

## RECONSTRUCTION OF LEGAL PROTECTION TO THE DEBTOR OF THE MOTORIZED VEHICLE AS THE FIDUCIARY GUARANTEE IN FINANCING AGREEMENT BASED ON JUSTICE VALUES

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### ABSTRACT

Article 23 Paragraph (2) of the Fiduciary Guaranty Act states that fiduciary Providers are prohibited from transferring, pledging and leasing of objects guaranteed to other parties except by the written consent of the fiduciary recipient. If violated, under Article 36 of the Fiduciary Guaranty Act, the fiduciary provider may be subject to a maximum imprisonment of 2 years and a maximum fine of Rp. 50.000.000, - (fifty million Rupiah). In practice, in Batam City, the transition of a motor vehicle by the first debtor to the second debtor is without the creditor's consent. The second debtor has received the transfer of rights from the first debtor and has good faith by making installment payments to the finance company. Legal Protection Against Debtors for Motor Vehicles as Fiduciary Guarantees in a Financing Agreement based on justice values is by reconstructing Article 36 of the Fiduciary Guaranty Act, namely with the addition of paragraph (2), stating: Criminal provisions referred to in paragraph (1) to the transfer of objects fiduciary guarantee does not apply to the fulfillment of creditor receivables.

**Keywords: Legal Protection, Fiduciary Guarantee, Financing Agreement**

### A. Background

National development is one of the efforts to achieve justice and prosperous society. In order to maintain and continue sustainable development, the actors of development, both government and society, both individuals and legal entities, need funds<sup>1</sup> to implement such sustainable development. In addition, as development activities increase, the need for funding is also increasing. Moreover, most of the fund needed to meet these needs is obtained through borrowing and lending activities.

The development of the economy and the need for capital cause the community's need for capital tends to increase. In order to meet the community's need for this capital the bank develops various types of fund assistance to help the field of capital provision. One of the assistances is with the help of credit from third parties who provide loans to debtors.

In running the borrowing and lending process, the bank is one form of financial institutions that aims to provide credit and other banking services. The lending is done by the bank either with its own capital, or by trading new payment instruments.<sup>2</sup>

To guarantee or ensure the smoothness of the refund, it is necessary to have a object guarantee. The form of securing credit in banking practice is done by binding of the guarantee.<sup>3</sup>

In providing assistance in the form of borrowing, the debtor as the party who owes can provide a guarantee as a loan to the creditor. The collateral may be either tangible or intangible movable objects or immovable objects, especially buildings that cannot be burdened with mortgages, often referred to as fiduciary collateral<sup>4</sup>. The object of fiduciary guarantee as stipulated in

<sup>1</sup> As it is known that fund or money is one important capital factor to run and develop an economic business or business. To obtain funds for the implementation and development of business enterprises can be pursued by implementing lending / credit through banking services, with adequate assurance either in the form of movable or immovable objects.

<sup>2</sup> O. P. Simorangkir, *Kamus Perbankan*, Bina Aksara, Jakarta, 1989, page 33. The new means of payment herein may be interpreted as an agreement of a debtor's debt or credit granting between the creditor to the debtor, provided that both parties agree to grant and return with the time agreed upon by both parties.

<sup>3</sup> Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Alumni, Bandung, 2006, page 2. Guarantees have a very important function in economic activity in general because in lending capital from financial institutions (both banks and non-banks) requires a guarantee, which must be met by the capital seekers if he wants to get additional capital loans (in the form of credit) both for long term and short term. For the debtor a good form of guarantee is a form of guarantee that will not cripple its daily business activities, whereas for the lender a good guarantee is a guarantee that can provide a sense of security and legal certainty that the credit given can be recovered just in time.

<sup>4</sup> Fiduciary is derived from the word *fiduciair* which means trustworthy, directed to the trust given by reciprocity by one party to the other party that what comes out is shown as the transfer of property, actually into the (internal) is just a guarantee only for debt. Bambang Riswanto, *Sejarah dan Pengertian Fidusia*, Citra Aditya Bakti, Bandung, 2005, page 15.

the Fiduciary Guaranty Act can replace the *cessie* of guarantee on the receivable. It is called *Suijling* as *Fiduciaire Cessie* which is widely used in the practice of lending in banks. Furthermore, the fiduciary guarantee object may be an object already possessed by the fiduciary giver at the time of loading, but may also be inserted objects to be obtained later.<sup>5</sup>

The status of material rights to motor vehicle objects charged with a fiduciary guarantee of the right to property is wholly owned by the creditor. On the other hand, the debtor as the fiduciary giver has the right to enjoy the security object to fiduciary collateral.

In practice, the financing agreement with fiduciary assurance is said that the first debtor is the owner of the collateral goods. The proof of ownership of the vehicle object on behalf of the first debtor is delivered by the creditor in accordance with the agreement made at the beginning of the agreement. In practice, it is found that collateral goods are transferred or guaranteed to a third party by any means, without obtaining written consent in advance from the creditor is said to be a debtor making a default.<sup>6</sup>

In the course of the fiduciary guarantee agreement between the debtor and the creditor, it is possible to transfer credit from one creditor to another. This can happen by reason of the debtor as the borrower of the fund wishing to seek a lower interest on the other creditor. The transfer of fiduciary guarantee can occur. The act of transferring the collateral to a third party shall not be made by a debtor in any way without the prior written consent of the creditor. In the event of such occurrence, then all debtor debt to the creditor may be billed instantly and simultaneously, without prior notice in writing by the creditor to the debtor.

The debtor's actions can be said to be embezzlement as set forth in Article 372 of the Criminal Code with the threat of imprisonment for 4 years. In contrast to Article 23 Paragraph (2) of the Fiduciary Guaranty Act, it states that fiduciary givers are prohibited from transferring, pledging and leasing of objects guaranteed to other parties except by the written consent of the fiduciary recipient. If the provision is violated, then under Article 36 Fiduciary Guaranty Act, fiduciary giver may be subject to imprisonment for a maximum of 2 years and a maximum fine of Rp. 50.000.000, - (fifty million Rupiah).

The transfer of fiduciary security has been regulated in Article 19 of the Fiduciary Guaranty Act, which states "the transfer of rights secured by fiduciary securities resulted in the transfer of by law all rights and obligations of fiduciary beneficiaries to new creditors. The transfer of fiduciary security is registered by the new creditor to the Fiduciary Registry Office.

In practice in Batam City, the transition of motor vehicles made by the old debtor to the new debtor is made by the delivery of the real goods of the motor vehicle from hand to hand at the signing of the agreement under the hand. The transition is justified only in the sense that the first debtor can only transfer if there is permission from the finance company first. The second debtor has received the transfer of rights from the first debtor and has good faith by making installment payments to the finance company.

Based on the description, further research on the **Reconstruction of Legal Protection to the Debtor of the Motorized Vehicle as the Fiduciary Guarantee in Financing Agreement Based on Justice Values** needs to be done.

## B. Theoretical Framework

In every study, it must be accompanied by theoretical ideas. The theory is to explain and figure out the specific symptoms for a particular process.<sup>7</sup> Theoretical framework is the basis of theory or theoretical support in constructing or reinforcing the truth of the problem analyzed. A logical path of thought that has a correlation to the problem will give rise to a theory that describes the way of thinking according to a logical framework as well.<sup>8</sup>

The theoretical framework used in this study was the theory of legal protection, which was based on legislation on the protection provided by positive law to the subject of law. Legal protection under the law does not require the consent of the parties, whereas the legal protection under the contract is the legal protection set forth in the contract on the rights and obligations of the parties which have been mutually agreed. Both of these legal protections, whether derived from the law or originating from the agreement constitute legal protection obtained through the engagement.

According to Fitzgerald, the theory of legal protection is the law aims to integrate and coordinate various interests in society because in many interests, protection of certain interests can be done by limiting the other interests<sup>9</sup>. The point is that the legal interest is to take care of human rights and interests, so the law has the highest authority has role to determine the human interest

<sup>5</sup> Arie S. Hutagalung, *Analisa Yuridis Mengenai Pemberian dan Pendaftaran Jaminan Fidusia*, Fakultas Hukum Universitas Indonesia, Jakarta, 2003, page 3.

<sup>6</sup> Syarat dan Ketentuan Umum Perjanjian Pembiayaan dengan Jaminan Fdusia Angka 12 Huruf (f) pada perjanjian di PT. Astra Sedaya Finance Kota Batam.

<sup>7</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Universitas Indonesia Press, Jakarta, 1986, page 122. The theoretical framework is a framework of thought or points of opinion, theory, thesis, as a handle either approved or not approved. M. Solly Lubis, *Filsafat Ilmu dan Penelitian*, Mandar Maju, Bandung, 1994, page 80.

<sup>8</sup> The theory that describes the way of thinking according to a logical framework means explaining the problem of thought that has been formulated within the relevant theoretical framework, capable of explaining the problem.

<sup>9</sup> Satjipto Raharjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2000, page 53.

that needs to be regulated and protected.<sup>10</sup> Meanwhile, according to Satjipto Rahardjo, the protection of the law is to provide guidance on human rights harmed by others and the protection is given to the community in order to enjoy all the rights granted by law.<sup>11</sup>

Philipus M. Hadjon divided the form of legal protection into two parts:<sup>12</sup>

1. Protection of preventive law.

This legal protection provides an opportunity for the people to file an objection before a government decision gets a definitive form, so the protection of this law aims to prevent the occurrence of disputes and is very meaningful for government action based on freedom of action.

2. Protection of repressive law.

This legal protection works to resolve in case of dispute.

Tan Kamello says that legal protection is the protection afforded by law (legislation or contract) against legal subjects (rights and obligations) and the object of law (objects).

In addition, the theory used in this study was the legal theory of fiduciary assurance that according to Tan Kamello that the legal theory of fiduciary assurance is a creditor who has given credit with fiduciary assurance and acquired the right constituted *possessorium* must be given protection juridically. On the other hand, a third party who has received a motor vehicle from the debtor under the hands must also be protected. Supposedly the guarantee goods on motor vehicles already bound in fiduciary warranties are not allowed to be transferred to a third party, unless there is a permit from the debtor.<sup>13</sup>

Law is a tool, not a goal, and whose purpose is human. However, because human is as a member of society that cannot be separated by law, the purpose of law is human with law as a means to achieve the purpose of the law. The existence of law in the community actually can not only be interpreted as a means of disciplining the life of the community, but also be a means that can change the pattern of thinking and behavior patterns of society and law-making should be able to eliminate any conflicts that are expected to occur in society.

Regarding the purpose of law, the main purpose of law is to create an orderly society, create order and balance. In achieving that objective, the law has the duty to divide the rights and obligations between individuals within the community, to divide authority and to organize ways of solving legal problems and maintaining legal certainty.<sup>14</sup>

Research conducted was a normative legal research, theoretical framework directed specifically the science of law. The purpose of this research was to understand judicial fiduciary guarantee. It means to understand the object of research as law that is as the law or as the content of the legal rules specified in the jurisprudence and regulations relating to the issue of security law, the legal system of objects and credit agreement of the bank.<sup>15</sup>

In analyzing the fiduciary assurance in both court decisions and fiduciary guarantee agreements that occur in banking practices and the laws governing fiduciary guarantees, an approach system was required. The purpose of using a systems approach was to imply the complexity of the fiduciary guarantee legal issue faced with the aim of avoiding the simplifying view of the fiduciary guarantee issue resulting in a false view.<sup>16</sup>

In addition to the normative legal theory used in discussing the problems formulated, in this study also used the theory of legal certainty. Theory of legal certainty contains 2 (two) definitions: first: the existence of a general rule makes the individual know what deeds may or may not be done, and second: the legal security of the individual from the abuse of the government because with the existence of the rule of law that is the general nature of the individual can know what the state can charge or do to the

<sup>10</sup> *Ibid*, page 69. Indeed, the protection of the law must see the stage of the protection of the birth law from a legal provision and all the rules of law provided by the community which is basically the agreement of the community to regulate the behavioral relationship between the members of society and between individuals and the government which is considered to represent the interests of the community.

<sup>11</sup> *Ibid*, page 54.

<sup>12</sup> Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat Indonesia : Sebuah Studi tentang Prinsip-prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum*, Bina Ilmu, Surabaya, 1987, page 2. Consider the division of repressive legal protection grouped into 3 (three) bodies by Philipus M. Hadjon, namely: 1. Courts within the scope of the General Courts, which in practice today have taken the path to submit a particular case to the General Court as an act by law, by the authorities 2. The government agency, which is the administrative appeals body, is an appeal request by a government act by a party who feels aggrieved by the government's actions. 3. Special bodies, are the bodies concerned and authorized to resolve a dispute. The special bodies include the Office of Housing Affairs, the Personnel Court, the Film Censorship Board, the State Receivables Committee, the State Administration Court.

<sup>13</sup> Tan Kamello, *Seminar Jaminan Fidusia : Kajian Atas Peraturan Menteri Nomor : 130/PMK.010/2012*, Kementerian Hukum dan Hak Asasi Manusia Sumut, Medan, 28 Mei 2015.

<sup>14</sup> [http://irawan-elazzam.blogspot.com/2013/04/teori-tujuan-hukum-dan-macam-delik\\_11.html](http://irawan-elazzam.blogspot.com/2013/04/teori-tujuan-hukum-dan-macam-delik_11.html)

<sup>15</sup> Soerjono Soekanto, *Teori yang Murni Tentang Hukum*, Alumni, Bandung, 1985, page 96.

<sup>16</sup> Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan yang Didambakan*, *Op, Cit*, page 19.

individual. The legal certainty is not only in the articles of the law but also the consistency in the judge's decision between the judgment of one judge and the other judge's decision for a similar case which has been decided.<sup>17</sup>

According to Gustav Radbruch, the relationship between justice and legal certainty needs to be addressed. Because legal certainty must be safeguarded for security within the state, positive law must always be obeyed, even if it is unfair or insufficient in accordance with the objectives of the law. But it can be the exception that when the contradiction between the content of the law and justice is so great that the rule of law seems unjust when the rule of law may be released.<sup>18</sup>

Without legal certainty people do not know what to do, and finally the emergence of anxiety, but too much emphasis on legal certainty, too strictly obeys the rule of law, the consequences are rigid and will lead to unfair feelings. Regardless of what happens the rules are so and must be adhered to or implemented. The law is often cruel when it is strictly enforced *Lex dura, set temen scripta* (the law is cruel but so it sounds).

### C. Research Methods

This research is a basic tool in developing the science contained from the literature of books and science of technology. This is due to research aimed to reveal the truth systematically, methodologically and consistently.<sup>19</sup> The methodology applied should always be adapted to the science of its source.

#### 1. Research Specifications

The specifications of this study include 3 things: type (type), nature, and research approach. The type of research used is normative legal research or also called doctrinal legal research, which refers to legal norms and law principles<sup>20</sup>, which are contained in Law Number 42 Year 1999 regarding Fiduciary Guarantee.

The nature of this study was descriptive explanative means the results obtained research was described. Furthermore, given the explanation juridically was used to answer the problems posed

The research approach was done by using normative juridical approach, that is a way to use legal norm and law principle in understanding the problem. In addition, the legal research is also supported by empirical data with the aim to find out further implementation of the guarantee contained in Law No. 42 of 1999 on Fiduciary Guarantee so that an accurate answer can be obtained in solving the problem.

#### 2. Source and Data Types

The data source of this research was obtained from library research and field research. Through literature research was obtained secondary data types.<sup>21</sup> Secondary data include primary legal materials, secondary legal materials and tertiary legal materials<sup>22</sup>, namely:

- a. Primary legal materials are binding materials as the main basis used in the framework of this research includes the Civil Code, and Law No. 42 of 1999 on fiduciary guarantee.
- b. Secondary law material is a literature that includes books of the work of scholars, research results and scientific discoveries related to the issues discussed.
- c. Tertiary legal material, which is the legal material that serves to explain the primary material and secondary law material in the form of legal dictionaries and other dictionaries.

#### 3. Data Collection Techniques

To obtain data relevant to the problems studied with the type of normative legal research, the data collection technique used was by using directional interviews that are using guided interview directive with information sources (informants)<sup>23</sup>. Focused interview as intended was by conducting question and answer to the authorized officer at PT. Astra Credit Company that has understanding and sufficient information about the purchase of motor vehicles with fiduciary guarantee.

#### 4. Data Analysis

<sup>17</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana Pranada Media Group, Jakarta, 2008, page 158.

<sup>18</sup> Theo Huijbers, *Filsafat Dalam Lintas Sejarah*, Kanisius, Yogyakarta, 1982, page 163.

<sup>19</sup> Soerjono Soekanto dan Sri Mulyadi, *Penelitian Hukum Normatif*, Suatu Tinjauan Singkat, Raja Grafindo Persada, Jakarta, 1995, page 7.

<sup>20</sup> Bambang Waluyo, *Metode Penelitian Hukum*, Ghalia Indonesia, Semarang, 1996, page 19.

<sup>21</sup> *Ibid*, page 10.

<sup>22</sup> Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, 2004, page 30.

<sup>23</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum, Op, Cit*, page 66.

The data collected both primary and secondary data types were then analyzed quantitatively and qualitatively.<sup>24</sup> Qualitative data were performed on the documents of finance companies regarding the form and content of the financing agreement by linking it to the fiduciary guarantee law. The method of analysis of quantitative data and qualitative data were done deductively and inductively. The deductive method was used by looking at legal norms and the legal principle of fiduciary assurance, whereas the inductive method was applied to individual cases individually. By using both methods of thinking, the problem solving in this study found out the answer comprehensively.

#### D. Research Results and Discussion

Consumer finance is a business activity of a finance company for the procurement of goods based on consumer needs with installment payments. To guarantee or ensure the smoothness of the refund or can be categorized funds provided on credit it is necessary to have a guarantee. The form of securing credit in banking practice is done by binding of the guarantee.<sup>25</sup> In binding the guarantee or executing the agreement made in writing, first set out firmly and carefully the contents in the agreement that will be poured in the agreement, whether it is about the obligations of both parties with the creditor debtor.<sup>26</sup>

A fiduciary guarantee is able to grant privileges or preferences right to the holder. The fiduciary assurance must be made in the form of Fiduciary Guarantee Deed before the Notary and registered to the Fiduciary Guarantee Registration Office so that if the debtor breaches the pledge, the creditor as the fiduciary receiver has the right to execute object of fiduciary assurances over its power in order to repay debtor's debt.

Ownership of objects that become objects of fiduciary security is still a legal problem that must be clarified. Understanding of ownership of objects in the law of guarantee has a broad meaning that includes property rights to objects and the right to control over objects. If a debtor handed over property as collateral to his creditor means that part of the ownership of the object was transferred to the creditor.

This Fiduciary Guaranty Agreement is included in a formal agreement, as under Article 5 of the Fiduciary Guaranty Act that the imposition of objects with fiduciary collateral is made by notarial deed in the Indonesian language and is a Fiduciary Guarantee Act. In fact, the deed must be registered to the Fiduciary Registry Office as stipulated in Article 11 paragraph (1) of the Fiduciary Guaranty Act and then the Fiduciary Guarantee Certificate is issued. The fiduciary guarantee agreement is the same as any other underwriting agreement, which is an *accessoir* agreement, as affirmed in Article 4 of the Fiduciary Guaranty Act that fiduciary guarantee is a subsequent agreement of a principal agreement which creates an obligation for the parties to fulfill an achievement.

*Accessoir* agreements have the characteristics: it cannot stand alone, the existence, move and end depending on the principal agreement. Regarding fiduciary as an *accessoir* agreement, Munir Fuady further explained as follows: as with other debt guarantee agreements, such as mortgage, pledge or mortgage agreement, the fiduciary agreement is also an *accessoir* agreement. The point is that the *accessoir* agreement cannot stand on its own, but follows any other agreement that is the principal agreement. In this case, the principal agreement is the accounts payable. Therefore, the consequence of this *accessoir* agreement is that if the principal agreement is invalid, or for any reason is void or declared null and void, then the legal agreement of fiduciary as the *accessoir* agreement also becomes null and void.<sup>27</sup>

The fiduciary relationships created by contract occur when the element of trust, necessary to achieve the purpose of the contract is present or present<sup>28</sup>. Included:<sup>29</sup>

1. Formal Fiduciary Relationships Created by Contract (Formal fiduciary relationship created by contract). A formal fiduciary relationship may be due to a contract.
2. Informal Fiduciary Relationships Created by Contract (Fiduciary informal relationships created by contract). An informal relationship arises where a person trusts and places trust in another, whether the relationship is a moral, social, household or personal relationship.

One scholar who from the outset argued that fiduciary can be applied both to the guarantee of fixed goods is Pitlo<sup>30</sup> and next is Tan Kamello. For objects of debt guarantee that are still classified as movable objects, but the debtor is reluctant to give power over the goods to the creditor, while the creditor has no interest and even hassles if the goods are handed to him. Therefore, it takes a form of debt guarantee that the object is still classified as movable objects but without surrendering power over these

<sup>24</sup> *Ibid*, page 68.

<sup>25</sup> Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan, Op, Cit*, page 2.

<sup>26</sup> Nurlaily, *Peralihan Hak Atas Milik Kendaraan Bermotor di Bawah Tangan Dalam Jaminan Fidusia (Studi di Kota Batam)*, Jurnal Program Magister Kenotariatan Universitas Sumatera Utara, 2015, page 2.

<sup>27</sup> Munir Fuady, *Jaminan Fidusia*, Aditya Bakti, Bandung, 2003, page 19.

<sup>28</sup> John F. Nichols S R, *Fiduciary Litigation-Defining Relationships*, State Bar of Texas, Houston Texas, 2006, chapter 1, page 4. Lihat juga Tan Kamello, *Jaminan Fidusia Suatu Kebutuhan Yang Didambakan, Op, Cit*, page 35. which explains that fiduciary is an institution derived from the western civil law system whose existence and development has always been associated with the civil law system.

<sup>29</sup> *Ibid*, page 4.

<sup>30</sup> Sri Soedewi Masjhoen Sofwan, *Jaminan di Indonesia*, Liberty, Yogyakarta, 1982, page 254.

objects to the creditor is what is called a fiduciary guarantee.<sup>31</sup> The Dutch legal expert O. K Brahn said that the division of property rights between the juridical properties is in the hands of creditors and property rights remain economically in the hands of the debtor, typically one calls the term fiduciary.<sup>32</sup>

Special object of fiduciary assurance in the form of movable objects, the debtor surrendered the object to the creditor but the control of the object used as collateral remained in the debtor. Delivery is done by constitution possessory, meaning that the delivery of objects is not submitted to the creditor but is still controlled by the debtor. Fiduciary security in particular, not written in the Criminal Code but by analogy of the mortgage can be said that fiduciary guarantee has a preference right. After the birth of the Fiduciary Guaranty Act, it is increasingly clear and explicitly stated that the fiduciary lender has a preferential right. It is not further stressed whether the creditor's preference privileges are superior to privileges or vice versa.

At Astra Credit Companies (ACC) in Batam City, ACC and Creditor parties bind themselves to a "Fiduciary Guaranteed Financing Agreement" agreement which sets out the standard terms laid down by ACC as creditor. In the agreement, the creditor describes the description of the vehicle, as well as the status of the vehicle (whether new or used) without neglecting to also include the calculation of the debtor's principal debts including monthly installment as the debtor's liability which is also set forth in the agreement.

The agreement is also known and signed by the showroom as the provider of vehicle units and is known to approve by the wife/husband of the debtor. Furthermore, after the agreement is signed, it will be made an Official Delivery Report of the vehicle unit where the delivery is done by the showroom/dealer to the debtor. To guarantee all payments to the debtor's liability to the creditor, the debtor agrees to pledge the object of the vehicle in fiduciary and the provisions concerning the fiduciary guarantee are included in Article 14 "Explanation of Fiduciary Guarantee Financing Agreement".<sup>33</sup>

In the case of proving the right to a movable object by proving the inherent documents that accompanies the vehicle/movable object. For example: on motor vehicles, Motor Vehicle Ownership Books or commonly referred to as BPKB, this evidence has many weaknesses, among others, the disadvantage is that the fact that the Motor Vehicle Ownership Book is merely a vehicle identity document and not a vehicle ownership document. Thus, it is often found that the name listed in the Motor Vehicle Ownership Book is not the owner of the vehicle. Against other movable objects, it can also be used as proof of purchase invoice, but this purchase invoice document only as one supporting document only. In the case of the establishment of a fiduciary guarantee agreement, the basis of ownership of a movable object typically uses a Motor Vehicle Owner Book and a receipt (invoice) of purchase or is also constituted by the type of agreement attached to the object of the movable object, for example in the case of a financing agreement on the object or the purchase of the lease in installments.

Tan Kamello explained that in the practice of everyday life, the most frequent problem is concerning the ownership status of fiduciary assets which are still in question the ownership status, whether the creditor receives a fiduciary or a fiduciary debtor.<sup>34</sup> The ownership rights of the collateral used in the concept of fiduciary guarantee have been transferred from the debtor to the fiduciary receiver, which means the right of the object is left to the creditor but the power of the object is physically in the possession of the debtor. So the fiduciary receiver is the right-holder, not the holder of the guarantee rights.

As the rights owner must be interpreted as the owner of the guarantee of the object, not the owner of the object entirely in the sense of sale and purchase. The creditor is as the owner of the right, controlling the proof of ownership of the vehicle object (BPKB and proof of other supporting receipts).<sup>35</sup>

Thus, the status of material rights to motor vehicle objects charged with a fiduciary guarantee of the right to property is wholly owned by the creditor while the debtor as the fiduciary giver has the right to enjoy the security object subject to fiduciary collateral.

The transfer of fiduciary security is regulated in Article 19 together with Article 24 of the Fiduciary Guarantee Act. Transfer of the right to debts (cession) is transfer of receivables made by authentic deed or deed under the hand. Referred to transferring includes, among others, selling or renting in the framework of its business activities. The transfer of the right to debt with Fiduciary Guarantee may be transferred by the fiduciary receiver to the new fiduciary receiver (new creditor). This new creditor registered the transfer of Fiduciary Guarantee to the Fiduciary Registration Office.

<sup>31</sup> Munir Fuady, *Op, Cit.*, page 2.

<sup>32</sup> Yosephina Hotma Vera, *Agunan Dalam Perjanjian Kredit Yang di Ikat Dengan Akta Jaminan Fidusia Terhadap Bangunan Yang Berdiri di Atas Tanah Otorita Batam*, Tesis, 2009, yang dikutip dari Mahadi, *Hak Milik dalam Hukum Perdata Nasional*, Badan Pembinaan Hukum Nasional, Jakarta, 1996, page 1

<sup>33</sup> The explanation of the debtor guarantees the object of his vehicle in fiduciary manner in accordance with the law applicable to Law Number 42 Year 1999 regarding Fiduciary Guarantee and / or in any other way in accordance with the provisions contained in "Fiduciary Guaranteed Financing Agreement"

<sup>34</sup> Tan Kamello, *Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, *Op, Cit.*, page 258. Here Tan Kamello conveyed that the discovery of jurisprudence in the case of the Medan District Court in the case of Bank Bumi Daya against the Tax Office Medan west and PT. Mahogoni Indah Industri with registration number of case Number 40 / Pdt.Plw / 1994 dated 17 November 1994.

<sup>35</sup> *Ibid.*

With this cession, all rights and duties of old fiduciary beneficiaries are transferred to new fiduciary recipients and the transfer of the rights to the receivables is notified to the fiduciary giver. Fiduciary providers are prohibited from transferring, mortgaging or renting to other parties the object of fiduciary, because the fiduciary guarantee still follows the object of fiduciary security in the hands of whoever the object is. The exception to this provision is that fiduciary givers may transfer over the inventory items that are subject to fiduciary guarantees.

This study illustrated that the first debtor (old debtor) transferred the rights of the movable good of the motor vehicle to the second debtor (the new debtor) whose installment is still running or the credit has not been settled between the creditor and the first debtor, it is commonly called over credit transfer. The first debtor does not inform the creditor that the vehicle has been transferred to the second debtor. Transfer of rights from the first debtor to the second debtor poses a legal problem because the second debtor accepts the transfer of rights to the vehicle without a legal right. This is a violation of the agreement made between the finance company and the consumer (the first debtor).

In practice the financing agreement with fiduciary assurance is said that the first debtor is the owner of the collateral goods, in which proof of ownership of the vehicle object on behalf of the first debtor is delivered by the creditor in accordance with the agreement made at the beginning of the agreement. In practice, it is found that collateral goods are transferred or guaranteed to a third party by any means, without obtaining written consent in advance from the creditor is said to be a debtor making a default.<sup>36</sup>

Sale and purchase transactions as stipulated in the provisions of the Criminal Code, affirmed in Article 1459 which implicitly explains that as long as the transfer does not transfer to the buyer before in accordance with the provisions of Articles 612, 613 and Article 616 of the Criminal Code, the transfer of the right to the object has not moved. Specifically for the movement of movable goods, Article 612 of the Indonesian Criminal Code states that the transfer of movable goods is done by handing over the material realities by or on behalf of the owner. The transfer of ownership rights over a motor vehicle under that article has two ways, namely handover with a short hand and symbolic handover.<sup>37</sup>

Ownership of motor vehicles has not yet transitioned from the lessee before the purchase option is exercised by the buyer, but since the lessor is intended as a financier, then as a finance company is not the owner. It is appropriate if the risk burden of a financing in *force majeure* is charged to the lessee

In the course of the fiduciary guarantee agreement between the debtor and the creditor, it is possible to transfer credit from one creditor to another. This can happen by reason of the debtor as the borrower of the fund wishing to seek a lower interest on the other creditor, for that the transfer of fiduciary guarantee can occur.

The act of transferring the collateral to a third party shall not be made by a debtor in any way without the prior written consent of the creditor. In the event of such occurrence, then all debtor debt to the creditor may be billed instantly and simultaneously, without prior notice in writing by the creditor to the debtor.

The debtor's actions can be said to be embezzlement as set forth in Article 372 of the Criminal Code with the threat of imprisonment for 4 years. In contrast to Article 23 Paragraph (2) of the Fiduciary Guaranty Act states that fiduciary givers are prohibited from transferring, pledging and leasing of objects guaranteed to other parties except by the written consent of the fiduciary recipient. If the provision is violated, then under Article 36 Fiduciary Guaranty Act, fiduciary may be subject to imprisonment for a maximum of 2 years and a maximum fine of Rp. 50.000.000, - (fifty million Rupiah).

The transfer of fiduciary guarantee has been regulated in Article 19 of the Fiduciary Guaranty Act, whose contents "the transfer of rights secured by fiduciary securities resulted in the transfer of by law all rights and obligations of fiduciary beneficiaries to new creditors. The transfer of fiduciary security is registered by the new creditor to the Fiduciary Registry Office.

In practice in Batam City, the transition of motor vehicles made by the old debtor to the new debtor is made by the delivery of the real goods of the motor vehicle from hand to hand at the signing of the agreement under the hand. The momentum proves that the new debtor has become the owner of the physical motor vehicle. But juridically, because BPKB (vehicle ownership book) is still in the creditor's control, the owner of the vehicle is a juridical person whose name is listed in BPKB (first debtor). New debtor will be the owner of the vehicle in juridical if there has been a name reversal on BPKB in the process at the Office of Batam City SAMSAT.

Based on the theory of protection stated above, the preventive theory in the transition of motor vehicles is as the object of fiduciary guarantee to other parties through the agreement under the hands. The company has not set in detail about how the transition of objects that becomes the object of fiduciary guarantee to other parties. The transition is justified only in the sense that the first debtor can only transfer if there is permission from the finance company first.

The repressive law protection states that the transfer of fiduciary security objects through the agreement under the hand has not been regulated in the financing agreement with fiduciary guarantee. Thus, in case of default of the first debtor, the company

<sup>36</sup> General Terms and Conditions of Financing Agreement with Fiduciary Guarantee Number 12 Letter (f) on the agreement at PT. Astra Sedaya Finance Batam City.

<sup>37</sup> <http://ejournal.unsrat.ac.id/index.php/lexprivatum/article/viewFile/1711/1353>

should be able to use the right of preference given by the Fiduciary Guaranty Act to execute fiduciary guarantee. However, since the first debtor has transferred the fiduciary guarantee object to the second debtor making it difficult for the company to control the default of the first debtor.

From the theory of protection, the second debtor who has received the transfer of rights from the first debtor and has good faith by making installment payments to the finance company, and not notified by the first debtor resulting from the payment. The first debtor should first notify the second debtor of any risk that will occur if the installment has been paid by the second debtor. Therefore, it can be done that the finance company gives a statement to the second debtor if in the future there is a claim from the first party regarding the right to BPKB (vehicle ownership book) from the motor vehicle.

Repressive legal protection in the transferee of the first debtor to the second borrower poses the right for the second debtor having good faith to claim the right to BPKB (vehicle ownership book) either through litigation and non-litigation ways. This legal protection is based on the principle of good faith that exists in the second debtor.

In relation to the above issue, to the beneficiary transferred debtor pays the installment, so that the creditor gets his right on his receivables, it is guaranteed by fiduciary guarantee. The Legal Protection of the Borrower on Motor Vehicles as Fiduciary Guarantee in a Value-Based Financing Agreement is done by reconstructing Article 36 of the Fiduciary Guaranty Act that is, with the addition of paragraph (2), thus stating:

**Article 36 of the Fiduciary Guaranty Act:**

- (1) The Fiduciary Submitter who transfers, pawns, or leases objects that are the object of the Fiduciary Guarantee as referred to in Article 23 paragraph (2) conducted without the prior written consent of the Fiduciary Receiver shall be liable to a maximum imprisonment of 2 (two) years and a fine of at most Rp. 50.000.000, - (fifty million rupiah).
- (2) **The criminal provisions as referred to in paragraph (1) against the transfer of fiduciary guarantee objects shall not apply to the fulfillment of creditor receivables.**

#### E. Conclusions

The transfer of fiduciary guarantee in Indonesia shall be regulated in the laws and regulations of the Fiduciary Guaranty Act, namely in Article 19 to Article 24 which in essence the transfer of the right to a debt with fiduciary guarantee may be transferred by the fiduciary receiver to the new fiduciary prize (new creditor). Therefore, all rights and duties of old fiduciary beneficiaries are transferred to new fiduciary recipients and the transfer of the rights to such receivables shall be notified to the fiduciary giver. The act of transferring the object of fiduciary collateral without the consent of the fiduciary is a criminal act, but to the debtor with good faith in keeping the creditor's debts, as the essence of the fiduciary guarantee object is for debt repayment, for the sake of justice in good faith is given legal protection. Legal Protection Against Debtors for Motor Vehicles as Fiduciary Guarantees in a Value-Based Financing Agreement is done by reconstructing Article 36 of the Fiduciary Guaranty Act, namely with the addition of paragraph (2), stating: Criminal provisions referred to in paragraph (1) to the transfer of objects fiduciary guarantee does not apply to the fulfillment of creditor receivables.

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