduciary Guarantee; (2). Government Regulation no. 86 of 2000 concerning Procedures for Registration of Fiduciary Guaranty and the Cost of Making Fiduciary Collateral Deed. In terms of elements. Pawn: 1. Pawns are given only on moving objects; 2. the mortgage guarantees must be removed from the control of the Pawnshop (Debtor), the physical delivery of lienings (lavinging); Pawn gives creditors the right to obtain early repayment of creditor's receivables (droit de preference); 4. Pawns authorize creditors to take their own repayment ahead of time. Fiduciary: 1. a fiduciary shall be granted to movable and immovable property which can not be borne by mortgage or mortgage rights; fiduciary is a guarantee of ownership that the debtor does not surrender physical assurance to the creditor but remains under the debtor's powers (constitutum possessorium), but the debtor is not allowed to transfer the collateral to another party (the debtor shall surrender the ownership rights to the creditor); 3. fiduciary provides the preferred position to the creditor to obtain the first repayment of the proceeds of the execution of the object which is the object of the guarantee; fiduciary authorizes the creditor to sell the collateral goods on his own power. And there are many more differences between the mortgage and fiduciary assurance in terms of various aspects. The properties of the Fiduciary Guarantee Adapun the nature of fiduciary security include: 1. Fiduciary Guarantees have accessoir properties. Fiduciary Guarantees grant Preferent Rights (rights to take precedence) .3. The Fiduciary Guarantee has the property of the droit de suite.4. Fiduciary Guarantee to guarantee existing or existing debt.5. Fiduciary Guarantees have an executorial power.6. Fiduciary Guarantees have a special nature and publicity.7. The object of fiduciary assurance in the form of a moving object, either tangible or intangible, and immovable objects not charged with the right of dependence, as well as objects obtained in the future.D.D. The Fiduciary Guaranty Act. The fiduciary security referred to in Article 1 paragraph (2) Number 42 of 1999 concerning Fiduciary Guaranty, is the right of security of tangible and intangible mobile objects and immovable in particular buildings which can not be encumbered with mortgages as referred to in Act Number 4 of 1996 concerning the Deposit Rights which remains in the control of the Fiduciary Giver, as collateral for certain debt repayment, which gives priority to the Fiduciary Receiver to the other creditor. Related to the above provisions, the following explanation concerning the process of fiduciary loading and the things that cause the fiduciary guarantee, and the following explanation: The process or phases of fiduciary loading is as follows: The first process, by making the principal agreement of credit agreement. The second process, the imposition of objects with fiduciary security marked by the making of the Fiduciary Guaranty Act (AJF), which contains the day, date, time of manufacture, the identity of the parties, the fiduciary principal agreement, the fiduciary object description, the value of the guarantee and the value of the fiduciary security object. The third process, is the registration of AJF at the fiduciary registration office,

which will then be issued the Fiduciary Guarantee Certificate to the creditor as the fiduciary receiver. The fiduciary security is removed due to the following matters is the elimination of debt secured by fiduciary and due to the release of the right to fiduciary guarantee by fiduciary recipients as well as due to the destruction of objects which become the object of fiduciary guarantee. In relation to the foregoing explanation in Law Number 42 Year 1999 concerning fiduciary, it is also mentioned that this law embraces a ban on property of bedding, meaning any pledge which authorizes the fiduciary recipient to possess the object of fiduciary security if the debtor breaches an appointment, is null and void.

E. Legal Effects of Fiduciary Guarantee. fiduciary nan who is not made a fiduciary security certificate gives rise to complex and risky legal consequences. The creditor can exercise his / her right of execution because it is considered unilateral and may lead to arbitrariness of the creditor. It could also be because given the financing of goods objects fidusia usually not full in accordance with the value of goods. Or, the debtor has already performed the obligations of some of the agreements made, so it can be said that the above goods stand the rights of some of the debtor and some belong to the creditor. Apalagi if the execution is not through the official price appraisal agency or public tender body. Such actions may be categorized as Legal Acts (PMH) as stipulated in Article 1365 of the Civil Code and may be claimed for damages. In the conception of criminal law, the execution of a fiduciary object under the hand is entered into a criminal act of Article 368 of the Criminal Code if the creditor exerts coercion and the threat of deprivation. This situation can occur if the creditor in the execution of coercion and take goods unilaterally, even though known in the goods partly or wholly owned by others. Although it is also known that some of the goods are owned by creditors who want to execute but are not registered in the fiduciary office. Even the imposition of other articles can occur given that everywhere execution is not an easy thing, for it requires legal guarantees and legal support of legal apparatus. This is the urgency of balanced legal protection between creditors and debtors. Even if the debtor transfers the fiduciary object undertaken under the hands of the other party, it can not be charged under Law no. 42 Year 1999 About fiduciary warranty, due to unauthorized or legal fiduciary guarantee agreement made.

F. Execution Process of Fiduciary Guarantees Whereas the principle of "pacta sunt servanda" agreement which states that agreements made by parties to consent, shall be laws for both, shall remain in effect and shall be the principal principle of the treaty law. But there is no execution under the treaty providing fiduciary underwriting. The process of execution must be done by filing a civil suit to the District Court through a normal procedural law process until the decisions of the court. This is the procedural choice of formal law in order to maintain justice and enforcement of the material laws it contains. This process will almost certainly take a long time, if the parties use all available legal remedies. Costs that must be issued not too little. Of course, this is a choice of dilemma. The pretext of pursuing a large margin should also consider the sense of justice of all parties.

Chapter II LOWEN. Conclusion From the above brief discussion can be drawn conclusions about the urgent about fiduciary security. Fiduciary by word of origin comes from the Roman fides which means belief.

The definition of fiduciary is the transfer of ownership of an object on the basis of trust with the provision that objects whose ownership rights are transferred remain in the possession of the object owner. Fiduciary security is a creditor debt payable agreement to the debtor involving the guarantee. The assurance of his position is still in the possession of the owner of the guarantee. In contrast to the fiduciary assurance Pawn is a right earned by the creditor of a moving good, which is handed over to him by the debtor (owed), or by another person on his behalf, and which gives the creditor the power to take away from the good precedence over other creditors, with the exception of the costs of auctioning the goods and the costs incurred to save them after the goods are pawned, which expenses should take precedence.

B. Suggestions Hopefully with the discussion of our paper can be an input and source of knowledge for everyone and hopefully useful. We are fully aware that we are just ordinary human beings who do not escape from wrong and forget, therefore we realize that this paper is still far from perfection. For that we really hope criticism and constructive suggestions from all parties, especially from the lecturers concerned, so that the future can make better.

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