

Legal Protection for Creditor in the Online Registration of Fiduciary Guarantee in Consumer Finance

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Abstract: The existence of online fiduciary guarantee registration in consumer finance will be very efficient. Online legal services surely ease the applicants, notaries, and those who works in the field of law[1]. Nonetheless, online fiduciary registration still has weakness which harms the legal protection of creditor. The main problem is on the Fiduciary Guarantee Certificate, since the certificate is the creditors' evidence as the holder of fiduciary guarantee. There are different interpretations regarding to the validity of the certificate which potentially makes problems. This research aims to discover and analyze the legal effect and legal protection for creditor in online registration of fiduciary guarantee. This research used socio legal approach, with integrate the rule of law, regulation, norm and legal principle research and the implementation of fiduciary guarantee registration online. The result of the research is: the registration of Fiduciary Guarantee is obliged to execute Fiduciary Guarantee. The electronic signs in the online certificate of Fiduciary Guarantee are valid under the law. By registering Fiduciary Guarantee online, the creditor is entitled of legal protection as preferred creditor making them the main priority to the repayment and becomes separatist creditor which does not have influence to the bankruptcy of debtor. The online registration of Fiduciary Guarantee fulfills specialty and publicity principle. The online certificate of Fiduciary Guarantee has executorial title which is equal to court verdict, making the creditor protected due to the bonding to third party and giving guarantee of legal assurance to those involved.

Keyword: Fiduciary Guarantee, Online Registration, legal protection, creditor Terrorism

1. Introduction

Financial institution in Indonesia is basically divided into bank financial institution, non-bank financial institution, and other financial institution. One of the non-bank financial institutions is more flexible and moderate funding agencies than bank which has higher risks in terms of finance institution. Finance institution includes finance company, venture capital company, and infrastructure's financial company [2]. Finance company has business activities, such as leasing business, factoring, credit card business, and consumers' finance regulated under Presidential Regulation Number 9 Year 2009 regarding Financial Institution. Article 1 section 7 of the Regulation states that "consumer finance is a financing activity to the procurement of goods based on consumers' needs with payments in installments".

The system of installment has high risks. Somehow, it is difficult to separate business from loan. "Onshuidige economics heleven is nietmeerdenkbaar zonder krediet verlenting" [3]. For banking or financial institution, every credit given to businessmen or consumers always has risks. Therefore, there should be a guarantee. One of the guarantee systems is material guarantee, since creditor will become both preferred creditor and separatist creditor. Fiduciary guarantee is one of the most practiced guarantees amongst all material guarantees.



This fiduciary guarantee provides many benefit to all parties. Fiduciary Guarantee subject is the giver and recipient Fiduciary [4]. For the giver of fiduciary guarantee, they get the benefit from controlling the materials which can be used for daily needs. Creditor can propose the guarantee of the debtor. To make it happens, fiduciary guarantee has to be made with notary deed (Article 5 section 1 Act No. 42 year 1999 regarding Fiduciary Guarantee/ Fiduciary Guarantee Act), and registered in Fiduciary Registration Office (Article 11 of Fiduciary Guarantee Act). The registration of Fiduciary Guarantee determines the occurrence of Fiduciary Guarantee. Nevertheless, practically, many Fiduciary Guarantees are unregistered. It raises the risks for creditors and debtors. There should be no existence of Fiduciary Guarantee because of the unregistered Fiduciary Guarantee to the Fiduciary Registration Office. Thus, it causes disputes happening later.

The unregistered Fiduciary Guarantees are generally caused by 1) the registration fees to Fiduciary Registration Office are added with notary fees. After the establishment of online registration to Fiduciary Guarantee, the payment of registration is decreased not as much as the manual registration. 2) the Registration Office is only in provincial level. Somehow, the existence of online fiduciary guarantee registration will be highly efficient. According to the report of Ministry of Law and Human Rights, the report of Directorate General of Common Law Administration (CLA) in Online Service states that online legal services surely eases the applicants, notaries, and those who works in the field of law[1]. Nonetheless, online fiduciary registration still has weakness which harms the legal protection of creditor. The main problem is on the Fiduciary Guarantee Certificate, since the certificate is the creditors' evidence as the holder of fiduciary guarantee. This certificate has executorial power which is equal to court verdict with permanent legal forces. However, this registration system brings several perspectives on the power of certificate of online fiduciary guarantee.

The online registration of Fiduciary Guarantee is regulated under Government Regulation Number 21 Year 2015 regarding to the Procedures of Fiduciary Guarantee Registration and the Cost of Making the Deed of Fiduciary Guarantee. The certificate from online registration of fiduciary guarantee, does not include the note as in Article 13 section (2). There is only a note of "SESUAI AKTA NOTARIS"/ "BASED ON THE NOTARY DEED". It causes different interpretation concerning the validity of the certificate which potentially makes problems.

The existence of potential problems and weaknesses in the registration of Fiduciary Guarantee with online system raises the idea to conduct this research. There are some problems raised on this research i.e What is the legal effect caused by online registration of Fiduciary Guarantee in Central Java? And How is the legal protection for creditors who use the online registration service of Fiduciary Guarantee in Central Java?

2. Methodology

2.1 Research Methods

This research used socio legal approach by reviewing legal norms from literature reviews to obtain secondary data and fields study to obtain primary data related to legal effect and protection to creditor in online registration of Fiduciary Guarantee. The methods of collecting the data were by literature reviews and interviews. The interviews were done to the Head of Fiduciary Registration Office in the Ministry of Law and Human Rights Officials in Central Java. Location of research are: Pekalongan City, Semarang City, and Kendal. The method of data checking was triangulation for source and methods. The validity of data used triangulation method. The theory and concept used for the analysis were the concepts of consumer finance, agreement, and fiduciary guarantee.

2.2 Material

2.2.1 The Concepts of Consumer Finance Agreement

Consumer finance is a financial service provided by finance company. The targeted market of this service is consumers. There are three parties involved in a transaction of consumer finance: finance company, consumers, and suppliers. The relation of those parties is bonded from an agreement of consumer finance.

In the agreement of consumer finance, the supplier will give the goods to consumer right after the finance company pays the supplier. After that, consumer has the responsibility to pay the goods in certain installments to finance company. This installment has risks of unpaid debts by debtors. In order to avoid the risks, the company will request the guarantee of payment to debtors.

2.2.2 Concepts of Fiduciary Guarantee

Guarantee is everything accepted by creditor and given by debtor to guarantee the debts of the society or the account receivables of creditor. Therefore, this guarantee is in principle an accessoir. [5]

Fiduciary Guarantee is a specific guarantee which is included as material guarantee. One of the agreement which inquired guarantee of Fiduciary Guarantee is in consumer finance. Providing Fiduciary Guarantee can be done by a process called as *Constitutum Prossesorium* (the transfer of material without giving the physical forms of the good)[6]. It will make the material still on the side of the debtors.

Article 1 section 1 of Fiduciary Act states that “Fiduciary is the transfer of ownership rights to certain materials based on the trust that the provision of the transfer will still be under the control of the owners.”

Article 1 section 2 of Fiduciary Act states that “Fiduciary Guarantee is a guarantee rights of moving materials whether concrete or abstract especially on building which cannot be burdened as mortgage rights, which is still under the control of Fiduciary giver, as a collateral for the repayment of the debts, providing prior place for the receiver of fiduciary to other creditor.”

Fiduciary Guarantee institution also has characteristics of [7] :

- a. Fiduciary Guarantee is accessoir, its existence or disapproval depends on the main agreement
- b. Giving preferred position to creditor as the receiver of fiduciary to other creditor
- c. Always follow the guaranteed object to any hands controlling the object (droit de suite).

2.2.3 The Occurrence of Fiduciary Guarantee

The process of Fiduciary Guarantee is done through two steps, the imposition of Fiduciary Guarantee and the registration of Fiduciary Guarantee.

a. The Imposition of Fiduciary Guarantee

In article 5 section (1) of Fiduciary Guarantee Act, it is stated that the imposition of materials with Fiduciary Guarantee is made under notary deed and automatically becomes the Deed of Fiduciary Guarantee. The Deed of Fiduciary Guarantee is a material requirement for the provision of Law of Fiduciary Guarantee under the agreement of Fiduciary Guarantee which is closed by all parties, and it also becomes the evidence of the case.[8]

b. Fiduciary Guarantee Registration

Fiduciary Guarantee is obliged to be registered (Article 11 of Fiduciary Act) in Fiduciary Registration Office (Article 12 section (1) of Fiduciary Act).

2.2.4 *The Online Registration of Fiduciary Guarantee*

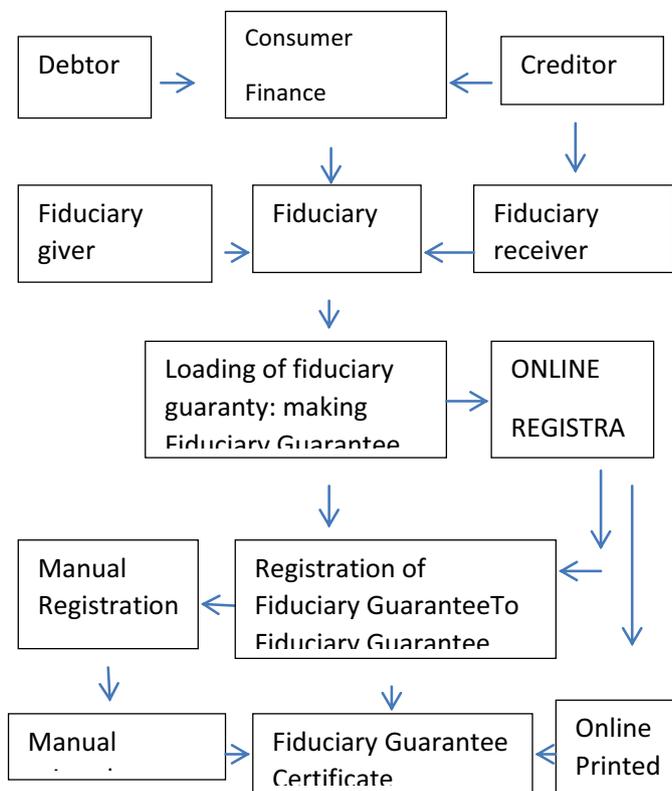
The online registration of fiduciary guarantee is explained on Article 2 of Government Regulation Number 21 Year 2015.

3. Findings

3.1 *Legal Effects from Online Registration of Fiduciary Guarantee*

Picture

The Implementation of fiduciary guarantee of consumer Finance agreement



Source: interview result modified

Article 11 section (1) of Fiduciary Act states that:

“Things which is entitled as Fiduciary Guarantee must be registered”

The registration of materials entitled as Fiduciary Guarantee is done in the place of Fiduciary giver, and the registration includes the materials whether inside or outside Indonesia to fulfill the principle of publicity as well as the certainty of guarantee to other creditor which has been burdened from this Fiduciary Guarantee.

The online registration is affirmed on the Government regulation Number 21 Year 2015 regarding to the Procedures of Fiduciary Guarantee Registration and the Costs of Making the Deed of Fiduciary Guarantee. The request of registration to Fiduciary Guarantee should be proposed not more than 30 days after the Deed of Akta Fiduciary Guarantee is created.

The legal effect from the online registration of Fiduciary Guarantee gives legal protection for creditor, making creditor becomes preferred creditor. Preferent rights is the rights to be prioritized, which is entitled to the receiver of fiduciary to take the repayment of debts from the execution of materials, which become the objects of Fiduciary Guarantee.

There is a difference between online and manual registration of Fiduciary Guarantee. In the manual registration, the applicants should do the registration in Fiduciary Registration Office and bring the requirements for the registrations. If all requirements are fulfilled, the officers will be able to note the registration request in the Book of Fiduciary Lists and publish the Certificate of Fiduciary Guarantee. In online administration for the registration of Fiduciary Guarantee, the applicant can access the website of www.sisminbakum.go.id and fill the required data in the proposal forms of Fiduciary Guarantee, do the payment of PNBP in the perception bank, and access the website again to print the certificate of Fiduciary Guarantee.

In the manual registration system of Fiduciary Guarantee, physical forms of required documents needed are: the statement of registration to Fiduciary Guarantee (form is provided by the Registration Office), request letter of Fiduciary Guarantee, copy of the Deed of Fiduciary Guarantee, power of attorney letter to do the registration, the evidence of PNBP payment, and the copy of object ownership as the requirement of registration. Meanwhile, the electronic registration system requires the documents to be uploaded to the website without the physical forms of the data.[8]

The online certificate of Fiduciary Guarantee registered through SISMINBAKUM website and printed by a notary, raises strong legal assurance to creditor, as it is regulated under the Law of Fiduciary Guarantee Number 42 Year 1999. It is also regulated in the Regulation of Ministry of Finance Number 130/PMK.010/2012 regarding to the obligation to Register the Fiduciary Guarantee for Finance Companies, which finances consumers to purchase vehicles under the entitlement of Fiduciary Guarantee and the Gazette of Directorate General of CLA Number AHU-06.OT.03.01 Year 2013 regarding to the Online Registration of Fiduciary Guarantee with a title of Executorial on the online Certificate of Fiduciary Guarantee.

The signs on the Online Certificate of Fiduciary Guarantee, which has the same validity to the manual process certificate due to the existence of registration number and only notary who has the access to register the Online Certificate of Fiduciary Guarantee along with the processes (from the registration), has been provisioned under the Law and Regulation. Thus, the signs can be accounted and controlled in Law Number 11 Year 2008 regarding Electronic Information and Transaction Chapter III Article 5 regarding Information, Document, and Electronic Signs. It states that:

1. Electronic Information and/or Document and/or its printed file is a valid legal evidence.
2. Electronic Information and/or Document and/or its printed file as stated in section (1) is the expansion of valid evidence based on the Procedural Law in Indonesia.
3. Electronic Information and/or Document is considered valid if using Electronic System acknowledged by this Law.

4. The Provision regarding Electronic Information and/or Document as stated in section (1) is not applicable for:

- a) Letter which under the law should be made written;
- b) Letter and Document which under the law should be made in the forms of notary deed or made by the officer of deed creator.

Article 11 (Law of Electronic Information and Transaction) states that electronic sign has valid legal power and legal effect after these requirements:

- a) The data of Electronic Signs is only related to the giver of the sign;
- b) The data of Electronic Signs in the process of Signing is only under the control of the giver of the sign;
- c) All changes to the Electronic Signs after the signing should be reported;
- d) All changes to Electronic Information of the Electronic Signs after the signing should be reported;
- e) There is a certain procedure to identify the giver of the sign; and
- f) There is a certain way to show that the signer has given the approval to the related Electronic Information.

The signs in online Certificate of Fiduciary Guarantee is accountable. Guarantee has electronic sign. Both of them have executorial power.

The online registration of Fiduciary Guarantee has legal effect which raise the principle of publicity. The creditor or the society can know and have the access to every important information to such guarantee. This principle of publicity becomes more important to the physical object as the guarantee. The legal effect of online fiduciary guarantee is to provide legal protection for creditor to do the execution of fiduciary guarantee's object if the debtor breaches the contract.[9]

3.2 Legal Protection for Creditor in Doing Online Registration of Fiduciary Guarantee

Fiduciary Act regulates the responsibility of registration to Fiduciary Guarantee that it gives legal certainty to every involved party including in online registration.[10] Article 11 Section (1) of Fiduciary Guarantee Act states that "Materials entitled as Fiduciary Guarantee must be registered". The aims of the registration are:

1. To provide legal assurance to involved parties;
2. To determine the occurrence of Fiduciary Guarantee
3. To provide the preference for fiduciary receiver to other creditor (Fiduciary Guarantee gives the ownership rights to fiduciary receiver of the object of Fiduciary Guarantee based on trust).
4. To give position as separatist creditor to the receiver of fiduciary.
5. To easy and ensure the execution of default debtors

In registering online Fiduciary Guarantee, the receiver of fiduciary guarantee still accepts the legal assurance as preferred creditor. In registering online fiduciary guarantee, there is also a publishing of Certificate of Fiduciary Guarantee by Fiduciary Registration Office which can be printed online. The

words “Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa” or “For the Sake of Justice Under God the Almighty” (Article 15 Section 1). The Certificate of Fiduciary Guarantee in section (1) has equal executorial power to court verdict which has obtained permanent legal forces (Article 15 Section (2)). The elaboration of Article 15 section (2) explains this provision. What is meant by executorial power is able to be executed directly without court and becomes final decision binding every party to do the verdicts.[11]

Online certificate of Fiduciary Guarantee has legal power which has been registered on the Ministry of Law and Human Rights of Indonesia and noted in the database of registration of Fiduciary Guarantee. The signs in the online certificate of Fiduciary Guarantee is still valid and acknowledged by the Ministry of Law and Human Rights of Indonesia.

By registering Fiduciary Guarantee online, if the debtor breaches of contract, creditor can execute the object of Fiduciary Guarantee. The execution of Fiduciary Guarantee is the confiscation and sales of object of Fiduciary Guarantee. The ease and assurance of execution if the debtor is default is one of the strong characteristics of Fiduciary Guarantee. Generally, the provision of execution has been regulated in the Civil Codes; although it is still needed to add specific condition upon the execution of Law of Fiduciary, especially regarding to *parate executie*.

The execution of legal problem in online fiduciary is the same to manual fiduciary as stated in Article 29 section (1) and the explanation of Article 29 section (1) Law of Fiduciary which stipulates that if the debtor breaches of contract, the execution to the object of Fiduciary Guarantee can happen as follows.

1. Execution in accordance with the Certificate of Fiduciary Guarantee or executorial title in the certificate of Fiduciary Guarantee done by the receiver of fiduciary.
2. Execution in accordance with *parate executie* through general auctions by the receiver of fiduciary;
3. Execution through under hand sales by the creditor.

Based on Article 29 Law of Fiduciary, the sales of object of Fiduciary Guarantee was only from General Auction without asking the fiat execution to the Chairman of State Court.[12]. It means, without the help of the Head or the Executor Officer of District Court, creditor can execute the object of Fiduciary Guarantee in general sales or auction to the object.[10]

Fiduciary Guarantee has the characteristics of initiating *Droit de preference*. Regarding the character of *Droit de preference*, it is related to legal protection of the creditor after the establishment of online Fiduciary Guarantee. As the provision of Article 28 Law of Fiduciary, this principle happens right after the registration date of Fiduciary Guarantee. It applies the adagium of “first registered, first secured”. The priority as stated in the law is the rights of fiduciary receiver to take the repayment on the execution of object of Fiduciary Guarantee. This rights of repayment is initiating other creditor.[13]

Article 17 of Law of Fiduciary prohibits the giver of fiduciary to redo the fiduciary to the registered object of Fiduciary Guarantee. It is to provide legal assurance to the receiver of fiduciary as the preferred creditor and give the legal protection for creditor.

The character of *Dorit de suite* of Fiduciary Guarantee is the guarantee still follows the materials which become the objects of Fiduciary Guarantee on whoever hands the objects exist, unless there is a transfer of supplied materials which become the guaranteed objects. It provides legal protection for creditor after the registration of Fiduciary Guarantee including the online registration.

The exception of *droit de suite* happens to inventory object. In this case, the legal protection to the materials is redirected as the inventory must be changed by the giver of fiduciary with similar object. The definition of similar is not only on the value, but also on the types to maintain the creditors' behalf.

Then, the obstacle of creditor in the online registration of Fiduciary Guarantee is related to connection problems of SISMINBAKUM which only has one server in the Official of Ministry of Law and Human Rights.

Online Fiduciary Guarantee is lacking in terms of database information to the details of object of Fiduciary Guarantee. In other words, the preference rights have not fulfilled the principle of publicity making the possibility of redoing the fiduciary. It raises the potential of conflicts. Considering this possibility, the Directorate Generale of CLA develops the application of administrative system to register Fiduciary Guarantee in electronic way since January 2014.

The difference of Fiduciary Guarantee object in online system is possibly not on fulfilling principle of specialty where there is no any clear and detail explanation to the object of Fiduciary Guarantee in the Deed of Fiduciary Guarantee which harms the creditor. The Directorate General of CLA returns the questions of Fiduciary Guarantee as it is initiated under the Article 13 Section (2) Law of Fiduciary that the applicants of Fiduciary Guarantee registration can input the details regarding the object of Fiduciary Guarantee to minimize the risk of redoing the fiduciary.

Specialty and Publicity also exist in online registration of Fiduciary Guarantee. From the online registration, the creditor can get the publicity through the detail of important information about the object of Fiduciary Guarantee. The specialty comes from the online certificate which does not have difference to manual certificate. The difference is only on the point where the manual only comes as one paper of certificate while the online certificate has two 100 grams paper consist of the certificate of Fiduciary Guarantee and the complete identity of the vehicle (object of fiduciary).

Legal protection of Creditor happens after the establishment of online Fiduciary Guarantee. It can be accounted for, and it has valid signs which can be used for the execution, since there is an executorial power to the online certificate of Fiduciary Guarantee.

4. Conclusion

1. The registration of Fiduciary Guarantee is obliged to execute Fiduciary Guarantee. The execution of online registration of Fiduciary Guarantee is based on Government Regulation Number 21 Year 2015. The electronic signs in the online certificate of Fiduciary Guarantee is valid under the law. The legal effect of the online registration is valid and has legal assurance and executorial power. The position of creditor as preferred creditor and separatist creditor can be done in the execution of Fiduciary Guarantee if the debtor breaches the contract.

2. By registering Fiduciary Guarantee online, the creditor is entitled of legal protection as preferred creditor, making them becoming the main priority to the repayment than other creditor. Besides, the creditor also becomes separatist creditor which does not have influence to the bankruptcy of debtor. The online registration of Fiduciary Guarantee also fulfills the specialty and publicity principle. The online certificate of Fiduciary Guarantee has executorial title which is equal to court verdict, making the creditor protected due to the bonding to third party and giving guarantee of legal assurance to involved parties.

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