

Fiduciary Shares as Collateral in Granting Credit

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Abstract

In a debt agreement, of course the existence of collateral is very important so that the creditor can feel safe about the loan given to the debtor. Shares are one of the valuable and valuable intangible moving objects. Arrangements relating to shares are regulated in Law Number 40 of 2007 concerning Limited Liability Companies. Although it is not yet known the exact and clear definition of shares in Law Number 40 of 2007 concerning Limited Liability Companies, the regulation provides several provisions which are presumably related to shares. One of the interesting guarantees discussed in relation to shares is fiduciary. Fiduciary provides several arrangements related to fiduciary based on Law Number 42 of 1999 concerning Fiduciary Guarantees.

Keywords: Fiduciary, Shares, Collateral, Credit, Goods



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INTRODUCTION

With reference to concepts in banking law, the meaning of the terms guarantee and collateral are distinguished. Law Number 14 of 1967 concerning Banking Fundamentals does not recognize the term collateral, but only regulates guarantees. Furthermore, Law Number 7 of 1992 concerning Banking (hereinafter referred to as Law 7/1992) as amended by Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as Law 10 /1998) provides arrangements relating to collateral. In Article I number 23 Law 10/1998 provides arrangements regarding collateral by stipulating that: "Collateral is additional collateral that is submitted by a Debtor Customer to a bank in the context of providing credit facilities or financing based on Sharia Principles."

If you look at this arrangement, you can see the meaning of the terms guarantee and collateral as two different things, with collateral being part of the guarantee. In transactions carried out by creditors or debtors, of course there will be goods that are used as collateral in the debt agreement between them. This is necessary so that the creditor can obtain a sense of security over the debt owned by the debtor. If one day the creditor experiences bankruptcy, then the collateral provided will certainly be used by the creditor to pay the debts owed by the debtor to him.

One of the arrangements regarding guarantees is also regulated based on the Civil Code (KUHPerdata). In Article 1131 of the Civil Code, it is regulated regarding the definition relating to guarantees which stipulates that: "All movable and immovable objects belonging to the debtor, both existing and future, serve as collateral for the debtor's individual commitments."

Then, Article 1132 of the Civil Code further stipulates: "These goods become joint guarantees for all creditors against which the proceeds from the sale of these goods are divided according to the ratio of their respective receivables unless there are valid reasons for priority among the creditors." Based on the arrangements provided by the two regulations, it appears that there are two types of guarantees, namely general guarantees and special guarantees (Meliala: 2015). Furthermore, special guarantees can be divided into material guarantees which can be in the form of pledges, fiduciaries, mortgages, mortgages, and warehouse receipts,

as well as individual guarantees which can be in the form of guarantee agreements, liability agreements, and guarantee agreements (Meliala: 2015).

In banking law, guarantees are also a common thing to do, especially when entering into credit agreements. Furthermore, the objects that can be pledged are very diverse. The same applies to how guarantees can be made. One that is suitable for discussion is related to stock guarantees. Arrangements relating to shares can be seen in Article 31 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPT) which stipulates that: "The authorized capital of a Company consists of the entire nominal value of shares."

Referring to the provisions contained in Article 31 paragraph (1) UUPT, it can be seen that shares are basically the nominal value of the authorized capital of a company. Therefore, it is clear that stocks are one of the most valuable assets. However, shares are intangible objects and their value can continue to fluctuate. This then raises questions related to stock fiduciaries as guarantees in granting credit.

One method of guarantee that seems to be attractive to be associated with stocks is fiduciary. Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the Fiduciary Guarantee Law) is the legal basis relating to fiduciaries in Indonesia. Article 1 point 1 of the Fiduciary Guarantee Law provides arrangements related to the definition of Fiduciary by stipulating that: "Fiduciary 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."

Furthermore, Article 1 point 2 of the Fiduciary Guarantee Law provides arrangements related to Fiduciary Guarantees by stipulating that: "Fiduciary Guarantee is a guarantee right over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be burdened with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the possession of the Fiduciary Giver, as collateral for repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors."

If you look at the arrangements regarding the fiduciary, then there will be questions relating to fiduciary shares as collateral in granting credit. Referring to this explanation, it will be interesting to discuss further in this regard. Based on the background previously described, several problem formulations can be found that can be discussed, namely: Can share fiduciary be used as a form of guarantee in granting credit? How is the fiduciary process of shares as collateral in granting credit?

RESEARCH METHODS

In conducting this research, normative juridical research methods were used. This research was conducted by examining library materials or secondary data (Soekanto & Mamudji: 2010). That is, in conducting research, the author will focus more on research on legislation, the findings of empirical law and other sciences without changing the character of law as a normative science (Efendi & Ibrahim: 2018). Therefore, the author will focus more research on the Civil Code, UUPT, UU 7/1992, and UU 10/1998. Research will basically be analytical descriptive in nature, namely research that provides a description or provides an overview of the object to be studied using data or samples that have been collected as they are without conducting analysis and forming conclusions that can apply to the public (Sugiyono: 2008). In connection with the approach method in this study. the author will use a statutory approach, a conceptual approach, and an analytical approach (Efendi & Ibrahim: 2018).

RESEARCH RESULTS AND DISCUSSION

Fiduciary Shares As Collateral in Granting Credit

In UUPT, there is no clear and firm regulation regarding the definition of shares. Therefore, it is necessary to research science and other literature to find explanations or definitions of stocks. When referring to the Big Indonesian Dictionary, it can be seen that shares are part of; share; sero (regarding capital), proof of ownership of a limited liability company's share of capital that gives rights to dividends and others according to the size of paid-up capital, rights owned by people (shareholders) against the company thanks to the surrender of a share of capital so that they are considered to share in ownership and control. Based on the opinion presented by John Downes and Jordan Elliot Goodman, it is known that shares are a unit of equity ownership in a company (Downes & Goodman: 1994). More clearly, Article 1 point c of the Decree of the Board of Directors of Bank Indonesia Number 24/32/Kep/Dir, dated 12 August 1991 concerning Credit to Securities Companies and Credit Collateralized by Shares stipulates that: "Shares are proof of ownership of a limited liability company whether traded in the Capital Market or not."

Based on the explanations related to these shares, it is clear that basically shares are a unit of a person's ownership of a limited liability company. When referring to the understanding of these shares, it can be seen that basically shares are valuable objects and have a fairly high economic value. However, based on this understanding it can also be understood that basically shares are movable objects that are intangible. This is because shares can be transferred easily, but shares have no form. This is then interesting to discuss further, regarding whether or not shares can be used as collateral in granting credit.

In a credit agreement or debt agreement, usually the creditor will ask for a certain guarantee given by the debtor as a form of security for the loan made by the creditor to the debtor. Basically in carrying out a guarantee, the object that is pledged must be an object that has value and has the right to transfer ownership of it (Suparji: 2020). In this regard, it would be interesting to find out more whether or not shares could be used as collateral, particularly as fiduciary objects.

Article 1 point 1 of the Fiduciary Guarantee Law provides arrangements related to the definition of Fiduciary by stipulating that: "Fiduciary 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." Furthermore, Article 1 point 2 of the Fiduciary Guarantee Law provides arrangements related to Fiduciary Guarantees by stipulating that: "Fiduciary Guarantee is a guarantee right over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be burdened with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the possession of the Fiduciary Giver, as collateral for repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors."

Based on the definition given by the Fiduciary Guarantee Law relating to Fiduciary and Fiduciary Guarantees, it appears that the things that are important for an object to become a Fiduciary object are that the object must be transferable, be a movable object, both tangible and intangible, or an immovable object. against which no mortgage is imposed. Of course, stocks meet these criteria because stocks are intangible movable objects. With regard to guaranteeing shares with a fiduciary, of course it would be appropriate to refer to the provisions stipulated under the Company Law. Article 60 UUPT regulates that:

- 1) "Shares are movable objects and give the rights as referred to in Article 52 to their owners.
- 2) Shares can be pledged as collateral by pledge or fiduciary guarantee as long as it is not specified otherwise in the articles of association.

- 3) Pledge of shares or fiduciary guarantee of shares that have been registered in accordance with the provisions of laws and regulations must be recorded in the register of shareholders and the special register as referred to in Article 50.
- 4) Voting rights over shares pledged as collateral by pledge or fiduciary guarantee remain with the shareholders."

If you look at the arrangements contained in Article 60 paragraph (1) UUPT, it can be seen that shares are objects. This causes shareholders to have material rights to these shares. Furthermore, referring to Article 60 paragraph (2) UUPT, it appears that shares can be a fiduciary guarantee. Based on this arrangement, it becomes clear and firm that shares can be made fiduciary. This can be done if the articles of association do not stipulate other than these arrangements. Therefore, it is known that shares can be made fiduciary.

Share Fiduciary Process as Collateral in Granting Credit

As previously explained, it has become clear and unequivocal that fiduciaries can act on shares. However, it is also necessary to know and understand more about the share fiduciary process as collateral in granting credit. This is important so that the fiduciary shares carried out can be in accordance with the legal corridors and applicable laws and regulations. The Fiduciary Guarantee Law provides arrangements regarding the encumbrance of an object with fiduciary. Article 5 of the Fiduciary Guarantee Law stipulates that: "(1) The encumbrance of objects with a Fiduciary Guarantee is made with a notarial deed in Indonesian and is a Fiduciary Guarantee deed. (2) For the making of the Fiduciary Guarantee deed as referred to in paragraph (1), a fee will be charged, the amount of which will be regulated further in a Government Regulation."

Based on the provisions contained in Article 5 paragraph (1) of the Fiduciary Guarantee Law, it is known that the imposition of objects, in this case shares with fiduciary guarantees, needs to be made with a notarial deed in Indonesian which will later be in the form of a Fiduciary Guarantee deed. In connection with this deed, it is further regulated in Article 6 of the Fiduciary Guarantee Law which stipulates that: "The Fiduciary Guarantee Deed as referred to in Article 5 at least contains: the identity of the Fiduciary Giver and Recipient; fiduciary guaranteed principal agreement data; a description of the object that is the object of the Fiduciary Guarantee; guarantee value; and the value of objects that are the object of the Fiduciary Guarantee."

Then, the shares to be guaranteed by fiduciary must be registered. This is in line with the provisions contained in Article 11 of the Fiduciary Guarantee Law, which stipulates that: "(1) Objects burdened with Fiduciary Guarantees must be registered. (2) In the event that the object encumbered with the Fiduciary Guarantee is outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) will still apply." Based on the provisions contained in Article 11 paragraph (1) of the Fiduciary Security Law, it is clear and unequivocal that shares charged with Fiduciary Guarantees need to be registered. In this regard, there is a further regulation in Article 12 paragraph (1) of the Fiduciary Guarantee Law which stipulates that: "Registration of Fiduciary Guarantees as referred to in Article 11 paragraph (1) is carried out at the Fiduciary Registration Office."

Referring to the provisions stipulated in Article 12 paragraph (1) of the Fiduciary Guarantee Law, it is clear that fiduciary guarantees are carried out at the Fiduciary Registration Office. Furthermore, Article 14 of the Fiduciary Guarantee Law regulates the issuance and submission of Fiduciary Guarantee Certificates, which stipulates that:

- 1) The Fiduciary Registration Office issues and delivers to the Fiduciary Recipient a Fiduciary Guarantee Certificate on the same date as the date of receipt of the application for registration.
- 2) The Fiduciary Guarantee Certificate which is a copy of the Fiduciary Register Book contains notes on the matters referred to in Article 13 paragraph (2).
- 3) The Fiduciary Guarantee is born on the same date as the date when the Fiduciary Guarantee is recorded in the Fiduciary Register Book."

It appears that clearly Article 14 of the Fiduciary Guarantee Law provides clear and firm regulations relating to Fiduciary Guarantee Certificates and the creation of fiduciaries. In addition to the provisions contained in the Fiduciary Guarantee Law, in the implementation of a share fiduciary, of course, it is also necessary to pay attention to the provisions contained in the Company Law. Article 60 paragraph (3) of the Company Law provides for provisions regarding the obligations that need to be fulfilled in conducting a fiduciary share, namely by stipulating that: specifically as referred to in Article 50."

Based on the arrangements provided for in Article 60 paragraph (3) of the Company Law, it appears that when the fiduciary registration of shares has been completed in accordance with the provisions in the Fiduciary Guarantee Law, the guarantee needs to be recorded in the register of shareholders and a special register. Of course this is important to do so that in the guarantee there is legal certainty for shareholders and for the parties so that it is hoped that later there will be no problems related to this matter.

CONCLUSION

Based on the explanation that has been explained, it can be understood that fiduciary shares as collateral in granting credit can be carried out. This is based on the provisions contained in Article 60 paragraph (2) UUPT. Furthermore, the guarantee of shares with a fiduciary needs to be made in a notarial deed. Shares that are registered as fiduciary guarantees also need to be registered at the Fiduciary Registration Office so that later a Fiduciary Guarantee Certificate can be issued indicating the time of birth of the fiduciary.

BIBLIOGRAPHY

- Downes, J. dan Goodman, Jordan. E. 1994. Kamus Istilah Keuangan dan Investasi. Jakarta: Elix Media Komputindo.
- Efendi, J. dan Ibrahim, J. 2018. Metode Penelitian Hukum Normatif dan Empiris. Jakarta: Kencana.
- Kitab Undang-Undang Hukum Perdata.
- Meliala, D. S. 2015. Perkembangan Hukum Perdata Tentang Benda Dan Hukum Perikatan. Bandung: Nuansa Aulia.
- Soekanto, S. dan Mamudji, S. 2010. Penelitian Hukum Normatif Suatu Tinjauan Singkat. Jakarta: Raja Grafindo Persada.
- Sugiyono. 2009. Metode Penelitian Kuantitatif, Kualitatif dan R&D. Bandung: Alfabeta.
- Suparji. 2020. Jaminan Kebendaan Dalam Pembiayaan. Jakarta: UAI Press.
- Surat Keputusan Direksi Bank Indonesia Nomor 24/32/Kep/Dir, tanggal 12 Agustus 1991 tentang Kredit Kepada Perusahaan Sekuritas Dan Kredit Dengan Agunan Saham.
- Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 Tentang Perbankan.
- Undang-Undang Nomor 14 Tahun 1967 tentang Pokok-Pokok Perbankan.
- Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas.

Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia.
Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan.