

Legal Analysis of Default Dispute Resolution in Money Lending and Borrowing Agreements with Fiduciary Guarantees for Certain Individuals in the City of Mataram

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ABSTRACT

This study aims to examine the resolution of breach of contract disputes in loan agreements with fiduciary guarantees among certain individuals in Mataram City. It covers the implementation of loan agreements with fiduciary guarantees as well as the methods and processes involved in resolving breach of contract disputes in such agreements, specifically in the Sekarbela District of Mataram City. The research also seeks to determine whether the dispute resolution and its implementation comply with legal mandates. This study employs a normative-empirical legal research approach, utilizing statutory, conceptual, and sociological approaches. The research findings indicate that loan agreements with fiduciary guarantees do exist among certain individuals. Observations conducted so far reveal that such practices are common; however, their implementation often involves minor errors that can have significant consequences in cases of breach of contract. One of these errors is the failure to register the fiduciary guarantee with the Fiduciary Registration Office, which results in legal uncertainty and the emergence of preferred creditors. Additionally, some loan agreements are made without collateral, which could ultimately harm the creditor.

INTRODUCTION

A contract is an event in which one person makes a promise to another or where two parties mutually agree to perform a specific action. This event gives rise to a legal relationship between the two parties, known as an obligation. (Subekti, 2005, 1) A contract between two or more people establishes an obligation between the parties involved. In its form, a contract consists of a series of statements containing promises or commitments made by both parties, either verbally or in writing.

In the legal field, there is a term known as a loan agreement. Loan agreements are regulated in Article 1754 of the Indonesian Civil Code. According to the law, a loan agreement is defined as follows: (Salim HS, 2021, 78)

"An agreement in which the first party transfers a consumable sum of money to the second party, under the condition that the second party will return an equivalent amount of the same type of goods in the same condition."

Based on this legal provision, a loan agreement results in a debtor-creditor relationship, where the debtor is obligated to repay the loan provided by the creditor under the agreed terms and conditions. To ensure debt repayment, a guarantee must be provided as collateral for the settlement of the debt. To secure this guarantee, a secondary agreement arises, known as an accessory agreement, which serves as a supplementary contract linked to the primary contract. One such accessory agreement is the fiduciary agreement.

A fiduciary agreement is a derivative contract of the primary agreement. Essentially, fiduciary security is a form of collateral that applies to movable assets, both tangible and intangible.

As stated in Law No. 42 of 1999 concerning Fiduciary Security, the general provisions define:

"Fiduciary security is a security right over movable assets, both tangible and intangible, and immovable assets that cannot be encumbered with a mortgage right under Law No. 4 of 1996 concerning Mortgage Rights, which remain under the control of the fiduciary provider, serving as collateral for the repayment of a specific debt, granting the fiduciary recipient a preferential position over other creditors."

The Fiduciary Security Law, hereinafter referred to as the Fiduciary Law, defines fiduciary as the transfer of ownership rights of an asset based on trust, with the condition that the ownership rights remain under the control of the fiduciary provider. It is considered trust-based because the pledged asset remains in the possession of the owner (debtor). Under the Fiduciary Law, fiduciary security involves the transfer of ownership rights of the debtor's assets to the creditor, while physical possession remains with the debtor (Constitutum Possessorium).

If the debtor repays the debt, the creditor must return ownership rights of the asset to the debtor (Munir Fuady, 2003, 10). This arrangement allows the debtor to retain control over the collateralized asset, though only as a temporary borrower and no longer as the rightful owner.

The Fiduciary Law outlines the requirements for executing agreements involving fiduciary security, including the obligation to register the fiduciary security as stated in the fiduciary security deed at the Fiduciary Registration Office. Essentially, registering fiduciary security at the Fiduciary Registration Office, as mandated by the Fiduciary Law, provides legal certainty for both creditors and debtors. A credit agreement secured by fiduciary security must be established through an authentic deed issued by a public official, specifically a Notary, as stipulated in Article 5 of the Fiduciary Law:

"The encumbrance of an asset with Fiduciary Security must be made by notarial deed in the Indonesian language and shall constitute a Fiduciary Security deed."

This requirement guarantees legal certainty for the fiduciary recipient (creditor) regarding the asset encumbered with fiduciary security.

A credit agreement secured by fiduciary security is highly effective in protecting the creditor's interests. It provides a preferential position to the fiduciary recipient over other creditors, and this right remains unaffected by the bankruptcy or liquidation of the fiduciary provider, as stipulated in Article 27(3) of the Fiduciary Law:

"The preferential right of the Fiduciary Recipient shall not be extinguished by the bankruptcy and/or liquidation of the Fiduciary Provider."

Currently, financing arrangements for debtors are commonly provided by financial institutions such as finance companies and banks. However, initial observations indicate that fiduciary-backed financing is also being conducted by certain individuals who offer financing services to other individuals. Such individual-based fiduciary financing is permitted under Article 1(6) of the General Provisions of the Fiduciary Law, which states:

"A Fiduciary Recipient is an individual or a corporation that holds a claim secured by Fiduciary Security."

Although fiduciary-backed individual financing is legally regulated under the Fiduciary Law, its implementation is often inadequate, leading to various issues. Loan agreements between individuals with fiduciary security pose significant risks for creditors, potentially resulting in disputes if the process does not comply with legal provisions.

There is a tendency for individual loan agreements to be made without notarial deeds and without being registered at the Fiduciary Registration Office to obtain a Fiduciary Certificate. The Fiduciary Certificate is issued by the Fiduciary Registration Office after the fiduciary security is registered by the fiduciary recipient.

If a debtor defaults on a fiduciary security that has not been registered at the Fiduciary Registration Office, the execution process cannot be carried out directly but must be pursued through a civil lawsuit in the District Court, following normal legal proceedings until a court ruling is issued. This requirement is based on Article 11(1) of the Fiduciary Law, which mandates that fiduciary security must be registered before its executorial title can be enforced.

Given the prevalence of legal events in society, research is necessary to analyze such occurrences. Loan agreements between individuals constitute a legal event that requires examination, as legal events are an integral part of the legal system and can have legal consequences. Legal events arise from human actions or circumstances that influence individuals to act in accordance with or contrary to the law.

Based on the background explanation above, the research problem to be addressed is: How are loan agreements with fiduciary security conducted between certain individuals in Mataram City, and what are the methods and processes for resolving breach of contract disputes in these fiduciary-backed loan agreements?

RESEARCH METHODOLOGY

Based on the research title and problem formulation, this study employs a normative-empirical legal research approach using data from Mataram City. Normative-empirical legal research examines the implementation of positive legal provisions to determine whether they are properly enforced, ensuring that stakeholders achieve their intended objectives (Muhaimin, 2020, 115).

A research methodology provides a systematic, structured approach to gathering information while maintaining clear boundaries to prevent misinterpretation. This study employs statutory, conceptual, and sociological approaches.

The collection of legal materials follows the approach of Mukti Fajar and Yulianto Achmad, who classify data collection into primary legal materials (such as laws and regulations) and secondary legal materials (such as books, legal journals, expert opinions, and case law). Additionally, empirical research methods involve field data collection through observation and interviews with respondents who have engaged in loan transactions.

After collecting and analyzing legal materials and empirical data, this study applies qualitative analysis to comprehensively evaluate respondents' statements

and legal sources. The qualitative analysis aims to explain and illustrate the findings as clearly as possible, incorporating both field and library research.

DISCUSSION

1. Implementation of Loan Agreements with Fiduciary Guarantees for Certain Individuals in Mataram City

Fiduciary security is a proprietary right that provides a guarantee for the repayment (payment) of a debtor's debt to a creditor. The debtor's debt to the creditor may arise from an agreement or from statutory provisions, which include: (Ashibly, 2018, 96)

2. Existing debt
3. Future debt that has been agreed upon in a specific amount
4. Debt that can be determined at the time of execution based on the principal agreement that creates an obligation to fulfill a performance

a. The Basis of the Obligation to Register Fiduciary Security

Fiduciary security emerged in legal practice guided by jurisprudence, both in the Netherlands and Indonesia. As a legal institution born from practice and not significantly regulated in legislation, there are no procedural or process-related provisions. Since fiduciary jurisprudence does not cover procedural and process aspects, it is unsurprising that the obligation to register fiduciary security as part of its procedural chain was not regulated, meaning there was no mandatory registration for fiduciary security.

Because fiduciary security is recognized in civil law as granting the fiduciary giver the right to retain possession of the secured object based on trust, a registration system was later introduced to provide guarantees to the fiduciary recipient and other parties with an interest in the object in a concrete and definite manner (Kashadi, 2019, 37).

As regulated in the Fiduciary Security Law, the registration of fiduciary objects is stipulated in Article 11, which states:

1. Objects encumbered with fiduciary security must be registered.
2. If the object encumbered with fiduciary security is located outside the territory of the Republic of Indonesia, the obligation referred to in paragraph (1) still applies.

b. Characteristics and Elements of Fiduciary Security That Must Be Registered

In the fiduciary security registration mechanism, certain elements and characteristics of fiduciary security must first be met. Based on Article 1, Paragraph 2 of Law No. 42 of 1999 on Fiduciary Security, the elements of

- fiduciary security include:
- a. The existence of a security right, specifically a proprietary security right
 - b. An object, which in the context of fiduciary security refers to immovable objects that cannot be encumbered with a mortgage and both tangible and intangible movable objects
 - c. The object remains under the control of the fiduciary giver, meaning the object remains in the debtor's possession through **constitutum possessorium** (where the debtor retains possession of the collateral)
 - d. The object serves as collateral for the repayment of a specific debt

Similar to mortgage rights, which have specific characteristics and provisions, fiduciary security also has the following characteristics to be considered valid as collateral:

- a. Grants a preferential position to the fiduciary recipient over other creditors
- b. The fiduciary security follows the object, regardless of who possesses it
- c. It is an accessory agreement to a principal agreement
- d. It adheres to the principle of specificity
- e. It adheres to the principle of publicity
- f. Its execution is straightforward and certain

c. Encumbrance and Status of Fiduciary Security

In the implementation of credit agreements secured by fiduciary security, as regulated in Law No. 42 of 1999 on Fiduciary Security, Article 5, Paragraph 1 stipulates that a notarial deed is required. This serves as proof for the creditor as the fiduciary recipient in case of future disputes, particularly for significant loan amounts.

The requirement for a written and notarized deed aims to ensure legal certainty and fulfill the principle of publicity. From a legal certainty perspective, requiring a fiduciary security deed in notarial form provides perfect evidence in court. However, this provision does not fully consider practical concerns, as requiring a notarial deed for relatively small debts secured by fiduciary security may impose financial burdens on the parties involved.

Nevertheless, legislators had strong reasons for requiring fiduciary security deeds to be in notarial form. Since the fiduciary collateral remains in the possession of the fiduciary giver, the fiduciary recipient bears significant risk, particularly if the debtor (fiduciary giver) acts in bad faith.

The encumbrance of objects with fiduciary security, as explained above, must be executed through a notarial deed in Indonesian, known as a **fiduciary security**

deed. This deed must include at least the following information (Ashibly, 2018, 101):

- a. The identities of the fiduciary giver and recipient
- b. Details of the principal agreement secured by fiduciary security
- c. A description of the object serving as fiduciary collateral
- d. The secured value
- e. The value of the object serving as fiduciary collateral

Debts secured by fiduciary security may include:

- a. Existing debts
- b. Future debts agreed upon in a specific amount
- c. Debts whose amounts can be determined at the time of execution based on the principal agreement that creates an obligation to fulfill a performance

The purpose of encumbering fiduciary security is to provide security for the creditor's claims against the debtor or, conversely, to guarantee the debtor's debt to the creditor. The Fiduciary Security Law, in addition to protecting the fiduciary giver (debtor), aims to strengthen the position of the fiduciary recipient (creditor). If the debtor defaults, the creditor has rights equivalent to those of an owner. Since the fiduciary collateral remains in the fiduciary giver's possession, the creditor has the right to terminate the debtor's right to use the collateral and reclaim it, as stipulated in the law.

D. Mechanism of Fiduciary Security Registration

Objects encumbered with fiduciary security must be registered. The registration of objects encumbered with fiduciary security is carried out at the domicile of the fiduciary grantor, covering objects both inside and outside the territory of the Republic of Indonesia. This is to fulfill the principle of publicity while also ensuring certainty for other creditors regarding objects that have been encumbered with fiduciary security. The Fiduciary Registration Office is part of the Ministry of Justice and is not an independent institution or a technical implementing unit.

To improve legal services for fiduciary security registration in a simple, fast, affordable, and convenient manner, electronic fiduciary security registration is currently implemented. The procedures for electronic fiduciary security registration are regulated under the Minister of Law and Human Rights Regulation No. 10 of 2013 concerning Electronic Fiduciary Security Registration Procedures and Government Regulation No. 21 of 2015 concerning Fiduciary

Security Registration Procedures and the Costs of Drafting Fiduciary Security Deeds.

In a fiduciary security registration application submitted by the fiduciary recipient, their attorney, or their representative, the following registration statement must be attached:

- a. The identities of the fiduciary grantor and fiduciary recipient;
- b. The date, fiduciary security deed number, name, and domicile of the notary drafting the fiduciary security deed;
- c. Details of the principal agreement secured by fiduciary security;
- d. A description of the object serving as fiduciary security;
- e. The guaranteed value of the object encumbered with fiduciary security;
- f. The value of the object serving as fiduciary security.

As stipulated in Article 13, Paragraph 3 of the Fiduciary Security Law, the fiduciary security registration at the Fiduciary Registration Office is the obligation of the fiduciary recipient, including their attorney or representative. Fiduciary security registration at the Fiduciary Registration Office is recorded in the fiduciary register on the same date as the application submission.

Additionally, Paragraph 2 of the article states that the Fiduciary Registration Office records fiduciary security in the fiduciary register on the same date as the application submission. This provision implies that the Fiduciary Registration Office is not authorized to assess the accuracy of the information provided in the fiduciary security registration statement but can only verify the submitted data.

After registration, as explained in the subchapter on the Encumbrance and Position of Fiduciary Security, a Fiduciary Security Certificate is issued, bearing the phrase "For the Sake of Justice Based on the Almighty God".

Dispute Resolution Process for Default in Loan Agreements with Fiduciary Security for Certain Individuals

The emergence of fiduciary security in Indonesia cannot be separated from Dutch influence, as the Netherlands once occupied Indonesia. The concept of fiduciary security arose from the impact of World War I. At that time, the demand for credit among small entrepreneurs was very high for business operations and growth. This credit demand required collateral to secure the lender's capital. At the time, the existing security institutions were pawn (gadai) and mortgage (hipotek). Mortgage security was difficult to use because it required land ownership, which not everyone possessed. Additionally, pawn security had its own limitations.

The enactment of Law No. 42 of 1999 on Fiduciary Security serves as a legal measure to ensure certainty, which is the fundamental function of the law. A legal system that provides certainty in social relations is considered beneficial.

The objectives of Law No. 42 of 1999 are clearly stated in its preamble, which outlines the following points:

- a. The increasing and substantial demand for business funding must be supported by clear and comprehensive legal provisions regulating security institutions.
- b. Fiduciary security, as one form of security institution, was previously based on jurisprudence and had not been comprehensively regulated in legislation.
- c. To meet legal needs that accelerate national development while ensuring legal certainty and protection for relevant parties, comprehensive regulations on fiduciary security must be established, and such security must be registered at the Fiduciary Registration Office.

The regulation of fiduciary security aligns with the principle of legal certainty, which is realized through the registration requirement. This registration process is expected to provide certainty to both the fiduciary grantor, fiduciary recipient, and third parties. The registration obligation is stated in Article 11, Paragraph 1 of Law No. 42 of 1999 on Fiduciary Security.

Currently, fiduciary security registration can be conducted electronically to facilitate individuals in need. The registration procedures are regulated from Articles 11 to 18 of Law No. 42 of 1999 and are further detailed in Government Regulation No. 21 of 2015 concerning Fiduciary Security Registration Procedures and Costs for Drafting Fiduciary Security Deeds, as previously explained in the preceding subchapter.

Fiduciary security certificates have a unique characteristic as they contain the phrase "FOR THE SAKE OF JUSTICE BASED ON THE ALMIGHTY GOD", which grants them executorial power equivalent to a final and binding court ruling. A court ruling with **executorial title** (titel eksekutorial) is one that includes a **condemnatory** order, while declaratory or constitutive rulings do not require execution as they do not involve enforcement measures.

Thus, execution fundamentally refers to the realization of the losing party's obligation to fulfill the performance stated in the court ruling. The winning party may request execution from the court that rendered the decision to enforce the ruling forcibly (**execution force**).

The inclusion of the phrase "FOR THE SAKE OF JUSTICE BASED ON THE ALMIGHTY GOD", as permitted by law, implies that the fiduciary security deed holder has the same standing as someone possessing a court ruling with

permanent legal force. However, it is important to note that a **grosse deed** is not the same as a court decision, although it carries the same legal force as one.

In addition to serving as a form of registration, a fiduciary security certificate grants a proprietary nature to the creditor's rights as the fiduciary recipient. This is reflected in the granting of parate execution rights and the status of a separate creditor, demonstrating the legislature's intent to provide a strong legal position to creditors.

In the execution of fiduciary security, the fiduciary grantor is obligated to hand over the object that is subject to fiduciary security. If the fiduciary grantor fails to surrender the object at the time of execution, the fiduciary recipient has the right to take possession of the object and, if necessary, seek assistance from the relevant authorities.

This illustrates that the execution of fiduciary security provides legal certainty and protection to creditors, with an easy and swift execution process. The quicker the security is liquidated or executed, the greater the opportunity for the creditor to recover their receivables optimally from the debtor.

From the explanations above, it is evident that before the enactment of Law No. 42 of 1999, creditors' proprietary rights in fiduciary security had no solid legal basis, as fiduciary arrangements were only regulated by jurisprudence. This meant that legal certainty for creditors had not been fully achieved. However, after the implementation of Law No. 42 of 1999, the regulations on fiduciary security became clear, ensuring both legal certainty and legal protection for creditors, as they could now execute their rights easily and promptly in case of debtor default. Moreover, the recognition of proprietary rights for creditors in fiduciary security further strengthens their legal standing within the fiduciary security system.

Legal liability arises from obligations that generate rights and responsibilities. Article 1233 of the Indonesian Civil Code states that obligations (engagements) originate from agreements and laws. Obligations arising from the law are further divided into lawful acts and unlawful acts. The rights and obligations of the parties are closely related to legal responsibility, as each party is accountable for the consequences of the agreement they have entered into.

Responsibility is a person's awareness of their behavior or actions, whether intentional or unintentional. Responsibility also means being aware of one's obligations. In essence, responsibility refers to an obligation that must be borne or fulfilled as a consequence of one's actions, the actions of others, or as a form of service and sacrifice to others. Such obligations or burdens are intended for the benefit of the person acting or another party.

Civil liability concerns a person's responsibility for unlawful acts. The scope of unlawful acts is broader than that of criminal acts, as it does not only include actions that violate criminal law but also those that contravene other legal provisions, including unwritten legal norms. The purpose of legal provisions regarding unlawful acts is to protect and provide compensation to the aggrieved party.

This liability includes the obligation to compensate for the harm caused. The basis of liability is the obligation to pay compensation for damages and the obligation to fulfill promises as stipulated in agreements or legal provisions.

In cases of default, debtors who fail to fulfill their obligations may be subject to several sanctions as stipulated in the Indonesian Civil Code, which explains the legal consequences from Articles 1237 to 1267, as follows:

- a) In agreements involving the transfer of goods, the risk shifts to the debtor upon default.
- b) The debtor is required to compensate for any losses suffered by the creditor.
- c) If the agreement is a reciprocal contract, the creditor may request fulfillment or cancellation of the agreement through the court.
- d) The debtor must fulfill the agreement if still possible or face cancellation along with an obligation to pay compensation for losses caused.

In simpler terms, the responsibilities of the debtor can be summarized as follows:

- a) The debtor must pay a fine as compensation for damages. Any debtor who delays fulfilling their obligations will be subject to a fine, and the principal installment will be linked to the monthly interest rate as agreed upon.
- b) The debtor must surrender collateral for confiscation. A debtor in default will receive verbal warnings. If the debtor ignores these warnings three times (through summons), the creditor may seize the collateral object.
- c) The debtor must sell their assets to fulfill their repayment obligations. If the debtor is deemed incapable of fulfilling their obligations, the creditor may request that the debtor sell their assets to settle the debt, including any fines or interest that have been agreed upon.

In addition to the consequences imposed on the debtor for default, creditors also have several legal remedies against defaulting debtors, including: Demanding fulfillment of the agreement, even if delayed.

- a) Demanding compensation based on Article 1243 of the Indonesian Civil Code, where compensation may include costs, damages, or interest.
- b) Demanding both fulfillment and compensation.

- c) Demanding contract cancellation.
- d) Demanding both cancellation and compensation.

CONCLUSION

The practice of personal money lending with fiduciary security in Mataram City, particularly in Sekarbela District, has been met with a generally positive response from the local community. They perceive such lending services as a convenient solution for their financial needs, whether for personal emergencies or other purposes. This practice has become commonplace among residents; however, a recurring issue is the tendency of borrowers to take loans without adhering to the proper legal procedures and regulations. Research indicates that a lack of legal knowledge is one of the main factors causing fiduciary-secured loan agreements to be conducted without following the legally mandated procedures. Information obtained from the study reveals that creditors are often unaware that fiduciary security must be registered with the Fiduciary Registration Office and that the security deed must be drawn up by a notary as the authorized official.

According to Law No. 42 of 1999 on Fiduciary Security, unregistered fiduciary security lacks legal certainty. The law stipulates that fiduciary security must be established through a notarial deed and registered to ensure legal certainty, while also granting creditors preferential rights upon registration. If fiduciary security is not created in accordance with the legally required procedures for encumbrance and registration, it will not have legal certainty, including executorial power or preferential rights for creditors.

The resolution of default disputes in fiduciary-secured loan agreements is governed by legislation, particularly Law No. 42 of 1999 on Fiduciary Security. This law provides legal certainty that facilitates and secures credit granting. Legal certainty ensures that the collateral is available for execution whenever necessary, provided there is an agreement between both parties regarding its execution. In other words, the collateral can be liquidated into cash to settle the borrower's debt. The primary purpose of the law is to protect the interests of both parties, preventing or resolving potential disputes.

Debtors bear responsibility for resolving disputes arising from legal consequences, such as the obligation to compensate for damages. If still feasible, they must fulfill the agreement, including selling their assets to settle the debt. Additionally, if an agreement is reached between both parties, the debtor is required to voluntarily surrender the collateral.

DAFTAR PUSTAKA

Ashibly, 2018, *Buku Ajar Hukum Jaminan*, MIH Unihaz, Bengkulu.

Kazwaeni, Rodliyah, Munandar

Kashadi, 2019, *Pelaksanaan Jaminan Fidusia Dalam Undang-Undang Jaminan Fidusia*, Majalah Masalah-masalah Hukum, Edisi VI.

Muhaimin, *Metode Penelitian Hukum*, Mataram University Press, Cet. 1, Ed. 1, Mataram, 2020.

Mukti Fajar dan Yulianto Achmad, 2010, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta.

Munir Fuady, 2003, *Jaminan Fidusia Revisi Kedua*, Citra Aditya Bakti, Jakarta.

Salim HS, 2021, *Hukum Kontrak (Teori dan Teknik Penyusunan Kontrak)*, Sinar Grafika, Jakarta Timur.

Subekti, 2005, *Hukum Perjanjian*, Intermedia, Jakarta.