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BANK UNCERTAINTY REGARDING INVENTORY COLLATERAL IN INDONESIAN MSMEs LOANS

Abstract

Purpose: An obligation in providing easy access to funding for MSMEs creates a dilemma for banks when the collateral is in the form of inventory objects. When MSMEs provide collateral in the form of inventory objects, it can cause uncertainty for banks as collateral recipients. This research examines legal protection efforts for banks when MSME credit guarantees are in the form of inventory objects. **Methodology:** The research method is normative juridical with analytical descriptive research, statute, conceptual, and case approaches. **Results:** The results showed that the existence of a norm in Law 42/1999, which allows fiduciary providers to sell inventories to third parties, results in legal uncertainty and risks to the bank's position as a preferred creditor. The fiduciary giver does not exchange inventory items that have been sold or traded but at a lower value. It is very detrimental to the bank if it is accompanied by an event of default from the debtor. The bank cannot sell the collateral object considering that the fiduciary giver has transferred the collateral object. **Conclusion:** Therefore, efforts are needed that can be made by banks to minimize these risks by asking for a personal guarantee (borg) as support for MSME credit.

Key Words

Bank, Credit, MSME, Inventory, Risk, Default

I. INTRODUCTION

Banks have two interrelated functions as intermediary institutions and development agents, because when the bank serves as an intermediary institution, the bank has conducted its function as development agent. One of bank obligation is to extend the credit to Micro, Small and Medium Enterprises (MSMEs) since MSMEs have a large contribution to national economy and employment. Then, it is necessary to facilitate its access to finance, one of which is through bank credit. This is emphasized in Article 4 and Article 249 of Law Number 4 of 2023 regarding the Development and Strengthening of Financial Sector. Law 4/2023 is a reform law in the financial sector that has a high urgency in increasing the role of intermediate financial sector. One of them is the strengthening in the banking sector for the development of MSME's by facilitating access to financing based on the principles of prudence and risk management.

The credit disbursed by banks is considered risky, as well as credit to MSME actors, which has the potential for default by debtors. This is confirmed by Doriz Fejza, that "The banking sector is constantly exposed to various types of risk, including strategic risk, cybersecurity risk, market risk, liquidity risk, credit risk, and operational risk. Among these, credit risk is the most significant risk, especially for commercial banks."¹ The loans provided by banks are the largest asset for banks since it is the main source of income that comes from loan interest. Unfortunately, it also become a big problem when the default occurred. The bank obligation is to extend the credit to MSMEs gradually is stipulated in Bank Indonesia Regulation Number 23/13/PBI/2021 concerning the RPIM (Macro Prudential Inclusive Financing Ratio) for Conventional Commercial Banks, Sharia Commercial Banks and Sharia Business Units (PBI 23/2021), that banks are obliged to fulfill the RPIM, such as:

1. Minimum 20% at the end of June 2022 and the end of December 2022.
2. Minimum 25% at the end of June 2023 and the end of December 2023.
3. Minimum 30% since the end of June 2024

Law Number 7 of 1992 concerning Banking as amended by Law Number 10 of 1998 (Banking Law), Law 4/2023 and its implementing regulations in the form of PBI 23/2021, POJK (Financial Services Authority Regulations) have provided standard for banks in distributing the credit, including credit to MSMEs based on the principles of prudence and risk management. However, no one can ensure that something will happen in the future, including credit risk in the form of default.

One of the bank's efforts to minimize the credit risk is by requesting the collateral or warranty from the debtor. The main elements of credit are character, ability, assets or capital, collateral and business prospects of prospective debtor. The juridical function of collateral is

¹ Doris Fejza, Dritan Nace, and Orjada Kulla, "The Credit Risk Problem—A Developing Country Case Study," *Risks* 10, no. 8 (July 22, 2022): 146, <https://doi.org/10.3390/risks10080146>.

an effort to protect the creditor itself, called the certainty of debt repayment of the debtor or the performance of debtor's obligations on the promises agreed upon in the agreement. This is emphasized by several opinions that the existence of collateral is to reduce the risk of credit loss that has been distributed by bank when the default by debtors occurred, as follows: Allen N. Berger² stated that "Conventional wisdom in the banking community associates the use of collateral with observably riskier borrowers. As part of every pre-loan credit analysis, commercial lenders assess the riskiness of prospective borrowers and base the collateral requirements at least in part on this assessment." In addition, Benjamin Hemingway³ also identifies that "Collateral now has two roles; as in traditional adverse selection models collateral can be used as a screening device but in addition it may also help the bank satisfy regulatory requirements by reducing the loss given default of a loan."

The Burgerlijk Wetboek (BW) has provided the institution of material collateral, called pawn and mortgage, while collateral outside BW is Mortgage Rights (Law 4/96) and Fiduciary Guarantee (Law 42/99). Fiduciary Guarantee is one of the collateral institutions in Indonesia that still used by banks since it is very helpful, especially for MSMEs actors who need capital with guarantee in supporting their business. In fiduciary guarantees, the collateral object remains in the debtor themselves and can be used in running his business. In addition, the scope of fiduciary guarantee object is so broad that it includes movable object, consisting inventory object, merchandise, credit, machine tools, motor vehicles, and immovable objects in the form of buildings that cannot be encumbered with mortgage rights.

Unfortunately, the advantages offered by fiduciary guarantees caused some problems for banks in the form of collateral object called inventory objects because Law 42/1999 contains a norm that allows the fiduciary to transfer inventory objects that are the object of fiduciary guarantees with a commonly procedure conducted in trade business. In addition, it also includes the fiduciary obligation to replace the transferred object with an equivalent object. Inventory objects as objects of collateral are interesting things to discuss, that the researchers will examine in terms of Indonesian and Malaysian law. Inventory objects as objects of guarantee are regulated differently in Indonesian and Malaysian legal system. Pledging of inventory objects in Indonesia can be conducted through a fiduciary guarantee institution with several exceptions as stipulated in Law 42/1999. The exceptions are made to the principles and objectives of inventory collateral, namely as traded goods, then it always changes in form of amount. The transferred ownership due to sale and purchase activities is certainly different from the principle of fiduciary guarantee, called *droite de suite*, where fiduciary guarantee will follow its object. This exception is regulated in Article 20 and Article

² Allen N. Berger and Gregory F. Udell, "Collateral, Loan Quality and Bank Risk," *Journal of Monetary Economics* 25, no. 1 (January 1990): 21–42, [https://doi.org/10.1016/0304-3932\(90\)90042-3](https://doi.org/10.1016/0304-3932(90)90042-3).

³ Benjamin Hemingway, "Banking Regulation and Collateral Screening in a Model of Information Asymmetry," *Journal of Financial Services Research* 61, no. 3 (June 7, 2022): 367–405, <https://doi.org/10.1007/s10693-021-00357-w>.

21 of Law 42/1999.

In Malaysia, the fiduciary guarantee can be equated with charge guarantee institution which has been classified into 2 parts, called fixed charge and floating charge. The collateral for inventory goods is conducted through a floating charge guarantee institution that provided to entrepreneurs to pledge objects or assets used in business activities, including inventory objects. Malaysian legal system does not have a separate legal regulation to regulate charge guarantees. However, in practice, the legal arrangements regarding floating charge are regulated in Companies Act 1965.

In Indonesian legal system, a fiduciary who breaks his agreement by not replacing the transferred collateral object will become a problem for bank as a fiduciary recipient when it will execute the fiduciary security object with the debtor who conduct the default, it turns out that the collateral object no longer exists because it has been transferred. In practice, the bank will have the difficulties in examining the principal collateral in the form of a bank inventory. Even though the bank has checking the reports, it still difficult to determine the amount of inventory since inventory fluctuations are relatively fast and hard to monitor it. The problems often occur when the amount of inventory is very small compared to the first time the credit was granted.⁴ Therefore, this research aims to examine and analyze the uncertainty of collateral in the form of inventory objects for banks. The results of this research are expected to contribute to the development of legal science and provide understanding and legal knowledge to readers, especially regarding to the collateral law. The creditors are expected to apply the precautionary principle when granting credit and the government is expected to make changes to Law 42/1999.

Based on the description that has been presented, there are problems regarding difficulties for banks when the collateral object is in the form of inventory objects, namely an obligation to provide credit to MSMEs, but there are norms that allowing in transferring collateral objects in the form of inventory objects that has the potential to weaken the bank as a creditor because it cannot enforce its property rights when the inventory object has been transferred.

II. METHODOLOGY

The research method used is normative legal research. Normative juridical method is a method conducted by examining library materials. This research is descriptive analytical that

⁴ Erich Kurniawan Widjaja and William Tandy Putra, "Karakteristik Hak Kebendaan Pada Objek Jaminan Fidusia Berupa Benda Persediaan," *Jurnal Mercatoria* 12, no. 1 (June 25, 2019): 14, <https://doi.org/10.31289/mercatoria.v12i1.2316>.

describe the bank's uncertainty over collateral in the form of inventory objects by adding the bank's efforts to minimize the credit risk of MSMEs, especially the collateral object in the form of inventory objects. This research is a legal research that uses a statutory approach, conceptual approach and case approach. The legal materials used include primary legal materials, such as Burgerlijk Wetboek, Law 42/1999, Banking Law, Law 4/2023, and its implementing regulations. Moreover, to sharpen the analysis, some court decisions used, such as Court Decision number 2749 K/Pdt/2017, Court Decision number 109K/PID.SUS/2019, Cianjur District Court Decision number 107/Pid.B/2018/PN.Cgr and Sukabumi District Court Decision number 70/Pd.B/2014/PN.Smi. Then, secondary legal materials include books and journal articles related to MSME credit, bank credit risk and collateral objects. All legal materials collected will be arranged systematically and will be analyzed to obtain the research answers. The data analysis technique in this research uses a deductive mindset.

III. DISCUSSION

A. THE OBLIGATION TO PROVIDE FUNDS FOR MSMES BY BANKS

Banks as intermediary institutions are encouraged to increase inclusive financing⁵ for MSMEs since MSMEs has the large contribution national economy and employment. In several articles in Law 4/2023, there are norms requiring banks to provide credit or financing based on Sharia principles for MSMEs in increasing national economic resilience through empowering MSMEs by providing easy access to credit or financing for MSMEs. The use of the word “wajib” in Article 12 B and Article 21 C of Law 4/2023 relating to MSME credit or financing shows that the government through Law 4/2023 has the power to force banks in providing easy access to funding for MSMEs, since they had difficulties in obtaining access to funding due to the large number of non-bankable MSMEs caused by the absence of transparent financial management and lack of managerial and financial capabilities.⁶

Ashiqur Rahman⁷ states that SME business conditions and financial environments are not competitive enough, therefore, SMEs may find it difficult to manage their credit risk properly and thus face strict terms when applying for bank loans. This was also emphasized by

⁵ Inclusive Financing is the provision of funds provided by the Bank to MSMEs, MSME Corporations, and/or PBR in rupiah and foreign currencies.

⁶ Wiwiek Rabiatul Adawiyah, “Faktor Penghambat Pertumbuhan Usaha Mikro Kecil Menengah (UMKM): Studi Di Kabupaten Banyumas,” *Sustainable Competitive Advantage* 1, no. 1 (2011): 1–18.

⁷ Ashiqur Rahman et al., “Collateral Requirement For SME Loans: Empirical Evidence From The Visegrad Countries,” *Journal of Business Economics and Management* 18, no. 4 (August 27, 2017): 650–75, <https://doi.org/10.3846/16111699.2017.1357050>.

Abdul Razak Munir⁸ in his research that Small-medium enterprises (SMEs) have a significant and competitive role in Indonesian economy. Numerous evidences support the fact that the nature of small and medium enterprises is quite prominent in Indonesian economy. Unfortunately, most SMEs are not able to go up the class due to various weaknesses. One of the weaknesses of SMEs is marketing ability/performance.

The legal norms generally contain commands, prohibitions and permissions. The primacy of legal norms is because they are general and have the power to force since they are made by the authorities. Referring to the opinion of Sudikno Mertokusumo that only the government can implement the coercion against violations of legal norms, because they monopolize the law, and the law exists because of legitimate power.⁹ It can be concluded that all regulations according to the legislator that based on public interest are coercive. Among other things, to protect economically and socially weak parties.¹⁰ The obligation of banks to provide funding for MSMEs is command from the government through PBI 23/2021 and Law 4/2023.

The urgency of regulating the obligation for banks to provide MSME loans is that MSMEs are the most important pillar in Indonesian economy. Based on data from the Ministry of Cooperatives and SMEs, the number of MSMEs in 2021 reached 64.2 million with a contribution to GDP of 61.07% or IDR 8,573.89 trillion. The contribution of MSMEs to Indonesian economy includes the ability to absorb 97% of the total workforce and can raise up to 60.4% of total investment.¹¹ However, there are many obstacles or problems faced by MSMEs, called internal and external problems. Internal problems are related to limited capital, not having good financial reports, and family-style management, while external problems are including difficulties in obtaining capital, technology, raw materials, information and marketing, infrastructure, and partnerships. In addition, there are also problems on the ability to access financial institutions, one of which is the inability to provide collateral and the absence of administration that considered not bankable.¹²

⁸ Abdul Razak Munir et al., "The Role of Geo-Cultural Product Attractiveness and Acculturative Aesthetic Attractiveness in Enhancing the Relationship between Innovation and SMEs Marketing Performance," *Management Science Letters* 10 (2020): 3419–24, <https://doi.org/10.5267/j.msl.2020.5.036>.

⁹ Soediro, "Mengkritisi Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal (UUPM)," *Kosmiki Hukum* 17, no. 2 (2017), <http://dx.doi.org/10.30595/kosmikhukum.v17i2.2330>.

¹⁰ Sudikno Mertokusumo, *Legal Discovery: An Introduction* (Yogyakarta: Liberty, 2009).

¹¹ Haryo Limanseto, "UMKM Menjadi Pilar Penting Dalam Perekonomian Indonesia," KEMENTERIAN KOORDINATOR BIDANG PEREKONOMIAN REPUBLIK INDONESIA (Jakarta, 2021), <https://ekon.go.id/publikasi/detail/2969/umkm-menjadi-pilar-penting-dalam-perekonomian-indonesia>.

¹² Adawiyah, "Faktor Penghambat Pertumbuhan Usaha Mikro Kecil Menengah (UMKM): Studi Di Kabupaten Banyumas."

Therefore, Indonesian government has implemented a number of MSME support programs, including incentive and financing assistance through PEN (National Economic Recovery) program, KUR (People's Business Credit), Gernas BBI (National Movement for Proudly Made in Indonesia), Digitalization of MSME marketing, Strengthening Alumni Entrepreneurship Pre-Employment Card Program through KUR Financing, that includes a long-term strategy to develop the MSME.¹³ In addition, through Law 4/2023 and PBI 23/2021, there is an imperative method for banks to distribute the credit to MSMEs that evidenced by the sanctions when banks do not provide inclusive financing in fulfillment of RIMP. The sanctions are in the form of administrative sanctions of written warnings and payment obligations calculated based on the constant product of 0.1% and the deficiency value of RIMP as regulated in Article 24 of PBI 23/2021.

B. CHARACTERISTICS OF INVENTORY OBJECTS AS CREDIT COLLATERAL OBJECTS

Law 42/1999 does not explicitly define inventory objects, but it is implied in the elucidation of Article 6 letter c of Law 42/1999 that objects of fiduciary guarantee are inventory objects which always changing, such as stocks of raw materials, ready stock goods, or portfolio of securities companies. Then, Fiduciary Deed of Guarantee (AJF) includes a description of type, brand, and quality of the object. The elucidation of Article 23 paragraph (2) of Law 42/1999 also does not provide a definition of inventory objects but provides examples of objects that not belong to inventory objects, such as production machinery, private cars or private homes that are become the object of fiduciary guarantees. Based on two articles above, inventory objects are objects that are always changing or not fixed object, that are used as business object. Likewise, the administration of inventory objects and non-inventory objects in Law 42/1999 is regulated differently that explained in the table 1 below (please, see next page):

¹³ Limanseto, "UMKM Menjadi Pilar Penting Dalam Perekonomian Indonesia."

Table 1: The Arrangement of Inventory and Non-Inventory Objects According to Law 42/1999

No.	Inventory items	Non-stock items
1	<p>It is permissible to sell with the model and process similar to the trading business without prior permission from the creditor (Article 21 paragraph (1) of Law 42/1999) With condition, that the transferred object of Fiduciary Guarantee must be replaced by an equivalent object (Article 21 paragraph (3) of Law 42/1999)</p>	<p>Prohibited from transferring, mortgaging or leasing to other parties, except with prior approval from the fiduciary (Article 23 paragraph (2) of Law 42/1999)</p>
2	<p>The principle of <i>droit de suite</i> is excluded so it does not apply in the items (Article 20 of Law 42/1999)</p>	<p>The principle of <i>droit de suite</i> Applies in the items (Article 20 of Law 42/1999)</p>
3	<p>The purchasers of inventory objects are free from prosecution even they knew that the object purchased is a fiduciary security object (Article 22 of Law 42/1999).</p>	<p>The claims of non-inventory objects are unavailable for purchaser, that the fiduciary can enforce its property rights against the purchaser.</p>
4	<p>Fiduciaries who transfer inventory objects are not subject to criminal sanctions and penalty because Law 42/1999 allows transfers as in Article 21 of Law 42/1999.</p>	<p>There are criminal sanctions and fines for the Fiduciary grantor who transfers, mortgages, or leases the object of the Fiduciary Guarantee as referred to in Article 23 (2) of Law 42/1999 without the prior written consent from Fiduciary Beneficiary. The sanction is imprisonment for a maximum of 2 (two) years and a maximum penalty of IDR. 50,000,000 (fifty million) rupiah. (Article 36 of Law 42/1999)</p>
5	<p>The examples of inventory items are electronic goods such as televisions, refrigerators, air conditioners, gas stoves and etc. that owned by the debtor whose business in selling electronic goods.</p>	<p>The examples of non-inventory objects are motor vehicles that used to support the debtor's business as an expedition business of mail and goods delivery.</p>

Understanding the differences between fiduciary guarantee inventory objects and non-inventory objects for bankers is very important because a failure to identify the guarantee object may harm the bank in dispute with the debtor. As in Court Decision number 491K/PID.SUS/2016, where the bank as a fiduciary receiver is wrong to interpret between the inventory and non-inventory guarantee object; thus, the bank is defeated in the cassation verdict. Dispute between R. Maslifah and Abdul Wahed, who received several types of credit facilities from BCA's Pamekasan Branch, one of which was a working capital loan for their grocery store business. The guarantees provided are in the form of Certificates of Ownership (SHM) burdened with Mortgage Rights and stock of merchandise loaded with fiduciary guarantees. As time goes by, the credit becomes jammed so that the bank executes the guarantee in the form of SHM. However, the proceeds from the sale of SHM are not enough to repay debtors' credit, so the bank executes stocks of merchandise. However, the supply of inventory by the debtor has been sold out to the buyer, and the proceeds from the sale are used to pay obligations to the bank. The bank filed criminal charges against the debtor for violating Article 23 paragraph (2) Jo. Article 36 of the Fiduciary Guarantee Law.

At the first level and appeal, the bank won that the debtor had violated the Article 36 of the Fiduciary Guarantee Law. However, in cassation, the judge said that the collateral object is an inventory object and is not categorized as a non-inventory object where the debtor's business is trading, so there is no need for written permission from the creditor to sell the debtor's stuff. The debtor is doing his business as how it is, and he is not violating Article 36 of the Fiduciary Guarantee Law. Related to the debtor who did not replace the sold inventory object, the bank can submit a civil lawsuit based on the default but not for the criminal case. Therefore, the cassation decision is granted the debtor's request from criminal prosecution.

The existence of fiduciary guarantees is very helpful for MSME actors, especially with inventory objects. Before the existence of fiduciary guarantees, when the collateral object is in the form of a movable object, it will be burdened with a pawn which has an *inbezitstelling* pattern that the collateral object must be handed over to the creditor or removed from the power of the object owner (Article 1152 paragraph (1) BW). This will clearly obstruct the business of MSME actors since the inventory objects are used in running their business. Likewise, inventory objects also cannot be encumbered with a mortgage (Article 1162 BW) because the object of the mortgage is immovable objects while inventory objects are not classified as immovable objects but are classified as movable objects. This phenomenon was solved by the existence of fiduciary guarantees, especially for MSME actors to have the access to funding with the guarantee of inventory objects that used to support the businesses of MSME actors.

The bank's position as preferred creditor required to several stages. The first stage is making the main agreement, called an authentically credit agreement or loan agreement under the hand signed by the parties, then followed by making an *accessoir* agreement, called Fiduci-

ary Guarantee Deed (AJF) which must be made by notarial deed in Indonesian which contains:

1. The identity of the Fiduciary Grantor and its beneficiary;
2. The data on fiduciary agreement;
3. The description of Fiduciary Guarantee object;
4. Guarantee value; and
5. The value of Fiduciary Guarantee object.

The next step is the application for fiduciary guarantee registration, which is submitted through electronic fiduciary guarantee registration system with the web address <http://ahu.go.id> or <http://fidusia.ahu.go.id> The application for fiduciary guarantee registration is submitted within 30 days from the date of AJF making as stipulated in Article 4 of Government Regulation No. 21/2015 on Procedures for Fiduciary Guarantee Registration and Fees for Making Fiduciary Guarantee Deed (PP 21/2015). The registration of Fiduciary Guarantee, the application for revision of Fiduciary Guarantee certificate, application for amendment of Fiduciary Guarantee certificate, and notification of deletion of Fiduciary Guarantee certificate shall be submitted by Fiduciary Recipient, his/her attorney or representative. The application for fiduciary guarantee registration contains of:

1. The identity of Fiduciary grantor and Fiduciary beneficiary;
2. Date, number of Fiduciary Guarantee deed, name, and notary domicile who are making the Fiduciary Guarantee deed;
3. The data of fiduciary agreement;
4. The description of Fiduciary Guarantee object;
5. Guarantee value; and
6. the value of Fiduciary Guarantee object.

The applications that have met the requirements will receive proof of registration and the applicant will pay the registration fee through a perception bank. After the payment is made, the fiduciary guarantee is stipulated on the same date as the fiduciary guarantee is electronically recorded. The regulation requiring the registration of fiduciary guarantees is intended to:¹⁴

1. Provide legal certainty to the parties concerned, such as creditor as fiduciary beneficiary, the fiduciary grantor and interested third parties;
2. Provide the fiduciary the right of its beneficiary;
3. The realization of publicity principle.

The stipulation of this fiduciary guarantee has legal implications for bank's position as a preferred creditor, called prioritized creditor in repayment compared to other creditors. The

¹⁴ Andreas Albertus and Andi Prajitno, *Fiduciary Law* (Malang: Selaras, 2010).

stipulation of fiduciary guarantee is also as evidence that the creditor's position as the owner of a property right has superior characteristics, such as absolute characteristics, the principle of *droit de suite*, the principle of priority and the principle of preference (the principle of *droit de preference*). Therefore, the rights stipulated in Law 42/1999 will be attached to the fiduciary creditor, called the right to execute the inventory object when the debtor is in default.

An example of a description of inventory items in the form of goods contained in AJF is as follows:

- Stock of goods as stated in the list of stock was made under the hand stamped dated 16-07-2014 amounted to IDR. 8,153,387,707.00. The collateral is now located at Rumah Jalan.....
- The inventory of groceries, food, beverages and other grocery items owned by the fiduciary located at Perumahan.... with a collateral value as of 31-05-2013 of IDR. 1,111,000,000.00.

The inventory objects as described above are classified as tangible movable objects or unregistered objects. It is quite difficult to determine the tangible movable objects or unregistered objects, even though the legislator has provided an answer as stipulated in Article 1977 paragraph (1) BW which emphasizes that whoever controls a movable object is considered as the object's owner. Therefore, when tangible movable objects or unregistered objects are used as collateral, the creditor already has the guidelines to assess whether the debtor is the owner of the collateral object or not. meanwhile, it is easy to confirm the object ownership of registered objects like a house that includes in property right and make the general register at the Land Office.

C. THE RISKS ON FIDUCIARY GUARANTEE OBJECTS IN THE FORM OF INVENTORY OBJECTS AND THE EFFORTS TO MINIMIZE IT

Law 42/1999 stipulates that inventory objects are allowed to be transferred and its buyer is exempted from prosecution even when they knew that the object is a fiduciary object. The fiduciary is required to replace the transferred inventory object with an equivalent object in the form of its value and its type. When the debtor is in default, the transfer and receivables proceeds become the substitute fiduciary object of the transferred fiduciary object. However, this norm provides an opportunity for the fiduciary grantor to act in bad by not replacing the transferred collateral object and the transfer proceeds of collateral object are also not used to repay his credit to the creditor. In this case, the fiduciary creditor cannot make indictment on the buyer of inventory objects since the Law 42/1999 exempts the buyer from prosecution, then the fiduciary beneficiary creditor is helpless when all inventory objects have been transferred and the fiduciary grantor does not replace them. Then, the fiduciary beneficiary creditor is no longer as the creditor owner a property guarantee.

The norm that allows transferring inventory objects in Article 21 paragraph (1) of Law 42/1999 is from the institution of fiduciary guarantees that provides convenience for fiduciary grantor to remain control the pledged object in order to conduct its business activities, then the fiduciary grantor can still transfer the inventory objects in the context of its business activities. The meaning of transferring according to the explanation of Article 21 paragraph (1) of Law 42/1999 is selling or renting. However, equating the meaning of transferring with renting out is inappropriate considering that renting out does not mean transferring ownership, while the meaning of selling is appropriate with the meaning of multiplying ownership since selling intends to transfer the ownership. Therefore, the sale and purchase made by fiduciary with the buyers is a valid sale and purchase agreement as long as it fulfills the requirements of agreement validity in Article 1320 BW with fair price according the market sale in minimizing the fraud act in selling the inventory object.

Another risk faced by fiduciary creditor is the bad faith of the fiduciary, namely replacing the inventory object with an unequal quality as mandated in Article 21 paragraph (3) of Law 42/1999, resulting in a value decrease of the collateral object. Another risk faced by the fiduciary creditor is that the inventory object is mortgaged by fiduciary grantor. This is commonly happening considering that the collateral object is owned by fiduciary grantor, then the fiduciary grantor becomes free to conduct legal actions on the collateral object. Although there is a prohibition to re-fiduciate as stipulated in Article 17 of Law 42/1999, this can still be conducted by the fiduciary grantor, especially with the provisions of Article 28 of Law 42/1999 which stipulates that when the same object becomes more than one object, the party who initially registered the fiduciary guarantee agreement will own it.

Mortgaging inventory objects to third parties is a possible risk faced by the fiduciary creditor. This is possible when the inventory object is a movable object that can be the pledge object as stipulated in Article 1150 BW. When this happens, the fiduciary beneficiary creditor cannot enforce its property rights on the pledgee if the debtor defaults and the execution of the inventory object will be conducted. Due to the inventory objects in the form of unregistered movable objects, the pawn recipient will be protected in Article 1977 paragraph (1) BW which contains the principle that whoever controls a movable object is considered as the object's owner, then when the debtor pawns the inventory object which is actually in his power, it is considered that the debtor has the authority to pawn it. Even though the inventory object has been encumbered with a fiduciary guarantee, then the position of fiduciary creditor is even worse because it cannot enforce its property rights on the pawn beneficiary. The norm contained in Article 18 of Law 42/1999 states that all information regarding objects of fiduciary guarantees at Fiduciary Registration Office is available to the public, then the possibility of inventory objects being pawned will not occur. This norm has been ineffective since the registration of fiduciary guarantees is conducted electronically, especially for unregistered movable objects since interested third parties cannot access the web address <http://ahu.go.id>

or <http://fidusia.ahu.go.id> to find out whether the unregistered movable objects are encumbered by fiduciary guarantees or not.

Moreover, for non-inventory object, Article 23 paragraph (2) of Law 42/1999 clearly prohibits the fiduciary grantor from transferring, mortgaging or leasing to another party for fiduciary guarantee object which is not an inventory object except with the written consent from the fiduciary creditor. It is even subject to imprisonment and penalty when it violated. When examining the norm, it can be interpreted that inventory objects is allowed to transfer, lease and mortgage it. This creates uncertainty for the position of fiduciary beneficiary creditor over the collateral object in the form of inventory objects.

In addition, it is possible that the fiduciary grantor is negligent in keeping the security object that caused damaged, lost or stolen object (the collateral object is not insured). This will affect the position of fiduciary beneficiary creditor when the object of supply is lost or stolen and cannot be recovered, resulting in fiduciary agreement being nullified and changes the creditor's position as concurrent creditor and no longer having the position of a preferred creditor. Besides, if one examines the norms contained in Article 23 paragraph (2) of the Law 42/1999, it can be interpreted as an exception to inventory items, that is not only allowed to transfer but also allowed to renting out. This further creates uncertainty for the creditor's position whose collateral object is in the form of stock.

This is a dilemma for banks in providing credit to MSMEs with collateral object in the form of inventory objects. On the one hand, there is a mandatory norm that must obliged by banks, but, the existence of collateral in the form of inventory objects does not guarantee the certainty of the bank's position as a preferred creditor. This is highly dependent on the objective of MSMEs for agreements contained in credit agreements and fiduciary guarantee agreements, including fulfilling the obligation to replace inventory objects that have been transferred to the buyer as stipulated in Article 21 paragraph (3) of Law 42/1999. This is clearly very risky for banks in providing MSME loans with collateral in the form of inventory objects.

As an illustration, credit risk for MSME debtors always exists even though the collateral is in the form of land rights, but with collateral in the form of fixed assets in the form of land rights' certificates, the bank's position is relatively more secure. This is in line with what was

conveyed by¹⁵ that even though there is collateral in the loan, there is still a risk, especially when the loan is without collateral that causing bigger risk. As in Cassation Decision Number 2749 K/Pdt/2017, called the dispute between PT Bank Pundi Indonesia, Tbk cq PT Bank Pundi Micro Business KCP Bukittinggi with Darman and Afnetti (wife of Darman). Darman and Afnetti are MSME debtors who received a credit facility from PT Bank Pundi amounting to IDR. 500,000,000.00 and experienced bad credit due to business decadency. The bank has made a subpoena and continued with warning letters I to III and restructuring has been conducted, but it has no results and the bank conducts an auction of collateral in the form of Certificate of Ownership Number 187/Kel.Bukittinggi, covering an area of 675 M2 in the name of Darman which has been burdened with Mortgage Rights through the Bukittinggi KPKNL (State Wealth and Auction Service Office). However, Darman and Afnetti did not accept the auction of their collateral conducted by KPKNL Bukittinggi and they sued PT Bank Pundi in District Court Decision Number 13/Pdt.Plw/2016/PN Bkt and their lawsuit was granted. At the appeal level, the District Court Decision was corrected by Padang High Court Number 1/Pdt/2017/PT PDG which granted their lawsuit. PT Bank Pundi then filed an appeal against the verdict to grant PT Bank Pundi's appeal and annul the Padang High Court Decision Number 1/PDT/2017/PT PDG which corrected the District Court Decision Number 13/Pdt.Plw/2016/PN Bkt and adjudicate themselves rejecting Darman and Afnetti's lawsuit in its entirety. Then, it can be interpreted that the auction conducted by KPKNL Bukittinggi on the mortgage collateral is valid, that the proceeds from the auction will be used to repay the credit that has been given to Darman and Afnetti as MSME debtors.

Based on the description above, the efforts are needed to minimize the credit risk of MSMEs, especially for the collateral object in the form of inventory objects. The efforts to protect fiduciary creditors is the existence of a clause in AJF as follows:

"The fiduciary is not entitled to re-fiduciate the collateral object. The fiduciary is also not allowed to charge, mortgage, sell or transfer in any way of the fiduciary guarantee object to another party without written consent from the fiduciary."

However, the clause above clearly contradicts with the norm that allows the transfer of inventory objects without the permission of the fiduciary creditor as in Article 21 paragraph (1) of Law 42/1999. Therefore, when the collateral object is in the form of inventory, the debtor must seek the written approval from fiduciary creditor every time he wants to transfer the object, that resulting in obstructing the mobility of debtor's business considering that the collateral object is goods that must be transferred by the debtor will be used to pay his debt to the creditor. This is contradicted by the explanation of Law 42/1999, which states that Law 42/1999 guarantees flexibility with regard to objects that can be encumbered by Fiduciary

¹⁵ Gabriel Jiménez and Jesús Saurina, "Collateral, Type of Lender and Relationship Banking as Determinants of Credit Risk," *Journal of Banking & Finance* 28, no. 9 (September 2004): 2191–2212, <https://doi.org/10.1016/j.jbankfin.2003.09.002>.

Guarantees for debt repayment. Moreover, for MSME players whose business depends on the sale of inventory objects, it clearly hampers the business of MSME actors. This is also stated by Fabio Dias Duarte that the failure of loans to MSMEs has been a concern for several decades, as states “The prediction of default in bank loans to small and medium enterprises (SMEs) has been a concern of managers, academics, and policy makers for several decades. The 2007-2009 financial crisis enhanced concerns about bank credit at several levels. SMEs were in need of access to bank financing to implement their projects in an adverse setting.”¹⁶

When the inventory object is used as collateral object, its position is in the additional collateral, not as the main collateral. The fixed asset of collateral object such as certificates of land rights, motor vehicles, and gold should be sought. However, when MSME actors do not have the main collateral in the form of fixed assets, there is a need for a more business feasibility analysis and stricter supervision by bank in monitoring inventory transfer transactions.

The bank can request additional collateral in the form of personal guarantee (*borgtocht*) where the guarantor must waive its privileges as stipulated in Article 1831 BW for the bank can directly collect the guarantor if the debtor conduct the default. Moreover, the guarantor (borg) can be bankrupt in the context of payment of obligations from the debtor.

This was also stated by Fabio Dias Duarte and Ana Paula Matias Gama that during the financial crisis many banks in Europe required small company owners as guarantors in order to access loans to banks. Unlike collateral, it is only limited to the value of the collateral given to the bank, while personal guarantees given by the owner of the company will strengthen the responsibilities of the owner of the company which are not limited.¹⁷

1. Include a clause that the fiduciary is obliged to provide periodic reports every month on the position of inventory objects and periodic checks are conducted by the bank, for it is known that the transferred objects have been replaced.
2. Include a clause that the fiduciary is obliged to keep the value of the security object from decreasing due to the transfer and is obliged to maintain and keep the security object as well as possible.
3. Include a clause that the debtor is obliged to use the lender's bank account every time it receives payment for inventory transfer and the payment is sought to reduce the debtor's obligation on received credit.

¹⁶ Fábio Dias Duarte, Ana Paula Matias Gama, and Mohamed Azzim Gulamhussen, “Defaults in Bank Loans to SMEs during the Financial Crisis,” *Small Business Economics* 51, no. 3 (October 2018): 591–608, <https://doi.org/10.1007/s11187-017-9944-9>.

¹⁷ Fábio Dias Duarte, Ana Paula Matias Gama, and Mohamed Azzim Gulamhussen, “Credit Risk, Owner Liability, and Bank Loan Maturities during the Global Financial Crisis,” *European Financial Management* 26, no. 3 (June 2020): 628–83, <https://doi.org/10.1111/eufm.12239>.

4. Insure the inventory against fire and other hazards with a banker's clause for the insurance claim becomes a substitute for fiduciary object when there is an uncertain event
5. Guaranteeing MSME credit with credit guarantees by Jaminan Kredit Indonesia (Jamkrindo).

The bank must make the efforts mentioned above as a fiduciary creditor in securing funds that have been distributed to MSMEs, considering that the collateral object in the form of inventory objects should provide legal certainty for creditors in terms of debt repayment when the debtor conducts the default action, but instead provides uncertainty for the bank position as a fiduciary creditor.

IV. CONCLUSION

Banks, as creditors, are obligated to provide easy access to funding for MSMEs to encourage the development of the Indonesian economy. However, the ease of access to funding must be considered based on prudence and risk management principles. The collateral objects in the form of inventory objects encumbered with fiduciary guarantees can cause uncertainty for banks as fiduciary creditors. Law 42/1999 regulates that inventory objects are allowed to be transferred, and the buyer is exempted from prosecution even though they know that the object is fiduciary. The debtor who transfers the inventory object is obliged to replace it with the same collateral object in the form of value and type. Then the replacement object will have the same value and type as a collateral object.

However, when the debtor conducts the default or the replacement object does not meet the same value and type. At the same time, the fiduciary creditor cannot execute the inventory object. The money from the sale of the inventory object that has been transferred becomes the object of collateral. In this case, banks must minimize the credit risk in MSMEs, especially against collateral objects in the form of inventory objects. These efforts are that inventory objects are placed as additional collateral, not principal collateral. In addition, banks request additional collateral in the form of personal guarantees, including a clause that the debtor is obliged to provide regular reports, the debtor is obliged to keep the value of the collateral from decreasing, ensure the inventory objects and guarantee MSME credit. Moreover, Banks can adopt the crystallization stage in Malaysia to avoid the risk of drastically reducing the value of collateral objects and the creditors' security; in this case, the bank can be maintained. Furthermore, the government should change Law 42/1999 regulation regarding fiduciary guarantees on inventory objects.

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НЕВИЗНАЧЕНІСТЬ БАНКІВ ЩОДО ЗАСТАВИ ТОВАРНО-МАТЕРІАЛЬНИХ ЦІННОСТЕЙ В ІНДОНЕЗІЙСЬКИХ КРЕДИТАХ MSME

Анотація

Мета: Зобов'язання щодо забезпечення легкого доступу до фінансування для MSME створює дилему для банків, коли застава надається у формі товарно-матеріальних цінностей. Коли MSME надають заставу у вигляді товарно-матеріальних цінностей, це може спричинити невизначеність для банків як одержувачів застави. У цьому дослідженні розглядаються заходи правового захисту для банків, коли кредитні гарантії MSME надаються у формі товарно-матеріальних цінностей. *Методологія:* Метод дослідження - нормативно-правовий з використанням аналітично-описового дослідження, законодавчого, концептуального та кейс-підходів. *Результати:* Результати дослідження показали, що існування норми в Законі 42/1999, яка дозволяє фідучіарним постачальникам продавати товарно-матеріальні цінності третім особам, призводить до правової невизначеності та ризиків для позиції банку як привілейованого кредитора. Фідучіарний надавач не обмінює товарно-матеріальні цінності, які були продані або продані, але за нижчою вартістю. Для банку дуже шкідливо, якщо це супроводжується подією дефолту боржника. Банк не може продати предмет застави, вважаючи, що довірчий власник передав предмет застави. *Висновок:* Таким чином, банки повинні докладати зусиль для мінімізації цих ризиків, вимагаючи надання особистої гарантії (боргу) в якості забезпечення кредитів MSME.

Ключові слова

банк, кредит, MSME, запаси, ризик, дефолт