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THE LEGAL NATURE OF THE DEBTOR IN CONTROL OF THE OBJECT OF FIDUCIARY GUARANTEE

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Abstract:

Contract law is often interpreted the same as the law of engagement. This is based on the concept and definitional limitations on the words agreement and engagement. Basically contract law is carried out if in an event someone makes a promise to another party or there are two parties who promise each other to do something. In general, the agreement begins with differences in interests that are tried to be reconciled through an agreement. Through the agreement these differences are accommodated and then framed with legal instruments so that they are binding on the parties. In the agreement, the question of certainty and justice will actually be achieved if the differences between the parties are accommodated through an engagement relationship mechanism that works in a balanced manner.

Keywords Law, agreement engagement

INTRODUCTION

Guarantee is a guarantee of trust that comes from the existence of a feeling relationship between one human being and another human being where they feel safe, so that a sense of trust grows in their interaction friends, and then gives their property as collateral to the place where they owe their debt. Fiduciary in the Roman era was also called Fiducia Cum Creditore, meaning that it was surrendered as a guarantee, not a transfer of ownership. (J, 2002)

Fiduciary was not regulated in the Civil Code, and was born from the implementation of the principle of freedom of contract as regulated in Article 1338 of the Civil Code. - The Civil Law which states that all agreements made are valid for the parties who make them and apply as law for those who make them. This means that everyone is allowed to make any kind of agreement, whether regulated in the law or not yet regulated in the law, so that many new agreements appear that describe the intentions and wills of the people who are always dynamic. (Nurwidiatmo, 2011)

Basically, every human to companies on a daily basis are always faced with all kinds of needs. In dealing with this need, human nature in general hopes to always want to be able to fulfill everything because they basically want to live decently and always have enough. For that, they have to work or try to earn income. This income is an important capital in his life. To be able to meet their needs as mentioned above, must consider between income and expenses. (Supramono, 2013)

Humans and society are complementary terms. Moch. Isnaeni stated that: Humans as members of society who have a purpose in life continue to maintain their lives by growing and developing. The purpose of human life is to grow and develop as an effort to obtain prosperity and a prosperous life. A prosperous and prosperous life will be achieved by humans by making efforts to meet the needs of daily life. The needs of human daily life include physical needs and spiritual needs, meaning that humans will only prosper if all external and internal needs are fulfilled. The physical needs of humans are obtained by getting food, clothing and shelter as well as a shower of faith to get a peaceful life as the fulfillment of their inner needs. Humans as creatures who always live in groups in a group called society, definitely need objects. There is no daily activity carried out by humans as members of a group without involving objects as supporters. Every member of the community who is poor across the board chasing the fulfillment of their needs, in fact often hunts for things to own so that their welfare will increase. There have been many stories told by history, how persistently humans defend every object they have when they are about to be confiscated by other parties by force. In fact, there are also many legendary stories about the struggle of human children to obtain the desired object in order to support the desired hegenomy of power, or to reach the throne in order to hold the highest position of power. The cycle of human history has told

many stories of how persistently humans struggle to obtain objects as the completeness of their profession, even the saga has never been weathered by heat or weathered by rain even though modern civilization. (Moch. Isnaeni, 2017)

In terms of its form: a written agreement (which in America is called a contract) and an unwritten agreement (oral). In order for an agreement to be binding on the parties, it must be made legally. The conditions for the validity of the agreement are specified in Article 1320 of the Civil Code, namely:

a. Agree of the parties; Agree, meaning that there is a conformity of will between the parties. This conformity of will occurs when negotiating an offer has been accepted (acceptance). The agreement is deemed not to have occurred, even though the contract was signed in the event of coercion, fraud, or oversight and error. If this agreement is not reached even though there is an agreement, then the status of such an agreement can be canceled, meaning that certain parties can apply for cancellation. If the cancellation is not made, then the agreement continues.
b. The competence of the parties making the agreement; Cakap, which means that the parties who make the agreement, if they are individuals, must be adults, of sound mind, and not under guardianship. If the person making the agreement is a legal entity or organization, then it must be a person who has the authority or competence to enter into legal relations with other parties. If these conditions are not met, the status can also be canceled.
c. The object of the agreement must be certain; The object of the agreement is a certain thing, meaning that the contents of the agreement must be clearly specified, so that the object is easily identified. If these conditions are not met, then the status of the agreement is null and void, meaning that from the beginning the agreement was considered non-existent, so it could not be implemented, and if there was a breach of promise, it could not be prosecuted in court.
d. What is promised is lawful. Halal matters, meaning that the object of the agreement is not prohibited by laws and regulations and does not conflict with the public interest and morality.

If this is not fulfilled, then the status is also null and void. Article 1338 of the Civil Code states that: All agreements made legally valid as law for those who make them. The agreements cannot be withdrawn other than with the agreement of both parties, or for reasons which are stated to be sufficient by law. Agreements must be executed in good faith.

The law stipulates that legally made agreements/agreements apply as law (binding) for those who make them. This means that the agreement cannot be withdrawn or canceled unilaterally, unless there is an agreement by both parties or for reasons which are stated to be sufficient by law, and the agreement must be carried out in good faith. Fulfillment of birth needs in the form of welfare and prosperity, to support it required facilities or tools in the form of material. Objects are something that is owned by someone, so everything that cannot be owned is not included in the definition of objects. Regarding the meaning of this object, it is very broad, according to the law, objects (zaak) are everything that can be used as objects of property rights. Article 499 of the Civil Code states that: "According to the understanding of the law, what is called material is, every item and every right, which can be controlled by property rights**.** (R. Subekti, 2009)

Article 1754 of the Civil Code states that: borrowing and borrowing is an agreement in which one party gives to another party a certain amount of goods that have run out due to use, provided that the latter party will return the same amount of the same kind and condition.

Article 1754 of the Civil Code can be interpreted as an agreement in which one party (creditor) promises to provide goods that are exhausted due to use, while the other party (debtor) promises to return the goods with other goods of the same type, quality and quantity elsewhere. time, whether accompanied by interest or not according to the agreement.

According to Mariam Darus Badrulzaman stated that: The agreement of the directorate of banking in Indonesia has a special meaning in the context of development, it is not an agreement. (Mariam Darus Badrulzaman, 1994)

PROBLEM FORMULATION

Based on the background of the problem above, the problems taken in this study are:

1. What is the philosophy of fiduciary guarantee.?
2. What is the position of the debtor in UUJF when it controls the object of fiduciary security?

RESEARCH OBJECTIVES

1. To analyze and find the philosophical basis of fiduciary guarantees.
2. To analyze and find out the nature of the debtor's legal position while controlling the object of fiduciary security based on the fiduciary guarantee law.

RESEARCH BENEFITS

1. Theoretically, it can contribute ideas for the development of legal science in general and changes to laws and regulations, especially those related to fiduciary guarantee institutions.

2. Practically As a contribution to the characteristics of fiduciary guarantee institutions as stated in UUJF, the legal position of debtors in controlling the object of fiduciary guarantees has never been clear, especially for the government, as well as legislative institutions and law enforcement officials, especially the authorities, consumers and the wider community.

DISCUSSION

PHILOSOPHY BASIC FIDUCIARY GUARANTEE

Basically an agreement begins with a legal relationship regarding property between two parties, in which a party promises or is deemed to have promised to do something and not to do something. The formulation of the agreement relationship generally always begins with a negotiation process between the parties. Through negotiations, the parties seek to create forms of agreement to bring together what they want (interests) through a bargaining process. Contract law is often interpreted the same as the law of engagement. This is based on the concept and definitional limitations on the word agreement and engagement. Basically contract law is carried out if in an event someone makes a promise to another party or there are two parties who promise each other to do something. In general, the agreement begins with differences in interests that are tried to be reconciled through an agreement. Through the agreement these differences are accommodated and then framed with legal instruments so that they are binding on the parties. In the agreement, the question of certainty and justice will actually be achieved if the differences between the parties are accommodated through an engagement relationship mechanism that works in a balanced manner. In principle, a contract consists of one or a series of promises made by the parties to the contract. The essence of the contract itself is an agreement. On that basis, Subekti defines that: "A contract is an event where a person promises to another person where two people promise each other to carry out something" (R. Subekti, 1984)

According to J. Satrio stated that: "People are bound by their own promises, namely promises given to other parties in the agreement. The promise is binding and the promise creates a debt that must be fulfilled." (J, 2001)

According to Sudikno Mertokusumo stated that: "Agreements should be distinguished from promises. Although the promise is based on an agreement, the agreement does not have legal consequences, which means that if the promise is violated, there will be no legal consequences or no sanctions. "In contrast, in various definitions of contracts in the common law contract law literature, the contract contains a series of promises, but what is meant by these promises is expressly stated as promises that have legal consequences and if violated, their fulfillment can be prosecuted in court". (Sudikno Martokusumo, 1999)

Elements of Agreement

The elements of the agreement are needed to find out whether what is being faced is an agreement or not, has legal consequences or not. The elements contained in an agreement are described by Abdulkadir Muhammad as follows:

1. There are parties. The party in question is the subject of the agreement consisting of at least two people or legal entities and has the authority to carry out legal actions based on the law.
2. There is agreement. The agreement is made between the parties which is permanent and not a negotiation.
3. There is a goal to be achieved. This means that the purpose of the party's will does not conflict with public order, morality and the law.
4. There are achievements to be made. This means that achievement is an obligation that must be fulfilled by the parties in accordance with the terms of the agreement.
5. There is a certain form, spoken or written. This means that the agreement can be written orally or in writing. This is in accordance with the provisions of the law which states that only in certain forms an agreement has binding force and strong evidence.
6. There are certain conditions. Conditions according to the law, for an agreement or contract to be valid. (Abdulkadir Muhammad, 1992)

According to Herlien Budiono stating that: The agreement formulated in Article 1313 of the Civil Code is an obligatory agreement, namely an agreement that creates, fills, changes or abolishes an engagement that creates legal relationships between the parties, who makes an agreement in the field of assets on the basis of which one parties are required to carry out an achievement, while the other party has the right to demand the implementation of the achievement, or for the sake of and at the expense of both parties reciprocally. (Herlien Budiono, 2014)

Based on this opinion, the elements of the agreement according to Herlien Budiono consist of:

1) Agreement from two parties;
2) The agreement reached must depend on the parties;
3) The desire or purpose of the parties for the emergence of legal consequences;
4) Legal consequences for the benefit of one party and at the expense of the other or reciprocal;
5) Made with due observance of the provisions of the legislation.

jian, which is contained in Article 1320 of the Civil Code, among others:

1) There is an agreement (consensus) between the parties making the agreement;
2) The existence of legal skills between the parties making the agreement;
3) Object (certain thing) clear agreement;
4) The contents of the agreement are lawful.

In general, agreements can be divided into two groups, namely obligatory agreements and non-obligatory agreements. An obligatory agreement is an agreement that requires someone to deliver or pay something. Meanwhile, a non-obligatory agreement is an agreement that does not require someone to submit or pay for something.

Principles of Agreement

In general, there are three principles of agreement, namely the principle of consensualism, the principle of binding force, and the principle of freedom of contract. According to Herlien Budiono, "The three principles need to be added with the principle of balance, so that they are more in line with the conditions in Indonesia". (Komariah, 2002)

1) The principle of consensualism (consensualism); At first an agreement or agreement must be confirmed by oath. But in the 13th century this view was abolished by the church. Then an understanding is formed that with an agreement between the parties, an agreement already has binding power. This principle can be found in Article 1320 of the Civil Code which requires an agreement as a condition for the validity of an agreement. However, it should be noted that there are exceptions to the principle of consensualism. Namely in real agreements and formal agreements that require submission or fulfill certain forms required by law.
2) The principle of binding force (verbindende kracht der overeenkomst); This principle is also known as the adage pacta sunt servanda. Each party bound in an agreement must respect and carry out what they have agreed and may not commit acts that deviate or contradict the agreement. The principle of binding force can be found in Article 1338 paragraph (1) of the Civil Code which reads: All agreements made legally apply as law for those who make them.
3) The principle of freedom of contract (contractsvrijheid); The principle of freedom of contract means that every person according to his free will can make an agreement and bind himself with whoever he wants. However, this freedom must not conflict with the laws and regulations that are coercive, public order and morality.
4) The principle of balance (evenwichtsbeginsel). According to Herlien Budiono, the principle of balance is: a principle intended to harmonize legal institutions and the basic principles of contract law known in the Civil Code which are based on thoughts and backgrounds of individualism on the one hand and the way of thinking of the Indonesian nation on the other.

Before discussing the principles of the agreement, it is first stated that the notion of the principle is based on the opinions of several scholars. Some scholars try to decipher the meaning and understanding of the principle in question.

Sudikno argues that: Legal principles are not concrete laws, legal principles are general and abstract basic thoughts, or are the background of concrete regulations contained in and behind every legal system that is embodied in statutory regulations and judge decisions which are positive law. and can be found by looking for the properties or characteristics that are common in the concrete rules.

The legal principle functions as a system builder as described by

The Principle Freedom of Contract

Principle of freedom of contract is one of the most important principles in contract law. This freedom of contract by some legal scholars is usually based on Article 1338 paragraph (1) of the Civil Code that all agreements made legally apply as law for those who make them. Likewise, there are those based on Article 1320 of the Civil Code which explains the conditions for the validity of the agreement.

Freedom of contract guarantees freedom for a person to be free in several matters relating to the agreement, as stated by Ahmadi Miru, including:

a) is free to determine whether he will enter into the agreement or not;
b) free to determine with whom he will enter into an agreement;
c) free to determine the contents or clauses of the agreement;
d) free to determine the form of the agreement; and
e) other freedoms that do not conflict with statutory regulations. (Ahmadi Miru, 2007)

The Principle Consensualism

Principle of consensualism is not only found in the pre-agreement period, but also in the implementation and termination of the agreement. This can be seen from what is contained in the second sentence of Article 1338 of the Criminal Code which states that "The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law." The principle of consensualism does not have to be present at the time of making the agreement (see Article 1320 of the KUHPer), but must also be present at the time of execution of the agreement, even at the time of termination of the agreement. (Muhammad Syaifuddin, 2012)

The Principle of Pacta Sunt Servanda

The term pacta sunt servada is an agreement that has been legally made by the parties, binding the parties in full in accordance with the contents of the agreement. Fully binding means that the force is the same as the law, so that if one of the parties does not fulfill the obligations that have been agreed upon and stated in the agreement, then by law a means of compensation is provided or it can be enforced. This principle relates to the effect of the agreement and is concluded in the sentence "applies as law for those who make it" at the end of Article 1338 paragraph (1) of the Civil Code. So, the agreement made legally by the parties binds the makers as a law. And this sentence also concludes that it is forbidden for all parties, including "judges" to interfere with the contents of the agreement that has been legally made by the parties. Therefore, this principle is also called the principle of legal certainty. This principle can be fully defended in terms of:

1) The position of the parties in the agreement is balanced;
2) The parties are capable of carrying out legal actions.

According to Herlien Budiono, this principle underlies the statement that an agreement will result in a legal obligation and therefore the parties are bound to carry out the contractual agreement. An agreement that must be fulfilled is considered to have been given and is not questioned again. The binding of an agreement is contained in the promise made by the parties themselves. (Herlien Budiono, 2009)

The Principle Good Faith

Principle of good faith the principle of good faith is contained in Article 1338 of the Civil Code which states that agreements must be carried out in good faith. This principle relates to the implementation of the agreement and applies to debtors as well as creditors. And stated that "Agreements must be executed in good faith." This means that the agreement must be carried out according to propriety and justice. Good faith includes all stages of the agreement relationship, both from the pre-agreement phase, the agreement phase, and the post-agreement phase. According to Subekti, stating that: The definition of good faith can be found in the law of objects (subjective meaning) as well as in contract law as regulated in Article 1338 paragraph (3) (objective meaning). In the law of matter, good faith means honesty or cleanliness. A good-willed buyer is an honest person, a clean person. He does not know about the inherent defects in the goods he buys, in the sense of defects regarding its origin. Meanwhile, the meaning of good faith in Article 1338 paragraph (3) of the Civil Code is that the implementation of the agreement must take into account the norms of decency and decency. The provisions of Article 1338 paragraph (3) of the Civil Code also give power to judges to supervise the implementation of an agreement lest the implementation violates decency and justice. (Subekti, 2001)

THE DEBTOR'S LEGAL POSITION IN THE FIDUCIARY GUARANTEE LAW WHEN CONTROLLING THE OBJECT OF FIDUCIARY GUARANTEE.

Position of Object of Fiduciary Guarantee by the Debtor

Fiduciary guarantee is a material guarantee known in positive law, which can provide economic benefits to business actors when compared to other guarantee institutions. This advantage can be seen from the mastery of the collateral object so that the business that is being run can still run and the credit loan can be returned smoothly. Fiduciary Eigendom Overdracht (FEO), hereinafter referred to as fiduciary, "is the transfer of ownership rights to an object on the basis of trust and provided that the object whose ownership rights are transferred remains in the control of the owner of the object". (Article 1 point 1 UUJF) But the transfer of ownership rights to fiduciary collateral is not perfect like the transfer of property rights in buying and selling, because the transfer of rights is only constitutum prossesorium, meaning that legally only the ownership rights are transferred while the goods remain in the power of the fiduciary giver.

In relation to UUJF, a fiduciary guarantee agreement is a pure material agreement and is regulated separately in the law as part of the material security legal system. The Fiduciary Guarantee Agreement is an accesoir agreement, meaning it is a follow-up agreement to the main agreement, namely a credit agreement. The abolition of the credit agreement results in the abolition of this fiduciary guarantee agreement. This agreement is an obligatory agreement, because the Fiduciary Giver and Fiduciary Receiver promise to bind themselves to do or give something. The importance of determining the obligations that must be fulfilled by the party who is obligated. The obligation to give something, do something, and or not to do something is called achievement. On the other hand, if the debtor does not fulfill this achievement, it is known as a default or breach of contract.

In the law of fiduciary guarantees, a problem that often creates juridical problems is when the debtor providing the fiduciary guarantee does not carry out an obligation that should have been agreed upon. The debtor's negligence is evidence of a default.

The definition of breach of contract, according to Subekti, is: If the debtor does not do what he promised, it is said that he is in default, meaning that the debtor is negligent or negligent or breaks his promise, or violates the agreement, if he does or does something. what he can't do." (Subekti, 1982)

In principle, debtor defaults can be categorized in three ways, namely:

1) If the debtor does not pay the amount owed to the bank based on the credit agreement according to the specified time.

2) The fiduciary debtor is negligent in fulfilling his obligations to pay debts to the bank and it is sufficient only to prove it by the passage of time specified in the agreement without a warning letter from the bailiff.
3) Default is not regulated in the deed of fiduciary guarantee agreement but is sufficiently regulated in the main agreement**.** (H. Tan Kamelo, 2004)

Ownership of Fiduciary Collateral.

The relationship between article 1 point 1 UUJF, "Fiducia is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object" with Article 17 UUJF, "The fiduciary giver is prohibited from repeating the fiduciary to the object that is the object Registered Fiduciary Guarantee. As well as the explanation of Article 17 UUJF, "Re-fiduciary by the Fiduciary Giver, both debtors and third party guarantees, it is not possible for objects that are objects of Fiduciary Guarantees because the ownership rights to the object have been transferred to the Fiduciary Recipient", is a very complicated matter to be connected system in the law of guarantees.

According to Moch.Isnaeni, who stated that: Having only glimpsed the initial provisions of the Fiduciary Law, many parties were shocked and flung into a situation that was full of ambiguity. Beginning a critical review of the order of a law that has a strategic position in business, with such a state of mind twisted with doubt, will surely immediately scream filled with distrust that is piled up. In the end, you have to be smart to get tangled up in order to reach the consistency rope that looks complicated to shackle the mindset. This all happens when people listen to the Fiduciary Law, of course they should be prepared with an understanding of the basic principles of the guarantee law, so that the confusion is not too severe. As has been widely understood, since the beginning, observing the pawn and mortgage in the Civil Code, it is very clear that there is a principle that apart from the object being used as collateral, the property rights of the object in question are recognized as remaining with the debtor. Meanwhile, for the collateral in question, the creditor only has the right to guarantee material goods and not ownership rights. Even if it was agreed from the start to make a guarantee agreement, that with the default of the debtor it was agreed that the collateral would automatically become the property of the creditor, is prohibited. This is important in order to provide legal protection to debtors who have a relatively weak position, when applying for debt to creditors. Starting from that, by the authorities, Article 1154 of the Civil Code is presented in pawns and Article 1178 of the Civil Code is included in mortgages, none other than that as an effort to provide external legal protection to weak parties, namely debtors who are pressed and squeezed by the need for loan funds. These two articles act as shackles for the relatively large power of creditors in controlling the debtor's will, so that they are not used to obtain large profits in an indecent manner. Article 1154 jo. 1178 The Civil Code is like an iron bird with double wings, where one wing is to provide external legal protection to debtors, while the other wing acts as a shackle of great power of creditors so that they are not misused. (Moch. Isnaeni., 2017)

The explanation of the provisions of Article 17 of the Fiduciary Law mentioned above, if it is related to Article 1 point 1 of the Fiduciary Guarantee Law, appears to be contradictory, on the one hand it is said about the "ownership rights" of the fiduciary recipient, while on the other hand, it is said, "the object whose ownership rights are transferred remains in the control of the owner of the object. (Article 20 UUJF, 1999)
Because in a fiduciary there is an element of *constitutum possessorium*, then of course what is meant by "in the control of the owner of the object" is the possession of the fiduciary giver. Now, if the property rights have been entrusted to the fiduciary recipient, how can the fiduciary giver still be called the owner of the object.

We can overcome the problem of the conflict between the explanations of Article 17 and Article 1 point 1 UUJF by looking at: in connection with the recognition of the transfer of property rights in trust as the title of transfer of property rights by constitutum possessorium submission, here it is indirectly acknowledged that Ownership rights to fiduciary objects during the guarantee are divided into 2 (two), namely the economic ownership rights are still with the fiduciary giver, while the juridical property rights are with the fiduciary recipient creditor.

Therefore, the word whose ownership is transferred remains in the control of the owner of the object in Article 1 point 1, which means that the economic property right still remains with the fiduciary giver, who remains domiciled as the owner, even though now he is only the holder of the economic owner's right, while the ownership right in the explanation of Article 17 is aimed at juridical property rights. The purpose of the fiduciary is to provide guarantees for creditors' claims against debtors or reversed, guarantee debtors' debts to creditors and the Fiduciary Guarantee Act, in addition to providing protection to fiduciary debtors, also intends to provide a strong position for creditors, then after the debtor defaults, the creditor must provide rights commensurate with an owner, considering that the collateral is in the hands of the guarantor, namely to end his agreement to borrow the collateral object and demand it back, as shown in the provisions.

Legal Protection Efforts for Creditors on Fiduciary Guarantee Objects.

With the promulgation of UUJF, our legislators have chosen to regulate fiduciary in written form. The issuance of the UUJF is an official acknowledgment from the legislators of a fiduciary guarantee institution, which so far has only received its recognition through jurisprudence. Guarantee institutions arise based on the desire to demand legal certainty over debts arising from credit agreements with banking institutions as creditors, and to

provide confidence in the ability to repay loans even in conditions of inability from the debtor. The guarantee as mentioned above is indeed needed by the creditor, because in an agreement between the creditor and the debtor, the creditor has an interest that the debtor fulfills his obligations in the engagement. In line with the principle of providing legal certainty, UUJF adopts the principle of registration of fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary givers and fiduciary recipients as well as to third parties. Registration of fiduciary guarantees is carried out at the Ministry of Law and Human Rights of the Republic of Indonesia. The legal protection and interests of creditors in UUJF can be seen in Article 20 UUJF: "Fiduciaries continue to follow objects that are objects of fiduciary guarantees in whoever's hands the objects are located, except for the transfer of inventory objects that are objects of fiduciary guarantees". (Article 20 UUJF, 1999)

According to the provisions of Article 1132 of the Civil Code, the debtor's assets become a joint guarantee or collateral for all parties who give debt to the debtor. This means that if the debtor fails to pay his debts, the proceeds from the sale of the debtor's assets are distributed proportionally according to the amount of the receivables of each creditor, unless there are valid reasons among the creditors to take precedence over other creditors.

Even though the law has provided protection for creditors as stipulated in Article 1131 and Article 1132 of the Civil Code, this protection does not apply to all interested creditors. Of course, it would be more attractive to potential creditors if the law provided better protection for all creditors. This special protection can only be granted if certain conditions are met and followed by a certain process, which is determined by law.
This special protection can be provided if the creditor holds collateral rights over certain objects belonging to the debtor. The object can be either a movable object or an immovable object.

The provision of special protection has been required by Article 1132 of the Civil Code which has been stated above. The article states that: "A creditor may be given the right to take precedence over other creditors". According to Article 1134 of the Civil Code, special rights are: "A right which is granted by law to a creditor so that the creditor's level is higher than other creditors, solely by the nature of the creditor's receivables".

From the information above, we can see that there are 2 types of creditors. The first type is the creditor who takes precedence over other creditors to obtain repayment of the proceeds from the sale of the debtor's assets provided that the object has been burdened with certain security rights for the benefit of the creditor. Such creditors are called Preferred Creditors. The legal term used in English for such Creditors is Secured Creditor.

The second type of creditor is creditor who must share between them proportionally, that is, according to the ratio of the size of their respective receivables, from the sale of the debtor's assets, the debtor is burdened with collateral rights. The second type of creditor is called concurrent creditor. The legal term used in English for the second type of creditor is Unsecured Creditor.

The author emphasizes here once again, that basically the transfer of the object of a fiduciary guarantee that has previously been burdened cannot be justified, because this is in accordance with the provisions in Article 17 UUJF. So basically the Fiduciary Giver is prohibited from transferring or re-fiduciary of objects that are objects of registered Fiduciary Guarantees. For redirect actions, there are exceptions. This means that objects that are not in stock, for example: production machines, private cars, or private houses that are the object of the Fiduciary Guarantee cannot be transferred, mortgaged, rented, or re-fiduciary by the Fiduciary Giver. Therefore, if the object of a registered fiduciary guarantee is transferred to another creditor, then the creditor cannot obtain proper legal protection, this is due to his position as a concurrent creditor who does not have the prior right to collect debt repayments as owned by the preferred creditor.

According to Satjipto Rahardjo, it is said that: Legal protection is to provide protection for human rights that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law. (Satjipto Rahardjo, 2000)
UUJF itself does not explicitly regulate sanctions against debtors who re-facilitate fiduciary objects that have been registered. Meanwhile, to protect the interests of creditors, so that re-fiduciary does not occur, the efforts made are: a. Registration of Fiduciary Guarantee Objects
In the absence of registration of Fiduciary Guarantees, it can result in a re-fiduciary. The existence of these weaknesses can be covered and can be supplemented by the presence of the Law on Fiduciary Guarantees, but the Law also has several weaknesses, especially regarding the imposition of fiduciary guarantee objects and registration of fiduciary guarantee deeds which can allow the parties not to charge and not register guarantees. the.

The obligation to charge the object of a fiduciary guarantee and the obligation to register a fiduciary guarantee are already regulated in UUJF. The obligation to impose a fiduciary guarantee object and its registration is very necessary, considering the possibility of negligence on the part of the parties regarding the imposition of a fiduciary guarantee object and its registration. One of the legal consequences that will arise if the fiduciary guarantee is not registered is the individual fiduciary guarantee agreement (personlijke character). In addition, the Fiduciary Recipient will find it difficult to execute if the Fiduciary Giver or Debtor defaults or is in breach of contract, because in UUJF it has been explained that if the Fiduciary Giver or Debtor defaults, then the object used as the object of the fiduciary guarantee can be executed by way of executing the executorial title,

selling objects that are the object of fiduciary guarantees and underhand sales. The parties who intentionally or because of their negligence are among others caused by the Fiduciary Giver or Debtor, Fiduciary Receiver or Creditor and Notary. Such negligence can of course harm one of the interested parties or third parties, or in other words may violate the provisions referred to in the Fiduciary Guarantee Act.

Any form of negligence or intentional imposition of the object of fiduciary security and registration of good fiduciary guarantees caused by the fiduciary giver, fiduciary recipient or notary can be considered to have committed an unlawful act. Such negligence or intentional omission can occur, because the Fiduciary Guarantee Law does not specify more explicitly how long the fiduciary guarantee registration must be registered, after the Fiduciary Giver and Fiduciary Receiver sign the Fiduciary Guarantee deed before a Notary.

The indecisiveness of the UUJF causes a gap for the Fiduciary Giver, Fiduciary Receiver or Notary to not burden the object of the fiduciary guarantee and not register it with the competent authority. These things have clearly violated the provisions referred to in UUJF, which requires the object of a fiduciary guarantee to be burdened and must be registered with the Fiduciary Registration Office in accordance with the place and position of the Fiduciary Giver.

The encumbrance and registration are to fulfill the principles of fiduciary guarantee and to avoid re-fiduciary, so that the encumbrance and registration will provide legal protection and certainty. Based on the description that has been stated above, the legal problem of imposing a fiduciary guarantee object and its registration is the main problem in the binding of credit guarantees between the debtor or fiduciary giver and the creditor or fiduciary recipient and the notary as the party making the credit agreement deed and binding the fiduciary guarantee deed.

The inclusion of a clause regarding the prohibition of transferring the object of collateral or re-fiduciary in the Notary deed of Protection for the creditor, according to Indonesian jurisprudence, is recognized not only limited to actual delivery. Even with the constitutum prossesorium, protection still exists. The problem here is that there are many re-fiduciaries of collateral objects that have been registered. Therefore, one way to bind the fiduciary provider so as not to transfer or re-fiduciary the object of the fiduciary guarantee to other creditors and it is recommended that creditors who will provide credit to the debtor should make an agreement with the debtor (the debtor makes a statement) that the object to be guaranteed is being pledged to another party.

Fiduciary position as a guarantee

institution Fiduciary guarantee institutions originally arose on the basis of the community's need for funds with guaranteed movable objects, but these objects are still needed for the company's needs or carrying out their daily work. If it is taken using a pledge as collateral, it will collide with the investment requirements, which is one of the conditions for the pawn to be considered valid where the object used as collateral passes into the hands of the pawnee or the holder of the pawn in accordance with Article 1152 of the Civil Code.

In order to overcome difficulties in investing and adapting developments and needs in society, the Court respects this guarantee institution which is manifested in the form of ownership rights to objects that are handed over to trust, while the objects themselves are still in the hands of the debtor so that they can still be used for companies and others. . Fiduciary has a very important position and role in positive law in Indonesia, as a guarantee institution that has served in society for decades and is well known among scientists and legal practitioners.

Although it has been accommodated in the form of standard legislation, it has become a necessity and can meet the needs of the community. At first the fiduciary object only included movable objects, but in its subsequent development, seeing the community's need for the importance of capital in expediting its business, the fiduciary object also includes fixed objects that can be used as collateral in the form of an iduciary such as buildings in the area. on land with lease rights, use rights, or on land with management rights which in banking practice have been accepted, both by state banks and state banks as well as private banks, which are expected to increase the economic development of the Indonesian people. (Sri Soedewi Maschun Sofwan, 2002)

Relinquishment of rights, or the destruction of the object that is the object of the fiduciary guarantee. Based on article 25 UUJF if the object is destroyed and no longer exists (burned or for other reasons). Meanwhile, in this case, the object as collateral is still there, but the creditor does not know where it is anymore. If the object does not exist because the debtor has sold it to a third party, then UUJF determines that the money from the sale of the object becomes the object of a Fiduciary Guarantee.

According to Indonesian law currently in force, the validity of a fiduciary for third parties is not determined by the registration of a fiduciary agreement and the objects that are pledged as fiduciary. The result is that the creditor is not protected from the possibility that the debtor is fraudulent or has bad intentions, namely without the knowledge of the creditor transferring the objects that have been pledged as collateral to a third party. Thus there is no obligation for the buyer to check whether the objects transferred by someone are not his. Moreover, there is no requirement for a third party to question that these objects are collateral for a debt. (Satrio, 2001)

The Legal Position of the Debtor in Mastering the Objects of Fiduciary Collateral Objects Fiduciary History.

Fiduciary according to the origin of the word comes from the word "Fides", which means trust. In accordance with the meaning of this word, the relationship (law) between the debtor (provider) and creditor (recipient of power of attorney) is a legal relationship based on trust. Fiduciary guarantee institutions were well known and enforced in Roman legal society. There are two forms of fiduciary guarantees, namely fiduciary cum creditore and fiduciary cum amico. Both arise from an agreement called pactum fiduciae which is then followed by the transfer of rights or iniure cessio.

In its first or complete form, fiducia cum creditare contracta, which means a promise of trust made with creditors, is said. That the debtor will transfer ownership of an object to the creditor as collateral for his debt with an agreement that the creditor will transfer the ownership back to the debtor if the debt has been paid in full. Fiduciary is a term that has long been known in Indonesian. The law that specifically regulates this matter, namely UUJF also uses the term "fiduciary". Thus, the term "fiduciary" is already an official term in our legal world. However, sometimes in Indonesian, this fiduciary is also referred to as "Delivery of Property Rights in Trust".

In Dutch literature, this fiduciary guarantee is also known in the following terms:

(1) Zekerheids-eigendom (Property as Collateral).
(2) Bezitloos Zekerheidsrecht (guarantee without Mastering).
(3) Verruimd Pand Begrip (Expanded Pawn).
(4) Eigendom Overdracht tot Zekerheid (Submission of Ownership – on collateral).
(5) Bezitloos Pand (Pawn without Mastery).
(6) Een Verkapt Pand Recht (Sheathed Pawn).
(7) Uitbaouw from Pand (Expanded Pawn).

Some of the main principles and fiduciary guarantees are as follows:

1. Whereas in real terms, the fiduciary holder only functions as a guarantee holder, not as the actual owner.
2. The right of the fiduciary holder to execute the collateral will only exist if there is a default on the part of the debtor
3. If the debt has been paid off, the object of the fiduciary guarantee must be returned to the fiduciary giver.
4. If the proceeds from the sale (execution) of fiduciary goods exceed the amount owed. the remaining sales proceeds must be returned to the fiduciary giver. In addition, in order for the transfer of rights to be valid in

This legal construction, the following requirements must be met:

(1) There is an agreement that is zakelijk.
(2) There is a title for a transfer of rights.
(3) The authority to control the object from the person who handed over the object.
(4) Certain methods for delivery, namely by way of constitutum posessorium for tangible movable objects, or by way of cessie for accounts payable.

If we look closely at the legal construction above, it is a characteristic of a fiduciary agreement, namely that the essence of a fiduciary agreement is an agreement on an object (material), the title of transfer of rights as a condition of clarity of the agreement as well as translating the existence of a guarantee law.

In the fiduciary agreement, the authority to control the object, what is meant is the delegation of authority to control the collateral object. From the responsibility given by the fiduciary giver to the fiduciary recipient to settle the loan by selling collateral objects, the intended delivery is more symbolic in nature, such as submission by constituttun posessoriuni for tangible movable objects, or by cessie method for accounts payable.

Article 1 UUJF provides the following limitations and meanings: "Fiducia is the transfer of ownership rights to an object on the basis of trust with the stipulation that the object whose ownership rights are transferred remains in the control of the owner of the object. Fiduciary guarantee is a guarantee right over movable objects both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage which remain in the control of the fiduciary giver, as collateral for the settlement of certain debts, which gives priority to the fiduciary recipient over other creditors".

Receivables are the right to receive payments. Objects are everything that can be owned and transferred, both tangible and intangible, registered or unregistered, movable or immovable which cannot be encumbered with mortgage rights.

The fiduciary giver is the individual or corporation that owns the object that is the object of the fiduciary guarantee. Debt is an obligation that is stated or can be stated in the amount of money either in Indonesian currency or other currencies, either directly or contingently. Creditors are parties who have receivables due to arrangements or laws. Everyone is an individual or a corporation".

From the given definition it is clear to us that fiduciary is distinguished from fiduciary guarantee, where fiduciary is a process of transferring ownership rights and fiduciary guarantee is a guarantee given in the form of

fiduciary. This UUJF is a fiduciary guarantee institution as stipulated in fiduciary cum creditore contracta, namely: "The guarantee imposed on a movable object on a fiduciary basis as part of the so-called granting of guarantee with trust", fiduciary guarantees are prioritized in UUJF rather than the meaning of fiduciary itself. This is based on the fact that the purpose of a fiduciary agreement made under UUJF is basically a process of legal relations in the business world which is based on the elements of mutual assistance and good faith on each party, this can be seen with the fiduciary conception and guarantees in the fiduciary agreement itself. yes From the beginning until its current development, it is characterized by the absence of control of the collateral object by the fiduciary recipient, even though with respect to movable objects the situation is very risky.

The imposition of objects with fiduciary guarantees is made with a Notary Deed in. Indonesian language which is a Fiduciary Guarantee deed (Article 5 paragraph (1) UUJF). In the Fiduciary Guarantee Deed, apart from stating the day and date, the time (hour) of making the deed is also stated. UUJF stipulates that a fiduciary agreement must be made with a notarial deed. Moreover, considering that the object of fiduciary security is generally unregistered movable property, then it is only natural that the law relates to the object of fiduciary guarantee. Besides that, an authentic deed is evidence because it is made by a state official (notary).

Before this law was formed, this institution was called by various names. According to Mariam Darus Badrulzaman states that: The term fiduciary, the Romans called it "fiducia cum creditore," Asser Van Oven called it "zekerheids eigendom" (property rights as collateral), Blom called it "bezitloos zekerheids re recht" (security rights without control), Kahrel member of the name "Verruimd Pandbegrip" (expanded meaning of pawn), A. Veenhoven called it "eigendoms overdracht tot zekerheid" (transfer of property rights as collateral) as an abbreviation, the term "fiduciary" can only be used. (Mariam Darus Badrulzaman, 2015)

The Legal Position of the Debtor in controlling the Fiduciary Collateral.

Basically, a person's life is based on the existence of a good relationship with the public over an object or other relationship. The relationship between one person and another is binding, meaning that it must be fulfilled in good faith, it cannot be canceled unilaterally. The person referred to in this relationship can be a personal human created by God Almighty or a legal entity created by humans based on the applicable law.

In this legal relationship, each party has the rights and obligations and the position of each and often reciprocal. One party has the right to demand something against the other party and the other party is obliged to fulfill that demand, and vice versa. "The party who has the right to demand something is called the claimant (creditor), while the party who is obliged to fulfill the demand is called the party who is being sued *(the debtor)"* (Abdulkadir Muhammad, 2017)

UUJF never gave a clear explanation, in fact the legal position of the debtor while controlling the collateral. If it is associated with a fiduciary guarantee agreement in accordance with Article 5 of the UUJF, it must be stated in an authentic deed, it is proven in one of the clauses of the agreement that it is stated that the legal position of the debtor in question is as a borrower. The statement contained in the notarial fiduciary guarantee agreement, that the debtor's position is as a use borrower, actually creates a conflict if it is related to Article 29, Article 30, Article 33 and Article 34 of the UUJF. This is a breakthrough to obtain a definite legal position for the debtor in controlling the object of the fiduciary guarantee only as the holder of the power of attorney. In a debt-receivable relationship, the debtor is called the debtor, while the party giving the debt is called the creditor.

In a buying and selling relationship, the buyer is the debtor, while the seller is the creditor. In the grant agreement, the grantor is the debtor, while the grantee is the creditor. "In a work agreement, the party doing the work is in the position of a creditor, while the buyer who pays wages is a debtor" (Abdulkadir Muhammad, 2017)

In the agreement there are creditor aspects or called active aspects and debtor aspects or passive aspects. Aspects of creditors, namely:

a) The right of the creditor to demand that payments be made;
b) The creditor's right to sue the implementation
c) The creditor's right to implement the judge's decision The debtor aspect is:

1) The debtor's obligation to pay debts;
2) The debtor's obligation to be responsible for the creditor's lawsuit
3) The debtor's obligation to allow the goods to be subject to execution confiscation. (R. Subekti, 1984)

Observing the existence of Article 1131 Jo. Article 1132 of the Civil Code, due to the pari pasu (pro rata) distribution, means that the auction proceeds will be divided proportionally based on the amount of each creditor's bill. If the auction proceeds are insufficient due to the larger debtor's debt, the creditor will only receive a partial repayment of the debt. Article 1131 of the Civil Code contains a high risk, because it is only a form of general guarantee and is a form of external legal protection packaged by the authorities, the fact is that financial institutions are still unable to provide a secure position for creditors. External legal protection does not always provide protection that can efficiently address risks. H. Moch.Isnaeni, classified the forms of legal protection into 2 (two), namely:

1) External legal protection, namely a form of legal protection that relies on the law and is given by the authorities, because its validity is not personal, but rather relies on general needs.

2) Internal legal protection, which is a form of legal protection in the form of a net of agreement clauses that are knitted together on the basis of an agreement between creditors and debtors. (Moch. Isnaeni, 2017)

In our contract law system, the principle of good ethics is regulated in Article 1338 (3) of the Civil Code which emphasizes the necessity for parties to carry out agreements in good faith.

According to Yohanes Sogar Simamora, it is said that: In line with theoretical thinking and business practices related to the agreement, the provision is interpreted broadly (extensive interpretation) which then results in the provision that good ethics does not only apply at the implementation stage, but also at the stage before closing the agreement. *(pre-contractual phase).* (John Sogar Simamora, 2009)

CONCLUSION

From the results of the research above, the author finally concludes as follows:

Conclusion

1. Basic Philosophy of Fiduciary Guarantee

Basically, the agreement begins with a legal relationship regarding property between two parties, in which a party promises or is deemed to have promised to do something and not to do something. The formulation of the agreement relationship generally always begins with a negotiation process between the parties. Through negotiations, the parties seek to create forms of agreement to bring together what they want (interests) through a bargaining process. Contract law is often interpreted the same as the law of engagement. This is based on the concept and definitional limitations on the words agreement and engagement. Basically contract law is carried out if in an event someone makes a promise to another party or there are two parties who promise each other to do something. In general, the agreement begins with differences in interests that are tried to be reconciled through an agreement. Through the agreement these differences are accommodated and then framed with legal instruments so that they are binding on the parties. In the agreement, the question of certainty and justice will actually be achieved if the differences between the parties are accommodated through an engagement relationship mechanism that works in a balanced manner. In principle, a contract consists of one or a series of promises made by the parties to the contract. The essence of the contract itself is an agreement. On that basis, Subekti defines that: "Contract as an event where one person promises to another person where two people promise each other to carry out something"

2. The Debtor's Legal Position in the Fiduciary Guarantee Act when Mastering the Fiduciary Guarantee Object.

Fiduciary guarantee is a material guarantee known in positive law, which can provide economic benefits to business actors when compared to other guarantee institutions. This advantage can be seen from the mastery of the collateral object so that the business that is being run can still run and the credit loan can be returned smoothly. Fiduciary Eigendom Overdracht (FEO), hereinafter referred to as fiduciary, "is the transfer of ownership rights to an object on the basis of trust and provided that the object whose ownership rights are transferred remains in the control of the owner of the object". (Article 1 point 1 UUJF) But the transfer of ownership rights to fiduciary collateral is not perfect like the transfer of property rights in buying and selling, because the transfer of rights is only constitutum prossesorium, meaning that legally only the ownership rights are transferred while the goods remain in the power of the fiduciary giver.

In relation to UUJF, a fiduciary guarantee agreement is a pure material agreement and is regulated separately in the law as part of the material security legal system. The Fiduciary Guarantee Agreement is an accesoir agreement, meaning it is a follow-up agreement to the main agreement, namely a credit agreement. The abolition of the credit agreement results in the abolition of this fiduciary guarantee agreement. This agreement is an obligatory agreement, because the Fiduciary Giver and Fiduciary Receiver promise to bind themselves to do or give something. The importance of determining the obligations that must be fulfilled by the party who is obligated. The obligation to give something, do something, and or not to do something is called achievement. On the other hand, if the debtor does not fulfill this achievement, it is known as a default or breach of contract.

In the Agreement there is a creditor aspect or what is called an active aspect and a debtor aspect or a passive aspect. Aspects of creditors, namely:

a. The right of the creditor to demand that payments be made;
b. The creditor's right to sue the implementation
c. The creditor's right to implement the judge's decision The debtor aspect is:

1) The debtor's obligation to pay debts;
2) The debtor's obligation to be responsible for the creditor's lawsuit

The debtor's obligation to allow the goods to be subject to execution confiscation.

Suggestion

1. In the philosophy of fiduciary guarantees, we know that fiduciary guarantees are not far from contract law, which in principle consists of one or a series of promises made by the parties to the contract. The essence of the contract itself is an agreement. On this basis, the mutually binding parties (creditors and debtors) must submit and comply with the agreements and/or agreements that have been made.

2. Law Number 42 of 1999 concerning Fiduciary Guarantees has given authority to creditors to take the object of fiduciary guarantees directly either with assistance or not with the assistance of the competent authorities. this is a court case. With this authority, it can be believed that Law Number 42 of 1999 concerning Fiduciary Guarantees has guaranteed the fulfillment of the rights of creditors and debtors as a result of which substantial justice as the primary goal can be optimally realized.
For creditors, it is not justified in the applicable regulations to be able to act unilaterally to the debtor considering that there are regulations that regulate it.
So in terms of the implementation of the Fiduciary Guarantee Act, creditors and debtors must comply with existing regulations so that the implementation of Law Number 42 of 1999 can be carried out properly.

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