

Legal Protection for Creditors in Credit Agreements Secured by Fiduciary Security When the Collateral Is Lost

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Abstract

Fiduciary security lets a debtor keep using the collateral while the creditor holds a preferential security right. This makes the arrangement efficient, but it exposes the creditor to the risk that the collateral is lost, stolen, destroyed or transferred. This article examines (1) the legal liability of the debtor in a credit agreement secured by fiduciary security when the collateral is lost, and (2) the legal protection available to the creditor. The study is normative juridical research using statute and conceptual approaches. Primary legal materials (Law No. 42 of 1999 on Fiduciary Security, Law No. 4 of 1996 on Mortgage Rights and the Indonesian Civil Code) and secondary and tertiary materials were collected through library research and analysed descriptively, interpretively, evaluatively and argumentatively. The findings show that the loss of the collateral extinguishes the fiduciary security but not the principal debt, because fiduciary security is accessory to the credit agreement. The debtor therefore remains obliged to repay the debt and is also liable for damages if the loss results from the debtor's fault, whereas a loss caused by force majeure releases the debtor from damages under Articles 1244–1245 of the Civil Code. The creditor loses the executorial title over the object and becomes, in effect, a concurrent creditor over the debtor's general assets under Articles 1131–1132. Protection then relies mainly on insurance claims, a default lawsuit and conservatory attachment. Preventive protection through notarial deeds, registration and insurance remains the most effective safeguard.

Keywords: fiduciary security; credit agreement; legal protection; creditor; lost collateral; force majeure; default

INTRODUCTION

Economic development, as part of national development, aims at a just and prosperous society based on Pancasila and the 1945 Constitution. Sustaining that development requires large amounts of funds from both government and society, individuals and legal entities alike. Most of these funds are obtained through lending and borrowing. Lending is commonly supported by security, and Indonesian law recognises several forms: mortgage rights over land under Law No. 4 of 1996, pledge, hypothec over certain assets, and fiduciary security.

Fiduciary security has been used in Indonesia since the Dutch colonial period, when it emerged from case law. It has been widely used in lending because creating it is regarded as simple, easy and fast. Its original weakness was legal uncertainty: because it was not registered, the recipient of the security could not be sure that the same asset had not been pledged to someone else without their knowledge. Law No. 42 of 1999 on Fiduciary Security (hereafter the Fiduciary Law) was enacted to respond to this need. It broadened the objects of fiduciary security to include tangible and intangible

movables and buildings that cannot be encumbered by mortgage rights, and it introduced registration, which gives the recipient of the security a preferential position over other creditors.

The Fiduciary Law defines fiduciary as the transfer of ownership of an object on the basis of trust, on the condition that the object whose ownership is transferred remains in the possession of its owner. This design benefits the debtor, who can go on using the collateral in business, but it places the collateral outside the creditor's physical control. The collateral may therefore be lost through theft or disaster, or it may be sold, re-pledged or otherwise disposed of. When that happens, the creditor's security disappears while the debt remains unpaid. The Fiduciary Law states that the destruction of the object extinguishes the security and that insurance claims are not extinguished, but it says little about how the loss is to be shared between the parties or what each must then do.

Discussions of fiduciary security tend to focus on creation, registration and execution. Less attention is given to what happens after the object has been lost. This article addresses two research questions: (1) what is the legal liability of the debtor in a credit agreement with fiduciary security when the collateral is lost, and (2) what legal protection does the creditor have in that situation? The study aims to analyse both questions. Theoretically, it contributes to understanding the principles of credit agreements and fiduciary security; practically, it offers guidance to creditors, debtors, notaries and legal practitioners who have to deal with lost collateral.

LITERATURE REVIEW

The legal state and the welfare state

Article 1 paragraph (3) of the 1945 Constitution declares Indonesia a state based on law. The idea of the legal state developed through the *rechtsstaat* tradition, in which Stahl identified four elements: recognition and protection of human rights, separation of powers, government based on regulations, and administrative justice (Azhar, 2003). The parallel concept of the *rule of law* in Anglo-Saxon systems was characterised by Dicey through the supremacy of law, equality before the law, and the protection of human rights by statutes and court decisions (Azhar, 2003). The liberal "night-watchman" state confined government to preserving order, but the welfare state, in which government actively promotes public welfare, later became dominant. Manan (2004) argues that the modern legal state has political, legal and socio-economic aspects, the last of which concerns social justice and public welfare. This aspect is the most relevant here, because credit and security law serve economic activity while also being expected to deliver fairness to both creditors and debtors.

Hierarchy of norms and legal protection

Kelsen described law as a hierarchy in which a lower norm derives its validity from a higher one, up to a basic norm; Nawiasky developed this into four groups of norms, from fundamental state

norms to implementing and autonomous regulations (Soeprapto, 2008). In Indonesia this hierarchy runs from Pancasila and the Constitution down to statutes and regulations. Conflicts between norms are settled by the principles of *lex superior*, *lex specialis* and *lex posterior*. These principles matter here because the Fiduciary Law is a special law that prevails over the general provisions of the Civil Code where the two conflict.

Law also functions as an instrument of legal protection. Salmond, cited in the literature, held that law integrates and coordinates conflicting interests so as to limit their collision. Rahardjo (2000) defines legal protection as giving shelter to human rights harmed by others so that people can enjoy the rights granted by law. Hadjon (2007) distinguishes preventive protection, which aims to prevent disputes, from repressive protection, which aims to resolve them, including through the courts. Rasjidi and Putra (2011) add that protection should be not only adaptive and flexible but also predictive and anticipatory, which is a useful standard for assessing whether the law prepares for risks such as lost collateral.

Legal responsibility

Legal responsibility is the obligation to bear the consequences of one's acts and to be held to account for them. In civil law, its basis is either fault or risk. The principal models are liability based on fault, in which the injured party must prove the wrongdoing; liability based on rebuttable presumption, in which the actor is released by proving the absence of fault; and strict liability, which does not require proof of fault (Asikin et al., 2016). The literature also distinguishes *accountability*, related to financial accounting, *responsibility*, understood as a moral and role-based burden, and *liability*, the legal duty to bear loss suffered by another (Asikin et al., 2016). Responsibility is closely tied to the concept of rights and duties: a right held by one person corresponds to a duty of another. In Kelsen's theory, a person is legally responsible for an act when a sanction may be attached to conduct that contradicts the law.

Credit and the credit agreement

The word *credit* derives from *credere*, meaning to trust. Credit is a loan of money to be repaid in instalments, and Article 1 point 11 of Law No. 10 of 1998 amending the Banking Law defines it as the provision of money or equivalent claims based on a loan agreement between a bank and another party, obliging the borrower to repay after a certain period with interest. Its elements are trust, time, degree of risk and performance (Tobing, 2014; Bahsan, 2010). The element of risk explains why security is demanded: the longer the period, the greater the uncertainty.

A credit agreement is subject to the law of obligations in the Civil Code. Article 1320 sets out four conditions of validity (consent, capacity, a certain subject matter and a lawful cause). The first

two are subjective and the last two objective; breach of an objective condition makes the agreement void by law, whereas breach of a subjective condition makes it voidable. A valid agreement binds the parties as a statute under Article 1338. Several principles apply: consensualism, freedom of contract, *pacta sunt servanda* and good faith, in both its subjective sense (honesty) and its objective sense (conformity with social norms) (Salim H.S., 2008a). In practice credit agreements are written, either as a private deed drafted by the bank on a standard form or as a notarial deed (Sutarno, 2005). A private deed can be weakened if the debtor denies the signature, in which case Article 1877 requires the court to verify it. Whatever its form, the credit agreement serves as evidence of the parties' rights and duties, as the principal agreement on which the security agreement depends, and it has no executorial force by itself.

Security in general

Security is an obligation that a debtor or a third party assumes towards the creditor to guarantee the debtor's performance (Sutedi, 2010). Security agreements are accessory: they come into being, continue and end with the principal agreement, they are void if the principal agreement is void, and they transfer with it (Sutedi, 2010). Security arises by law or by agreement. Security by law is the general security of Articles 1131 and 1132 of the Civil Code: all present and future assets of the debtor stand as security for all the debtor's obligations and are shared proportionally among creditors unless there are lawful grounds for priority. Security by agreement is special security and is divided into personal and real security (Sofwan, 2011).

Personal security creates a direct relation with a particular person and can only be enforced against that person. It includes the suretyship agreement (Article 1820), the guarantee agreement (Article 1316) and joint and several liability (Article 1280). Real security is an absolute right over a particular object. It is directly attached to the object, can be asserted against anyone, follows the object into whoever's hands it passes (*droit de suite*), and gives the holder priority over other creditors (*droit de preference*) (Purnamasari, 2011; Usman, 2016). Its main forms are pledge (Article 1150), mortgage rights over land (Law No. 4 of 1996), hypothec (Article 1162) and fiduciary security. In a pledge the object is handed over to the creditor, which places the pledgee in a stronger position than a fiduciary recipient (Usman, 2016).

Fiduciary security

Article 1 of the Fiduciary Law defines fiduciary security as a security right over tangible and intangible movables and over buildings that cannot be encumbered by mortgage rights, which remain in the possession of the giver of the fiduciary, as security for repayment of a certain debt, and which gives the recipient priority over other creditors. Its objects include vehicles, machinery, inventory,

receivables, shares and insurance claims where the object is insured. Mortgage rights, ship and aircraft hypothec and pledge are excluded. The parties are the giver, usually the debtor who owns the object, and the recipient, the creditor.

Creation follows two steps. First, the security is created by a notarial deed, because an authentic deed provides perfect proof, the objects are generally movables, and the law bans re-fiduciary. Second, the security must be registered at the Fiduciary Registration Office (Article 11), which is done electronically. Registration gives rise to the security on the date it is recorded, provides publicity to third parties and yields the preferential right. The Office issues a security certificate that carries the words “For Justice Based on the One Almighty God” and has executorial power equal to a final court judgment (Article 15). On default the recipient may execute through the executorial title, sell the object at a public auction under its own power, or sell it privately by agreement after one month’s written notice and announcement in two newspapers (Article 29). Any surplus must be returned to the giver, while any deficit remains the debtor’s debt (Article 34). The security is extinguished when the debt is extinguished, when the recipient releases it, or when the object is destroyed (Article 25).

METHOD

This is normative juridical (doctrinal) research. Normative legal research is library research, examining written materials and secondary data, in contrast with empirical legal research, which relies mainly on primary data (Soekanto & Mamudji, 2012; Salim H.S. & Nurbani, 2014). The study examines legal principles and the implementation of the Fiduciary Law in the situation of lost collateral. Because no field data were collected, the findings are analytical rather than empirical.

Two approaches were used. The statute approach reviews the statutes and regulations related to the legal issue and tests their consistency with each other (Marzuki, 2014). The conceptual approach starts from doctrines in legal scholarship in order to identify the concepts and principles relevant to the issue, such as credit agreement, security, accessoir nature, default, force majeure and legal protection. Used together, the two approaches supply the materials for analysis.

The legal materials are of three kinds. Primary materials are binding and authoritative: Law No. 42 of 1999 on Fiduciary Security, Law No. 4 of 1996 on Mortgage Rights and the Civil Code, together with the other statutes cited in the text. Secondary materials are non-official legal publications, namely textbooks, articles and research results on security law. Tertiary materials are dictionaries and similar reference works. The materials were collected by library research using a card system, in which relevant information was recorded in detail and classified systematically. They were analysed by four techniques. Description sets out the legal propositions as they are. Interpretation applies grammatical interpretation, which follows the meaning of words, and systematic interpretation, which explains

provisions by reference to other provisions of the statute. Evaluation assesses views and norm formulations in the primary and secondary materials. Argumentation supports the assessment with legal reasoning and leads to the conclusions.

RESULTS AND DISCUSSION

The legal relationship of debtor and creditor and the position of fiduciary security

The starting point is the credit agreement. It is a loan agreement in which the creditor provides funds and the debtor must repay them with interest within a certain period. When it meets the conditions of Article 1320, it binds both parties as a statute under Article 1338. From it flow reciprocal rights and duties: the creditor has the right to repayment and to take legal action if the debtor defaults, while the debtor has the right to the funds agreed and the duty to repay and to provide the security. In banking practice the agreement is made in writing, for the sake of orderly administration and proof.

The fiduciary security agreement is a second, separate agreement made to secure the first. Article 4 of the Fiduciary Law confirms its accessory nature. The consequence is that the credit agreement is the core of the relationship and the security is only an add-on. This has a direct effect on the question of lost collateral, because it means that whatever happens to the object of the security does not automatically alter the debtor's principal obligation.

A second feature is the difference between a notarial deed and registration. In practice, some financing institutions make the fiduciary deed before a notary but do not register it, in the belief that the deed is safe enough and that registration costs can be saved. The Fiduciary Law, however, requires registration (Article 11), and a deed without registration does not produce the preferential right that makes fiduciary security valuable. A creditor that does not register therefore begins with weaker protection even before the collateral is lost.

The legal consequences of the loss of the collateral

A gap in terminology. Article 25 paragraph (1)(c) speaks of the destruction (*musnah*) of the object, not of its loss (*hilang*), and the Fiduciary Law does not define either term. This study therefore interprets the term grammatically, by reference to the dictionary meaning, as covering objects that have disappeared or been damaged to the point that they can no longer serve as security. The provision covers theft, fire and similar events, and it is a gap that leaves room for disputes about whether a given event, such as an unexplained disappearance, qualifies.

Extinguishment of the security, not of the debt. When the object is destroyed, the fiduciary security is extinguished under Article 25 paragraph (1)(c). The same Article, in paragraph (2), states that the destruction does not extinguish the insurance claim covered by Article 10 letter (b). The principal debt is not extinguished because it arises from the credit agreement. Since the security is

accessory, its disappearance leaves the principal agreement intact, and the debtor must continue to perform.

From special to general security. With the object gone, the creditor loses the executorial title in the security certificate and cannot use the special execution mechanisms of Article 29, since there is nothing to sell. The Constitutional Court in Decision No. 18/PUU-XVII/2019 has also held that the executorial title can be used directly only where the debtor does not dispute the default and hands over the object voluntarily; otherwise execution must be sought through the court. This is impossible when the object no longer exists. The creditor is left with the general security of Articles 1131 and 1132: all the debtor's other assets stand as security, but the creditor now shares them proportionally with other creditors without the priority that the fiduciary security gave. In practice, the creditor's position shifts from a preferred, secured creditor to something close to a concurrent creditor.

The legal liability of the debtor

The debtor's duties under Article 1234 of the Civil Code are to give, to do or not to do something. Under the credit agreement these are to repay the principal, pay interest and, in a fiduciary arrangement, take care of the object and not to dispose of it. The Fiduciary Law reinforces this by banning re-fiduciary of a registered object (Article 17) and banning transfer, pledge or lease of the object without the recipient's written consent, except for inventory (Article 23 paragraph (2)). Default (*wanprestasi*) arises when the debtor fails to perform or performs late or defectively. It may arise from the debtor's fault, whether intentional or negligent, or from a circumstance outside the debtor's control (*overmacht*, or force majeure).

Two situations must be distinguished, and Table 1 summarises them. If the object is lost because of the debtor's fault, for instance through negligence or an unauthorised transfer, the debtor is liable for compensation under Article 1243 of the Civil Code, and the creditor may demand full repayment and seek payment from the debtor's other assets. If the object is lost through force majeure, for instance theft despite reasonable care and prompt reporting to the police, or a natural disaster, Articles 1244 and 1245 release the debtor from compensation because the debtor could not have prevented the event and the burden of proving that external cause rests on the debtor. Even then, the debtor is not released from the principal debt: the fiduciary security was only accessory, and the loss of the object does not remove the obligation to repay. What force majeure removes is the additional liability for damages for the loss of the object.

Table 1. Consequences of the loss of fiduciary collateral by cause of loss (author's synthesis of the legal materials)

Aspect	Loss caused by force majeure	Loss caused by the debtor's fault
Status of the debtor	Not in default if the debtor took reasonable care and can prove an external cause, such as theft reported to the police or a natural disaster (Arts. 1244–1245 Civil Code)	In default or committing an unlawful act, for example through negligence or an unauthorised transfer or re-pledge (Arts. 17 and 23(2) Fiduciary Law)
Damages	Not owed for the loss of the object	Owed (Art. 1243 Civil Code)
Principal debt	Remains; may be settled with insurance proceeds	Remains; creditor may demand full repayment
Fiduciary security	Extinguished (Art. 25(1)(c)); insurance claim survives (Art. 25(2))	Extinguished (Art. 25(1)(c)); insurance claim may survive (Art. 25(2))
Main recourse of the creditor	Insurance claim, agreed replacement collateral, continued instalments	Damages, full repayment, attachment of other assets (Arts. 1131–1132), default lawsuit

This division corresponds to the models of liability in the literature reviewed above. Where the loss is due to fault, liability follows the fault principle. Where the debtor relies on force majeure, the debtor must prove the external cause, which resembles a rebuttable presumption. The strict-liability model is not what the Civil Code adopts for the loss of the object; what remains strict is the debtor's duty to repay the debt, which does not depend on fault at all.

The legal protection of the creditor

Legal protection for the creditor can be analysed as preventive and repressive, following Hadjon (2007), and Table 2 lists the instruments.

Preventive protection. The strongest protection is created before any loss occurs. A notarial deed and registration give the creditor authentic proof, a preferential right, publicity against third parties and an executorial title (Articles 5, 11 and 14–15). The prohibitions in Articles 17 and 23 paragraph (2) keep the object within the security. Where the object is inventory that the debtor is allowed to sell, Article 21 paragraph (4) makes the proceeds and claims arising from the sale a substitute object of the security by law. Insurance is the most practical safeguard against loss: Article 10 letter (b) extends the fiduciary security to the insurance claim, and Article 25 paragraph (2) confirms that the claim survives the destruction of the object. In vehicle financing, for example, creditors typically require the debtor to insure the object, so that if the vehicle is stolen the insurance proceeds can be used to settle the debtor's obligation.

Table 2. Preventive and repressive legal protection for the creditor (author's synthesis of the legal materials)

Type	Instrument	Legal basis	Function
Preventive	Notarial deed of fiduciary security	Art. 5 Fiduciary Law	Authentic proof of the security
Preventive	Registration and security certificate	Arts. 11, 14–15	Publicity, preferential right and executorial title
Preventive	Ban on re-fiduciary and unauthorised transfer; proceeds of inventory as substitute object	Arts. 17, 21(4), 23(2)	Keeps the object and its proceeds within the security
Preventive	Insurance of the collateral	Arts. 10(b), 25(2)	Creates a substitute source of repayment
Repressive	Insurance claim	Art. 25(2)	Settles the debt in whole or in part
Repressive	Default lawsuit with conservatory attachment	Arts. 1243, 1131–1132 Civil Code; Art. 227 HIR	Recovers the claim from the debtor's other assets

Repressive protection. After the loss, the creditor's first recourse is the insurance claim. If the object was insured, the proceeds are applied to the debt, calculated on the value of the object at the time of loss, and any surplus benefits the debtor while any shortfall remains the debtor's obligation. If the object was not insured, the debtor bears the full repayment obligation. Where the debtor defaults, direct execution through the security certificate is unavailable, so the creditor must file a default lawsuit in court. In the lawsuit the creditor may ask the court to place a conservatory attachment (*conservatoir beslag*, Article 227 HIR) on the debtor's other assets to prevent their disposal while the case is pending, and may claim compensation, full repayment, or both, depending on whether the loss arose from the debtor's fault. The creditor may also invite the debtor to offer replacement collateral of equivalent value by agreement.

The balance of interests and the protection of the debtor

The regulation of fiduciary security leans towards the creditor. It gives certainty, a preferential right and a quick and efficient execution mechanism, which fits the logic of justice that a party that has provided financing is entitled to certainty of repayment. Justice in contract law, however, also requires proportionality under the principle of good faith in Article 1338. The debtor has protection in three ways. First, when the loss is due to force majeure, the debtor is not in default and owes no compensation (Articles 1244–1245). Second, the fiduciary security is extinguished (Article 25), so the creditor cannot execute against an object that has ceased to exist. Third, the burden of loss should be

borne by the insurer where an insurance clause exists. The provisions on execution also protect the giver of the fiduciary: any agreement to execute in a way that contradicts Article 29 is void by law (Article 32), and the creditor must return any surplus from the sale (Article 34). In addition, the Consumer Protection Law offers protection against unfair standard clauses in credit agreements.

It follows that the law protects both parties, but not equally at every stage. Before the loss, protection is largely preventive and favours the creditor who has registered and insured. After the loss, the debtor is protected against being punished for something outside his or her control, while the creditor is protected in the sense that the principal debt survives. The difference lies in what each party keeps: the debtor keeps freedom from damages, the creditor keeps a claim but loses the priority and easy execution of the security.

Obstacles and normative gaps

The literature and the legal materials point to four main obstacles for the creditor. First, the creditor loses the right of direct execution because the object no longer exists, so recovery must go through the slower route of a lawsuit. Second, the debtor may be dishonest or hard to hold to account, for example by claiming loss when the object has in fact been sold or hidden, which then turns a civil dispute into one that may also raise questions of criminal law. Third, insurance claims can be complicated, may be rejected if the insurer's investigation shows a breach by the debtor, and may not cover the whole outstanding debt. Fourth, the security effectively turns from real security into a general claim, so the creditor competes with other creditors.

There are also normative gaps. The Fiduciary Law uses the word "destroyed" without defining it and says nothing about who bears the risk of loss, what the debtor must do on discovering the loss, or whether the debtor must supply replacement collateral. Because Rasjidi and Putra (2011) expect legal protection to be predictive and anticipatory, these gaps are significant: the law should anticipate a foreseeable risk of the very kind that fiduciary security creates by leaving the object with the debtor. Until the statute is clarified, the parties can fill the gap themselves, through credit agreement clauses that require prompt notification of loss, mandatory insurance, and replacement collateral, and through courts that consider alternative security when ruling on lost-collateral cases.

CONCLUSION

This study examined the liability of the debtor and the legal protection of the creditor in a credit agreement secured by fiduciary security whose object is lost. On the first question, the loss of the object extinguishes the fiduciary security under Article 25 of the Fiduciary Law, but it does not extinguish the principal debt, because fiduciary security is accessory. The debtor therefore remains obliged to repay. Where the loss results from the debtor's fault, the debtor is additionally liable for

compensation under Article 1243 of the Civil Code; where it results from force majeure, the debtor is released from compensation under Articles 1244–1245, although the debt remains.

On the second question, the creditor loses the executorial title and preferential position that the security gave and is left with the general security of Articles 1131 and 1132. Protection then comes from insurance claims, which survive the loss of the object, and from a default lawsuit accompanied by conservatory attachment of the debtor's other assets. Preventive measures, namely a notarial deed, registration and insurance, are the most effective form of protection and should be completed before any loss occurs.

Several recommendations follow. Debtors whose collateral is lost should promptly report to the police, notify the creditor in writing with proof of the report, submit an insurance claim if the object was insured, offer replacement collateral of equivalent value if it was not, and settle any remaining debt according to the contract. Creditors should register every fiduciary security, require insurance of the object and, if the debtor defaults, file a default lawsuit with a request for conservatory attachment. Banks and notaries should remind debtors of the consequences of breaching the agreement before the deeds are signed. Judges deciding cases on lost fiduciary collateral could consider alternative security to cover the creditor's loss. Future research could complement this doctrinal study with an empirical analysis of court decisions and insurance practice in such cases.

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