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Legal Study of Fiduciary Guarantee Law in the Perspective of Islamic Law and Law No. 42 of 1999 Concerning Fiduciary Guarantee in Indonesia

Ayang Fristia Maulana, Irwanto Irwanto, Jaka Surya,
Mili Niko Tari Buah LZ, Mebu'aro Fosawato Nazara [1]
Fakultas Hukum, Universitas Bina Bangsa

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Abstract:
The law of guarantees recognizes two types of guarantees, namely general guarantees and special guarantees, while special guarantees can still be distinguished into material guarantees and guarantees of people who guarantee debts. General guarantees and debt guarantees do not fully provide certainty regarding debt repayment, because the creditor does not have priority rights so the creditor's position remains as a concurrent creditor against other creditors. Fiduciary guarantees are conventional products that are determined to protect creditors, especially if the debtor defaults. Fiduciary guarantees that have not been able to be applied comprehensively to all financial institution systems in Indonesia, need to be conducted several studies, especially from the perspective of Islam and Law No. 42 of 1999 which uses the Sharia financial system. The focus of the study that is used to formulate the problem is how is the law of fiduciary guarantees from the perspective of Islamic law and Law No. 42 of 1999 concerning fiduciary guarantees in Indonesia. In this study, normative law is used, or it can be called library research. The results of the study show that the practice of implementing fiduciary in Indonesia has a very important position and must be fulfilled by financing service providers. Meanwhile, according to Islamic views, there is no fiduciary guarantee in the aspect of Islamic law, but matters concerning guarantees can be equated with Rahn. Thus, in Islamic Financial Institutions, Rahn is guided as a guarantee system in lending activities by Islamic law, this is based on the word of Allah QS. Al-Baqarah verse 283 and Law Number 21 of 2008 concerning Islamic Banking.

Keywords: Juridical; Implementation; Fiduciary; Perspective; Guarantee, Islamic Law

A. INTRODUCTION

The implementation of a loan agreement (credit), then the collateral institution has an important function for the debtor's debt repayment. There are various forms of collateral institutions related to credit agreements that have been known in practice, including: mortgages and creditverband (now a mortgage), pawns and fiduciaries. The legal regulations on this collateral institution are certainly intended to provide legal

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certainty for the capital provider (creditor) so that the amount of money that has been lent to the borrower (debtor) can be returned to him, and if the debtor cannot repay the debt, then the collateralized object is used as a replacement. This condition makes it easier for financial institutions to collect compensation from the financing provided to customers (Maksum, 2015); (Muktamara & Badriyah, 2023).

The fiduciary guarantee institution is very helpful for the smooth running of the business managed by the debtor, because the goods used as collateral for the repayment of their debts remain in their control. This is allowed because fiduciary guarantees mean the transfer of ownership rights based on trust which gives the debtor a position to continue to control the collateral, even though only as a borrower for temporary use or no longer as the owner (Paparang, 2014). According to Law Number 42 of 1999 concerning Fiduciary Guarantee, this is also called the term transfer of ownership rights through trust, from the debtor to the creditor (Munir, 2003). Transfer of ownership rights through trust in fiduciary is also commonly called the transfer of Constitutum Possesorium (transfer with continued control). Fiduciary Construction is the transfer of ownership rights over the debtor's goods to the creditor while physical control over the goods remains with the debtor (Constitutum Possesorium) on the condition that when the debtor pays off his debt, the creditor must return the ownership rights over the goods to the debtor (Munir, 2003).

The types of goods that can be used as collateral in fiduciary are the same as collateral in pawn, namely both are movable goods, but when compared to the provisions on pawn contained in Article 1152 of the Civil Code which requires that the collateral be physically handed over to the creditor, then in fiduciary collateral the goods remain with the credit recipient (debtor). In addition, based on the provisions of Article 1152 of the Civil Code, if the collateral is still left in the possession of the debtor, the collateral is invalid. Since 1999, the existence of the fiduciary collateral institution has been recognized through Law Number 42 of 1999 concerning Fiduciary Collateral (hereinafter abbreviated as Law No. 42 of 1999), which was enacted on September 30, 1999. Fiduciary guarantee is a conventional product that is established to provide protection for creditors, especially if the debtor defaults. Creditors can execute fiduciary guarantees to debtors as a form of compensation as per applicable law (Maksum, 2015). In banking transaction products, almost all apply a guarantee system. In financial institutions that use a conventional debt-based system, fiduciary guarantees can be applied. However, in Indonesia there are Sharia financial institutions whose transactions are not based on debt, so fiduciary guarantees are not compatible with several banking models (Sabir & Tunnisa, 2020). The form of guarantee in Islam has similarities with fiduciary guarantees although not exactly the same, namely a letter guarantee (al-rahn al-tafsili) (Suryandari, 2023).

In Fiduciary Guarantee there is an execution of the object of Fiduciary Guarantee. Fiduciary guarantee execution can be carried out if the fiduciary giver (debtor) is in a state of default. The fiduciary giver is obliged to hand over the object that is the object of Fiduciary Guarantee in order to carry out the execution of the fiduciary guarantee. If the

fiduciary giver does not hand over the object that is the object of the fiduciary guarantee at the time the execution is carried out, the fiduciary recipient has the right to take the object that is the object of the fiduciary guarantee and if necessary can ask for assistance from the authorized party. The implementation of the execution of the fiduciary guarantee is regulated in Articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Fiduciary Guarantee Execution is the confiscation and sale of objects that are the object of the fiduciary guarantee. The cause of the execution is because the debtor is in default or does not fulfill his performance on time to the fiduciary recipient, even though the debtor has been given a warning (Nofianti & Apriani, 2023).

Fiduciary or Fiduciare Eigendom Overdracht or Fiduciary Transfer of Ownership comes from the word fides which means Transfer of ownership rights based on trust. The legal relationship between the fiduciary giver (debtor) and the fiduciary recipient (creditor is a legal relationship based on trust. The trust in question is that the fiduciary giver (debtor) believes that the creditor receiving the fiduciary is willing to return the ownership rights that have been transferred to him if the debtor has paid off his debt and the creditor believes that the debtor receiving the fiduciary does not misuse the collateral in his power and is willing to maintain the goods. 165 The fiduciary guarantee institution as known in Indonesia today is a form of fiduciare eigendomsoverdracht or FEO (transfer of ownership rights through trust), namely the transfer of ownership rights to objects that become objects of fiduciary guarantees is the transfer of ownership rights to an object based on trust with an agreement that the object whose ownership rights are transferred remains in the control of the fiduciary guarantee provider (Widjaja & Yani, 2000).

Collateral is something given by a debtor to a creditor to provide assurance that the debtor will fulfill his obligations which can be valued in money arising from an agreement (Hadisoeprapto, 1984). Collateral known in borrowing and lending was initially limited to collateral in the form of fixed and tangible objects, known as pawns, mortgages and mortgages. Along with the need for funds faced in the business world, in reality business actors need certain collateral institutions where small companies, shops, retailers, restaurants need credit to expand their businesses with collateral for their merchandise. Likewise, small employees, households need credit for household needs with collateral for household appliances, and companies that need credit to expand their businesses with collateral for movable objects and operational equipment in their companies (Nugraha & Rahmawati, 2021).

All of this raises the need for other guarantees besides pawns and mortgages that allow movable objects to be used as collateral but the objects remain in the hands and can still be used for the business of the guarantor. This guarantee is what we know as Fiduciary. There needs to be a guarantee law that is able to regulate legal construction, which allows the provision of credit facilities, by pledging the objects to be purchased as collateral. Such regulations should be sufficiently convincing and provide legal certainty for credit institutions, both domestic and foreign. In practice, the Bank as a creditor in

providing facilities in the form of credit, asks the debtor to submit collateral based on the terms and conditions that have been previously agreed upon between the Bank as the creditor and the borrower as the debtor. Regarding the existence of collateral in credit transactions between creditors and debtors, a guarantee institution is needed. One of the guarantee institutions that is often used is the fiduciary guarantee institution (Winarno, 2024).

Fiduciary guarantees have been used in Indonesia since the Dutch colonial era as a form of guarantee born from jurisprudence. This form of guarantee is widely used in lending transactions because the burden process is considered simple, easy and fast, although in some cases it is considered less certain of legal certainty. The position of the fiduciary recipient is as the owner of the fiduciary goods, but now it is accepted that the fiduciary recipient only has the position of the guarantee holder. Article 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees provides limitations and understanding of fiduciary as the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object (fiduciary giver) (Afra, dkk, 2022).

The fiduciary guarantee institution allows fiduciaries to control the collateralized objects, to carry out business activities financed by loans using fiduciary guarantees. In this case, what is transferred is only the legal ownership rights of the object or what is known as constitutum possessorium. Initially, the objects that were the objects of fiduciary were limited to the belief in movable and tangible objects in the form of objects in inventory, merchandise, receivables, machine tools and motor vehicles. However, by realizing the increasing needs of the business world and the need for legal certainty for creditors who provide loans, through this Fiduciary Guarantee Law, the Indonesian Government tries to summarize all the needs for collateral that are not covered and have been regulated in positive law into the Fiduciary Law (Hanum & Dewi, 2022). Since fiduciary guarantees are part of property law, it is only right that Law No. 42 of 1999 adopts the general principles of property law contained in Book II of the Civil Code. In other words, the principles of property law contained in Law No. 42 of 1999 must be adjusted to the principles of property law contained in Book II of the Civil Code. In accordance with this, this article is basically to describe and analyze the suitability of the application of the principles of property law in Law No. 42 of 1999, so that what needs to be reviewed is the implementation of the general principles of property law in the regulations on fiduciary guarantees (Tanjung, 2017).

Fiduciary guarantees are financing products that are currently developing rapidly in the midst of community life. Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees explains that fiduciary is the transfer of ownership rights of an object based on trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object. Fiduciary guarantees are conventional products that are established to provide protection for creditors, especially if the debtor defaults. Creditors can execute fiduciary guarantees to debtors as a form of compensation as per applicable law (Maksum, 2015).

In banking transaction products, almost all apply a guarantee system. In financial institutions that use a conventional debt-based system, fiduciary guarantees can be applied. However, in Indonesia there are Islamic financial institutions whose transactions are not based on debt, so fiduciary guarantees are not compatible with several banking models (Sabir & Tunnisa, 2020). The form of guarantee in Islam is similar to fiduciary guarantees, although not exactly the same, namely letter guarantees (al-rahn al-tafsili). Fiduciary guarantees that have not been able to be applied comprehensively to all financial institution systems in Indonesia, need to be studied, especially in the perspective of Islam which uses the sharia financial system. It should be noted from an Islamic perspective that this guarantee is in accordance with the main teachings of Islam as contained in the Qur'an, Hadith and the opinions of scholars or is not entirely appropriate in the application of fiduciary guarantees for the benefit of both parties involved. In addition, the Fiduciary Guarantee Law confirms that a fiduciary guarantee is an additional agreement or a follow-up agreement (accessoir) of a principal agreement. As a result of the agreement which is an additional agreement to the principal agreement, the fiduciary guarantee is canceled by law if the debt guaranteed by the fiduciary guarantee is canceled. From the background of the problems that have been mentioned, the formulation of the problem in the study is how is the guarantee law in the perspective of Islamic law and Law No. 42 of 1999 concerning fiduciary guarantees in Indonesia?

B. METHOD

The research method used in this study is normative juridical. Normative research is a legal research method conducted with secondary data. The normative juridical approach is an approach conducted by examining theories, concepts, legal principles and laws and regulations related to this research. Then there is also an approach called the literature approach, namely by studying books, laws and regulations and other documents related to this research. Secondary data is data taken from other parties, the researcher does not become the first hand of the subject in the form of data from books, the internet or software (Azwar, 2014). The specification of this research is descriptive analytical, namely describing facts in the form of data with primary legal materials, namely laws and regulations, secondary legal materials, namely doctrines (opinions of legal experts), and tertiary legal materials, namely legal dictionaries or encyclopedias, to obtain a comprehensive and systematic picture.

Data analysis in this study was carried out using a qualitative normative method. Normative because this study is based on existing laws and regulations as positive law. Qualitative because it is an in-depth analysis and review, which does not only adhere to statistics, but focuses more on the behavior and interaction of values in a social reality process (Soekanto, 1986). In this type of method, the writing in its legal aspects is often in accordance with what is written in the laws and regulations as a benchmark for whether humans should behave in this way (Asikin, 2006). Normative analysis in this study uses an analysis of existing laws and regulations in Indonesia. By using a normative legal research approach, this journal aims to provide a deep understanding

of legal protection for copyright in the context of its use as an object of fiduciary guarantee in Indonesia.

C. RESULTS AND DISCUSSION

1. Basic Understanding of Fiduciary Guarantees

Collateral was put forward by Hartono Hadisoeprapto and M. Bahsan. Hartono Hadisoeprapto argues that collateral is something given to a creditor to create confidence that the debtor will fulfill an obligation that can be valued in money arising from an obligation, while according to M. Bahsan, collateral is anything received by a creditor and submitted by a debtor to guarantee a debt in society. The two definitions of collateral presented by Hartono Hadisoeprapto and M. Bahsan are: (a) Focused on the fulfillment of obligations to creditors (banks) (b) The form of collateral can be valued in money (c) The emergence of a guarantee of an obligation between the creditor and the debtor (Salim, 2004). Fiduciary according to its origin comes from the Roman word fides which means trust. Fiduciary is a term that has long been known in Indonesian. Likewise, this term is used in Law Number 42 of 1999 concerning Fiduciary Guarantees (Slamet dkk, 2022)

Fiduciary guarantees are regulated by Law No. 42 of 1999 concerning Fiduciary Guarantees. A fiduciary is a developer of a pawn institution, therefore the objects of the guarantee are movable goods, both tangible and intangible, and immovable goods, especially buildings that cannot be burdened with mortgage rights. The object of the fiduciary guarantee in the form of immovable goods that cannot be burdened with mortgage rights, for example, is a flat unit built on state/regional property in the form of land or waqf by way of rent (Mulyati, 2019).

In Dutch terminology, this term is often referred to in full as Fiduciare Eigendom Overdracht (FEO), which is the transfer of ownership rights through trust, while in England it is called Fiduciary Transfer of Ownership. Fiduciary is the transfer of ownership rights of an object (movable and immovable property) where the registration of ownership rights is still in the control of the owner of the object (Wikipedia, 2007). The definition of Fiduciary Guarantee according to Article 1 number 2 states that Fiduciary Guarantee is a guarantee right for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Provider, as collateral for the settlement of certain debts, which gives the Fiduciary Recipient a priority position over other creditors (Article 1 number 2 of Law Number 42 of 1999).

The elements of fiduciary guarantee are: (a) The existence of a guarantee right, (b) The existence of an object, namely a movable object, both tangible and intangible, and an immovable object, especially a building that is not burdened with mortgage rights, (c) The object that becomes the object of the guarantee remains in the control of the fiduciary grantor, and (d) Giving a priority position to the creditor (Bahsan, 2012).

2. Objects of Fiduciary Guarantee According to Law No. 42 of 1999

Based on Law Number 42 of 1999 concerning Fiduciary Guarantees, the objects of fiduciary guarantees are divided into two, namely: (1) Movable objects, both tangible and intangible, and (2) Immovable objects, especially objects that are not burdened by mortgage rights. What is meant by buildings that are not burdened are flats (Salim, 2004).

The object of the fiduciary guarantee as contained in Article 1 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees and as stipulated in Article 1 paragraph (4) and Article 3 of Law Number 42 of 1999 concerning Fiduciary Guarantees, is further explained in Article 9 of Law Number 42 of 1999 concerning Fiduciary Guarantees which states that Fiduciary Guarantees can be given for one or more units or types of objects, including receivables, whether they already exist when the guarantee is given or are obtained later. From these provisions, fiduciary guarantees can be for one or more specific objects (Satrio, 2007).

The objects that are the objects of fiduciary guarantees are: (1) The object must be legally owned and transferred (2) Can be on tangible objects (3) Can also include intangible objects, including receivables (4) Movable objects (5) Immovable objects that cannot be bound by a mortgage (6) Immovable objects that cannot be bound by a mortgage (7) Both on existing objects and on objects that are acquired later. In the case of objects that will be acquired later, a separate fiduciary encumbrance deed is not required (8) Can be on one unit or type of object (9) Can also be on more than one or unit of objects (10) Includes the results of objects that have become fiduciary objects (11) Also includes the results of insurance claims from objects that are the objects of fiduciary guarantees (12) Inventory, trading stock can also be the object of fiduciary guarantees (Fuady, 2000).

3. Legal Basis for Fiduciary Guarantees in Indonesia

Viewed from the jurisprudence and statutory regulations, the legal basis for fiduciary is: (a) Arrest Hoge Road 1929, concerning Biebrouwerij Arrest (Netherlands) (b) Arrest Hoggerechtshof concerning BPM-Clynet Arrest (Indonesia) (c) Law Number 42 of 1999 concerning Fiduciary Guarantees (Salim, 2004). Therefore, in order to accommodate the needs of the wider community, so as to guarantee legal certainty and provide legal protection for interested parties, clear and complete legal provisions are regulated regarding Fiduciary Guarantees and fiduciary institutions in a Law, namely in Law Number 42 of 1999 concerning Fiduciary Guarantees which came into effect on September 30, 1999, with the enactment of this Fiduciary Guarantee Law, it means that from now on there will be no more opportunity for polemics regarding agreement or disagreement with the provisions or conditions of fiduciary guarantees as a form of independent material guarantee institution outside and because it is different from pawn (Usman, 2013).

4. Implementation of Fiduciary Guarantees from an Islamic Law Perspective

The concept of collateral in Islam has been known since the beginning of Islam when the Prophet Muhammad himself practiced debt collateral with collateral that can be in the form of people or objects. Collateral in the form of objects is called Rahn, while collateral in the form of people is called *kafala*. Financially or institutionally, the bank guarantees the party that has applied for the loan service (Maksum, 2015). Fiduciary collateral in Islam is almost the same as collateral in the form of rahn. The legal basis for borrowing and lending with collateral (rahn) is permitted and prescribed based on the Qur'an, As-Sunnah, and Ijma' of the scholars. The legal basis for rahn or pawn is mentioned in the word of Allah Q.S. Al-Baqarah verse 283, as follows:

۞ وَاِنْ كُنْتُمْ عَلٰى سَفَرٍ وَّلَمْ تَجِدُوْا كَاتِبًا فَرِهٰنٌ مَّقْبُوْضَةٌ ۗفَاِنْ اَمِنَ بَعْضُكُمْ بَعْضًا فَلْيُؤَدِّ الَّذِى اؤْتُمِنَ اَمَانَتَهٗ وَلْيَتَّقِ اللّٰهَ رَبَّهٗ ۗ وَلَا تَكْتُمُوا الشَّهَادَةَ ۗوَمَنْ يَّكْتُمْهَا فَاِنَّهٗٓ اٰثِمٌ قَلْبُهٗ ۗ وَاللّٰهُ بِمَا تَعْمَلُوْنَ عَلِيْمٌ

Meaning: "And if you don't find a writer on your journey, then you should have collateral. However, if some of you trust others, let those who are trusted fulfill their mandate (debt) and let them fear Allah, their Lord. And do not hide your testimony, because whoever hides it, indeed, his heart is dirty (sinful). Allah is All-Knowing of what you do."

In terms of language, the word rahn means fixed, lasting, and holding. In terms of terminology, Rahn is holding something in the right way with the aim of fulfilling the obligation to pay debts for the party in debt. As explained by Al-Subki from Syafi'iyah, Rahn is defined as making an asset as a form of collateral for financing or loans, so that the financing or loan can be paid off with the value of the financing asset or collateral that has been explained when the recipient of the fee or borrower is unable to pay off his obligations (Sahib, 2011) The concept of Islamic law does not recognize the term collateral for ownership rights. However, so far what has happened in the practice of Islamic banking, is financing carried out by Islamic banks, one of which is also attached to a collateral in civil law. In formal juridical terms, financing activities based on sharia do not conflict with the law. The problem in the context of Sharia arises when looking at Islamic financing which is associated with the concept of fiduciary guarantees that are not recognized in the context of Islamic economics (Salim, 2008).

In practice, sharia financing still requires complementary components of sharia guarantees to obtain legal certainty. One of the legal products issued by DSN MUI in Fatwa No. 68/DSN-MUI/III/2008 concerning Rahn Tasjily has outlined the concept of collateral with the transfer of ownership rights to goods as collateral as a form of service of sharia financial institutions to comply with sharia principles (Sutedi, 2011). Rahn as collateral in the form of objects is handed over based on trust, either physically or only the ownership rights from the debtor to the creditor for the reason of strengthening the certainty of the timeliness and smoothness of debt payment belonging to the debtor (*rahin*) to the creditor (*murtahin*), which can be used as a substitute for debt repayment if the *rahin* is not paid. The concept of rahn in Islam is implemented in order to ensure and provide encouragement to customers who are in debt to pay off their debts according to

the specified time period and avoid actions that can harm the party providing the debt (Wawointana, 2013).

Because fiduciary guarantees are not found in Islamic law, then in Islamic Economics, Rahn practices are carried out. As stated in Article 1 number 26 of Law Number 21 of 2008 concerning Islamic Banking, which is referred to as collateral, namely additional collateral, either in the form of movable or immovable objects submitted by the collateral owner to the Islamic Bank or Islamic Business Unit to guarantee the payment of the obligations of the customer receiving the facility. The ethics contained in Islamic banks as financial service providers with a money value system, as investors distribute funds through investment activities based on the profit sharing system, buying and selling, or renting. Also, in financial services, it is carried out with the principle of *wakalah* (mandate granting), *kafalah* (bank guarantee), *hiwalah* (debt transfer), *rahn* (debt guarantee or pawn), *qard* (policy loan for bridging funds), and others (Wahid, 2018).

There are several provisions in the practice of rahn in accordance with Islamic law, namely as follows: a. The customer submits collateral (*marhun*) to the Islamic bank (*murtahin*), this collateral is in the form of movable goods; b. The payment agreement is carried out between the *rahin* (customer) and the *murtahin* (Islamic bank); c. After the financing contract is signed, and the collateral is received by the Islamic bank, the Islamic bank disburses the financing; d. Rahin makes repayment plus the agreed fee. This fee is obtained from the rental of the place and the cost of maintaining the collateral (Mustofa, 2016).

5. Fiduciary Guarantee Binding Process in Indonesia

Fiduciary Guarantee is a secondary agreement of a principal agreement that creates an obligation for the parties to fulfill a performance. The burden of an object with a fiduciary guarantee is made by a notarial deed in Indonesian and is a fiduciary guarantee deed. A fiduciary guarantee deed at least contains: (1) The identity of the party giving and receiving the fiduciary; (2) Data on the principal agreement guaranteed by the fiduciary; (3) Description of the object that is the object of the fiduciary guarantee; (3) Guarantee value; (4) Value of the object that is the object of the fiduciary guarantee, and (5) Debts whose repayment is guaranteed by the fiduciary can be in the form of: (a) existing debts; (b) debts that will arise in the future that have been agreed upon in a certain amount; and (c) debts that at the time of execution can be determined in amount based on the principal agreement that gives rise to the obligation to fulfill a performance.

Fiduciary guarantees can be given to more than one fiduciary recipient or to the power of attorney or representative of the fiduciary recipient. Fiduciary guarantees can be given to one or more units or types of objects, including receivables, both those that already exist when the guarantee is given or those obtained later. The burden of guarantees on objects or receivables obtained later does not need to be carried out with a separate guarantee agreement. Unless otherwise agreed, Fiduciary guarantees include the results of objects that are the object of fiduciary guarantees including insurance

claims, if the objects that are the object of fiduciary guarantees are insured. After the fiduciary deed is made, it is continued with fiduciary registration (Yetniwati dkk,, 2020).

6. Position of Fiduciary Guarantee Implementation According to Law No. 42 of 1999 in Indonesia

Lending or credit financing activities in practice are closely related to the existence of a guarantee, where the definition of this guarantee is a special guarantee and not a general guarantee as regulated in Article 1131 of the Civil Code. Banks are prohibited from providing credit to any party without sufficient collateral. In banking, to secure the credit given, collateral is considered a powerful tool, and the bank as a creditor must always be guided by the Commaditerings Verbood principle which means that the bank does not want to bear the business risk of the debtor with the credit that has been given (Supianto, 2015).

The concept of collateral in this lending and borrowing activity is then known as fiduciary collateral. The term fiduciary is an official term and has long been known in Indonesian law. Fiduciary in Indonesian is called the transfer of ownership rights through trust (Fuady, 2013). Fiduciary itself comes from the word "fides" which means trust. In Dutch terminology, fiduciary is often referred to as fiduciary eigendom overdracht, namely the transfer of ownership rights based on trust, meaning the ownership rights of the debtor's goods that are used as collateral to the creditor are based on trust alone, while physically the goods in question remain with the debtor (Sutedi, 2010).

In Law Number 42 of 1999 Article 1 number (1) concerning Fiduciary Guarantees, it is written that the definition of Fiduciary is "the transfer of ownership rights of an object based on trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object". In addition to the definition of fiduciary, there is also the term fiduciary guarantee. The definition of Fiduciary Guarantee is stated in Article 1 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, namely: "Fiduciary guarantees are guarantee rights for movable objects, both tangible and intangible, and immovable objects, especially buildings, which cannot be burdened with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in the possession of the fiduciary grantor, as collateral for the payment of certain debts, which gives the fiduciary recipient a priority position over other creditors". In line with this understanding, it can be interpreted that collateral in the form of tangible or intangible movable objects given by the debtor to the creditor to guarantee the repayment of his debt, and the legal relationship between the debtor (fiduciary giver) and the creditor (fiduciary recipient) is a legal relationship based on trust.

The fiduciary giver believes that the fiduciary recipient will return the ownership rights of the goods that have been given after the debt is paid off. Likewise, the fiduciary recipient also believes that the fiduciary giver will not act to misuse the goods used as collateral while in his power. The fiduciary guarantee institution has been known and established in the Roman legal community (Sabir & Tunnisia, 2020). The history of

fiduciary regulations in Indonesia began with Law Number 4 of 1992 concerning Housing and Settlements, and Law Number 16 of 1985 concerning Flats. These laws are not sufficient to accommodate the development of debts and receivables in society.

The government then passed Law Number 42 of 1999 concerning Fiduciary Guarantees (Maksum, 2015). Fiduciary guarantees were born as a form of solution to the weaknesses of pawn guarantees. If there is a weakness in the pawn, the collateral object is in the hands of the pawnholder. While fiduciary guarantees are debt guarantees that are material in nature, where in principle they provide movable goods as collateral. The position of the implementer of fiduciary guarantees is clear, if examined in the development of jurisprudence and laws and regulations, the following is the legal basis for the application of fiduciary (Salim, 2014): (a) Arrest Hoge Raad 1929, dated January 25 concerning Beirbrouwerij Arrest (Netherlands), (b) Arrest Hoggerechtshof, dated August 18, 1932 concerning BPM-Clynet Arrest (Indonesia), and (c) Law Number 42 of 1999 concerning Fiduciary Guarantees which consists of 8 chapters and 41 articles.

The subject of fiduciary guarantee is the fiduciary giver and the fiduciary recipient, who acts as the fiduciary giver is the owner of the object that is the object of the fiduciary guarantee, while the fiduciary recipient is an individual or corporation that has receivables with payments guaranteed by fiduciary. Based on Law Number 42 of 1999 concerning fiduciary guarantees, the objects of fiduciary guarantees are divided into 2 types, namely movable objects both tangible and intangible, and immovable objects, especially buildings that are not burdened with mortgage rights as related to apartment buildings regulated in Law Number 16 of 1985 concerning Apartments.

The nature of fiduciary guarantees in their position is a supporting agreement (accessoire) of a principal agreement that creates an obligation for all parties to fulfill a performance. The imposition of fiduciary guarantees is carried out in the following manner: (a) Made with a notarial deed in Indonesian, (b) The debt whose payment is guaranteed by fiduciary guarantees (Salim, 2014). It has been explained in Article 11 of Law Number 42 of 1999 concerning Fiduciary Guarantees, that objects located both inside and outside the territory of the Unitary State of the Republic of Indonesia that are burdened with fiduciary guarantees must be registered. Thus, this has clarified the position of the application of a legitimate fiduciary guarantee, and if there are other matters involving fiduciary execution, they will be dealt with based on applicable laws and regulations (Suryandari, 2023).

D. CONCLUSIONS

Based on several descriptions of fiduciary, it can be concluded that in the practice of implementing fiduciary in Indonesia, it has a very important position and must be fulfilled by financing service providers related to Law No. 42 of 1999 concerning Fiduciary Guarantees. According to Islamic views, there is no fiduciary guarantee in the aspect of Islamic law, but matters concerning guarantees can be equated with Rahn. Thus, in Islamic Financial Institutions, Rahn is guided by a guarantee system in lending and borrowing activities by Islamic law, this is based on the word of Allah QS. Al-Baqarah verse 283 and Law Number 21 of 2008 concerning Islamic Banking.

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