THE URGENCY OF ELECTRONIC REGISTRATION OF FIDUCIARY GUARANTEES BY NOTARY

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Abstract

The primary goal of this study is to explore the legal underpinnings of electronically registering fiduciary guarantees through public notaries, as well as to examine the legal implications of not electronically registering fiduciary guarantees through public notaries. This study employs normative legal research methodology and utilizes both statutory interpretation and legal conceptual analysis. This research highlights that the legal foundation for electronic registration of fiduciary guarantees is established by Minister of Law and Human Rights Regulation Number 9 of 2013, which addresses the Implementation of Electronic Fiduciary Registration, and Minister of Law and Human Rights Regulation Number 10 of 2013, which outlines the Procedures for Registering Fiduciary Security Electronically. If the fiduciary guarantee remains unregistered, it will result in legal consequences, as it will lack legal force. Although a fiduciary guarantee deed executed before a notary will be considered a notarial deed, it will not hold legal validity without registration. The notarial deed will have the same legal force as a private deed because the notary has not registered the fiduciary guarantee electronically.

Keywords: *Registration, Fiduciary Guarantee, Electronic*

1. INTRODUCTION

Registering fiduciary guarantees is crucial as it directly affects the status of the pledged asset. The registration process is essential for establishing the legal significance of the fiduciary arrangement and is a key component of the fiduciary commitment contract. While a notary witnesses the signing of the fiduciary agreement, the registration ensures that the parties involved, as well as the pledged asset, are legally recognized and protected. This process provides legal stability and assurance for all parties involved (Witanto, 2015). In a fiduciary guarantee contract, the people involved are referred to as the “trustee provider” and the “trustee recipient.” Essentially, the trustee provider is the one who owes money, while the trustee recipient is the one who is owed money. To put it simply, the debtor is the client, and the creditor is the lender or financial institution.

In the business and banking world, fiduciary guarantees provide solutions and ease for debtors. Debtors often need capital for their business operations (Pramana et al., 2022). Fiduciary warranties provide the benefit of protecting mobile assets without the need to physically transfer the collateral to the lender. This allows the debtor to continue using or benefiting from the asset for business purposes. This is different from a pawn, where the collateral must be surrendered to the creditor, causing difficulties for the debtor in running their business.

Financial institutions like banks, credit unions, and finance companies often provide funding to consumers through leasing and factoring. They usually use contracts with fiduciary guarantees to secure the collateral. However, it’s surprising that these contracts are often not formalized with a notarial document or registered with the Fiduciary Registration Office to obtain a fiduciary guarantee certificate (Grace, 2007).

Despite the importance of fiduciary registration in financing, some fiduciary guarantee agreements remain unregistered due to uncertainties about fiduciary guarantees. The Fiduciary Guarantee Law lacks clear regulations regarding the time frame for fiduciary guarantees and the registration of fiduciary objects, resulting in uncertainties in these areas. Additionally, reasons for not registering fiduciary guarantees include short credit terms (less than a year), low loan amounts, and high costs of creating notarial deeds (Abdul Kadir & Murniati, 2010).

Many banks frequently use the term "secured by fiduciary guarantee" in financial contracts without formally documenting it through a notarized deed or registering it with the Fiduciary Registration Office to obtain certification. However, recent technological advancements and procedural updates from the Ministry of Law and Human Rights have simplified the registration process. This now includes the option for electronic registration, which is available exclusively to notaries.

2. RESEARCH METHODS

The method of research utilized in this publication is normative legal research. Normative legal research involves examining regulations related to the electronic registration of fiduciary guarantees by notaries. Additionally, the research includes a review of bibliographic sources and tertiary legal materials such as dictionaries. The research employs two approaches: the statutory approach and the conceptual approach (Nasution, 2008). The statutory approach analyzes the legal basis for electronic registration of fiduciary guarantees, while the conceptual approach examines the legal consequences of failing to register fiduciary guarantees electronically through notaries.

3. RESULTS AND DISCUSSION

3.1. Legal Basis for Electronic Registration of Fiduciary Guarantees

The legal basis for registering fiduciary guarantees is outlined in Law No. 42 of 1999 concerning Fiduciary Guarantees. According to Article 1, paragraph (2), “Fiduciary Guarantee is a type of security interest over both tangible and intangible movable assets, as well as immovable assets like buildings that are exempt from mortgage rights, as defined in Law No. 4 of 1996 on Mortgage Rights. The assets remain under the control of the Fiduciary Grantor and serve as collateral for specific debts, giving the Fiduciary Recipient priority over other creditors.” This regulation establishes the legal framework for debtors who offer assets as collateral, whether movable or immovable, provided they are not subject to mortgage rights.

Article 11 of the Fiduciary Guarantee Law highlights the importance of registration for a fiduciary guarantee. It stipulates that items under a fiduciary guarantee must be recorded to uphold the principle of transparency (Kamelo, 2006). Before the introduction of the existing electronic registration system for fiduciary guarantees, fiduciary guarantees were registered manually following the Fiduciary Guarantee Law.

Government Regulation No. 86 of 2000 outlines the rules and costs for registering fiduciary guarantees. This regulation details the steps for registering fiduciary guarantees, issuing certificates, making amendments to certificates, and outlines the related expenses. To register a fiduciary guarantee, a copy of the notarized deed specifying the imposition of the guarantee is required.

Minister of Law and Human Rights Regulation No. 9 of 2013 and Minister of Law and Human Rights Regulation No. 10 of 2013 outline additional legal foundations for the electronic registration of fiduciary guarantees. Establishing a fiduciary guarantee through a notarial deed is recognized as legally binding. The notarial deed serves to finalize the legal transaction and provides proof of the resolution of the specified debts outlined in the fiduciary guarantee (Junuchandrasari, 2020). Therefore, registering fiduciary guarantees is crucial for ensuring legal certainty for creditors and preventing fraudulent behaviour by debtors (Adnyaswari, 2018).

According to Article 5, paragraph (1) of the Fiduciary Guarantee Law, "The imposition of an object with a fiduciary guarantee must be documented with a Notarial Deed in Indonesian, which constitutes the fiduciary guarantee deed." The clause suggests that in order to place a fiduciary guarantee on an object, a notarial deed must be used as a basis or support for any legal action. As a result, the Fiduciary Guarantee Law only applies to fiduciary guarantee agreements that have been established with a notarial deed as a prerequisite.

The introduction of electronic registration for fiduciary guarantees aims to enhance the legal process by making it simpler, more efficient, cost-effective, and user-friendly. Consequently, fiduciary guarantee registration is now conducted electronically.

3.2. Legal Consequences of Notaries Failing to Register Fiduciary Guarantees Electronically

The Fiduciary Guarantee Law mandates the registration of assets under a fiduciary guarantee. Failure to register a fiduciary guarantee means missing out on the advantages of registration, such as:

a. Priority Right (Preference): The priority status is regarding the funds gained from the enforcement process. The connection to Article 1132 of the Civil Code becomes evident, as it states that creditors are entitled to a share of the proceeds from the sale of the debtor's assets. By requiring a trust guarantee, the creditor is given priority in receiving the money from selling certain assets owned by the debtor.
b. Executory Power: Execution of the fiduciary guarantee can be done using the official document called the "grosse" or with the enforcement title of the fiduciary guarantee certificate as specified in the Fiduciary Guarantee Law. The fiduciary guarantee certificate has the same legal power as a finalized court ruling. This means that executing the fiduciary guarantee is similar to carrying out a court ruling. The recipient of the fiduciary can reclaim the collateral object if the borrower or guarantor fails to meet their obligations, without waiting for a court decision.

Not registering a fiduciary guarantee due to expensive fees can result in legal ramifications. The lack of legal force in the fiduciary guarantee deed is one of the repercussions of not registering it electronically (Virgayanti & Karma, 2022). If the fiduciary guarantee deed lacks legal force, it is equivalent to a privately made deed. A privately made deed obviously has a different legal standing compared to a notarial deed. A notarial deed has perfect legal force, while a privately made deed does not (Sudira, 2022). A privately made deed only applies to the parties who created it, namely the debtor and the creditor.

Registering a fiduciary guarantee is crucial because it provides legal protection that would otherwise be unavailable without registration. The party that does not receive legal

protection is the fiduciary recipient or creditor (Febriana et al., 2023). The person who receives a fiduciary promise should make sure that it is properly documented. According to Article 11, section (1) of the Fiduciary Guarantee Law, "assets under a fiduciary guarantee must be registered. If the fiduciary guarantee is not registered, it is considered as if it never existed." Additionally, Article 14, section (3) of the Fiduciary Guarantee Law states that "a fiduciary guarantee takes effect on the day it is recorded in the fiduciary register." Registering and recording the fiduciary guarantee establishes the proprietary rights of the fiduciary holder, adhering to the principle of transparency and making it clear to all parties that the ownership of the asset has been transferred to the creditor. Electronic registration of fiduciary guarantees is a crucial requirement for their execution and must be followed.

If a fiduciary guarantee is not registered and a credit default occurs, the agreement may only be recognized as a private deed, which does not have the authority to directly seize the collateral. This entails no longer having the top position among creditors when it comes to receiving payment from the proceeds of the collateral's sale. The problem occurs when the borrower fails to make payments or defaults on the loan, making it difficult for the lender to retrieve the collateral directly. Therefore, electronic registration of fiduciary guarantees is crucial for ensuring legal certainty for the fiduciary recipient. Proper registration protects the creditor by providing a legal means to enforce the guarantee and reclaim the collateral in case of default.

4. CONCLUSION

The discussion makes it clear that the legal basis for the electronic registration of fiduciary guarantees is established in Minister of Law and Human Rights Regulation No. 9 of 2013, which addresses the "Implementation of Electronic Registration of Fiduciary Guarantees", and Minister of Law and Human Rights Regulation No. 10 of 2013, which outlines the "Protocols for Electronic Registration of Fiduciary Guarantees."

If a fiduciary guarantee is not officially recorded, it will not be legally binding. A fiduciary guarantee deed that is notarized will become a notarial deed, but it will not have legal validity. The legal force in question is that if a dispute arises later, the notarial deed will have the same legal standing as a privately made deed because the notary has not yet registered the fiduciary guarantee electronically. Therefore, a notarized document that has not been officially recorded using electronic registration of fiduciary assurances lacks the authority to be enforced. It is recommended that the government impose sanctions on notaries who fail to register fiduciary guarantees electronically. In addition, creditors should be required to register fiduciary guarantees electronically to ensure they receive legal certainty, both in terms of preferential rights and executorial rights.

REFERENCES

Abdul Kadir, M., & Murniati, R. (2010). *Lembaga keuangan dan Pembiayaan, PT*. Citra Aditya Bakti.

Adnyaswari, N. N. A., & Putrawan, S. (2018). Kekuatan Hukum Akta Jaminan Fidusia Yang Tidak Didaftarkan. *Kertha Semaya: Journal Ilmu Hukum*, *6*(12), 1–14.

Febriana, A., Siddiq, N. K., & Mandala, O. S. (2023). Kajian Yuridis Non-Figure Token (NFT) Menjadi Jaminan Kebendaan di Indonesia. *Jurnal Fundamental Justice*, 80–95.

Grace, N. (2007). Eksekusi Terhadap Benda Objek Perjanjian Fidusia dengan Akta Di bawah Tangan. *Dalam: Http://Www. Mediakonsumen. Com/Artikel*, *1164*.

Junuchandrasari, A. A., & Wiryawan, I. W. (2020). Perlindungan Hukum Terhadap Penerima Fidusia Apabila Benda Jaminan Fidusia Musnah Dalam Perjanjian Kredit. *Jurnal Kertha Semaya*, *8*(5).

Kamelo, T., & Fidusia, H. J. (2006). *Suatu Kebutuhan yang didambakan, Bandung: PT*. Alumni.

Nasution, B. J. (2008). *Metode Penelitian Ilmu Hukum, Mandar Maju, Cetakan kesatu*. Bandung.

Pramana, A. A. G. R., Arini, D. G. D., & Mahendrawati, N. L. M. (2022). Pelaksanaan Perjanjian Kredit Dengan Jaminan Fidusia PT. BPR Bank Daerah Gianyar Kabupaten Gianyar. *Jurnal Preferensi Hukum*, *3*(3), 517–523.

Sudira, I. M. (2022). Spatial Regulation of Protected Rice Fields through A Notary Law Approach on Freehold Title Splitzing. *Jurnal Hukum Prasada*, *9*(2), 98–106.

Virgayanti, N. K. S., & Karma, N. M. S. (2022). Kedudukan Hukum Akta Jaminan Fidusia yang ditandatangan oleh Para Pihak Diluar Wilayah Kerja Notaris di Denpasar. *Jurnal Preferensi Hukum*, *3*(2), 419–423.

Witanto, D. Y. (2015). Hukum Jaminan Fidusia dalam Perjanjijan Pembiayaan Konsumen, Bandung, CV. *Mandar Maju*.

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