

# STATE RESPONSIBILITY IN LEGAL PROTECTION OF DEBTORS AND CREDITORS AGAINST THE RISK OF TERMINATION OF AGREEMENTS

*by* Dhaniswara K. Harjono

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## STATE RESPONSIBILITY IN LEGAL PROTECTION OF DEBTORS AND CREDITORS AGAINST THE RISK OF TERMINATION OF AGREEMENTS

HEDDY KANDOU<sup>1</sup>, JOHN PIERIS<sup>2</sup>, DHANISWARA K. HARJONO<sup>3</sup> and AARCHE TEHUPEIORY<sup>4</sup>

<sup>1,2,3,4</sup> Doctor of Law Study Program, Faculty of Law, Universitas Kristen Indonesia.  
Email: <sup>1</sup>heddy@techno9indonesia <sup>4</sup>aartjetehupeiory@gmail.com

### Abstract

Economic progress has led to an increase in the need for funding, where the funding is obtained through lending and borrowing activities. However, this effort has the risk of default from the debtor, so the creditor requires a fiduciary guarantee. This is also exacerbated by the risk of terminating the agreement due to the fulfillment of the cancellation conditions which poses a risk. This study aims to determine the state's responsibility in legal protection for debtors and creditors against the risk of termination of the agreement. This study used qualitative research methods. The data collection technique in this study was a literature study. The results of the study show that the state's responsibility in legal protection for debtors and creditors against the risk of termination of the agreement by carrying out the legal construction of Indonesian legal policies in providing justice to debtors and creditors from the risk of termination of fiduciary guarantees regulated in Article 11 of Law no. 1999, among others, objects burdened with fiduciary guarantees must be registered, objects burdened with fiduciary guarantees are outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) are still valid and failure to register is the responsibility of the creditor, and the losses incurred are not can be sued against the debtor and the negligence of registration from the creditor cannot be a reason for the forced execution of a fiduciary object.

**Keywords:** Legal Protection, Debtors, Creditors, Termination of Agreement

### INTRODUCTION

The development process is not only limited to an economic phenomenon, because in the end the development process must be able to bring humanity beyond prioritizing material and financial aspects of their daily lives. Economic progress is a major component of development, but not the only component (Todaro & Smith, 2006). The economic progress factor is an important component of development because with economic progress, development will receive maximum support, where development definitely requires support from the availability of funding, this is in line with the explanation of the Fiduciary Guarantee Law No. 42 of 1999 which explains that, "economic progress encourages increased need for funding, where the funding is obtained through lending and borrowing activities."

Financial service institutions which include banking, financing institutions, and other financial service institutions have made a major contribution in terms of providing funds to finance national economic development (Hudiyanto et al, 2019). This is because financial service institutions are institutions that run their business to collect funds from the public and distribute them for funding to the community. Borrowing funds through financial service institutions has

guaranteed legal protection that makes it easier for parties who need funds to continue their business to be safer and in accordance with the wishes of the parties to borrow money (Subagyo, 2018).

Financial services that are widely used by the public today, especially to meet the needs of consumer goods, are financing institutions through financing companies. One of the financing models carried out by financing companies is consumer financing (Prasetyawati, 2012). This Consumer Financing is a sale credit because consumers do not receive cash but only receive goods purchased from the credit" (Fuady, 2022). In this consumer financing, credit or loans provided by finance companies are not in the form of money but in the form of purchasing goods.

Like credit in general, this consumer financing facility also has a risk of default from the debtor, so to guarantee the fulfillment of the achievements of the debtor, the creditor requires collateral or collateral (Hasanah, 2021). This form of guarantee is a Fiduciary Guarantee, which is a material guarantee which is currently the center of attention, especially after the Constitutional Court Decision No. 18/PUU-XVII/2019 January 6 2020 and Constitutional Court Decision No. 2 of 2021 August 31 2021.

Fiduciary guarantees as one of the material guarantees for movable objects that are starting to develop are currently mainly related to consumer credit/financing for the community such as the purchase of motorized vehicles, allowing the debtor to continue to operate or use his business equipment or motorized vehicles while the equipment or motorized vehicles are guaranteed fiduciarily. However, sometimes circumstances occur where the fiduciary agreement ends due to the fulfillment of the null and void conditions as stipulated in Article 1321 of the Civil Code, while the main agreement does not end. The null teaching applies to all legal actions, where by saying a legal action is void, it means that there is a legal defect which results in the agreement being cancelled. This condition is contrary to the legal norms of the guarantee agreement as an *accessoir* agreement, where the guarantee agreement cannot end if the main agreement has not ended. With the cancellation of the fiduciary agreement, it means that the fiduciary agreement ends while the main agreement has not ended.

By applying the legal culture of good faith in making agreements, the risk of termination of fiduciary guarantees can be avoided. To be able to create a good legal culture requires the role of the government, namely establishing various policies that cover various aspects of the fields of public life, namely in the field of political ideology, in the economic field, and in the social field which is distinguished from social welfare policies aimed at overcoming problems. Community welfare and community protection policies (social defense policies) aimed at providing protection to the community. The country's policies can run well if the legal system is running well. To realize this, the state as a regulator must be able to create protection for debtors by making changes to laws relating to fiduciary guarantees. For example, with changes to the Fiduciary Guarantee Law and the Consumer Protection Law. Based on the background description, the author is interested in conducting research with the title: "State Responsibility in Legal Protection for Debtors and Creditors against the Risk of Termination of Fiduciary Agreements".

## RESEARCH METHODS

This study used qualitative research methods. According to (Moleong, 2017) qualitative research is research that intends to understand phenomena about what is experienced by research subjects such as behavior, perceptions, motivations, actions and others holistically and by means of descriptions in the form of words and language, in a natural context by utilizing various natural methods. The data collection technique in this study was a literature study. According to Koentjaraningrat, in (Magdalena, 2019) library techniques are a way of collecting data on various materials found in the library, such as newspapers, books, magazines, manuscripts, documents and so on that are relevant to research.

## DISCUSSION

### A. Risks Faced by the Debtor on Termination of the Fiduciary Guarantee Agreement

That the fiduciary guarantee ends because the debt guaranteed by the fiduciary guarantee is deleted is a logical consequence of the nature of the fiduciary guarantee as an accessoir agreement. Regarding the abolition of fiduciary guarantees, the provisions of Article 25 of Law no. 42 of 1999 juncto Article 16 Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Deeds determines regarding the abolition of fiduciary guarantees.

There are certain events that cause fiduciary guarantees to be nullified by law. Fiduciary guarantees are deleted due to the following:

- a. Eliminate debt guaranteed by fiduciary.
- b. Relinquishment of rights to fiduciary guarantees by fiduciary recipients.
- c. The destruction of objects that are the object of fiduciary guarantees.

Provisions for the abolition of fiduciary guarantees based on Law no. 42 of 1999 and Fiduciary Government Regulation no. 21 of 2015 has several differences, one of which is the legal subject. The subject in the Fiduciary Guarantee Law Article 25 paragraph (3) is the fiduciary recipient, there are no other parties. Meanwhile, in Fiduciary Government No. 21 of 2015, Article 16 paragraph (2) states that the subject of deletion is not only the fiduciary recipient but also his attorney or representative. The fiduciary recipient, proxy or representative must notify the deletion within 14 (fourteen) days from the date the fiduciary guarantee is deleted, by attaching a statement regarding the write-off of the debt, release of rights or the destruction of objects that are the object of the fiduciary guarantee (Alfitra, 2021).

### Risk Due to Termination of Fiduciary Guarantee

The definition of risk in contract law is special because it relates to teachings about parties who must be liable to pay compensation if the debtor cannot carry out the promised performance. According to the teachings on compensation (resicoler), a person is obliged to bear the loss if something happens outside the fault of one of the parties that befalls the object that is the object

of the agreement. This teaching can be applied to reciprocal agreements as well as unilateral agreements.

Risks in agreements can be classified into 2 (two), namely risks in unilateral agreements and risks in reciprocal agreements.

- 1) Risks in unilateral agreements Article 1237 of the Civil Code regulates risks in unilateral agreements, that is, since the birth of an agreement, the risk is borne by the creditor.
- 2) Risks in reciprocal agreements Risks in reciprocal agreements are divided into 3 (three), namely:
  - a. The risk in buying and selling is regulated in Article 1460 of the Civil Code that the risk is borne by the buyer.
  - b. The risk in exchanging goods is regulated in Article 1545 of the Civil Code that the risk is borne by the owner of the goods.
  - c. The risk in leasing is regulated in Article 1553 of the Civil Code that the risk is borne by the lessor.

The risk faced by the debtor by terminating the fiduciary guarantee must be distinguished between the risk that occurs as a result of default from the debtor which causes the execution of the **fiduciary guarantee** and the risk of terminating **the fiduciary guarantee** due to the cancellation of **the** agreement.

### **1. Risk of terminating the fiduciary guarantee agreement due to default**

In the agreement there is an obligation for one of the parties to fulfill the achievement (the debtor) and if the achievement is not carried out then the debtor is said to have taken an action called broken promise or default. The debtor's negligence so that default is classified as a void condition which is included in every good lead agreement.

According to the provisions of Article 1267 of the Civil Code, in an agreement arising from a reciprocal agreement if the debtor does not carry out the obligations as promised in the agreement, the creditor on the basis of default of the debtor has the right to choose whether a) force the debtor to fulfill the agreement if it is still possible to do so; b) demand cancellation accompanied by reimbursement of costs, losses and interest from the debtor. This is as emphasized in the provisions of Article 1267 of the Civil Code which reads, "the party against which the agreement is not fulfilled, can choose: to force the other party to fulfill the agreement, if it can still be done, or demand cancellation of the agreement, by reimbursing costs, losses, and flower.

Referring to the consequences of a default debtor, the risks faced by the debtor as a result of terminating the principal agreement are:

- a. If in default the creditor demands that the debtor pay off the debtor's debt without going through demands for cancellation of the agreement
- b. If the debtor defaults, the creditor demands the cancellation of the main agreement which results in the cancellation of the fiduciary agreement or because of the default the debtor actually files a demand for cancellation of the main agreement and results in the cancellation of the fiduciary agreement.

## **2. The debtor's risk due to termination of the fiduciary guarantee due to the cancellation of the main agreement or fiduciary agreement either due to being canceled by law or being canceled/requested by the judge**

The provisions of Article 1381 of the Civil Code state that one of the cancellations of agreements or engagements is due to cancellation and annulment. Cancellation conditions as one of the reasons for the cancellation of the agreement is if the cancellation conditions are included in the contents of the agreement that has been made by the parties so that the cancellation conditions can occur. An annulment like this can be requested by anyone who has an interest in something that is being fought for because it is related to decency and public order. Meanwhile, annulment is if one of the parties submits or demands an annulment to the court of the agreement that has been made.

A basic principle of civil law is that if an agreement is null and void, the legal position of the parties must be returned to its original state, as if the agreement never existed. This shows that if an agreement is terminated by law (cancellation of the agreement) it generally results in the condition between the two parties bound in an agreement being returned to the state at the time the agreement was not made. Then the consequence is that no party may be harmed or it can be called a "return to its original state" where the legal action in question is deemed by law to have never happened, so that no party may be harmed, as a result of returning to its original state (Amalia, 2018). Thus the consequences of canceling the agreement may not be a party that is harmed or returns to its original state.

With the cancellation of the fiduciary agreement, the situation returns to its original state. In such rights, the risk faced by the debtor is that the fiduciary guarantee debtor in the consumer financing agreement must pay back all the money received to buy the fiduciary guarantee object and or hand over the fiduciary guarantee object to the creditor.

## **B. Legal Construction of Indonesian Legal Policy in Providing Justice to Debtors and Creditors from Risks against Termination of Fiduciary Guarantees**

### **1. Justice for Debtors from the Risk of Termination of Fiduciary Agreements through Legal Reconstruction**

Legal construction or legal argumentation is a method used for legal discovery. The legal construction method is used when faced with a situation where there is a legal vacuum (rechts vacuum) or a legal vacuum (wet vacuum), where based on the principle of *ius curia novit*

(judges may not refuse a problem to be resolved on the grounds that the law does not exist or has not been regulated). In the event of a legal vacuum or statutory vacuum, the judge uses his logical reasoning to further develop the text of the law. Legal construction methods commonly used (especially by judges) include argumentum per analogium (analogy), argumentum a cotrario, narrowing/concreting law, and legal fiction methods

## 2. Construction of Fiduciary Guarantee Law

Fiduciary is a form of material guarantee that is very well known in business life in the form of transfer of ownership rights to an object on the basis of trust.

**Table 1: The legal construction of the provisions of Article 11 of Law no. 1999**

Provisions of Article 11 of Law no. 42 of 1999	Legal construction
1) Objects burdened with a Fiduciary Guarantee must be registered.	1) Objects burdened with a Fiduciary Guarantee 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.	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.
	3) Failure to comply with registration obligations is the responsibility of the creditor, and losses incurred cannot be claimed against the debtor
	4) Failure to register from a creditor cannot be a reason for the forced execution of a fiduciary object

The ease of fiduciary registration is one of the solutions, making it easier for creditors to register fiduciaries. Provisions regarding registration of collateral objects are not regulated in Government Regulation of the Republic of Indonesia Number 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Fiduciary Deeds. Legal certainty is obtained by issuing a fiduciary certificate by the Fiduciary Registration Office which is authorized to issue fiduciary certificates as proof of ownership of fiduciary rights which have strong evidentiary powers as authentic deeds. As valid evidence, if there is other evidence in any form, such as evidence only in the form of a fiduciary deed, then this evidence must be rejected because the fiduciary deed has not yet given birth to fiduciary rights. A new fiduciary right is born when it is registered at the Fiduciary Registration office. With electronic registration, the Fiduciary Guarantee Certificate issued will be in the form of an electronic document. With electronic form, the issue of strength of proof becomes very important. From these provisions, the fiduciary guarantee certificate in the form of an electronic document still has strong evidentiary power

## CONCLUSION

Economic progress has led to an increase in the need for funding, where the funding is obtained through lending and borrowing activities. Like credit in general, this consumer financing facility also carries a risk of default from the debtor, so that to ensure the fulfillment of the achievements of the debtor, the creditor requires a guarantee or collateral, this form of guarantee is a Fiduciary Guarantee. However, circumstances sometimes occur where the fiduciary agreement ends due to the fulfillment of void conditions. Therefore, it is necessary to have state responsibility in legal protection for debtors and creditors against the risk of terminating the agreement. The results of the study show that the state's responsibility in legal protection for debtors and creditors against the risk of termination of the agreement by carrying out the legal construction of Indonesian legal policies in providing justice to debtors and creditors from the risk of termination of fiduciary guarantees regulated in Article 11 of Law no. 1999, among others, objects burdened with fiduciary guarantees must be registered, objects burdened with fiduciary guarantees are outside the territory of the Republic of Indonesia, the obligations as referred to in paragraph (1) are still valid and failure to register is the responsibility of the creditor, and the losses incurred are not can be sued against the debtor and the negligence of registration from the creditor cannot be a reason for the forced execution of a fiduciary object.

## Bibliography

- 1) Alfitra, D. P. (2021). Kepastian Hukum Penghapusan Objek Jaminan Fidusia Secara Elektronik. *Recital Review*, 3(1), 122-149.
- 2) Amalia, I. Q. A. (2018). Akibat Hukum Pembatalan Perjanjian dalam Putusan Nomor 1572 K/PDT/2015 Berdasarkan Pasal 1320 dan 1338 KUH Perdata. *Jurnal Hukum Bisnis Bonum Commune*, 1(1), 61-72.
- 3) Fuady, M. (2002). *Hukum Tentang pembiayaan konsumen*. Bandung, Citra Aditya Bakti.
- 4) Hasanah, U. (2021). *Hukum jaminan: konsep dan pengaturannya di Indonesia*. Setara Press.
- 5) Hudiyanto., Situmorang, Riri Lastiar., Prasetyo, Aji., & Bari, Rija Fathul. (2018). *Kajian Perlindungan Konsumen di Sektor Jasa Keuangan :Penguatan Perlindungan Konsumen Dalam Penggunaan Jaminan Fidusia*, Jakarta : Otoritas Jasa Keuangan, Departemen Perlindungan Konsumen.
- 6) Magdalena, T. (2019). *Implementasi Diplomasi Ekonomi Indonesia–Tiongkok pada Pemerintahan Presiden Joko Widodo (2014-2019)* (Doctoral dissertation, Universitas Kristen Indonesia).
- 7) Moleong, Lexy J. (2017). *Metode Penelitian Kualitatif*, cetakan ke-36, Bandung : PT. Remaja Rosdakarya Offset
- 8) Prasetyawati, E. (2012). *Perlindungan Hukum Terhadap Para Pihak Dalam Pembiayaan Konsumen*. DiH: *Jurnal Ilmu Hukum*, 8(16), 240028.
- 9) Subagiyo, D. T. (2018). *Hukum Jaminan dalam perspektif undang-undangan jaminan fidusia (Suatu pengantar)*. Surabaya : UWKS Press.
- 10) Todaro, M. P., & Smith, S. C. (2006). *Pembangunan Ekonomi/Edisi Kesembilan, Jilid 1* (Alih Bahasa: Haris Munandar dan Puji AL). Jakarta: Penerbit Erlangga.



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