

# Execution Of Fiducia Guarantee In Government Pawnshop Companies In Semarang City



Siti Malikhatun Badriyah, R. Suharto, Ety Susilowati, Muhammad Haidar Fakhri Allam

**Abstract:** *The line of business carried out by the pawnshop company is always experiencing growth. At the moment, it does not only provide facilities for lending money guaranteed by pawnshop but also includes other activities, one of which is a credit facility with fiduciary collateral. This fiduciary loan is intended to help Micro, Small and Medium Enterprises to obtain financing easily and quickly. This fiduciary guarantee benefits the creditors, because it can provide confidence that the debt will be repaid by the debtor in accordance with the agreement. On the other hand the giver guarantees the benefits of getting financing and can still use collateral. However, the use of fiduciary guarantees at the pawnshop company raises problems in practice. Among other things, there are differences in the principle between pawning with fiduciary collateral and fiduciary collateral execution if the debtor defaults.*

**Keywords :** *Government pawnshop Company, fiduciary guarantee, execution, default.*

## I. INTRODUCTION

A Pawnshop Company is a private pawnshop company and a government pawnshop company that is regulated and supervised by the Financial Services Authority (Article 1 Number 2 of the Financial Services Authority Regulation Number 31/POJK.05/2016 concerning Pawnshop Businesses). The focus of this research is the Government (Persero) Pawnshop Company. The Government pawnshop Company is PT Pegadaian (Persero).

Article 1 Number 1 POJK of the Pawnshop Business states that the Venture Business is all businesses involving the provision of loans guaranteed by movable goods, safekeeping services, estimation services, and/or other services, including those held based on sharia principles (Lathif & Habibaty, 2019).

Venture business continues to develop. Pawnshop business

regulations evolve along with the development of alternative financing needs, especially for the lower middle class, as well as micro, small and medium enterprises (Abubakar & Handayani, 2018). Even at this time the pawnshop business does not only cover loans guaranteed by mortgage. Business ventures are further expanded, namely safekeeping services, estimated services, and/or other services. PT Pegadaian also conducts lending business with fiduciary guarantees. The agreement is a credit agreement with a fiduciary guarantee. Guarantees are very necessary to provide confidence to creditors that the debtor will carry out his achievements (Suyatno, 2018). According to Sumit Agarwal et al. (2015) the role of collateral in debt contracts in an effort to reduce agency costs or conflicts in contracts.

Initially the business carried out by the Pawnshop Company was the provision of loans guaranteed by movable objects with the principle of pawning. In various other countries like France (Tobin et al., 2018), China (Hornstein, 2017), Malaysia (bin Mohd Noar, & Islam, 2015) use pawn to guarantee with a moving object object. In the pawnshop there are conditions that cannot be deviated, namely inbezitstelling conditions as stipulated in Article 1152 Paragraph (2) of the Civil Code which states that there is no lien if the pledge object is left in the hands of the Pawn Giver or returned to the Pawn Giver at the willingness of the Creditors. This certainly becomes a problem when the Pawnshop Company is currently conducting a business providing credit with fiduciary guarantees, because the principle of pawnshop is very different from fiduciary guarantees.

The Pawnshop Company The Government expanded its business by providing credit facilities with fiduciary guarantees, in addition to developing its business as well as implementing government programs to help micro, small and medium enterprises to obtain financing more easily, quickly and with simple conditions. One of the biggest challenges facing entrepreneurs is getting funds for their business activities (Crosetto & Regner, 2018). In obtaining this fund, it can come from yourself or from other parties. In the case of funds originating from this other party in general with a debt agreement. Therefore guarantees are an important factor to ensure the performance of debtors' achievements. However, it is often difficult for business actors to provide collateral because collateral is still needed for their business needs. In a fiduciary guarantee the object of the guarantee remains in the hands of the Fiduciary Giver. What is transferred to the recipient of Fiduciary is the ownership of the object of fiduciary guarantee. This is very beneficial for the parties (Badriyah, 2015, Badriyah et al., 2019).

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Even though fiduciary benefits provide great benefits to the parties, there are various problems that arise with the conduct of lending business with fiduciary guarantees, among others in the case of default debtors. Fiduciary guarantee is one of the guarantees of material. Therefore, if the debtor defaults, execution of the object of fiduciary collateral can be carried out in accordance with Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Therefore this research is very urgent to do. This study aims to uncover and analyze the background of the Government pawnshop Company to conduct a business providing credit with Fiduciary Assurance which has a different principle from mortgage. In addition, this research also reveals and analyzes the Execution of Objects of Fiduciary Guarantees in Government pawnshop Companies if the debtor defaults.

## II. RESEARCH PROBLEM

1. Why does the Government pawnshop Company (Persero) conduct a business providing loans with Fiduciary Guarantees which have very different principles from pawning?
2. How to Execute the Object of a Fiduciary Guarantee at a Government pawnshop Company (Persero) if the debtor defaults?

## III. METHODS

The approach used in this study is an empirical juridical approach by conducting library research and field research to uncover and analyze the background of the Government pawnshop Company to carry out lending business with Fiduciary Assurance which has different principles from pawn and execution of objects of Fiduciary Assurance at Government pawnshop Companies if default debtor. The specification of this study is analytical descriptive.

## IV. RESULTS

### A. Implementation of a Fiduciary Guarantee on a Government Pawnshop Company

At present the Government pawnshop Company conducts business in the field of providing financing with a credit system with fiduciary guarantees. The business is called Pegadaian Kreasi (Installment Credit Fiduciary System). Creation is the provision of loans to micro-small entrepreneurs for business development with a fiduciary guarantee scheme (collateral in the form of BPKB and in certain areas can be in the form of kiosks or stalls of business premises). Loan repayments are made in installments per month for a credit period of 12 to 36 months. Capital rental rates charged to customers at 1% per month flat.

The juridical basis for the law of liens is found in Articles 1150-1160 Civil Code. Pawn is a right obtained by a creditor on a movable property, which is handed over to him by a debtor or by another person in his name, and which gives the debtor party the power to take repayment of the item prior to that of other debtors; with the exception of the cost of auctioning the item and the costs incurred to save it after the item is pawned, which costs take precedence.

Thus the business sector carried out by the Government

pawnshop Company (PT Pegadaian (Persero)) not only provides loans with a pawnshop guarantee system but also extends to also cover installment loans with the Fiduciary System. Even if you pay attention grammatically, the Pawnshop Company should only do business with a pawnshop system not with a fiduciary guarantee system, because these two types of collateral have different principles.

From the definition of pawnshop as stated in Article 1150 Civil Code can be known that pawnshop has several elements, namely:

- a. Pawn is a guarantee right, that is a right obtained by a creditor to guarantee repayment of creditors' receivables;
- b. Pawn occurs due to the surrender of a pledge object from the pledge to the pawn holder;
- c. The existence of a pawn subject, namely the pawner and pawn holder;
- d. The existence of pawn objects, namely movable goods, both tangible and intangible;
- e. The existence of the previous position of the creditor holder is compared to other creditors, meaning that the pawnshop holder has the right to take precedence in repaying the receivables rather than other creditors from the sale of the pawnshop object.

Pawn is one of the material guarantees because it fulfills the characteristics of material rights. As a material guarantee, the creditor is a preferred creditor. Preferred creditors are creditors who have the right to take precedence in repaying their receivables rather than other creditors from the sale of collateral objects.

Pawnshop rights are also strong and easy collateral rights. Pawnshop is a strong guarantee right, because:

1. According to Article 1134 paragraph (2) mortgages and mortgages are higher than privileges unless otherwise specified by law
2. Pawnshop creditors include separatist creditors, so they are not affected by the debtor bankruptcy.

Pawn can be said to be an easy guarantee right foreclosures, because the bailiff's seizure according to the provisions in the civil procedural law does not apply to pawning, so if the debtor defaults, the pawn holder creditor can easily sell the pawn by auction without requiring the court judge.

Pawn is different from fiduciary guarantees even though both are guaranteed material. Like pawn, fiduciary guarantee is one of the special guarantees that are guaranteed material. The Fiduciary Institution is actually very old and is known and used in Roman law societies. In Roman law the guarantee institution is known as the fiduciary name cum creditore contracta (meaning, the promise of trust made with creditors). The content of the promise made by the debtor with his creditor is that the debtor will give ownership rights to an object to his creditor as collateral for his debt with an agreement that the creditor will transfer the ownership back to the debtor when the debt has been paid in full. The surrender of ownership rights over the object of the fiduciary guarantee is not intended to truly constitute a transfer of ownership, but only as collateral.

Fiduciary creditors do not have the full authority that an owner has. After the debtor fulfills its obligations, the creditor must give back the ownership rights to the fiduciary giver. The debtor acts with trust, that after the debtor has repaid his obligations, the creditor will not break his promise by continuing to have a collateral object (and considers himself to be the full legal owner). Such relationships are called fides or fiduciary relationships (Satrio, 1998).

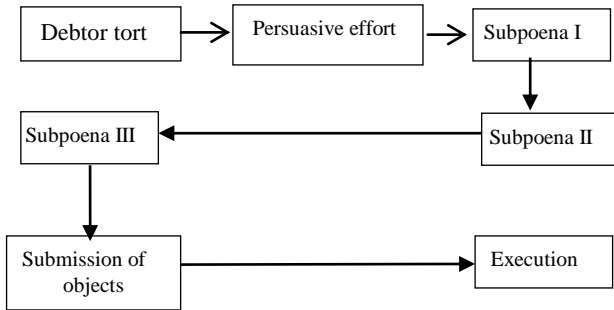


Figure 1. Flowchart of the process of executing fiduciary collateral objects in pawnshop companies against registered fiduciary collateral

The emergence of a fiduciary guarantee institution as it is known now in the form of a fiduciare eigendomsoverdracht or FEO is related to the provisions in Article 1152 paragraph (2) Civil Code about pawn that requires that the power over the mortgaged object must not be at the pawnshop (inbezitstelling conditions). This raises difficulties for the pawnshop provider because he can no longer use the mortgaged object for the benefit of the pawnshop giver.

In fiduciary guarantees, usually all documents relating to the ownership of the goods in question will be held by the finance company as a fiduciary recipient, while the physical matter remains with the consumer.

Provision of fiduciary guarantees is carried out through a process called the Constitutum Prossessorium (surrender of ownership of objects without surrendering the physical property) (Fuady, 2002)). In connection with this fiduciary guarantee, the physical property remains in the hands of the owner or Fiduciary Giver.

One element that is the focus of attention in this paper is that in a fiduciary guarantee, the fiduciary recipient has a prioritized position over other creditors from the debtor's repayment (fiduciary guarantee). This element shows that the fiduciary creditor will have a better position before the law in billing, as well as if there is an execution of a fiduciary collateral, then the position is preferred/prioritized from other creditors in taking repayments for the execution of fiduciary collateral.

As a material guarantee, fiduciary guarantee is a guarantee right that is strong and easy to implement. Fiduciary guarantee Provides a prior position to the fiduciary creditor against the creditor. The precedence referred to is the right of the fiduciary recipient to repay his debt for the results of the execution of an object which is a fiduciary object. In addition, the Fiduciary Recipient creditor is also a separatist creditor. Thus the fiduciary creditors were not affected by the debtor's bankruptcy.

The process of fiduciary assurance is carried out through two stages, namely the stage of imposition of Fiduciary Guarantee and the stage of registration of Fiduciary Guarantee.

**B. Loading Fiduciary Guarantee**

In Article 5 paragraph (1) the Fiduciary Guarantee Law states that the imposition of objects with a fiduciary guarantee is made by a notary deed in Indonesian and is a Fiduciary Guarantee Deed. According to Kashadi, the reason for the law stipulates the notary deed is (Kashadi, 2000):

- a. Notary deeds are authentic deeds so that they have the power of perfect proof.
- b. The object of fiduciary guarantee is generally a moving object.
- c. The law prohibits repeated fiduciary.

In the Fiduciary Guarantee Deed other than the day and date stated, it also states the time (hours) of making the deed.

In Article 5 paragraph (1) the Fiduciary Guarantee Law is not found at all the words "must" or "mandatory" made by the notary deed. Although it is not said to be obliged to be made by a notary deed, but the making of this notary deed is very useful in terms of proof, because the notary deed is one of the authentic deeds referred to in Article 1868 of the Civil Code, and in accordance with the provisions of Article 1870 the Civil Code has perfect proof power towards the parties and heirs or people who get the rights thereof. In addition, the making of a fiduciary guarantee deed with a notary deed is required in the case of registration of fiduciary collateral, which is at the time of the birth of a fiduciary guarantee.

According to J. Satrio, this fiduciary guarantee deed is a material requirement for the enactment of the provisions of the Fiduciary Guarantee Law on fiduciary guarantee agreements which are closed by the parties, and in addition also as evidence. In addition, the fiduciary guarantee certificate is a document required in the registration of fiduciary guarantees to issue a fiduciary guarantee certificate, so that the fiduciary guarantee agreement made has a permanent legal force, and guarantees more legal protection for both parties.

**C. Registration for Fiduciary Guarantees**

The purpose of Fiduciary Guarantee registration is to give birth to fiduciary guarantees, provide legal certainty to interested parties, give prioritized rights to Fiduciary Recipients to other creditors, and to fulfill publicity principles because the Fiduciary Registration Office is open to the public.

The significance of the registration of fiduciary guarantees is basically:

- a. Is the time of the birth of a fiduciary guarantee. If the fiduciary guarantee is not registered with the Fiduciary Registration Manager, then fiduciary guarantees do not occur, so that they do not receive protection under the provisions of the Fiduciary Guarantee Act.

In Article 37 paragraph (3) of the Fiduciary Guarantee Law and its explanation stated that the fiduciary guarantee agreement that is not



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registered does not have preferential rights, both inside and outside bankruptcy and or liquidation.

- b. Providing legal certainty to the parties, because it provides a prior position to the fiduciary recipient of other creditors.
- c. Provide legal certainty for the community, because the public can know that an object has been burdened with fiduciary guarantees.
- d. Providing legal certainty to third parties, because they can find out the traits inherent in objects that are objects of fiduciary jminan, especially regarding the imposition of Fiduciary Guarantees.

The occurrence of a fiduciary guarantee is at the time of registration of a fiduciary guarantee at the Fiduciary Registration Office.

From the results of fiduciary collateral registration research at PT Pegadaian (Persero), the difference between loans is less than Rp. 20,000,000.00 with Rp. 20,000,000.00. For loans less than Rp. 20,000,000.00 only made a waarmeding deed. For loans of more than Rp.20,000,000.00 a Fiduciary Guarantee Deed is made by a Notary and subsequently registered at the Fiduciary Registration Office.

Fiduciary guarantees that are not registered do not occur fiduciary guarantees. Thus the creditor does not have the rights as a fiduciary creditor as stipulated in the Fiduciary Guarantee Act.

The Government pawnshop Company in Indonesia provides fiduciary credit facilities given the development of a society that is increasingly in need of financing in an easy, fast and simple condition. Pawnshop companies can help fulfill the needs of the community, especially micro, small and medium enterprises that need funds. While if you get financing with mortgage, then the collateral must be submitted to the Pawnshop Company. Though often the entrepreneurs still need the object for their business operations. Therefore, the Pawnshop Company opens opportunities to be able to help micro, small and medium enterprises.

In addition to the foregoing, although there are fundamental differences between pawn and fiduciary guarantees, there are still similarities, namely both are special guarantees in the form of material guarantees. Thus there are certain objects that are objects of guarantee. Material guarantees also create preferential positions and separatists to creditors who receive guarantees.

As a material guarantee, if a default creditor can be executed directly on the object of fiduciary collateral.

### D. Execution of Fiduciary Assurance at Government pawnshop Companies

One characteristic of a good material guarantee is if the collateral object can be executed quickly, simply and there is legal certainty. The fiduciary guarantee certificate has executive power. This means that the Fiduciary guarantee certificate has the same strength as court decisions that have permanent legal force. Thus, if the debtor defaults, the Fiduciary Recipient Creditors can execute the object of fiduciary collateral through a public auction without going through a court.

The execution of Fiduciary Guarantees is regulated in

Article 29-34 of the Fiduciary Guarantee Act. If the debtor or Fiduciary is injured, the execution of objects that are objects of Fiduciary Assurance can be done by:

- a. Implementation of the executorial title as referred to in Article 15 paragraph (2) by Fiduciary Recipients;
- b. Sales of objects that are objects of Fiduciary Assurance for the power of the Fiduciary Recipient himself through public auction and taking repayment of his receivables from the proceeds of sale;
- c. Underhand sales carried out based on the agreement of the Fiduciary Giver and Recipient if in this way the highest price can be obtained that benefits the parties.

The implementation of sale of sales under the hand is carried out after the expiration of 1 (one) month from the written notification by the Fiduciary Giver and/or Recipient to interested parties and announced at least in 2 (two) newspapers circulating in the area concerned.

The Fiduciary must submit objects that are objects of Fiduciary Assurance in order to carry out the execution of the Fiduciary Guarantee. In the case of objects that have objects of Fiduciary Assurance consisting of trade objects or securities that can be sold on the market or on the stock, the sale can be carried out in these places in accordance with the applicable laws and regulations.

Every promise to carry out the execution of objects that are objects of Fiduciary Assurance in a manner that is contrary to the provisions of the Fiduciary Guarantee Law is null and void. Any promises that give authority to Fiduciary Recipients to own objects that are objects of Fiduciary Assurance if the debtor is injured in the promise, null and void. mIn the event that the execution exceeds the guarantee value, the Fiduciary Recipient must return the excess to the Fiduciary Giver. If the results of the execution are insufficient for repayment of debt, the debtor is still responsible for paying off the shortcomings.

To be able to carry out the execution of fiduciary collateral objects in accordance with the provisions of the Fiduciary Guarantee Law, a fiduciary guarantee must be in accordance with the process specified in the law. Based on the Fiduciary Guarantee Law, fiduciary guarantees are when registering fiduciary guarantees.

From the results of the study, it can be seen that not all fiduciary guarantees carried out at the Government Examination Company are registered. Even though the occurrence of fiduciary guarantees is during the registration of fiduciary guarantees in the Office of Fiduciary Registration. Thus the imposition of unregistered fiduciary guarantees does not occur in fiduciary guarantees.

In the case of default debtors, if there is a registration for fiduciary guarantees, the fiduciary creditor can immediately execute the collateral object. This is different if there is no registration, there is no fiduciary guarantee.

As a result, the creditor's rights as specified in the Fiduciary Guarantee Law, one of which is to execute in accordance with Article 29-34 of the Fiduciary Guarantee Act that cannot be carried out.

The results of the study indicate that the execution of the object of fiduciary collateral is the last attempt of the fiduciary creditor in resolving bad credit (default). Before the execution of the object of fiduciary collateral the Pawnshop Company will make other efforts first and prioritize deliberation efforts with the debtor.

If there is bad credit, the pawnshop Company will check first to see how many times the debtor has not paid the installments of Creation. If the customer does not pay monthly installments or extend credit, the Government pawnshop Company does not immediately execute, but does the following steps:

1. Checking customer installments. Customers who do not make one or two installment payments will be billed by the Pawnshop Company
2. Approach by the Pawnshop Company to customers to obtain information on whether the business carried out by the customer is still running smoothly or not. In this case the Company will contact customers through communication media and with a warning letter until the customer pays installments.
3. For customers who have not paid their installments three times or more, billing is carried out and the First Warning Letter is given. The warning letter is given after the Reclamation Company repeatedly collects and tries to communicate via electronic and direct media. In this case the Pawnshop Company seeks to meet directly with customers. If the customer cannot be found, the Pawnshop Company will try to meet the debtor's family to inform them that the debtor is in default. If the effort is not successful then the Hospitality Company will give a warning letter three times.
4. In case there is already a third Warning Letter and the debtor still does not make a payment, the object of fiduciary guarantee is executed.

In the execution of fiduciary guarantees there is a possibility that the object of fiduciary collateral is not in the hands of the fiduciary giver, for example being sold to a third party. In such case, the Pawnshop Company can still execute because based on Article 23 Paragraph (2) the Fiduciary Giving Fiduciary Law is prohibited from transferring, pawning, or renting to other parties objects that become objects of fiduciary guarantee without written approval from the Fiduciary Recipient. This is in accordance with the principles contained in fiduciary guarantees as material guarantees, namely the principle of the *droit de suite* that material rights always follow the object in the hands of whoever the object is. Thus in this case the Pawnshop Company can still execute the object in the hands of whoever the object is.

## V. CONCLUSION

The Government pawnshop Company (Persero) conducts business to provide loans with Fiduciary Guarantees which have very different principles from pawning, because they are to develop a business in the context of helping small and medium-sized communities and micro, small and medium scale businesses. With the provision of credit facilities with

fiduciary collateral, the fiduciary giver (customer) can still use the object of fiduciary collateral for the purposes of his business because the object remains controlled by the Fiduciary Giver. This makes it easier for the public to obtain financing from the pawnshop Company to improve their business in order to improve welfare. On the other hand, the Pawnshop Company continues to obtain material guarantees, so that if the debtor defaults, the collateral object can be executed to fulfill the debtor's performance.

The execution of the object of fiduciary collateral at the Government pawnshop Company is carried out as a last resort after other efforts have not succeeded. In this case, the Pawnshop Company prioritizes deliberation with customers first. Execution of fiduciary collateral objects in accordance with the Fiduciary Guarantee Law can only be carried out against fiduciary guarantees carried out in accordance with the Fiduciary Guarantee Law, namely there is imposition of fiduciary guarantees by Fiduciary Guarantee Deed and then registration of Fiduciary Guarantees in the Fiduciary Registration Office. If it is not registered, there is no fiduciary guarantee, so that the Fiduciary Recipient does not obtain the right of execution under the Fiduciary Guarantee Law.

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