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REFORMULATION ON FIDUCIA SECURITY ENFORCEMENT LAW IN THE FRAMEWORK OF EASE OF DOING BUSINESS

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Abstract

Banks and non-bank financial institutions as distributors of funds to the public through credit (financing) to customers (debtors) using non possessory movable goods (known as fiducia security) as security. The existence of fiducia security has problems in terms of the enforcement that affect the ease of doing business. This research was conducted with the aim of analyzing the rules of enforcement of fiducia security and the implementation of these rules, starting from the problems that occur in the field, the factors that cause these problems to occur and the proposed solutions. The final objective of this research is to find an ideal formulation (reformulation) of the rules of enforcement of fiducia security in line with the needs of the business practice, which can be implemented so as to support the ease of doing business. The research method used is normative legal research with several approaches, namely statutory, conceptual, historical, comparative, and case approaches. The results of the research show that there is a need for improvement in the fiducia security enforcement system starting from the registration stage to the enforcement. The ultimate goal of the improvement is the creation of a fast, efficient and low-cost fiducia security enforcement system. The creation of the ultimate goal of improvement will have an impact on business ease, where from the debtor's perspective, it will be easy to access financing, while from the side of banks and non-bank financial institutions there would be a certainty in relation to the repayment of the channeled financing, which ultimately leads to the ease of doing business for all parties.

Keywords: *Fiducia Security; Ease of Doing Business; Bank; Financial Institution*

1. INTRODUCTION

Financing institutions, which include banks and non-bank financial institutions, have an important function as a distributor of funds to the public, by providing credit (financing) to customers (debtors). The security institution is a necessity for economic players and business players, where the provision of material security will strengthen the agreement between the debtor and the creditor for the provided financing. Collateral goods as a legal institution gives birth to legal principles regulated in civil law which have an important position in economic law.[1]

The existence of collateral goods opens access to low-interest financing (credit) and provides opportunities for businesses, especially micro, small and medium enterprises to gain access to financing by pledging the goods they have. The pledged goods can be in the form of movable goods and/or immovable goods. In the context of this research conducted, the researcher focuses on movable goods which pledge uses a fiducia security (non possessory) mechanism.

[1] Sri Redjeki Hartono, *Hukum Ekonomi Indonesia* (Malang: Banyumedia Indonesia Publishing, 2007), 163–164.

Fiducia security, as one of the security interest, is recognized in Indonesian positive law. Where movable goods, whether tangible or intangible, can be used as collateral by debtors for loans they obtain from creditors, but at the same time, debtors can still use these goods in carrying out their business and obtain results from the use of the goods they give as security.

As security interest over movable goods without possession (non-possessory), fiducia security in the Indonesian legal system is based on the concept that ownership of the secured movable goods has been transferred in trust to the creditor, where the owner of the movable goods is still allowed to control and use the movable goods for his needs. [2]

Data shows that best practices in developed countries have positioned non possessory movable goods without creditor control as an important instrument for obtaining financing at competitive costs. For example in the United States, financing secured by movable goods, accounts for 70% of the total small business financing.[3] Asset-based financing has grown rapidly since the 70s and the volume of movable asset-based financing has grown 40-fold in the last 30 years, with the movable asset-based financing industry growing at an average annual rate of 12% over the last 10 years.[4]

In its implementation, the fiducia security regulated in Law Number 42 of 1999 on Fiducia Security ("Fiducia Security Law") has many problems, especially during the enforcement of fiducia security objects. The Constitutional Court of the Republic of Indonesia ("Constitutional Court") Decision Number 18/PUU-XVII/2019 ("Constitutional Court Decision") in conjunction with Constitutional Court Decision Number 2/PUU-XIX/2021 emphasizes the existence of problems in the enforcement of fiducia security, as well as sent signals that the enforcement of fiducia security can be long, complicated and protracted, and possibly costly, where there is the potential for deviant behavior (moral hazard) for debtors who have bad faith/mischievous to use the Constitutional Court Decision as an excuse to avoid obligations.

This fact will ultimately affect financing institutions to disburse financing to debtors due to the risk of recovering payments for the financing provided, which will ultimately have an impact on the ease of access to financing for prospective debtors, and the desire of financing institutions to provide financing using fiducia security-based.

It should be noted that prior to the Constitutional Court's decision, the enforcement of fiducia security had been faced with many problems both from the debtor's side and from the creditor's side, including:

a. The object of fiducia security is damaged, or lost, or changes hands without the knowledge of the creditor;
b. the debtor's attempt to block the enforcement of the fiducia security through resistance to the court, or criminal reporting to the police;

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[2] Article 1(1) of Law Number 42 of 1999 on Fiducia Security.
[3] Alejandro Alvarez de la Campa et al., *Secured Transactions Systems and Collateral Registries* (Washington, D.C.: World Bank Group, 2010), https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/755831486450371941/secured-transactions-systems-and-collateral-registries, 7.
[4] *Commercial Finance Association Annual Asset-Based Lending and Factoring Surveys* (2005).

c. the practice of requiring a court order as a condition of enforcement requested by auction officials at several State Wealth and Auction Service Offices (*Kantor Pelayanan Kekayaan Negara dan Lelang*/"KPKNL");
d. The use of third parties (debt collectors) to forcibly withdraw fiducia objects that is still in the hands of the fiducia grantor due to the fiducia grantor's unwillingness to voluntarily surrender the fiducia goods;
e. the existence of double fiducia;
f. decrease in value or reduction of fiducia goods, especially goods in the form of stock of trade goods or raw materials;
g. Some courts decision that negates the existence of fiducia security.

From the problems mentioned above, the reformulation of the law on the enforcement of fiducia security is important and necessary for many parties, both creditors, debtors, and even the state, and therefore the existence of a law on the enforcement of fiducia security that fulfills practical aspects to facilitate access to financing and economic development is needed.

2. RESEARCH METHODS

In this research, the research method uses normative law. Normative legal research is research whose object is legal norms, both documented, declared and implemented. This normative legal research is intended to use only secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials.[5]

This research combines several approaches, namely legislative, conceptual, historical, comparative, and case approaches. It is expected that by combining the above approaches, it is expected to be able to obtain a comprehensive picture of the existing problems, which will then be used as input in explaining legal norms as well as reformulation of these legal norms if necessary to meet the needs of the community in the context of ease of doing business.

Through the statute approach, this research will see the law as a closed system that has comprehensive characteristics (the legal norms in it are logically related to one another), all inclusive (the collection of legal norms is sufficient to accommodate existing legal problems, so that there will be no lack of law), and systematic (linked between one another and arranged hierarchically).[6]

The conceptual approach starts from the views and doctrines that develop in legal science. By looking at these views and doctrines, legal notions, legal concepts will be found, in accordance with the problems or legal content material to be studied.

The historical approach is used to look at the laws and regulations and their historical background. By knowing the historical background of the legislation, the stakeholders, especially the Financing Institution, debtors, judges, prosecutors, police, advocates and/or interested parties will have the same interpretation of the legal issues studied, namely the enforcement of collateral (fiducia) associated with ease of doing business.

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[5] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Rajawali Press, 1990), 11.
[6] Harjono, *Penelitian Hukum Pada Kajian Hukum Murni* (Lecture material for Master of Law Program Universitas Airlangga, Surabaya), 3 in Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, revision edition (Malang: Bayumedia Publishing, 2008), 303.

A comparative approach is used to compare the content of other countries' legal rules that are specific to the legal rules under study. In this research, the legal rules of fiducia security in Indonesia will be compared with the legal rules of the secured transactions (in the form of non possessory - fiducia) applied by the Netherlands and Germany.

The case approach is used to study the application of legal norms in legal practice. Research is conducted on cases that have been decided by the court to obtain an overview of the impact of the dimension of norming in a rule of law with legal practice, where the results can be used as input in explaining legal norms.

In this research, the theoretical basis used is Lawrence Friedman's Legal System Theory and Development Law Theory according to Mochtar Kusumaatmadja.

3. ANALYSIS AND DISCUSSION

3.1. Regulations on the Enforcement of Fiducia Security in Indonesia

Article 1 paragraph (2) of the Fiducia Security Law defines fiducia security as a security right over movable goods, both tangible and intangible and immovable goods, especially buildings that cannot be encumbered by Mortgage Rights as referred to in the Law No. 4 of 1996 concerning Mortgage Rights on Land and Goods Related to Land (*Undang-Undang Hak Tanggungan*/"UUHT"), which remains in the control of the fiducia holder, as collateral for certain repayments, which gives priority to the fiducia holder against other creditors. From here, there are several important elements of the Fiducia Security including:[7]

a. Security Rights

A security right is a right granted to a creditor in the form of a better position than other creditors. What is meant by other creditors are other creditors who do not have security rights, both property security rights and personal security rights.[8] The security right in this case is a property security right. [9]

b. As Collateral

The transfer of ownership rights on the secured good is only intended as a security to give the creditor a better position. Although there are problems related to the concept of transfer of ownership rights for security purposes, to prevent overlap in the legal system, the construction of transfer of ownership orights for security purpose is made so that it looks different from the Pledge Institution.[10]

c. For the Repayment of a Debt

The fiducia agreement is also an ancillary agreement in addition to the main credit agreement.[11] This means that the fiducia security agreement cannot stand

[7] J. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan Fidusia* (Bandung: Citra Aditya Bakti, 2002), 186.
[8] Satrio, *Hukum Jaminan,* 188.
[9] Djaja S. Meliala, *Perkembangan Hukum Perdata About Benda dan Hukum Perikatan* (Bandung: Penerbit Nuansa Aulia, 2015), 39.
[10] Satrio, *Hukum Jaminan*, 190.
[11] Sri Soedewi Masjchun Sofwan, *Hukum Jaminan di Indonesia: Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan* (Yogyakarta, Liberty, 1980), 76.

alone, but the fiducia security agreement is only an ancillary agreement, with the credit agreement as the main obligation. If the credit agreement is terminated, the fiducia security agreement is also terminated.[12] It can be concluded that a fiducia security exists only to secure the repayment of a debt.[13]

d. Preferred position

   Priority means precedence in taking repayment of the proceeds from the enforcement of the fiducia security object. This is stated in Article 27 of the Fiducia Security Law, which states that the fiducia holder has precedence over other creditors.[14]

   In the event that the fiducia grantor becomes bankrupt, the fiducia goods do not fall into the bankruptcy estate, and the position of the creditor (fiducia holder) becomes a separatist creditor, and can execute its rights as if bankruptcy had not occurred. [15]

Specifically, the enforcement of fiducia security is regulated in Articles 29 through 34 of the Fiducia Security Law. Based on Article 29 paragraph (1) of the Fiducia Security Law, there are 3 ways to execute fiducia goods:[16]

a. Enforcement of *titel eksekutorial* by the fiducia holder. What is meant by *titel eksekutorial* (enforcement title) is a writing containing the enforcement of a court decision, which provides the basis for confiscation and auction of confiscation goods (*executorial verkoop*) without intermediary judges;
b. Sale of the fiducia goods under the authority of the fiducia holder himself through a public auction and take repayment of the said debts from the proceeds of the sale; and
c. A private sale is conducted based on the agreement of the fiducia grantor and the fiducia holder if the highest price favorable to the parties can be obtained in this way. This sale is conducted after a period of 1 month has passed since it was notified in writing by the fiducia grantor and the fiducia holder to the interested party and announced in at least 2 newspapers circulating in the area concerned.

There are many cases where creditors often have difficulty dealing with debtors who default and execute their collateral. In the end, creditors often hire the services of third parties to carry out direct collection and enforcement so that the resolution of bad credit is resolved. The Fiducia Security Law does not mention that creditors can use the services of third parties in the collection and enforcement of fiducia goods.

The Financial Services Authority (*Otoritas Jasa Keuangan*/"OJK") in OJK Regulation Number 35/POJK.05/2018 on the Implementation of Financing Company Business ("POJK 35/2018"), states that creditors may cooperate with third parties for

[12] Meliala, *Perkembangan Hukum Perdata*. 44.
[13] Satrio, *Hukum Jaminan*, 190.
[14] Satrio, *Hukum Jaminan*, 191.
[15] Article 55 (1) Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations.
[16] Salim H.S., *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: Raja Grafindo Persada, 2004), 90.

the collection of defaulted debtors.[17] Creditors and third parties are required to put the cooperation in the form of written agreement.[18] Regarding the creditor's responsibility for the implementation of collection cooperation by using the services of collection personnel, the creditor is fully responsible.[19]

In terms of cooperation with third parties, creditors cannot arbitrarily enter into such cooperation contracts. Article 48 paragraph (3) of POJK 35/2018 states that the third party referred must fulfill the following conditions:

a. The said third party is a legal entity;
b. The said third party has a license from the authorized agency; and
c. The said third party has human resources who have obtained certification in the field of debt collection from the Professional Certification Institute in the field of financing.

In addition, the creditor can request by filling written request for the assistance fiducia security enforcement to the police office where the enforcement is carried out.[20] The creditor in this case does not have to go directly to the field to carry out the enforcement, but can hire a third party by attaching a fiducia security enforcement cooperation agreement.[21]

From the comparative research on Germany and the Netherlands, in general, both countries recognize the concept of non possessory security over movable goods. There are some similarities between the norms of non possessory security over movable goods that apply in Germany and the Netherlands with fiducia security law in Indonesia, but there are also some differences between them:

a. Germany
    1. The regulation of non possessory security over movable goods is not explicitly regulated in the *Burgerliches Gesetzbuch* ("BGB"/Civil Law Book), but there are rules in the BGB that refer to the form of non possessory security over movable goods which is further recognized through court decisions;
    2. Does not require publication of the existence of the non possessory security over movable goods;
    3. Prohibition of over collateralization;
    4. For certain goods, a court decision is required for enforcement, but in practice (for convenience) this requirement is not made.

[17] Article 48 of Financial Services Authority Regulation Number 35/POJK.05/2018 on Implementation of Financing Company Business.
[18] Article 48(1) of Financial Services Authority Regulation Number 35/POJK.05/2018 on Implementation of Financing Company Business.
[19] Article 48(4) of Financial Services Authority Regulation Number 35/POJK.05/2018 on Implementation of Financing Company Business.
[20] Article 7 of Regulation of the Chief of Police of the Republic of Indonesia Number 8 of 2011 concerning Securing the Enforcement of Fiducia Security.
[21] Article 9 of Regulation of the Chief of Police of the Republic of Indonesia Number 8 of 2011 concerning Securing the Enforcement of Fiducia Security.

b. Netherlands
   1. The institution of fiducia security has been banned since the *Nieuw Burgerlijk Wetboek* ("NBW"/New Civil Law), and replaced with the institution of silent pledge (non possessory pledge);
   2. Registration is done at the local tax office, not for the benefit of the public (the principle of publicity), but rather to determine the date the agreement was made;
   3. The enforcement of non possessory security over movable goods is not carried out by the Court, but by a private bailiff.

The United Nations Commission on International Trade Law has published a Legislative Guide on Secured Transactions in 2007 which followed by Model Law on Secured Transactions in 2019 that can be used as a reference if we want to reformulate the Fiducia Security Law.[22] Furthermore, the direction given from the Legislative Guide on Secured Transactions for a security law to be effective and efficient, it must be designed to be able to:[23]

a. Promote low-cost credit through the provision of secured financing;
b. provide an opportunity for debtors to use the full value of their goods to secure credit;
c. ensure that parties can obtain security rights easily and efficiently;
d. provides equal treatment of various forms of credit and secured transaction formats;
e. provides recognition (validation) of non possessory security goods on all types of goods;
f. increase certainty and transparency by providing registration of security rights at the general security rights registry;
g. create clear and measurable rules of preference (priority);
h. facilitate efficient enforcement of security by creditors;
i. gives the parties the freedom to negotiate the terms and conditions of the security agreement;
j. balancing the interests of the parties affected by a secured transaction; and
k. harmonize the law of secured transactions including issues related to conflicts of law in secured transactions.

The World Bank in a policy research working paper conveyed the provisions that must exist in a secured transaction system, namely:[24]

a. Scope of Collateral Object
   Legal vehicles used to secure obligations such as pledges, mortgages; types of transactions that must be considered within the scope of existing rules (such as

[22] The UNCITRAL Legislative Guide on Secured Transactions ("the *Guide*"), adopted by the Commission at its fortieth session in 2007.
[23] The UNCITRAL Legislative Guide on Secured Transactions page 1. *Key objectives of an effective and efficient secured transactions law.*
[24] Alejandro Alvarez de la Campa, *Increasing Access to Credit Through Reforming Secured Transactions in the MENA Region* (World Bank Group, 2011), https://openknowledge.worldbank.org/entities/publication/4f8c337a-d5b0-5d69-b463-aee54a89d081, 9.

multipurpose loans, motor vehicle financing, leasing, hire purchase with purchase option, *cessie*, novation and other forms that have existed or will exist in the context of meeting the needs of society and the economy).

b. Establishment of Securities
Legal provisions capable of granting and receiving security rights over movable goods to secure an obligation.

c. Priority
The existence of rules that determine the right of precedence over claims filed against fiducia goods.

d. Registration of Collateral Following Publicity
There is a provision to make security rights over certain movable property transparent to third parties, which can be done through registration in a public registry, where the right to access information on the possession or control of the movable goods is granted, through direct notification, or by other means. An efficient register is characterized by having a single electronic database containing all information on security rights enforced against movable goods, accessible to the public in real time at an affordable cost.

e. Enforcement
The process of enforcing rights over movable goods when the debtor defaults. The enforcement mechanism must include the possibility to carry out out-of-court enforcement.

From the above points of thought made by UNCITRAL and the World Bank, as well as a legal comparison of non possessory pledge in Germany and the Netherlands, it can be seen that the Fiducia Security Law has fulfilled some of the criteria stated, but in order for the Fiducia Security Law to be more effective and efficient, it is necessary to reformulate the Fiducia Security Law.

3.2. Implementation of the Fiducia Security Enforcement Regulation

3.2.1. Legal Issues in the Implementation of the Fiducia Security Law

a. Inconsistency in Formulation

Fiducia Security is a transfer of ownership rights, and therefore makes the recipient of the fiducia as the owner of the goods transferred and received by him, but on the other hand it is said that the transfer is only a transfer in trust, especially Article 1 paragraph 1 part 2 of the Fiducia Security Law, which states that the good whose ownership rights are transferred remains in the possession of the owner of the good.

This brings legal uncertainty, especially for creditors, because the arrangement does not provide clarity on the status of creditors. With this distinction, the legal consequences will certainly be different. For example, if the creditor here will act as the owner, then the creditor can freely take action against the fiducia goods. However, if the transfer is only based on trust, then the actions taken by the creditor will be limited.

b. Administrative Constraints on Fiducia Registration Fees

Article 11 of the Fiducia Security Law requires every fiducia to be registered with the Fiducia Registration Office. However, it is necessary to pay attention to the fiducia registration fee for small value fiducia goods. If these goods are fiducia, it is necessary to compare the value of the fiducia goods with the overall cost to create fiducia security and its registration, whether the value of the fiducia goods with the cost incurred will burden the parties, especially the debtor, which ultimately hinders the creation of a fiducia security.

Facts obtained from the registration of fiducia security, as processed data from the Directorate General of General Legal Administration, Ministry of Law and Human Rights, in 2017, show that the number of fiducia security registrations reached more than 8 million registrations, of which more than 80% were dominated by fiducia security for two-wheeled motorized vehicles. This fact shows that there are basic problems related to the registration of fiducia security, the benefits obtained and the amount of costs paid for having the fiducia security deed followed by the fiducia security registration fee, will be an additional costs to the credit transaction, and these costs end up being passed to the debtor, increasing the overall cost of credit, which might not worth it for small value movable goods such as motorcycles.

c. Fiducia Goods is Inventory Stocks

If the fiducia security is placed on non inventory stocks merchandise, then usually the fiducia grantor would be deemed as a borrower of the said fiducia goods. However, it is different if the object on which the fiducia security is given is inventory stocks, which during the financing period will continue to be traded by the fiducia grantor (see Article 21 of the Fiducia Security Law). The Fiducia Security Law does not clearly state the legal position of the fiducia grantor in such an event.[25]

This brings the next problem, namely the existence of the principle of specialty, namely that the fiducia security must be described in detail on the object of the fiducia security. According to Article 6 sub-c of the Fiducia Security Law, goods in inventory that are always changing and/or not fixed, such as stocks of raw materials, finished goods, or securities [shares, bonds, options etc], the fiducia security deed shall include a description of the type, trademark, quality of the object. In this case, there is a problem regarding inventory that is always changing due to debtor run its business.

This poses a problem, given that the goods should belong to the creditor, as the fiducia concept should give the creditor ownership of the goods. Moreover, by fiducia the inventory stock, there is a possibility that when the debtor defaults, the goods is not available because the debtor has gone bankrupt or the inventory stocks decreasing in value, such as an obsolete machine or rotten fruit. So that the creditor in a loss position when executing the fiducia goods.

[25] Satrio, *Hukum Jaminan,* 185.

d. Determination of the Value of Fiducia Security Goods

The Fiducia Security Law does not explain who and how to determine the value of the security goods, especially for fiducia security goods that will exist in the future.[26]

e. Rules for Online Registration of Fiducia Security

The rules for online registration of fiducia security are regulated by Minister of Law and Human Rights Regulation Number 9 of 2013 on the Implementation of Electronic Registration of Fiducia Security, and Minister of Law and Human Rights Regulation Number 10 of 2013 on Procedures for Electronic Registration of Fiducia Securities, which is followed up by Government Regulation Number 21 of 2015 on Procedures for Registration of Fiducia Security and Fees for Making Fiducia Security Deeds.

The online registration rule above raises issues related to the order of laws and regulations that may have implications for the legality of registration procedures and fiducia security certificates, including deeds of improvement, transfer and abolition of fiducia security.[27]

Furthermore, the Fiducia Security Law requires that fiducia encumbrances be made by notarial deed,[28] and registered at the Fiducia Registration Office [29] by attaching an application for registration of the Fiducia Security,[30] while in the rules for online registration of the Fiducia Security, some matters related to the requirements stipulated in the Fiducia Security Law expressly require manual procedures. This needs to be reviewed in order to fulfill the rules of good legislation that provides legal certainty and benefits for the community in the legal system of fiducia security.

f. Re-Fiducia

While the Fiducia Security Law allows fiducia holder to re-fiducia, this permissibility brings several problems, as shown below:

In the first scenario, A acts as a creditor and lends money to B. B as the debtor gives A a fiducia security in the form of machine X. Machine X is then registered with the Fiducia Registration Office. It turns out that A needs money and decides to seek a loan from C, a third party. A then fiducia machine X to

[26] Satrio, *Hukum Jaminan*, 212.
[27] Abdul Gani Abdullah, "Pelaksanaan Sistem Jaminan Fidusia dan Harapan Lanjutan di Indonesia" Material Exposure in Focus Group Discussion about Review and Evaluation UU No. 42 of 1999 about Fiduciary Guarantee at Universitas Pelita Harapan, 5 December 2018 in Maria Pranatia, *"Penguatan Aspek Kepastian Hukum Dalam Sistem Pendaftaran Perjanjian Jaminan Fidusia Secara Online"* (Dissertation, Universitas Pelita Harapan, 2020), Universitas Pelita Harapan Institutional Repository, https://repository.uph.edu/id/eprint/10847/.
[28] See Article 5 (1) of Law Number 42 of 1999 on Fiducia Security.
[29] See Article 12 of Law Number 42 of 1999 on Fiducia Security.
[30] See Article 13 of Law Number 42 of 1999 on Fiducia Security.

C and registers it with the Fiducia Registration Office.[31] From the above facts, we can see that there are two fiducia security of the same object, but by two different fiducia to two different creditors.[32]

The above scenario will not be a problem, if B can pay his debt to A and A can pay his debt to C. However, the problem occurs if A cannot pay his obligations to C, while B has fulfilled his obligations to A. This becomes a problem because with the completion of the debt between A and B, the fiducia agreement as an ancillary agreement, will automatically be terminated, considering that the loan agreement between A and B has been settled. Can C still execute machine X, even though the Fiducia Security agreement has been nullified?

g. The Practice of Not Registering Fiducia Security Until the Debtor Defaults

This practice is widely practiced by financing institutions, especially Rural Banks (*Bank Perkreditan Rakyat*/BPR), which deliberately not registering the fiducia security, and only register the fiducia security when the debtor defaults or the debtor has shown that he is unable to fulfil his obligations under the loan agreement. This practice is carried out in order to avoid the burden of fiducia security creation costs. This brings problems because according to the provisions in Article 14 paragraph 3 of the Fiducia Security Law, the Fiducia Security is established on the same date as the date of registration of the Fiducia Security. Therefore, if there is an agreement made earlier, but only registered later, the consequence is that legal events carried out before registration would not in compliance with the provisions of the Fiducia Security Law.[33]

h. Object of Fiducia Security for Goods that Will Exist in the Future

The Fiducia Security Law also regulates fiducia security against goods that will exist, where the debtor is allowed to place security over the goods that will exist. These include, among others: the debtor's income that will later be received, royalties that will later be received, and so on. This will later lead to the problem, how do we pledge fiducia goods that have not yet exist at all?

By fiducia goods that will exist, this would contradict the basic concept of fiducia, which is the transfer of ownership. If the object or good being secured is an object or good that will exist, there will be no transfer of ownership by the debtor to the creditor, because the item does not yet exist when the agreement is closed.

[31] Satrio, *Hukum Jaminan*, 317.
[32] Satrio, *Hukum Jaminan*, 317.
[33] Hera Dwi Nurwitasari, "Problematika Berbagai Peraturan Eksekusi Obyek Jaminan Fidusia," *Jurnal Repertorium* 1, no. 2 (November 2014): 35, https://www.neliti.com/publications/213001/problematika-berbagai-peraturan-eksekusi-objek-jaminan-fidusia.

3.2.2. Obstacles in the Enforcement of Fiducia Security

a. Repossession of Fiducia Goods by Creditor

If the fiducia grantor refuses to hand over the fiducia security object, the fiducia holder can take possession of the fiducia security object, if necessary, with the assistance of the relevant authority. However, in reality, repossession of fiducia security goods in practice is not an easy task. In general, the fiducia holder will seek assistance from a debt collection service company to repossess the fiducia security object, where the service provided generally uses intimidation and violence that leads to an unecessary legal problems.

Based on the issues above, OJK issued a regulation that prohibits banks and finance companies from collecting debts (including repossession of fiducia goods) using debt collectors, but allows the use of third party services that are licensed and have human resources who have passed the exam and certification from the Indonesian Financing Professional Certificate,[34] which is also accompanied by the Regulation of the Chief of Police of the Republic of Indonesia Number 8 of 2011 concerning Securing the Enforcement of Fiducia Security ("Perkap 8/2011").

b. Constitutional Court Decision

The Constitutional Court ruled that Article 15 paragraph 2, paragraph 3 and the Explanation of Article 15 paragraph 2 of the Fiducia Security Law related to certain phrases are unconstitutional and therefore declared to have no binding legal force.

In its judgment, the Constitutional Court considered that the phrase "executorial power" and the phrase "the same as a court decision with permanent legal force" can only be said to be constitutional insofar as it is interpreted that "for fiducia security where there is no agreement on the occurrence of a "breach of promise" (default) and the debtor goods to voluntarily surrendering the object of fiducia security, all legal mechanisms and procedures in the enforcement of the Fiducia Security Certificate must be carried out and apply the same as the enforcement of a court decision that has permanent legal force". Meanwhile, Article 15 paragraph 3, especially the phrase "breach of promise" can only be said to be constitutional insofar as it is interpreted that "the existence of a breach of promise is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine the occurrence of a breach of promise".

The Constitutional Court's decision effectively deprives the creditor of the ability to unilaterally declare the debtor in default, and cannot exercise its right to *parate* executie without the debtor's cooperation or consent or by court

[34] See Article 29 of Financial Service Authority Regulation Number 35/POJK.05/2018 on Implementation of Financing Company Business.

decision, which is not in line with the guidance provided by UNCITRAL and the World Bank as explained above.

c. Disharmonization Among the Institutions

In 2017, the Director General of State Assets at the Ministry of Finance of the Republic of Indonesia, issued Director General of State Assets Regulation Number 2/KN/2017 concerning Technical Guidelines for the Implementation of Auctions, based on which the Auction Office can carry out auctions submitted by fiducia holder without requiring a court order. In practice, each Auction Office has its own requirements and therefore it is possible that some Auction Offices require a court decision as part of the auction implementation.

Disharmony between institutions can also be seen in the decisions and/or stipulations of enforcement confiscation issued by the courts that negate the existence of fiducia securitiy, which is illustrated in the Decision of the Industrial Relations Court at the Tanjung Pinang District Court Number 65/Pdt.Sus-PHI/2015/PN Tpg dated March 10, 2016 which ordered the auction of machinery owned by PT Multi Petro Sarana which was fiducia to PT Bank DBS Indonesia.

d. Implementation of Legal Protection in Debtors' Favor

Legal protection excessively emphasis on the debtor has been found in previous court decisions, such as the Decision of the Supreme Court of the Republic of Indonesia Number 3192K/Pdt/2012 which stated that the collection of bad debts by violence is unprofessional because it prioritizes the use of intimidation, and therefore deserves to be punished to pay compensation.[35]

In this case, the Supreme Court of the Republic of Indonesia did not pay attention to the background of the incident and the creditor's frustration with the debtor's behavior, and the need for ease of recovering the financing that had been given had encouraged creditors to use the services of third parties (who may not have good legal knowledge) to carry out collections which led to acts of intimidation in collection by the debt collectors.

The rise of tort claims brought by fiducia grantor or debtor to the court, and accepted by the court under the pretext of tort, creates a moral hazard that can be used by delinquent debtors and/or fiducia holders, which is a challenge in the implementation of the enforcement of fiducia security described above.

e. The Role of Other Institutions Compared to Fiducia Security

The high cost and difficulty in enforcing fiducia security have stifled the existence of fiducia security. Meanwhile, the existence of a fiducia security institution is expected to be able to provide answers for debtor who have difficulties in obtaining access to financing, especially Small Medium Enterprice. This difficulty is mostly bypassed by creditors through having the

[35] Supreme Court Decision Number 3192K/Pdt/2012, 27.

Power of Attorney to Sell and/or Credit Insurance mechanism, which has an ease of implementation compared to fiducia security.

f. Repressive Enforcement

After the Constitutional Court Decision, the police gave a statement regarding the implementation of Fiducia Security Enforcement that does not meet the requirements as stipulated in POJK 35/2018 is threatened with criminal charges based on Article 335 paragraph (1) of the Criminal Code, namely committing unpleasant acts and Article 365 in conjunction with Article 53 of the Criminal Code, namely theft with violence.[36] The use of criminal articles as stated by the police further complicates the issue of fiducia security enforcement and shows the lack of harmony between institutions.

3.3. Development and Reformulation of the Ideal Fiducia Security Enforcement Law for Indonesia

3.3.1. A Comprehensive Evaluation of the Current Legal System for the Enforcement of Fiducia Security

a. Definition of Goods that can be used as Fiducia Security

It is necessary to expand the scope of goods that can be encumbered by fiducia, not only to cover what is regulated in Article 1, number 2 and 4, Article 9, and Article 10 of the Fiducia Security Law, but also to any tangible or intangible movable goods that have functional equivalents, that are currently not covered by the definition as regulated in the Fiducia Security Law, such as invoices arising from factoring transactions, lease purchase financing with or without purchase option, leasing financing, project financing with a turn key project scheme, infrastructure financing in the form of government cooperation with business entities, or other forms of financing or financial schemes as long as they follow the applicable laws and regulations.

The expansion of goods used as fiducia collateral may also include movable goods owned by the debtor with substantial value such as classic vehicles, art objects or antique objects that are deposited and exhibited at an exhibition or museum, which are then traded through art galleries or auction houses. The difficulty in determining the value of art objects or antique objects is not a reason to reject these goods as fiducia collateral, because these goods are highly dependent on the quality of the object, market conditions, purchasing ability and willingness to buy from collectors. It should also be noted that it is possible to place a pledge on these goods, but it is necessary to consider the risks that may occur, including the costs that must be incurred to manage and

[36] Rakha Arlyanto, "Debt Collector Harus Pegang SPPI, Ini Aturan Penarikan Kendaraan Leasing," *Detik*, May 10, 2021, https://news.detik.com/berita/d-5564994/debt-collector-harus-pegang-sppi-ini-aturan-penarikan-kendaraan-leasing; *DetikOto*, "Polisi: Debt Collector Tak Bisa Sembarangan Rampas Kendaraan," *DetikOto*, May 11, 2021, https://oto.detik.com/berita/d-5565901/polisi-debt-collector-tak-bisa-sembarangan-rampas-kendaraan?tag_from=wpm_nhl_2.

maintain the object, so that fiducia is a more suitable form of security for these goods.

b. Effectiveness of the Fiducia Registration System

There is a need for electronic fiducia registration that is centralized in an electronic database that can be accessed from anywhere and by anyone who has interest in knowing the fiducia goods that is the object of fiducia security so that the principle of publicity is fulfilled. Related to this, the improvement of regulations related to electronic fiducia registration, which is still regulated based on ministerial regulations, can be carried out by using regulations equivalent to Government Regulations, so as to fulfill the rules of the order of laws and regulations, and provide broad effectiveness, because it will cover and apply across agencies, so that the rules will be correct in substance, fulfill what is required in the legal structure and can be applied in practice in order to create a legal culture that is orderly.

Currently, information related to fiducia security goods as referred to in Article 18 of the Fiducia Security Law can be accessed by interested parties. However, the access is still very limited and categorized based on the party who will access. This restriction is certainly an obstacle for third parties who are in good faith in terms of conducting transactions and will access information on fiducia security goods in the database. Granting broader access, accompanied by appropriate and reasonable restrictions, needs to be considered, so that information on goods used as fiducia securities can be accessed by interested parties. Concerns about excesses from granting access can be minimized by the threat of fines or penalties for misuse of such access.

c. The Difficulty of Repossession of Fiducia Goods by Creditors

The Fiducia Security Law specifically regulates the Enforcement of Fiducia Security, where any promise to execute the object of fiducia security in a manner contrary to the provisions referred to in Article 29 and Article 31 of the Fiducia Security Law, is null and void,[37] including any promise in the fiducia deed that authorizes the fiducia holder to take possession of the fiducia goods.[38] This rule is intended to protect the fiducia grantor from the possibility of abuse of right to execute, which has impact on the low proceeds received from the enforcement. Meanwhile, creditors usually always require collateral goods that have a value that exceeds the amount of the loan secured by the goods, which means that the acquisition of ownership by the creditor will only benefit the creditor and harm the debtor.

Provisions related to the prohibition of owning collateral goods only apply at the time of granting fiducia security. In the event that the debtor defaults, the principle of freedom of contract applies, where the creditor and the fiducia grantor can make an agreement to settle the obligation through the means they

[37] See Article 32 of Law Number 42 of 1999 on Fiducia Security.
[38] See Article 33 of Law Number 42 of 1999 on Fiducia Security.

prefer, and these actions are not included in the prohibited actions as required by Article 33 of the Fiducia Security Law.

The Fiducia Security Law distinguishes the enforcement of fiducia security using executorial title and *parate executie*. The *parate executie* is carried out by the fiducia holder by selling the fiducia security object through a public auction and taking the proceeds from the enforcement of the security object after deducting the costs incurred in the implementation of the auction to pay off part or all of the debtor's obligations. In the event that the fiducia grantor does not voluntarily surrender the fiducia security object to the fiducia holder for enforcement, the repossession over the fiducia security object will be against the will of the fiducia grantor who holds the fiducia security object, and therefore the repossession of the fiducia security object can only be carried out with the assistance of the court bailiff, and therefore court assistance is required to carry out a revindication seizure through ordinary civil lawsuit procedures which will take a lot of time and cost. For this reason, the creditor will prioritize the enforcement of the fiducia security object using the executorial title with the assistance of the chief of court's stipulation (*fiat executie*).

The problem with *parate executie* enforcement is that it can only be carried out if Auction Office is willing to carry out the auction without a court order, and the fiducia grantor voluntarily surrenders ownership of the object that is the fiducia security to be auctioned, if one of these two things is not fulfilled then the enforcement of the fiducia security requires a court order.

Repossession of the Fiducia Security by the Creditor is still difficult under the Fiducia Security Law. Especially after the Constitutional Court Decision that requires enforcement to be agreed by the parties in the event of default or breach of promise.

This is certainly difficult in practice, if the debtor deliberately does not want to declare himself in default even though he has actually defaulted. Therefore, the creditor must make more efforts to execute the fiducia security by requesting a court order for enforcement or conducting a civil lawsuit against the debtor, which is certainly not an ideal action.

The application of private bailiffs as practiced in the Netherlands should be considered, given that the Financial Services Authority and the Police currently recognize and allow the existence of certified third parties to collect and repossess the fiducia goods. It would be good if the existence of such certified third parties is formally institutionalized, which at the end will create ideal conditions in the enforcement of fiducia security, while also meeting international standard related to the ease of enforcement of security interests.

3.3.2. Fiducia Security Enforcement System that Supports Ease of Doing Business

In line with the research focus on the legal reformulation of the enforcement of fiducia security in the context of ease of doing business, which is based on the community's need to access easy and low-cost financing, it is necessary to reformulate the law on the enforcement of fiducia security that have an impact on ease of doing business.

The Fiducia Security Law in its implementation faces structural and cultural obstacles, where the law is used as a tool by certain groups to fulfill their personal interests. This can be seen from the disharmony between institutions in interpreting the enforcement of fiducia security, where these institutions only see one side of the interest (generally the debtor) and negate other interests.

The ease of executing fiducia security supported by a good legal structure and culture will help economic development that leads to the welfare of the people. Therefore, law as a tool should regulate the direction of human activities in the direction desired by development. In the event that the Fiducia Security Law has made it easy to execute fiducia security in the event that the debtor and/or fiducia grantor defaults, it is appropriate that structurally related institutions such as the courts, police, Auction Office assist and facilitate the process of executing fiducia goods in order to realize order and legal certainty.

The legal reformulation of the enforcement of fiducia security in the form of improvements is expected to function as a tool of social engineering (law as a tool of social engineering) that directs the community to obtain easy access to financing. The need for easy and cheap access to financing has become a necessity in economic development, where the role of the Fiducia Security Law to meet the needs of the community, especially related to fiducia security institutions, can be realized. Therefore, the existence of the Fiducia Security Law, supported by implementing regulations (as substance) that are good according to international standard, accompanied by supporting institutions and structures, will ultimately create a legal culture both internally and externally that will lead to the creation of easy access to financing which leads to ease of doing business from various sides. Considering the aims and objectives as described above, the following matters are required:

a. Improvement of the Fiducia Security Registration System for the Ease of Fiducia Security Enforcement

   A special study is needed regarding the requirements for making a Fiducia Deed at a Notary. The requirements for making a Fiducia Deed of Security at a Notary should be compared to the costs incurred and the value of the collateral provided. Many financing/credits with fiducia security are given to small and medium entrepreneurs as well as consumer loans such as motor vehicles.

   From the character of the financing provided, the credit value, the collateral provided will have an impact on the costs incurred if an authentic deed (notarial deed) is required, which will increase the cost of financing. This is certainly not in line with the function of law as a tool that directs society towards prosperous development.

Furthermore, in the fiducia registration process, there are groupings of collateral values ranging from the smallest to the largest. Based on the grouping of collateral values, it is appropriate that the use of notarial Fiducia Deed, especially a small collateral value compared to the amount of costs that will be incurred to fulfill the requirements of fiducia registration, be left to the parties or [if still required] should be regulated by government as reasonable as possible, in order to create efficiency in costs and encourage ease in making fiducia feed.

With the reformulation related to the making of the Fiducia Deed and the improvement of the electronic registration system measured by the amount of collateral value and costs incurred, it is hoped that it can be a step towards more advanced legal development in order to achieve the legal objectives of development, namely order manifested in a welfare state, where access to financing becomes easier and cheaper, which in turn will improve the ease of doing business.

b. Simplifying Fiducia Security Enforcement Requirements

Simplifying the requirements for the enforcement of fiducia security, especially after the Constitutional Court Decision, is a necessity to improve the Fiducia Security Law. The improvement of the legal system for the enforcement of fiducia securities should include substance, structure and legal culture.

More detailed and clear arrangements for the enforcement of fiducia security are needed to avoid inconsistencies and practical problems in the field due to the unequal legal knowledge of human resources carrying out enforcements, as well as a culture that interprets the law according to the interests of the party that will carry out the enforcement which leads to the erosion of legal norms themselves. Legal arrangements for the enforcement of fiducia security also need to be harmonized with the civil procedural law that has been in effect including the legal structure in this case the institutions that carry out law enforcement in order to reduce the difficulty of enforcement.

It is also necessary to conduct socialization to the institutions involved in the enforcement of fiducia securities to prevent different interpretations of the legal norms made which result in the erosion of the legal norms for enforcing fiducia security.

In looking at the law of enforcement of fiducia security in a security law system, the implementation of the reformulation of the law on fiducia security in the context of ease of business needs to follow the best international practices as recommended by international institutions such as UNCITRAL and the World Bank, which of course must be harmonized with applicable legal norms in Indonesia, so that the reformulation of the law of enforcement of fiducia security within the ecosystem of security law in Indonesia can provide order and legal certainty for the parties.

As explained, fiducia security goods are basically controlled by the debtor or fiducia grantor and not by the creditor, so the enforcement process must be simple, easy and low cost considering the fact that more than 80% (eighty percent) of registered fiducia goods have a collateral value that sometimes does not meet the economic scale if using the fiducia security enforcement process involving the court (even with the help of the police).

Article 15 of the Fiducia Security Law states that a Fiducia Security certificate has the same executorial power as a court decision that has obtained permanent legal force. However, after the Constitutional Court Decision, the enforcement of fiducia security is translated to have to go through the court in the event that there is no agreement between the creditor and the fiducia grantor regarding the state of default, which is certainly not in line with the spirit of ease of enforcement of fiducia security.

The provisions in the Fiducia Security Law have accommodated prevailing international practices, especially related to the ease of enforcement of fiducia security, but further confirmation is needed for the following matters:

1) State of debtor's default. For example: if the debtor fails to pay his obligations, and has been warned in writing twice within a reasonable period of time, and has also been notified of the default, the creditor has the right to execute the fiducia goods provided;
2) Legal certainty over the creditor's right to execute the fiducia goods, if the debtor has been proven to be in default, then there is no need for involvement from the Court;
3) Clarity regarding the procedures for executing fiducia goods through third parties; and
4) Efficiency in costs incurred in connection with the registration of fiducia deeds and fiducia goods, especially for small-value financing.

Beyond these four things, it is also necessary to consider technological advances, especially in mapping the whereabouts of fiducia goods with the use of technology such as the Global Positioning System (GPS), in order to avoid the actions of debtors or fiducia grantor to eliminate, transfer or erase traces of the existence of fiducia goods.

The above should be outlined in the implementing regulations of the Fiducia Security Law to clarify the position of the existing problems.

By accommodating this affirmation and the involvement of technology to facilitate the tracing of fiducia goods, it is clear that the law in substance supported by structure and culture will become a tool to engineer the interests of the community in fulfilling the need for easy access to financing and business.

The reformulation of the Fiducia Security Law will provide legal certainty for parties based on credit agreements and fiducia security agreements, which in turn will provide an equal balance between creditors and debtors or fiducia grantors. Through this balance, it is hoped that creditors will find it easier to provide financing to debtors, and debtors will find it easier to obtain access to cheap financing, due to the clarity of the process of encumbering fiducia security and their enforcement.

4. CONCLUSIONS

The implementation of the fiducia security institution as regulated in the Fiducia Security Law faces many problems related to norms, interpretation and implementation, especially the enforcement of fiducia goods.

The ideal fiducia security enforcement concept that supports ease of doing business requires the following: following international rules and best practices, where enforcement of the security interests is made easy, effective and low cost, with as little as possible to involve court; harmonization in the interpretation of legal norms, especially default situations without having to take them to court; legal certainty of the creditor's right to execute the fiducia object in the event of the debtor's default; the procedure for executing fiducia goods through a formalized third party as happens in the Netherlands by using certified private bailiffs who understand the law could be considered; cost efficiency in the creation and registration of fiducia security interests to avoid reluctance of the parties to register fiducia goods, by providing options for the parties to determine the form of fiducia deed or by having government regulation regulating reasonable costs for creating fiducia deed in adjustment to the value of the security and the costs incurred; and the application of technology to fiducia goods such as GPS, along with the threat of punishment for fiducia grantors who attempt to commit fraudulent acts on fiducia goods that harm the interests of creditors.

The reformulation of the Fiducia Security Law will provide legal certainty for parties based on credit agreements and fiducia security agreements, where the enforcement of fiducia goods easily and at low cost will provide potential benefits to business players, especially Small Medium Enterprises, for access to cheap and effective financing, and therefore without the reformulation of the Fiducia Security Law, low-cost and effective financing will be difficult to be accessed by business players, especially Small Medium Enterprises, which in the end the idea of ease of doing business will slowly fade.

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