

Legal Review of the Transfer of Fiduciary Guarantee Objects and the Legal Responsibilities of Creditors-Debtors

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ABSTRACT

Fiduciary security plays a central role in modern security transactions by allowing creditors to obtain enforceable ownership rights over movable assets, while debtors retain physical possession of the collateral. The effectiveness of fiduciary security depends not only on the creation of enforceable ownership rights in the event of default but also on the clear allocation of legal liability between the debtor and creditor when the pledged assets are transferred to another party. The transfer of fiduciary security objects gives rise to complex legal issues regarding the continuity of ownership rights. This article discusses: (1) how fiduciary security generates enforceable ownership rights in security transactions; and (2) how the responsibilities of the debtor and creditor toward the fiduciary security object shift when it is transferred to another party. This study employs a doctrinal legal research method, combining a statutory approach to analyze the normative framework of fiduciary security with a conceptual approach to examine ownership rights and debtor-creditor liability, as well as the judicial interpretation of Law Number 42 of 1999 concerning Fiduciary Security, specifically Constitutional Court Decision No. 18/PUU-XVII/2019 and Constitutional Court Decision No. 2/PUU-XIX/2021.

Keywords: Fiduciary Security, Secured Asset, Secured Transactions, Self-Help Enforcement.

I. Introduction

The dynamics of contemporary economic law and the need for access to capital demand flexible collateral institutions that still provide legal certainty. Fiduciary collateral exists as a solution to the limitations of pawnbroking institutions, which require physical delivery of the object (in bezitstelling). Article 1, number 1, of Law Number 42 of 1999 concerning Fiduciary Collateral states that fiduciary collateral is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the possession of the object's owner. Theoretically, fiduciary collateral provides a strong position for creditors through collateral registration, which creates preferential rights. The executorial power inherent in a Fiduciary Collateral Certificate, under Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Collateral, allows creditors to exercise pirate executive in the event of default. However, in practice, the separation between ownership rights (for the creditor) and physical control (for the debtor) creates moral hazard. The most common legal issue is the illegal transfer of the collateral by the debtor to a third party. This triggers a conflict of interest between the creditor's property rights and the legal protection of third parties who may act in good faith.



The debtor's and creditor's responsibilities when the object of fiduciary security is transferred to another party are essentially determined by the normative construction of fiduciary security as a property right belonging to the creditor that remains physically controlled by the debtor, the explicit prohibition on the transfer of the object without the creditor's written consent; and the nature of fiduciary security as a subsidiary agreement that does not extinguish the principal debt even if the object changes hands, as concluded from Law Number 42 of 1999 concerning Fiduciary Security and confirmed by the jurisprudence of Constitutional Court Decision Number 18/PUU-XVII/2019 changes this landscape by stating that the phrase "executory power" in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Security, states that if there is no agreement regarding default and the debtor objects to voluntarily handing over the collateral object, then execution must be through an application to the District Court. This aims to protect debtors from arbitrary action, but on the other hand, it adds complexity to the procedures for enforcing rights for creditors, especially if the assets have transferred to another party.

A crucial issue arises when a debtor violates Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which prohibits the debtor from transferring, pawning, or renting out objects subject to fiduciary guarantees without the written consent of the fiduciary recipient. Based on Article 20 of Law Number 42 of 1999 concerning Fiduciary Guarantees, the fiduciary guarantee remains with the object of the guarantee, regardless of who it is held in (*droit de suite*). Theoretically, the creditor can still execute the object even if it has been sold to a third party. However, in judicial practice, this principle often conflicts with the protection of good faith buyers as stipulated in Article 1977 of the Civil Code.

Constitutional Court Decision Number 18/PUU XVII/2019 confirms that the executorial power of a fiduciary guarantee certificate in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees can only be exercised directly if there is an agreement regarding the breach of promise and the debtor is willing to surrender the object voluntarily; otherwise, the execution must follow the court decision execution mechanism as noted in the annotation to Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees. This decision was further strengthened by Constitutional Court Decision Number 2/PUU-XIX/2021, which emphasized that although creditors may carry out execution through the courts, this is a last resort if an agreement is not reached, but still emphasizes protection for debtors from arbitrary actions. The same decision stated that the phrase "breach of promise" in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees does not have binding legal force as long as it is not interpreted to mean that the existence of a breach of promise is determined based on an agreement between the creditor and the debtor or a court decision, as stated in the annotation to Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees.

II. Literature Review and Hypothesis Development

2.1. Fiduciary Guarantee Theory and Property Rights

Fiduciary guarantees are a legal instrument for property security that has developed to meet modern financing needs, particularly for movable assets without the need to transfer physical control to the creditor. According to Law Number 42 of 1999 concerning Fiduciary Guarantees, fiduciary is defined as the transfer of ownership rights based on trust while remaining in the debtor's possession. This concept demonstrates the separation between legal ownership and physical control, which is the main characteristic of fiduciary guarantees (Pratama, 2023). From a property law perspective, fiduciary guarantees are considered property rights (*zakelijk recht*), which are absolute and binding on third parties (*erga omnes*). Property rights in fiduciary are created through the process of establishing a notarial deed and registration, which provides publicity and legal certainty for creditors (Sari & Nugroho, 2023). Thus, registering a fiduciary guarantee is not merely administrative but also determines the creation of property rights that grant the creditor a preferential position. A fiduciary guarantee has the main characteristics of *droit de suite* (the right to follow the object) and *droit de preference* (the right to take precedence). This principle allows the creditor to retain rights over

the collateral even after it has been transferred to another party (Hidayat, 2024). However, in practice, this principle often conflicts with the protection of good-faith third parties, giving rise to conflicting norms in its application (Rahmawati, 2023).

2.2. Theory of Contracts and Default

A fiduciary guarantee is essentially an accessory agreement to the principal debt agreement. In contract theory, every legal relationship arising from an agreement between the parties must be carried out in good faith in accordance with the principle of *pacta sunt servanda*, namely that agreements bind the parties like law (Putri, 2023). As an accessory agreement, the existence of a fiduciary guarantee is highly dependent on the principal agreement. However, the removal of the collateral does not automatically eliminate the debtor's obligation to repay the debt, as the collateral only serves as a safeguard for debt repayment (Saputra & Wibowo, 2024). This confirms that the obligatory relationship remains the primary basis of the creditor-debtor relationship. Default is a condition in which a debtor fails to fulfill their obligations under the agreement. In the context of fiduciary obligations, default can include non-payment of debt, late payment, or transfer of the collateral without the creditor's consent (Firmansyah, 2023). Transferring the collateral without permission is a serious violation because it not only violates the agreement but also violates applicable law. The determination of default cannot be made unilaterally by the creditor. This is emphasized in Constitutional Court Decision Number 18/PUU-XVII/2019, which states that default must be determined by agreement or through a court decision (Kusuma, 2023). Thus, the theory of default in fiduciary obligations has evolved, placing greater emphasis on the principles of fairness and balance between the parties.

2.3. Fiduciary Security Execution Theory

Fiduciary security execution is a form of realization of the creditor's right to obtain debt repayment through the collateral. A fiduciary security certificate has execution power equivalent to a legally binding court decision, thus facilitating the creditor's enforcement of the collateral (Yuliana, 2023). Theoretically, there are several execution mechanisms for fiduciary security, namely *parate* execution, public auction, and private sale. *Parate* execution is a characteristic of fiduciary security, allowing the creditor to sell the collateral without going through a court process (Ardiansyah, 2024). However, in practice, this mechanism often creates problems, particularly related to arbitrary actions by the creditor. Legal developments indicate limitations on *parate* execution through Constitutional Court Decisions Number 18/PUU-XVII/2019 and Number 2/PUU-XIX/2021, which emphasize that execution can only be carried out directly if the debtor acknowledges default and is willing to voluntarily surrender the object (Wijaya, 2024). If the debtor objects, execution must be carried out through the courts. Thus, the theory of fiduciary security execution has shifted from the concept of self-help execution to judicial control, which aims to provide fairer legal protection for debtors without eliminating creditor rights (Nugraha, 2023).

2.4. Theory of Legal Responsibility and Protection of the Parties

Legal responsibility in fiduciary security is closely related to the distribution of risk between the debtor and creditor, especially when the collateral object is transferred to another party aspect is the debtor's obligation to safeguard and not transfer the collateral without the creditor's consent (Prasetyo, 2023). Violation of this obligation can result in civil liability in the form of compensation or criminal liability. Transferring collateral without the creditor's consent constitutes a form of breach of contract and an unlawful act, as it violates legal provisions and is detrimental to the creditor (Lestari, 2024). In this situation, the debtor remains responsible for repaying the debt even though the collateral has changed hands. On the other hand, the creditor is not responsible for the debtor's actions in illegally transferring the collateral. The creditor retains the property rights inherent in the collateral and has the right to enforce the collateral according to legal

procedures (Handoko, 2023). This indicates that the debtor, as the party in physical control of the collateral, faces greater legal risk. The theory of legal protection in this context emphasizes the importance of balancing the interests of creditors and debtors. Creditors are protected through preferential rights and execution rights, while debtors are protected from arbitrary execution through court mechanisms (Santoso, 2024). Thus, the fiduciary legal system seeks to create substantive justice through a balance of the rights and obligations of the parties.

III. Research Method

This research is normative legal research (doctrinal legal research) that focuses on the study of positive legal norms. It aims to delve deeper into the fiduciary guarantee deed, which can serve as a reference for executing the guarantee if the debtor is proven to have committed a breach of contract and/or committed an unlawful act by transferring the fiduciary guarantee object to another party without the creditor's consent, as referred to in Law Number 42 of 1999 concerning Fiduciary Guarantees. The approaches used in this research include a statutory approach and a conceptual approach. The conceptual approach is used to examine the concepts, principles, and principles of consumer protection law, such as the principles of lawful processing, purpose limitation, data minimization, and accountability. The data used are secondary data consisting of primary legal materials Law Number 42 of 1999 concerning Fiduciary Guarantees, Constitutional Court Decision Number 18/PUU-XVII/2019 concerning the Judicial Review of Law Number 42 of 1999 concerning Fiduciary Guarantees, secondary legal materials (legal literature, scientific journals), and tertiary legal materials. The analysis was conducted qualitatively to draw deductive conclusions regarding legal protection in fiduciary guaranteed transactions.

IV. Result and Discussion

4.1. A Fiduciary Guarantee Deed Creates Executable Property Rights

A fiduciary guarantee deed creates executable property rights because the law expressly converts the accompanying agreement into a security right over the property with executorial power. This, after being supported by registration and certification, is treated like a legally binding court decision and can be enforced through execution or parate execution mechanisms, as regulated by the Fiduciary Guarantee Law and interpreted by the Constitutional Court. A fiduciary guarantee deed, as an accompanying agreement, creates property rights. Law Number 42 of 1999 concerning Fiduciary Guarantees defines a fiduciary guarantee as "a security right over movable property... and immovable property... as collateral for the repayment of certain debts, which gives the fiduciary recipient a priority position over other creditors" in Article 1, number 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, from the outset, a fiduciary guarantee is constructed as a property right (zakelijk recht) with a preferential nature over the object.

Law Number 42 of 1999 concerning Fiduciary Guarantees emphasizes that a fiduciary guarantee is a subsidiary agreement to a principal agreement that creates an obligation to fulfill the performance as stipulated in Article 4 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, a fiduciary guarantee deed serves to bind certain objects as collateral for debts arising from the principal agreement. The encumbrance of objects with fiduciary guarantees must be made by a notarial deed in Indonesian, which is a fiduciary guarantee deed according to Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, from a formal perspective, this deed is an authentic deed that directly encumbers the object with material security rights. Conversion of obligatory relationship into property rights through deed and registration, because fiduciary guarantee can only be imposed on certain objects, then the fiduciary guarantee deed must contain at least the identity of the fiduciary giver and recipient, data of the main agreement, description of the object, guarantee value, and value of the object according to Article 6 of Law Number 42 of 1999 concerning Fiduciary Guarantee (reconstructed from the obligation of the contents of the

deed in the explanation), so that materially this deed individualizes the object and links it to certain receivables as material guarantee. Law Number 42 of 1999 concerning Fiduciary Guarantees requires that objects encumbered with fiduciary guarantees be registered with the Fiduciary Registration Office as outlined in Article 11 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees (referred to in the general explanation and registration practices). The general explanation of Law Number 42 of 1999 concerning Fiduciary Guarantees emphasizes that registration is carried out to provide legal certainty and priority rights (preference) to the fiduciary recipient, so that from the moment of registration, the fiduciary right acquires binding force erga omnes.

After the registration fee is paid, the fiduciary guarantee is registered electronically and its encumbrance is declared valid according to an analysis of the registration provisions in the Government Regulation concerning the registration of fiduciary guarantees referred to in Article 11 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, normatively, it can be concluded that the deed stage creates a binding relationship and designates the object and the registration stage transforms it into a property right that binds third parties.

a. Fiduciary Guarantee Certificate as a vehicle for property rights with an executorial title

The Fiduciary Registration Office issues a Fiduciary Guarantee Certificate after registration as stipulated in Article 14 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees (confirmed by the explanation of Article 15 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees), and this certificate serves as evidence of the birth of the fiduciary guarantee right. The Fiduciary Guarantee Certificate must include the words "For the Sake of Justice Based on the One and Only God" as mandated by Article 15 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which systematically equates the certificate with an executable deed according to the logic of Article 224 of the HIR concerning deeds containing similar formulations. The Fiduciary Guarantee Certificate is given the same executive power as a court decision that has obtained permanent legal force based on Article 15 paragraph (2) of the Fiduciary Guarantee Law, so that the certificate holder is positioned as if holding a condemnatory decision that can be executed without first filing a new lawsuit.

b. The structure of property rights is preferential and attached to the object

The fiduciary recipient has priority rights over other creditors according to Article 27 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees, and this right is explicitly intended "to take payment of his receivables from the results of the execution of the object that is the object of the fiduciary guarantee" in Article 27 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, so that fiduciary rights are explicitly linked to "execution results", which emphasizes the material character and its executorial function. This priority right is not removed due to the bankruptcy or liquidation of the fiduciary provider according to Article 27 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees, and the explanation of this article relates it to the character of fiduciary guarantees as collateral rights over objects, so that doctrinally, fiduciary rights are recognized as rights that follow objects (*droit de suite*) and provide a preferential position over the proceeds of the sale. If there is more than one fiduciary guarantee agreement for the same object, then the priority right is given to the party who registered first, as stipulated in Article 28 of Law Number 42 of 1999 concerning Fiduciary Guarantees, so that the order of priority is determined materially based on the registration date, not merely the obligatory relationship of the agreement.

c. Execution mechanisms that affirm "executable" nature

The Fiduciary Guarantee Law stipulates that if the debtor or fiduciary provider defaults, execution of the object of the fiduciary guarantee can be carried out by: implementing the executorial title of the certificate, selling it through a public auction by the fiduciary recipient, or selling it privately based on an agreement, as stipulated in Article 29 paragraph (1) letters a, b, and c of Law Number 42 of 1999 concerning Fiduciary

Guarantees. Therefore, since this norm, fiduciary rights have been explicitly designed to be "realized" through execution of the object.

The fiduciary grantor is obliged to hand over the object of the fiduciary guarantee in the context of carrying out execution according to Article 30 of Law Number 42 of 1999 concerning Fiduciary Guarantees, and the explanation of this article emphasizes that if the fiduciary grantor does not hand over, the fiduciary recipient has the right to take the object and "if necessary can ask for assistance from the authorized party" as reconstructed in the Annotation of the Constitutional Court Decision Number 71/PUU-XIX/2021 which interprets "the authorized party" as the district court, so that the obligation to hand over and the right to take with the assistance of the authorities are attributes of property rights that are ready to be executed. Any promise to carry out the execution of fiduciary collateral objects in a manner that is contrary to Article 29 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantees is declared null and void by law according to Article 32 of Law Number 42 of 1999 concerning Fiduciary Guarantees, and any promise that authorizes the fiduciary recipient to possess collateral objects if the debtor defaults is void by law according to Article 33 of Law Number 42 of 1999 concerning Fiduciary Guarantees, so that the law locks the method of execution in order to maintain the character of property rights as rights to the value of objects, not the right to "own" without execution procedures.

d. Parate Execution as a Direct Consequence of Fiduciary Property Rights

If the debtor defaults, the fiduciary recipient has the right to sell the object of the fiduciary guarantee themselves, based on Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees. This doctrine is called parate execution, which is execution without requiring a new court decision because the basis for execution already exists in the fiduciary guarantee certificate and the agreement. Article 29 paragraph (1) letter b of Law Number 42 of 1999 concerning Fiduciary Guarantees stipulates that the fiduciary recipient can sell an object under their own authority through a public auction and collect the receivables from the proceeds of the sale. Fiduciary property rights thus operate by "forcing" the conversion of the object into cash to pay the receivables, without requiring any action from the debtor other than the obligation to hand it over. In doctrinal analysis, this fiduciary execution parate is seen as a development of the historical concept in Article 224 HIR, which has long placed a deed strengthened by a notary with the phrase "For the Sake of Justice Based on the One Almighty God" as a document equivalent to a legally binding decision that can be executed, so that the provision of this phrase on the certificate in Article 15 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees is an affirmation that fiduciary rights are intended to be directly executable.

e. Constitutional Court Jurisprudence: Confirmation and Limitation of Executorial Power

The Constitutional Court, through Decision Number 18/PUU-XVII/2019, reinterpreted the phrases "executory power" and "equal to a court decision with permanent legal force" in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees as contradictory to the 1945 Constitution insofar as they are not interpreted to mean that for fiduciary guarantees where there is no agreement regarding default and the debtor objects to voluntarily handing over the object, all mechanisms for implementing the fiduciary guarantee certificate must be carried out and apply the same as the execution of a court decision with permanent legal force, as reconstructed in the annotation to Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, the Court does not actually remove the "executable" characteristic, but requires judicial execution procedures in the event of a dispute or objection.

The same Constitutional Court ruling also declared the phrase "breach of promise" in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees unconstitutional to the extent that it is not interpreted to mean that "the existence of a breach of promise is not determined unilaterally by the creditor but rather based on an agreement between the creditor and the debtor." The legal analysis discussing this ruling states that the Court views the fiduciary guarantee certificate as a reflection of Article 224 HIR: a deed that has executorial power because it is equated with a court decision with permanent legal force.

However, if the debtor refuses to hand over the object or questions the breach of promise, the execution must comply with the procedures of Article 196 HIR and Article 208 RBg, which regulate the execution of decisions through an order from the head of the district court. Therefore, this jurisprudence confirms two things fiduciary property rights can still be executed and physical coercion against the debtor is controlled through the court's execution mechanism in the event of a dispute.

f. Relationship to the concept of breach of promise in civil law General

Conceptual analysis states that the definition of breach of contract must refer to the general principle of breach of contract in the Civil Code, which teaches that a debtor is considered in breach of contract after receiving a warning (summons) or if the contents of the agreement have determined that the debtor is in a state of negligence without the need for a summons, as explained in the doctrine cited in the critical discussion of Constitutional Court Decision Number 18/PUU-XVII/2019. From this perspective, if the indicators of breach of contract are not clearly stipulated in the agreement, then issuing a summons can serve as a determination that the debtor has defaulted, as explained in the legal commentary analysis. Therefore, in the absence of a dispute, a valid summons plus a deed and fiduciary guarantee certificate are sufficient to activate property rights that can be executed in parate.

If the debtor denies or refuses to hand over the object, then according to the Constitutional Court's interpretation of Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees, the determination of breach of contract shifts to the court, and fiduciary property rights can still be executed, but through the execution of a judgment, so that the nature of the "Executable" changed from pure parate execution to judicial execution. Through this normative framework, the fiduciary security deed (as a subsidiary agreement encumbering a specific object) along with registration and certification creates fiduciary property rights that not only bind third parties but are also equipped with executorial power and a parate execution mechanism. This was later clarified and limited by Constitutional Court jurisprudence to maintain compliance with the protection of debtors' rights and the principle of due process of law.

4.2. The Debtor's and Creditor's Responsibility for Fiduciary Security Objects Transfers to Another Party

The issue of responsibility and the risk of fiduciary security objects transferring to another party are essentially determined by who owns the property rights (fiduciary recipient), who physically controls the property (fiduciary provider/debtor), and whether or not each party has committed negligence (breach of promise) according to the fiduciary security regime and the general principle of default in civil law.

a. Position of the Parties' Rights and Obligations regarding Fiduciary Security Objects

From the moment the encumbrance is enacted through a deed and registration, legal ownership of the property transfers to the creditor as fiduciary recipient, while the property remains physically in the possession of the debtor as fiduciary provider, as defined in the definition of fiduciary and fiduciary security, which emphasizes the transfer of ownership rights based on trust, but the property remains in the possession of the original owner, as stipulated in Article 1, numbers 1 and 2 of Law Number 42 of 1999 concerning Fiduciary Security. Because a fiduciary guarantee is a subsidiary agreement to the principal agreement that gives rise to a performance obligation under Article 4 of Law Number 42 of 1999 concerning Fiduciary Guarantees, the principal debt obligation remains attached even if the fiduciary guarantee is subsequently terminated, including due to the destruction of the object under Article 25 paragraph (1) letter c in conjunction with the explanation of Article 25 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore, the debt-receivable relationship does not automatically end simply because the guarantee is transferred or lost.

b. Prohibition on Transfer of Objects by Debtors and Its Qualifications

The Fiduciary Guarantee Law expressly prohibits debtors from transferring fiduciary objects without the creditor's written consent, as the fiduciary grantor is prohibited from transferring, pawning, or renting to another party objects that are the object of the fiduciary guarantee that are not inventory items, except with the prior written consent of the fiduciary recipient under Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees. Conceptually, because legal ownership of the object has been transferred to the creditor, the doctrine positions the fiduciary as merely a "borrower-in-use," thus lacking the authority to act as owner of the object encumbered by collateral. When the debtor nevertheless transfers the object, this action is classified as an unlawful act detrimental to the creditor, in line with the view that transferring fiduciary objects without written consent is prohibited by Law Number 42 of 1999 concerning Fiduciary Guarantees and has the potential to give rise to civil and criminal liability. In practical terms, the transfer of fiduciary objects to a third party without the creditor's written consent is doctrinally considered a breach of the obligation of trust in the fiduciary relationship and places the debtor as the party responsible for the loss of collateral for the creditor.

c. Debtor's Responsibilities When the Asset is Transferred to Another Party

Because the asset remains in the debtor's possession, he or she bears the obligation to ensure that the collateral remains in his or her possession and is not transferred without the creditor's permission. This is systematically illustrated by the nature of the fiduciary trust relationship and the prohibition in Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees. Illegal transfer of assets by the debtor constitutes a civil breach of contract and a criminal offense as stipulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees:

"A Fiduciary Grantor who transfers, pawns, or leases an asset that is the object of a Fiduciary Guarantee [...] without the prior written consent of the Fiduciary Recipient shall be punished by imprisonment for a maximum of 2 (two) years and a maximum fine of Rp 25,000,000 (twenty-five million rupiah)."

Although criminal sanctions are available, these are often insufficient to recover a creditor's financial losses if the asset cannot be located or has been damaged. When a debtor transfers a fiduciary security object to a third party without the creditor's written consent, the loss of the object from the debtor's possession has two consequences:

- 1) Under the principal obligation, the debt obligation remains in place because the fiduciary security is merely a subsidiary agreement; even if the fiduciary security agreement is terminated due to the loss or destruction of the object, the principal agreement remains intact, so the debtor's obligation to fulfill its obligations to the creditor remains, as analyzed in Article 4 in conjunction with Article 25 paragraph (1) letter c of Law Number 42 of 1999 concerning Fiduciary Security.
- 2) Under civil liability, the debtor bears the entire risk that the creditor will no longer receive payment of its receivables from the execution of the object, so the debtor remains obligated to pay the entire remaining debt without being able to argue that the object has been transferred to another party. This aligns with the provision that if the proceeds of the execution are insufficient to repay the debt, the debtor remains liable for the shortfall, as per Article 34 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which a fortiori applies when there is no longer an object that can be executed.

Civil jurisprudence (in the pattern of District Court and High Court decisions confirmed by cassation decisions) consistently holds that the unauthorized transfer of a fiduciary object does not extinguish the debtor's obligation; the court still orders the debtor to repay the principal debt and, in some cases, declares the transfer to be unlawful, thus obligating the debtor to compensate the creditor for the losses, which logically aligns with the above construction.

d. Creditor's Position and Responsibilities

Law Number 42 of 1999 concerning Fiduciary Guarantees expressly exempts creditors from liability for the debtor's actions or omissions related to the use and transfer of collateral. The fiduciary recipient is not liable for the consequences of the fiduciary grantor's actions or omissions, whether arising from a contractual relationship or from unlawful acts related to the use and transfer of the object subject to fiduciary guarantees, as stipulated in Article 24 of Law Number 42 of 1999 concerning Fiduciary Guarantees. When a debtor unauthorizedly sells, pawns, or transfers an object to another party, the risk of unlawful action against the third party does not, in principle, pass to the creditor as long as the creditor does not participate in or approve of the act. The creditor only bears the commercial risk of loss of collateral, not the legal risk of the debtor's actions against the third party.

Objects transferred under fiduciary guarantee rights are created as collateral for the repayment of certain debts, which confers priority over other creditors, as per Article 1 number 2 in conjunction with Article 1 number 2. Article 27 paragraphs (1) and (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, conceptually, fiduciary rights follow the object (*droit de suite*) and can be enforced against a third party who receives the object, especially if the third party acts in bad faith. The Constitutional Court's decision interpreting Article 15 paragraphs (2) and (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees, when the debtor or third party refuses to hand over the object and there is no agreement regarding the breach of contract as defined in the Constitutional Court's decision on Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Changes to the procedure for executing movable objects (such as motor vehicles) can no longer be carried out unilaterally by the financing company if the debtor objects.

The creditor's responsibility in the context of an object transferred to another party is more procedural in nature, where the creditor must exercise his rights through parate execution only if there is no objection, and through the courts if there is an objection. Materially, the creditor does not bear any liability for the consequences of the debtor's actions in transferring the fiduciary guarantee object, and the creditor can even take criminal or civil legal action in the jurisdiction where the debtor is known to have transferred the fiduciary guarantee object to another party.

e. Risk Distribution between Debtor and Creditor When the Object Transfers

Normally, the risk distribution when the object of a fiduciary guarantee is transferred to another party is as follows:

The Debtor:

- 1) Violates the prohibition on transfer without the creditor's written consent as defined in Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees.
- 2) Remains fully responsible for the repayment of the principal debt even though the object has changed hands, because the fiduciary guarantee is only a supporting agreement, the termination of which does not nullify the principal agreement as defined in Article 4 in conjunction with Article 25 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees.
- 3) Bears civil risks (default and compensation) and potential criminal risks resulting from the unlawful transfer of the object, as understood in judicial practice and doctrine.

Creditors:

- 1) Retain fiduciary property rights and priority rights over the proceeds of execution pursuant to Article 27 paragraphs (1) and (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees.
- 2) Are not responsible for the consequences of the debtor's actions or negligence in transferring the object pursuant to Article 24 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

- 3) Must execute according to the legal mechanism: parate execution only if the debtor does not object and surrenders the object. If there is a refusal, an execution application must be filed with the district court in accordance with the Constitutional Court's interpretation of Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

The Supreme Court's decision in fiduciary cases (both those concerning the debtor's default and the validity of the creditor's actions) is based on the debtor's obligation to repay the debt never being extinguished simply because the collateral object is transferred to another party, while the creditor does not bear responsibility for the debtor's unlawful actions against third parties but is obliged to comply with the execution mechanism determined by law and in particular to the Constitutional Court Decision No. 18/PUU-XVII/2019 and the Constitutional Court Decision No. 2/PUU-XIX/2021, relating to the methods of executing fiduciary guarantees according to law by assessing the limits of enforcement and the role of debtor protection and creditor protection.

V. Conclusion

A fiduciary guarantee deed can serve as an effective basis for execution only if the agreement clearly regulates the relationship between the principal debt and the collateral object, the parameters for determining default, and the available execution mechanisms in accordance with Law Number 42 of 1999 concerning Fiduciary Guarantees and the Constitutional Court's interpretation of Article 15. The fiduciary guarantee remains an accessory agreement, meaning that the debtor's obligation to repay the principal debt does not disappear even if the fiduciary object is lost, transferred, or moved to another party without the creditor's consent.

The debtor, as the fiduciary provider, remains the party primarily responsible for the legal and economic consequences arising from the unauthorized transfer of the collateral object. Such transfer is prohibited under Article 23 paragraph (2) of Law Number 42 of 1999 and may constitute an unlawful act, or even give rise to criminal liability if the required legal elements are fulfilled. Meanwhile, the creditor, as the fiduciary recipient, is not responsible for losses caused by the debtor's actions or negligence, as affirmed in Article 24 of the same law. Nevertheless, the creditor retains the right to claim repayment of the debt and to exercise preferential rights over the fiduciary object or its replacement value, provided that the execution is carried out in accordance with the applicable legal procedures.

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