

## The Legal Implications Due to Default by the Debtor on a Car Loan Agreement with Fiduciary Guarantee

Wieke Dewi Suryandari<sup>1)</sup> & Hono Sejati<sup>2)</sup>

<sup>1)</sup> Faculty of Law, Universitas Darul Ulum Islamic Center Sudirman GUPPI (UNDARIS), E-mail: [wieke@undaris.ac.id](mailto:wieke@undaris.ac.id)

<sup>2)</sup> Faculty of Law, Universitas Darul Ulum Islamic Center Sudirman GUPPI (UNDARIS), E-mail: [sejatihono@gmail.com](mailto:sejatihono@gmail.com)

**Abstract.** *The purpose of this study is to determine and analyze: 1) The legal position of the strength of a car loan agreement with a fiduciary guarantee for creditors and debtors at Commerce International Merchant Bankers (CIMB) 2) The juridical implications of default by the debtor on a car loan agreement with a fiduciary guarantee at Commerce International Merchant Bankers (CIMB) . The approach method used in discussing this research problem is a sociological juridical approach. The research specification used is descriptive analytical research. This type of data uses primary and secondary data. The data analysis method used in this research is qualitative data analysis. The results of the study concluded: 1) The legal position of the strength of the car loan agreement with fiduciary guarantees for creditors and debtors at Commerce International Merchant Bankers (CIMB) is included in the construction of an anonymous agreement (Innominaat), as far as the contents of the agreement have met the legal requirements (1) of the Civil Code which states that an agreement made legally applies as the law that made it, the CIMB Finance consumer financing agreement, 2) The juridical implication due to default by the debtor on a car loan agreement with a fiduciary guarantee at Commerce International Merchant Bankers (CIMB) is that the creditor does not get the fulfillment of his rights that should be obtained by the existence of the agreement. When the debtor defaults, the thing that will be done by the creditor to get the debt repaid is to sell the object that is guaranteed by the debtor. Another legal consequence of this default is that the Customer may be subject to Article 372 of the Criminal Code regarding embezzlement with a criminal offense imprisonment for a maximum of four years, then Article 36 of Act No. 42 of 1999 concerning Fiduciary Guarantees carries a maximum penalty of 2 years.*

**Keywords:** Credit; Fiduciary; Guarantee.

## 1. Introduction

Credit is a loan agreement between a bank as a creditor and another party as a debtor that requires the debtor to repay his debt after a certain period of time with interest. Factors that play an important role in providing credit is a credit agreement. Without a credit agreement signed by the creditor and debtor, there is no credit agreement<sup>1</sup>. The credit agreement is usually followed by a guarantee agreement, then the credit agreement is the principal or principle, while the guarantee agreement is a follow-up agreement or accessory, meaning that the existence and expiration of the guarantee agreement depends on the principal agreement.<sup>2</sup>

Credit is the provision of the use of money or goods to another person at a certain time with a guarantee<sup>3</sup>. The term guarantee law is a translation of the term security of law, *zakerheidsstelling*, or *zakerheidsrechten*.<sup>4</sup> The law of guarantee according to Salim HS is the whole of the legal rules that regulate the relationship between the giver and the recipient of the guarantee in relation to the imposition of guarantees to obtain credit facilities. In essence, the law of guarantee is a legal provision that regulates the relationship between the guarantor (debtor) and the recipient of the guarantee (creditor) as a result of the imposition of a certain debt (credit) with a guarantee (certain object or person).<sup>5</sup>

In Indonesia, there are 4 types of material guarantees, namely pawn, mortgage, mortgage and fiduciary. The main agreement is a consumer financing agreement, and from this agreement, additional agreements or other accessoir agreements are born, such as fiduciary guarantee agreements.<sup>6</sup> This fiduciary granting agreement is an agreement between the fiduciary giver and the fiduciary recipient, where the fiduciary giver submits collateral objects based on trust to the fiduciary recipient as collateral for a debt. Fiduciary givers are recipients of credit facilities from finance companies, while fiduciary recipients are finance companies, which are generally submitted by fiduciary providers in the form of BPKB of motorized vehicles that are the object (goods) of consumer financing agreements. This BPKB is retained by the fiduciary recipient until the fiduciary

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<sup>1</sup> Dewi Suryandari, Wieke. (2021). The Application of Fiduciary Guarantee in the Perspective of Islamic Law. *Jurnal Daulat Hukum* Volume 4 Issue 4, December 2021 ISSN: 2614-560X, 260-268

<sup>2</sup> Lindgren, C. J., Garcia, G., & Saal, M. (1996). Bank soundness and macroeconomic policy. Washington, DC: International Monetary Fund.

<sup>3</sup> Kane, E. J., & Wilson, B. (1998). A contracting theory interpretation of the origins of federal deposit insurance. *National Bureau of Economic Research Working Paper* No: W6451.

<sup>4</sup> Kelmen, S. (1983). *Regulating America, regulating Sweden: A comparative study of occupational health policy*. Cambridge, MA: MIT Press.

<sup>5</sup>Ibid

<sup>6</sup>Kindleberger, C. P. (1978). *Manias, panics, and crashes: A history of financial crises*. New York, NY: John Wiley & Sons.

giver can pay off its debts.<sup>7</sup> However, if in the implementation of the credit the debtor defaults in accordance with the provisions in the credit agreement and the fiduciary grant agreement, then in practice the creditor has the right to execute the fiduciary guarantee.

Motor vehicle loans that are currently in great demand are car loans, because cars really support mobility. As a result, currently many financial and banking institutions offer vehicle financing through the credit system, one of which is Commerce International Merchant Bankers (CIMB) (CIMB). In practice, the implementation of car loan agreements at banks does not always run smoothly. Sometimes there are problems between the two parties. The problem that is most often encountered in the implementation of bank credit is the existence of defaults in the form of bad loans.

## **2. Research Methods**

The approach method used in this research is a sociological juridical approach. The research specification used is descriptive analytical research. This type of data uses primary and secondary data. The data analysis method used in this research is qualitative data analysis. And the result is analyzed with data reduction and took the conclusion as the final.

## **3. Results and Discussion**

### **3.1 Legal Position Strength of Car Loan Agreement with Fiduciary Guarantee for Creditors and Debtors at Commerce International Merchant Bankers (CIMB)**

Currently, many leasing companies are collaborating with banks to offer special loan products for motor vehicles, such as KKB CIMB. The requirements for applying for KKB Car Financing at CIMB are:<sup>8</sup>

1. Indonesian citizens
2. Permanent Employee/Entrepreneur/Entrepreneur/Professional/Company
3. Minimum 2 years (permanent)
4. Minimum age 21 years or already married
5. Maximum age 64 years when the credit ends
6. Vehicles must be insured through KKB CIMB
7. Comprehensive insurance for the first year and a minimum of TLO the following year (except TLO commercial vehicles during the credit period)
8. Payment via autodebit

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<sup>7</sup>Ibid

<sup>8</sup> <https://www.CIMB.co.id/id/>, accessed on April 12, 2023

Meanwhile, the required documents are:

1. Copy of Applicant's ID card
2. Photocopy of KTP of husband/wife, family card, marriage certificate/divorce
3. Photocopy of the customer's home ownership certificate/AJB
4. Photocopy of CIMB Savings Account & Current Account for the last 3 months
5. Salary Slip for the last 1 month or Income Statement

The car purchase financing agreement at CIMB Finance is subject to the general provisions of the agreement, by applying the principle of the agreement, namely freedom of contract, based on Article 1338 of the Criminal Code paragraph (1) which states that all agreements made legally valid as law for those who make them, meaning an agreement. The agreement can contain the terms of any agreement, as long as the agreement is made legally and in good faith, and does not violate public order and morality. If you look at the type, the consumer financing agreement of PT. CIMB Finance is a one-sided standard agreement in which the contents of the agreement are determined by the consumer finance company.<sup>9</sup>

The legal terms in the agreement have been stated in the Civil Code. Article 1320 of the Civil Code states that for the validity of an agreement, four conditions are needed, namely the agreement of those who bind it, capable of making an agreement, a certain matter and a lawful cause<sup>10</sup>.

A new agreement can be said to be valid if all the provisions stipulated in Article 1320 of the Civil Code have been fulfilled. From this information, it can also be seen that there are things that cause the cancellation of an agreement. If described in detail, the terms of being able and agreeing to an agreement are classified into subjective conditions (conditions regarding the person making the agreement). If one of these subjective conditions is not met, then the legal consequences of the agreement can be requested for cancellation. Meanwhile,

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<sup>9</sup> Klein, R. W. (2017). Regulation and markets in catastrophe insurance. Applied and Agricultural Economics Association Annual Meeting, Chicago, IL. , see to Lenaerts, K. (1993). Regulating the regulatory process, delegation of powers in the European community. *European Law Review*, 18, 23.

<sup>10</sup>Knight, F. (1921). Risk, uncertainty and profit. New York, NY: Houghton KPMG (America). (2016). Ten key regulatory challenges – Facing the financial services industry in 2017. *KPMG LLP*, Delaware, and see to Chuasanga A., Ong Argo Victoria. (2019). *Legal Principles Under Criminal Law in Indonesia and Thailand*, Jurnal Daulat Hukum, Vol 2, No 1 (2019) <http://jurnal.unissula.ac.id/index.php/RH/article/view/4218> , see to Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. Sultan Agung Notary Law Review, 1 (1), 46-56, <http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/4435>

regarding a certain matter and the halal cause, it is classified into objective conditions (objects that are the object of the agreement). If one of these objective conditions is not met, then the legal consequences of the agreement are null and void. This means that the agreement automatically becomes void, in other words the agreement has been canceled since the agreement was made or is considered non-existent. These things are important elements in entering into an agreement.

The subject of this car loan agreement is PT. CIMB Finance as Creditor and Consumers as Debtors, then in the clauses of the CIMB Finance consumer financing agreement Article 1 states that:

1. By taking into account the terms and conditions of this agreement, the Creditor agrees to provide consumer financing facilities (financing facilities) to the Debtor with the amount, period, interest rate and other terms and conditions, along with all attachments and letters/deeds. /agreement and its supporting documents (hereinafter referred to as the Summary of Consumer Financing Facilities) which are an integral and inseparable part of this agreement.
2. The terms and conditions stipulated in this agreement shall be binding on the parties to this agreement as long as they do not conflict with this agreement.

This is in accordance with what is stipulated in Article 1320 paragraph (1) of the Civil Code regarding the agreement of those who bind themselves. That there has been an agreement between the parties as evidenced by the Creditor and Debtor signing the CIMB Finance Consumer Financing Agreement (PPK). By signing the clauses of the CIMB Finance consumer financing agreement, it means that the agreement is binding on the parties, and there will be rights and obligations that must be fulfilled by both, if one party is unable to carry out its obligations, it will have legal consequences.

The provisions of Debtors and Creditors are in accordance with those stipulated in Article 1320 paragraph (2) regarding the ability of the parties to take legal actions to enter into an agreement, in the clause of the CIMB Finance consumer financing agreement Article 4 paragraph (1) letter a states:

1. The debtor submits a photocopy that is adjusted to the original by the authorized official/agencies, documents and the identity of the debtor, including Identity Card, Family Card, Proof of Citizenship of the Republic of Indonesia, Marriage Certificate/Marriage Certificate, Taxpayer Identification Number Card, and other documents deemed necessary by

the Creditor or its replacement document in the form and content accepted by the Creditor.

2. Whereas Article 1330 paragraph (1) of the Criminal Code states that a person who is not capable of entering into an agreement is a person who is not yet an adult and according to Article 330 of the Criminal Code, a person who is not yet an adult is not yet 21 years of age and has never been married. In this case, the debtor has fulfilled the element of competence in entering into a consumer financing agreement, this is evidenced by having an identity card (KTP)/marriage certificate, while for consumer finance companies, in this case, PT. CIMB Finance is evidenced by the company's deed of establishment number No. 38 dated April 10, 2015 drawn up by FX Budi Santoso Isbandi, SH and the Decree.

The implementation of the consumer financing agreement at CIMB Finance is a credit agreement with the possibility of negligence on the part of the Debtor, so to ensure the smooth and orderly payment of installments and prevent losses for the financing company, there is a guarantee in the agreement. The guarantee imposed in the CIMB Finance consumer financing agreement is in the form of a fiduciary guarantee.

According to Article 1 paragraph (1) of Act No. 42 of 1999 concerning Fiduciary Guarantees, what is meant by 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, which means the submission of a certificate. The right of ownership of the car or the Motorized Vehicle Ownership Book (BPKB) from the debtor to the consumer finance company or creditor. This is in accordance with the contents of the clause in the CIMB Finance consumer financing agreement Article 4 paragraph (1) letter b which states that "Submit the original document of proof of ownership of the goods along with all supporting documents or replacement documents in a form and content acceptable to the creditor".

Whereas in the clause 7 of the CIMB Finance consumer financing agreement, it states:

*In order to guarantee the payment of the entire amount of debt obligations in an orderly and orderly manner, the Debtor hereby promises and binds himself to deliver the goods or collateral by signing a Letter/Deed of Power of Attorney to impose a Fiduciary Guarantee or a Fiduciary Guarantee Deed in accordance with the provisions of Act No. 42 of 1999 concerning Collateral Fiduciary. Letter/Deed of Power of Attorney to Charge Fiduciary Guarantee or Deed of Fiduciary Guarantee is an*

*integral and inseparable part of this agreement.*

The contents of the clause in the consumer financing agreement of CIMB Finance Article 7 contains rules regarding the Power of Attorney to Charge Fiduciary Guarantees that must be fulfilled by the Debtor.

Notaries have an important role in the car loan agreement at CIMB , namely making a Fiduciary Guarantee Deed. At CIMB , the assignment of objects with fiduciary guarantees is made with a notarial deed in the Indonesian language. The stipulation of a notarial deed in imposing a fiduciary guarantee is intended to have legal force as evidence for debtors and creditors, and the fiduciary guarantee deed contains at least:

1. The identity of the fiduciary giver and recipient.
2. Fiduciary guaranteed principal agreement data.
3. A description of the object that is the object of a fiduciary guarantee.
4. Guarantee value.
5. The value of the object that is the object of the fiduciary guarantee.

The legal position of the strength of a car loan agreement with fiduciary guarantees for creditors and debtors at Commerce International Merchant Bankers (CIMB) is included in the construction of an anonymous agreement (Innominaat), as long as the contents of the agreement have fulfilled the legal requirements of the agreement as stipulated in 1320 of the Civil Code, the agreement has binding force. This is based on the provisions in Article 1338 paragraph (1) of the Civil Code which states that an agreement made legally applies as the law that made it, the CIMB Finance consumer financing agreement is in accordance with Presidential Regulation no. 9 of 2009 concerning Financing Institutions. The imposition of collateral in the car purchase agreement at CIMB Finance uses a fiduciary guarantee as regulated in Act No. 42 of 1999 concerning Fiduciary Guarantees, namely in the form of transferring the ownership rights to the car or the Motor Vehicle Ownership Book (BPKB) from the debtor to a consumer finance company. This means that there is a 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. In the event that the purchase of goods financed by this financing facility will be in the hands of the Debtor, and the Creditor will hold the BPKB as long as the Debtor makes installments of the credit paid every month. After the installment has been paid off by the debtor, the BPKB will change hands to the debtor.<sup>11</sup>

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<sup>11</sup> Kahn, A. E. (1990). Deregulation: Looking backward and looking forward. *Yale Journal on Regulation*, 7, 325–354.

In the implementation or realization of a legal state based on Pancasila and the 1945 Constitution, it is appropriate that the state must guarantee legal certainty and protection with the core of truth and justice. Whereas to guarantee certainty, order and legal protection, authentic written evidence is needed regarding the legal conditions, events, or actions carried out from one legal act, namely the registration of objects of fiduciary security. The need for written evidence in the form of an authentic deed is increasing in line with the development of demands for certainty, order and legal protection. For this reason, it must be regulated in a statutory rule that will become the basis and guideline for business actors and communities who need and need funds.<sup>12</sup>

### 3.2 Juridical Implications Due to Default by the Debtor on a Car Loan Agreement with Fiduciary Guarantee at Commerce International Merchant Bankers (CIMB)

The problem that often causes juridical problems in the law of fiduciary guarantees is when the debtor providing the fiduciary guarantee does not carry out an obligation that should have been agreed upon. The debtor's negligence is evidence of a default. The definition of breach of contract, according to Subekti, is if the debtor does not do what he promised, it is said that he is in default, meaning that the debtor is negligent or negligent or breaks his promise, or violates the agreement, if he does or does something that is not allowed."<sup>13</sup> Meanwhile, according to M. Yahya Harahap, what is meant by default is the implementation of obligations that are not timely or carried out inappropriately. A debtor is mentioned and is in a state of default if he is negligent in carrying out the agreement so that he is late from the specified time schedule or in carrying out his performance not properly or properly.<sup>14</sup>

In principle, debtor defaults can be categorized in three ways, namely:

1. If the debtor does not pay the amount owed to the bank based on the credit agreement according to the specified time.
2. The fiduciary debtor is negligent in fulfilling his obligations to pay debts to the bank and it is sufficient only to prove it by the passage of time specified in the agreement without a warning letter from the bailiff.

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<sup>12</sup> Kaminsky, G. L., & Reinhart, C. M. (1996, March). *The twin cases: The causes of banking and balance of payments problems*. International Finance Discussion Paper No. 544. Board of Governors of the Federal Reserve System, Washington, DC. 94 References

<sup>13</sup>Kane, E. (1981, May). Accelerating inflation, technological innovation, and the decreasing effectiveness of banking regulation. *The Journal of Finance*, 555–567.

<sup>14</sup>Lindholm, C. (1997). Logical and moral dilemmas of postmodernism. *The Journal of the Royal Anthropological Institute*, 3(4), 747–760.



3. Default is not regulated in the deed of fiduciary guarantee agreement but is sufficiently regulated in the main agreement.<sup>15</sup>

The position of the creditor as a fiduciary recipient has priority rights (preferential rights) over other creditors, meaning that if the debtor fails to pay his debts or forgets to pay his debts, the creditor has the right to sell or execute the fiduciary guarantee object and the creditor also has the first right to get repayment of the debt from the proceeds execution of the collateral. The juridical implication due to default by the debtor on a car loan agreement with a fiduciary guarantee at Commerce International Merchant Bankers (CIMB) is that the creditor does not get the fulfillment of his rights that should be obtained by the existence of the agreement. This happens because the legal relationship that occurs between the debtor and the leasing company is based on an agreement, namely a consumer financing agreement. Juridically, the legal consequences of default in an agreement are not that simple. Because the agreement is a bond in the field of civil law between two or more legal subjects, where one party is entitled to something and the other party is obliged to do so.<sup>16</sup> Another legal consequence of this default is that the Customer may be subject to Article 372 of the Criminal Code concerning Embezzlement with a maximum imprisonment of four years or a fine of 111 Bath. Then in Article 36 of Act No. 42 of 1999 concerning Fiduciary Guarantees with a maximum penalty of 2 years and a maximum fine of 111.111 Bath, while the buyer will be subject to Article 480 of the Criminal Code on detention with a maximum imprisonment of four years.

The measures used to determine whether a debtor has defaulted on a car loan at CIMB include:

1. Non-payment of the financing debt installments with the lapse of 30 (thirty) days from the due date of the installments.
2. Pawned car
3. Over credit was carried out without the knowledge of CIMB

To settle the default, the debtor will first be summoned or given a SP (Warning Letter) by CIMB. If within 3 months or 90 days the debtor is still unable to make payments, the case will be transferred to the PSO Division (Problem Solving Officer), which is the division for handling debtors who are late in carrying out obligations for 3 months and above. If the debtor in handling the PSO is unable

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<sup>15</sup>Mifflin & Co. Kohn, M. (1999). Early deposit banking. Chapter in "Finance, Business, and Government before the Industrial Revolution", Dartmouth College. Retrieved from <http://www.dartmouth.edu/mkohn/>.

<sup>16</sup> Kneeshaw, J. T. (1995, April). Survey of non-financial sector balance sheets in industrialised countries: Implications for the monetary policy transmission mechanism. Working Paper No: 25, Bank for International Settlements, Geneva.

to make payments, the unit in this case the motorcycle will be immediately secured by the PSO Division. If the PSO Division is unable to make a withdrawal, the withdrawal process will be carried out by the Debt Collector (DC) who incidentally is an external employee of the company (freelance).

Instead of using violent methods that have the potential to violate the criminal law, it is better for the leasing party to resolve the problem of bad credit / installments by using several methods. In the event of a dispute, there are several ways that can be used to resolve disputes that arise from both parties, namely in the following ways which are expected to prevent violence by debt collectors:

1. Peace or negotiation, the meaning of the word peace here is that between the creditor and the debtor or consumer, make a peace outside the court (non-litigation). The implementation of the peace depends on both parties so that there is an agreement from both parties so that this dispute does not proceed to court.
2. Court, if efforts to resolve the dispute through non-litigation efforts fail, the parties can file a lawsuit to the court.

Regarding the execution of fiduciary guarantees in the latest regulation, namely the Constitutional Court Decision No. 2/PUU-XIX/2021, it is stated that the execution of fiduciary guarantees can be submitted to a district court by alternative creditors. The alternative in question is an option if there is a default but an agreement is not reached and there is no voluntary surrender of the object of fiduciary security by the debtor, then the choice of execution cannot be made by the creditor himself, but asks the district court for assistance to carry out the execution. The Constitutional Court's decision is the latest decision on the lawsuit filed by Joshua Michael Djami who filed a petition for judicial review of Article 15 Paragraph 2 of Act No. 42 of 1999 concerning Fiduciary Guarantees. The application for judicial review is the aftermath of the Constitutional Court's decision number 18/PUU-XVII/2-2019. In the 2019 Constitutional Court ruling, there are several different interpretations regarding the execution of fiduciary guarantees. With the (latest) decision of the Constitutional Court number 2/PUU-XIX/2021 page 83 paragraph 3 it is clearly stated that the execution of a fiduciary guarantee certificate through a district court is only an alternative and not an obligation. The Constitutional Court's decision stated that the court was only taken if the debtor or one of the parties objected to the confiscation process.

#### **4. Conclusion**

The legal position of the strength of a car loan agreement with fiduciary guarantees for creditors and debtors at Commerce International Merchant

Bankers (CIMB) is included in the construction of an anonymous agreement (*Innominaat*), as long as the contents of the agreement have met the legal requirements. The juridical implication due to default by the debtor on a car loan agreement with a fiduciary guarantee at Commerce International Merchant Bankers (CIMB) is that the creditor does not get the fulfillment of his rights that should be obtained by the existence of the agreement. Another legal consequence of this default is that the customer may be subject to Article 372 of the Criminal Code concerning Embezzlement, then concerning Fiduciary Guarantees with a maximum penalty of 2 years and a maximum fine of 111.111 Bath.

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