LEGAL CERTAINTY ON FIDUCIARY GUARANTEE DEED BASED ON POWER OF ATTENTION UNDER THE LEASING AGREEMENT

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ABSTRACT

The Fiduciary Guarantee Law requires legal certainty over the implementation of fiduciary guarantee object activities so that special rights can arise from the issuance of a fiduciary guarantee certificate. guarantee binding agreement between creditor and debtor. The power of attorney under the hand used in imposing fiduciary guarantees on credit objects does not contain the actual will of the debtor, this can lead to unilateral arbitrariness by creditors to take credit objects against the will of the debtor so as to eliminate the debtor's rights as the party who controls the object of the fiduciary guarantee. The method used is descriptive-analysis with a normative juridical approach. The research phase uses library research with secondary data and field studies with primary data. This data collection was obtained by means of library research and also interviews obtained by means of field studies. Furthermore, the data were analyzed using the juridical-qualitative method. The use of a power of attorney under the hand as the basis for loading/making a fiduciary deed is "illegitimate". Legal certainty on the Fiduciary Deed based on a Power of Attorney under the hand in a leasing agreement, is not achieved by using a power of attorney as the basis for loading/making a fiduciary deed, then based on the teaching of causality the validity of the fiduciary deed will depend on the validity of the power of attorney that.

Keywords: Legal Certainty, Fiduciary Guarantee, Power of Attorney, Lease Agreement.

INTRODUCTION

In today's life, it is almost impossible to imagine a situation without credit or debt institutions. The rapid development of the world economy has given birth to various market products that make it easier for consumers to increase services in quality and quantity. A financial institution is part of a financial institution that has an important role as an alternative source of financing to support economic growth. As is known, currently many financial institutions (finance) provide financing for consumers (consumer finance), leasing (leasing), factoring (factoring), which generally use agreement procedures that include fiduciary guarantees for objects of fiduciary collateral.

Law is basically formed with the aim of providing guidelines for people to behave. There are many opinions regarding the definition of law, one of which was put forward by Mochtar Kusumaatmadja who stated that the law is the entirety of the principles and rules that govern human life in society, also includes the institutions and processes that bring about the application of these rules in reality. In line with Mochtar Kusumaatmadja's opinion, the main and first objective of law is order. Another purpose of law is the achievement of justice, justice cannot be realized if there is no legal certainty and legal certainty will not be real if the law fails to function as a regulator of public order.

CONCEPTUAL FRAMEWORK

According to Hans Kelsen, law is not about "how the law should be" (how the law ought to be) but "what and how the law is". Thus, even though the law is a category of necessity/ideal, what is used is positive law (ius constitutum), not what is aspired (ius constituendum).

Legislation is formed to fulfill one of the legal objectives, namely the existence of legal certainty. Regarding the theory of legal certainty,
Mochtar Kusumaatmadja stated as follows:

> "In order to achieve order in society, it is necessary to have certainty in the interaction between people in an orderly society, but it is an absolute requirement for a living organization that transcends the boundaries of the present. That's why there are legal institutions such as marriage, property rights and contracts. Without the certainty of law and public order incarnated by humans, it is impossible develop the talents and abilities that God gave him optimally in the society in which he lives."

Legal certainty as one of the objectives of the law itself must be felt by every community, not just sticking to one group. In other words, the law has a universal nature where everyone will be treated equally before the law. The Fiduciary Guarantee Law requires legal certainty over the implementation of fiduciary guarantee object guarantee activities so that special rights can arise from the issuance of a fiduciary guarantee certificate. As regulated in Article 1 paragraph (2) of the UUJF, namely the emergence of a position that is prioritized for fiduciary recipients over other creditors. However, this can be obtained by fulfilling the provisions contained in the UUJF. In making a power of attorney under the hand, which is already widespread in the practice of credit agreements in Indonesia, it creates legal uncertainty because it is based on a power of attorney made under the hand.

In his consideration, the power of attorney made under the hand without involving a notary has a charge that does not meet the elements of the content of the Fiduciary Guarantee Deed, because in a fiduciary guarantee it is required that the lessee must be the owner of the car which is handed over in trust to the lessor as debt repayment if the lessee is unable to do so. pay the debt, but the power of attorney obtained from the standard leasing agreement only states unilaterally and in writing the provisions of the power of attomey, in fact the lessee does not intend to pledge his vehicle as repayment of his debt and cannot negotiate the clauses in the leasing agreement. Based on the background of the problems mentioned above, the researcher wishes to raise two identification problems that will be discussed including:

1. How is the use of a power of attorney under the hand in imposing a fiduciary by creditors in practice?
2. How is the Legal Certainty on the Fiduciary Guarantee Deed based on the Power of Attorney under the hand in the leasing agreement?

In developing countries such as Indonesia, lending activities are the main business of a financial institution, because income from credit in the form of interest is the largest component compared to income from services other than credit interest which is commonly called fee base income. The term credit agreement cannot be found in the Civil Code. However, in the doctrine it is said, a credit agreement is a "preliminary agreement" of the delivery of money where this preliminary agreement is the result of an agreement/agreement between the lender and the borrower regarding the legal relations

between the two. The Indonesian banking law, both Law No. 7 of 1992 as amended by Law No. 10 of 1998 is also not know the term credit agreement. The terms of the credit agreement can be found in the Instruction of the Presidium of the Cabinet No. 15/EK/10 dated October 3, 1966 Jo. Circular Letter of Bank Negara Indonesia unit I No. 2/539/UPK/Pemb dated October 8, 1966, which instructs banking institutions that in making credit agreements, banks must put them in written form. Thus, to define a credit agreement, it can also refer to Article 1 Number 11 of Law no. 10/1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law), namely "…approval/agreement on the provision of money or claims or equivalent thereto, between the bank and other parties, which is set forth in written form…". The credit agreement is a bond or written evidence between the bank and the debtor so that it is arranged and made in such a way that everyone can easily find out that the agreement made is a credit agreement.

The functions of the credit agreement are:

a. As evidence for creditors and debtors proving the existence of reciprocal rights and obligations between the bank and the credit applicant;
b. As a tool/means for monitoring or supervising credit that has been provided by the bank;
c. As the main agreement that forms the basis of the accompanying agreement, namely the guarantee binding agreement;
d. As ordinary evidence that proves the debtor's debt, it means that the credit agreement does not have executive power or does not give direct power to the bank to execute collateral if the debtor does not pay off the debt (default).

Just like in the procedure for granting credit, in banking practice there are various titles and formats in making credit agreements. In general, there are 2 (two) forms of credit agreements, namely:

a. A private credit agreement or so-called private deed made by the bank and offered to the debtor for approval;
b. A credit agreement made by and before a notary is called an authentic deed or notarial deed.

By making a credit agreement in the form of a private deed, the consequence is that the credit agreement will only have legal force of proof such as an authentic deed, as long as it is recognized/not denied by the parties who signed the deed. So if the deed is denied the truth, then the person who submits the deed under the hand as evidence must look for additional evidence to support its veracity.

METHODOLOGY

The method used is descriptive-analysis with a normative juridical approach. The research phase uses library research with secondary data and field studies with primary data. This data collection was obtained by means of library research and also interviews obtained by means of field studies. Furthermore, the data were analyzed using the juridical-qualitative method.

DISCUSSION

1. The use of a power of attorney under the hand in charging Fiduciaries by Creditors in practice

The use of a power of attorney is intended so that the recipient of the power of attorney becomes authorized to carry out legal actions for and on behalf of the power of attorney. Juridically, power can be given through unilateral legal actions (machtinging), as well as legal actions in the form of agreements such as lastgeving. The power of attorney granted unilaterally will only give rise to authority for the recipient of the power of attorney, but does not create an obligation for the recipient of the power to exercise the power. However, if the power is given through a legal act of agreement such as lastgeving, then the power of attorney will create an obligation for the recipient of the power to exercise the power.

The emergence of the practice of making power of attorney in financial institutions today is actually a manifestation of the creditor's initiative, which wants to present a situation where the creditor can at any time represent the guarantor (debtor) to burden/make a fiduciary deed before a notary, which is then made after the fiduciary deed is made. , by the creditor, it will be followed up with the registration of the object of the fiduciary guarantee at the Fiduciary Registration Office (KPF), in order to obtain a fiduciary certificate. In the application of the use of power of attorney in the current environment of financial institutions, it is alleged that creditors who already hold power of attorney rarely immediately realize the real fiduciary burden. Because creditors feel safe as long as there is no indication that the debtor has difficulty paying installments or defaults.

In response to this, if viewed from its function, fiduciary is indeed given for the benefit of creditors, and therefore it is given a form of protection and rights to it. In law, if we accept and acknowledge that fiduciary rights are rights, then we will be in the territory of partij autonomie, namely the freedom for individuals to want to use their rights or not. Therefore, if the creditor holding the power of attorney does not actually realize the fiduciary charge, it is up to the creditor concerned to use it or not, because by not being actually burdened with the fiduciary guarantee object, it has brought its own risk to the creditor who will lose his opportunity to become a fiduciary guarantee. special creditors as promised by law. However, what should be considered here is that the exercise of a right is not the same as abusing a right. A person is indeed free to use or not to exercise his rights, however, if doing or staying silent constitutes an abuse of rights, then that certainly cannot be justified.

Based on the format of the power of attorney obtained, it can be seen that the power of attorney was made privately and stated in the form of an agreement. So that it can be concluded that the power of attorney is a last-geving which contains power of attorney. The provisions regarding lastgeving have been regulated in Book III Chapter XVI starting from article 1792 to article 1819 of the Civil Code. While the provisions regarding power of attorney, UUJF and its implementing regulations do not regulate it at all. The UUJF only stipulates that the imposition of a fiduciary deed must be made with an authentic deed. However, there is not a single article in it that regulates his power. The existence of a legal vacuum in the UUJF has led to the practice of adopting the last-geving provision in Book III of the Civil Code to fulfill its initiative in making power of attorney. So that the principle that the granting of power of attorney is free of form and can be carried out for all legal actions, can be used as a justification for making a power of attorney under the hand. This practice is also supported by the general principle in civil law, where as long as there are no provisions prohibiting it, it may/can be done. Even in the development of the regulation of power, doctrine teaches, as long as the law does not specifically regulate, the granting

of power is a legal act that is free from form. Based on these matters, it would be logical if the practice is of the opinion that the use of a power of attorney under the hand can be applied in the encumbrance/making of a fiduciary deed. However, before following or agreeing to the above practical opinion, it is appropriate to consider that fiduciary guarantees are material guarantees, although they are regulated in a separate law, fiduciary guarantees are still part of material guarantees which are a sub-system of property law that adheres to closed and coercive principles (dwingendrecht). . This, of course, is in stark contrast to lastgeving which is a sub-system in contract law that adheres to open and complementary principles (aanvullendrecht). Therefore, the lastgeving provision cannot be simply adopted to fill the absence of regulation in the property law system. The principle that the provisions of Book III of the Civil Code cannot be simply applied in the object law system can also be seen in the existence of material agreements. Where the provisions of obligatory agreements in Book III of the Civil Code are not all applicable/can be used in material agreements. The existence of a power of attorney stating that if one of the parties wants to be represented in the making of a Fiduciary Guarantee deed (Fiduciary Encumbrance), then that party can make a power of attorney. This power of attorney does not have to be made in the form of a notarial deed, but should be legalized by a notary. Legalized here means, the signing of the power of attorney is done before a notary. So, the form is not a notarial deed, but there is a notary who witnessed the signing of the power of attorney.

Legal actions in the form of the use of power under the hand can be applied in the imposition/making of a fiduciary deed, with the suggestion that the power of attorney should be legalized. Consideration of the need for legalization in an underhand power of attorney is intended to guarantee the correctness of the signatures of the parties in the power of attorney, so that if there is a dispute, it can be proven that the parties stated in the power of attorney have indeed signed it. The practical thinking in financial institutions is that as long as there are no stipulations that regulate it, the last-geving provisions in Book III of the Civil Code can be adopted for making power of attorney. The only difference here is that there is a suggestion that the power of attorney should be legalized. Even if it is legalized, what is the basis that the legalized power of attorney can be accepted in the material security legal system.

With the legalization of a power of attorney, it will only increase the power of proof against that power. This does not mean that a legalized power of attorney can be used as a basis encumbrance/making fiduciary deed. If it only refers to no provisions prohibiting and granting power of attorney is a free legal act, will it also be justified later, if the power to charge/make a fiduciary deed is stated in oral or secret form. In the absence of provisions prohibiting the use of a power of attorney under the hand, it does not always mean that it is permissible, but must be viewed on a case-by-case basis. As it is known, that the ability of legislators is limited, sometimes the legislators do not have time to regulate an act in the law but regulate it further in other laws and regulations. the legislators thought of, because at that time it was not yet felt urgent to be regulated or was not expected to happen later.

Therefore, to find out whether or not an underhand power of attorney can be used for loading/making a fiduciary deed, it is necessary to find out the law. One cannot simply say yes, or establish a certain form only on the basis that there are no provisions governing it. In responding to the absence of regulation, legal science has provided several methods that can be used to find the law, namely: Argumentum Per Analogian (analogy), if the legislation is too narrow in scope, it will be expanded with the argumentum per analogy

method. With this analogy method, the legal vacuum will be filled with provisions that apply to similar, similar events or circumstances where the law treats the same. In this case the Fiduciary Property Guarantee and Mortgage Rights are both part of the material guarantee, then in its nature Book II of the Civil Code which adheres to a closed system, will not easily transfer rights from the object that is the collateral as stipulated in Article 15 UUHT which states that the Power of Attorney Imposing Mortgage must be made in the form of an authentic deed so it should also apply to Fiduciary which will achieve legal certainty for the issued Fiduciary Certificate, therefore it will not corner one of the parties in an equal position in drafting the agreement.

Based on the review of the security law system that has been discussed in the previous sub-chapter, it can be seen that the guarantee law has placed fiduciary as part of the material security legal system. The material security legal system consists of pawns (pand), mortgages, mortgages and fiduciaries, where each of the provisions in the material security legal system does not stand alone, but is intertwined with each other to form a unit that has a purpose and mission that is same. Therefore, to solve the problem of whether or not a power of attorney can be used under the hand, it can be solved by using the method of finding the law of Argumentum Per Analogian (analogy), namely by analogizing fiduciary with other material guarantees in a material security legal system. Looking at mortgages and mortgages, it can be seen that if necessary, the use of power of attorney can be applied to the imposition of collateral objects (Article 1171 of the Civil Code and Article 15 of the UUHT). Therefore, the use of SKMJF for encumbering/making fiduciary deeds can also be used

justified according to the legal system of guarantees, of course with the condition that the form must also follow the form of power that is known and indeed regulated in the law of material security, which must be stated in an authentic form. So that deviations from the form of power of attorney will result in the cancellation of the SKMJF. Not all of the last-geving provisions in Book III of the Civil Code can be used for power of attorney in the material security legal system. The use of the word power of attorney in the law of material security is only intended to show that there is authority in the power of attorney. This does not mean that the power of attorney in the law of material security is a power that is included in Book III of the Civil Code.

2. Legal Certainty on the Fiduciary Guarantee Deed based on a Power of Attorney under the hand in the leasing agreement

The Fiduciary Guarantee Law requires legal certainty over the implementation of fiduciary guarantee object guarantee activities so that special rights can arise from the issuance of a fiduciary guarantee certificate. As regulated in Article 1 paragraph (2) of the UUJF, namely the emergence of a position that is prioritized for fiduciary recipients over other creditors. However, this can be obtained by fulfilling the provisions contained in the UUJF. In making a power of attorney under the hand, which is already rampant in the practice of credit agreements in Indonesia, it creates legal uncertainty because it is based on a power of attorney made under the hand, unlike the Power of Attorney for Imposing Mortgage which is regulated in Article 15 UUHT which provides certainty regarding the power of attorney as the basis for imposing rights on objects that are guaranteed, this is in line with the nature of book II of the Civil Code regarding objects that adhere to a closed system, so it cannot be treated like book III of the Civil Code regarding open agreements, including transfers and the power of encumbrance cannot be exercised freely. according to the will of the parties.

The credit agreement as proof of the existence of debt made between the debtor and creditor is the main agreement that forms the basis for the binding agreement between the creditor and the debtor. The form of binding collateral for movable objects is pawning which is regulated in book II Article 1150-1160 of the Civil Code, but due to a conflict with the In Bezit Stelling requirement, namely movable objects must be in the possession of the pawnee, it is difficult for the pawnbroker because of the need to use the movable object for his activities. In everyday life, jurisprudence arises, namely Arrest Hoogerechtshof in 193215 which allows for a fiduciary guarantee institution so that movable objects that become collateral can be controlled by the Guarantee Giver. Article 5 paragraph (1) UUJF stipulates that the loading of objects with a fiduciary guarantee is made with a notarial deed in Indonesian and is a fiduciary guarantee deed. Furthermore, according to Article 4 of Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees, applications for registration of fiduciary guarantees shall be submitted within a maximum period of 30 (thirty) days from the date of making the fiduciary guarantee deed. This provision is in principle to ensure legal certainty.

Article 1868 of the Civil Code provides an explanation that an authentic deed is a deed made in the form determined by law, made by or before public officials who have power for that at the place where the deed was made. The public understands the power of the deed as a written evidence, which has perfect evidence as regulated in Article 1870 of the Civil Code which states that an authentic deed provides between the parties and their heirs or people who have rights from them, a perfect proof of what is contained in it. If someone denies the truth of an authentic deed, the provision applies that someone who denies it must prove his denial as regulated in Article 1865 of the Civil Code. Based on the provisions of Article 1 Number (1) of Law Number 2 of 2014 concerning the Position of a Notary, it is explained that a Notary is a public official who is authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws. The authenticity of the deed made by a notary has perfect legal force. As a public official, a notary must understand and comply with all provisions of the applicable laws and regulations.

The law of matter is a coercive law (dwingend recht), that is, the nature of book II of the Civil Code is a closed system, which means that everyone cannot establish/make new material rights other than those already stipulated by law. So the recognized material rights are rights that have been regulated by law. There are many standard rules regarding material arrangements that serve as a reference for the implementation of material guarantees. By looking at the security law as a system, it appears that UUJF is not just norms that stand alone but has an important meaning and is related to the legal norms of material security as a whole, where the problems or problems contained therein can be found answers or solutions in the system itself. According to Mariam Darus Badrulzaman, the system is the entire legal order that is built on a foundation in the form of principles or principles. These principles are interrelated, are unified, integrated and harmonious. Therefore, the law of objects cannot be applied to the freedom to make a provision that is directly related to the right of material security without the provisions of laws and regulations as the basis for legal actions. In the Decision of the Plenary Meeting of the Central Executive Board which was expanded by the Indonesian Notary Association, in Balikpapan, dated January 12, 2017 stated that the Indonesian Notary Association has the following attitude:

a. The power of attorney used for granting fiduciary guarantees must be an authentic power of attorney made before a notary.
b. Recommend to the Ministry of Law and Human Rights of the Republic of Indonesia to issue at least a Ministerial Regulation which specifically regulates the power to provide

fiduciary guarantees. This is to avoid any abuse of authority or abuse of circumstances by certain parties which may result in losses for parties related to the Fiduciary object.

In his consideration, the power of attorney made under the hand without involving a notary has a charge that does not meet the elements of the content of the Fiduciary Guarantee Deed, because in a fiduciary guarantee it is required that the lessee must be the owner of the car which is handed over in trust to the lessor as debt repayment if the lesse is unable to do so. pay the debt, but the power of attorney obtained from the standard leasing agreement only states unilaterally and in writing the provisions of the power of attomey, in fact the lessee does not intend to pledge his vehicle as repayment of his debt and cannot negotiate the clauses in the leasing agreement. as referred to in Article 6 of UUJF which stipulates that the Fiduciary Guarantee Deed as referred to in Article 5 at least contains:

a. The identity of the Fiduciary Giver and Recipient;
b. Fiduciary guaranteed principal agreement data;
c. A description of the object that is the object of the Fiduciary Guarantee;
d. Guarantee Value and;
e. The value of the object that is the object of the Fiduciary Guarantee

The power of attorney used in imposing fiduciary guarantees on credit objects does not contain the actual will of the debtor, this can lead to unilateral arbitrariness by creditors to take credit objects against the will of the debtor, thereby eliminating the debtor's rights as the party who controls the object of the fiduciary guarantee. The strength of the material evidence in the fiduciary guarantee deed is related to the truth of the contents of the statement in the deed itself, material evidence provides certainty that the official or the parties declare and do as contained in the fiduciary guarantee deed, in principle the power of attorney under the hand is valid if there is no lawsuit or if it can be proven true by the parties included in the leasing agreement that is implemented, in accordance with the principle of freedom of contract Article 1338 of the Civil Code. The word fiduciary comes from the word fiduciair or fides, which means trust. Trust in the meaning of this word, the legal relationship between the debtor (fiduciary giver) and creditor (fiduciary recipient) which carries out a legal relationship based on trust. The fiduciary giver believes that the fiduciary recipient is willing to return the property rights to the goods that have been handed over after paying off the debt.

The UUJF only stipulates that the imposition/making of a fiduciary deed must be made with an authentic deed, but never prohibits or regulates the imposition/making of a fiduciary deed through a power of attorney. The existence of a legal vacuum in the UUJF has led to the practice of adopting the last-geving provision in Book III of the Civil Code to fulfill the making of a power of attorney in the form of a power of attorney. Fiduciary guarantees are part of material guarantees which are a sub-system of the law of objects that lays a closed and coercive principle (dwingendrecht), Mariam Darus Badrulzaman states that:

"The law of objects has a closed nature, meaning that the rights of objects can only be regulated by law. In addition, the law of objects contains a coercive nature, meaning that the provisions concerning the law of objects must be obeyed and cannot be deviated.
This is of course very contrary to the provisions of lastgeving which is a subsystem in contract law which places an open and complementary principle (aanvullendrecht). Therefore, the lastgeving provision should not be simply adopted to fill the absence of regulation in the property law system. Making a power of attorney to impose a fiduciary

guarantee deed will provide more legal certainty if it is made in the form of a notarial deed so that it has perfect evidentiary power as evidence. Montesquieu said that certainty is an inseparable feature of the law for written legal norms. Law without the value of certainty will lose its meaning because it can no longer be used as a behavioral guide for everyone. Certainty itself is referred to as one of the goals of law, when viewed historically, the discussion about legal certainty is a conversation that has emerged since the idea of separation of powers. Community order is closely related to certainty in law, because order is the essence of certainty itself, regularity causes people to live with certainty so that they can carry out activities needed in social life. In relation to the imposition of objects that are objects of fiduciary guarantees, it is necessary to have certainty that will fulfill the rights and obligations of the parties in terms of imposing fiduciary guarantees where misuse of credit agreements that can harm one party can be avoided, there is no legal certainty in the imposition of fiduciary guarantees. will result in the transfer of ownership of objects in the lease agreement, then in the imposition of fiduciary guarantees it is necessary to have a valid basis for the act of encumbrance so that it is in accordance with the needs of the community.

Basically, a power of attorney under the hand, even though it is carried out with the consent of both parties, does have a legal basis in accordance with the principle of freedom of contract known in Article 1334 of the Civil Code. However, from the perspective of authenticity, one deed has a weakness because the power of attorney under the hand is only valid for both parties. But if there is a lawsuit or intervention from another party, then the power under the hand will be a problem. Regarding the power of attorney under the hand as the basis for making a fiduciary guarantee deed which is evidence, then if it is only under the hand, the deed has the weakness of the evidentiary process. That is, there is no legal certainty that the making of the fiduciary guarantee deed is made in accordance with the conditions for the validity of the agreement, namely Article 1320 of the Civil Code. As we understand that the agreement must fulfill: 1) the agreement of those who bind themselves; 2) The ability to make an engagement; 3) A certain thing; 4) a lawful cause.

Regarding the existence of a deed as a means of proof, the position of the power of attorney under the hand is very weak and does not have legal certainty. Deed is a letter as evidence that is signed, which contains events that form the basis of a right or engagement, which was made from the beginning intentionally for proof. So to be classified in the sense of a deed, the letter must be signed. The necessity of signing a letter to be called a deed is in Article 1869 of the Civil Code, thus train tickets, receipts and so on are not included in the deed. Article 1869 of the Civil Code states that a deed that cannot be treated as an authentic deed, either because it is not authorized or incompetent of the public official concerned or because of a defect in its form, has the power of being written under the hand if signed by the parties. Then Article 1874 of the Civil Code states that what is considered to be written under the hand is a deed signed under the hand, letters, lists, household affairs and other writings made without the intermediary of a public official.

An underhand deed is a deed that is intentionally made for proof by the parties without assistance from officials. So solely made by interested parties. Regarding this deed under the hand, it is not regulated in the HIR, but in S 1867 no. 29 for Java and Madura, while for outside Java and Madura, it is regulated in Articles 286 to 305 Rbg. Included in the meaning of an underhand letter according to Article 1 S 1867 no. 29 (Article 1874 BW, 286 Rbg) is a private deed, register letters, household records and other documents made without the help of an official. Article 1875 of the Civil Code stipulates that an underhanded

writing which is acknowledged to be true by the person who is brought before him or is legally deemed to have been justified by him, creates complete evidence such as an authentic deed for the people who signed it, the heirs and the people who have the rights of the person who signed it. they. To carry out a legal action, it is necessary to have a statement of the will of the person who did it (will). An agreement occurs when an agreement is reached between the parties from the statement of the will of the parties concerned. Thus, it can be concluded that in principle the form of a statement of will, both as an offer (aanbod) and acceptance (aanvaarding) is free and can be done in various ways, both orally and in writing that can be understood and accepted by the community. Article 1867 of the Civil Code states that written evidence is carried out in authentic writing or in writing under the hand. An authentic deed is a letter or writing that was originally made as evidence and its purpose is to prove it in the future

days and provide legal certainty for the truth of its contents.
The definition of an authentic deed is regulated in Article 1868 of the Civil Code, namely that an authentic deed is a writing which in its form is determined by law, made by or before a public official in power for that where the deed is made. Based on the regulatory limitations above, it is clear that the power of attorney under the hand has weaknesses in the perspective of legal strength and legal certainty for proof. In practice there are often problems related to the strength of the evidence held by the parties. The practice that often occurs is when the power of attorney contained in the standard credit agreement is not known by the debtor so that if the fiduciary object is charged on the basis of a power of attorney under the hand, it has a risk.

the debtor will lose his rights. Thus, there is no legal certainty regarding the fulfillment of the conditions for making a fiduciary guarantee deed before the authorized official. That there must be fulfillment of the conditions for the validity of the agreement contained in Article 1320 of the Civil Code, namely the first condition, namely the existence of an agreement to carry out the imposition of the object controlled by the debtor.

In principle, the imposition of collateral objects must be carried out by the owner himself, this is based on the idea that the act of loading collateral objects can result in the guarantor losing the objects he guarantees. However, this does not mean that the guarantor cannot control his legal actions. This exception has been granted by the law itself, where the Civil Code and UUHT have stipulated that the granting of mortgages and mortgages can be done through a power of attorney, namely through a power of attorney to install mortgages (SKMH) and a power of attorney to impose mortgage rights (SKMHT).

In principle, the granting of power is not tied to a certain form. This can be seen in Article 1793 of the Civil Code which states that power of attorney can be given and received in a general deed in a handwritten note, even in a letter or orally. Apart from that, what needs to be known from an authentic deed is that an authentic deed is a special deed. The specialty of an authentic deed lies in the perfection of its evidentiary power, in the sense that the authentic deed does not require an addition or the support of other evidence to prove its truth. So what is written in the authentic deed must be considered true. In the event that the law already requires, a legal action must be stated in a certain form, whether the power to carry out the legal action must also follow that particular form. Regarding this kind of issue, the law does not provide clear guidelines/handles, even among legal experts there is no uniformity of opinion. According to Van Brakel and Klaassen-Eggens-Luyten, if the law has required a legal act to be stated in a certain form, the form of power of attorney must

also follow that particular form, on the grounds that the provisions of the form regarding legal actions are intended to protect people who wish to take legal action. perform the legal action. So if the person acting in question wants to give power to another person, then it is only natural that the power of attorney is also bound by the form that applies to his legal action. Based on this opinion, Van Der Griten did not agree. According to him, the purpose of the law cannot always be known and the provisions of the form intended to protect legal actions will not lose their meaning if the proxies are freed from the provisions of the form.

As the Power of Attorney to impose liability rights which already exist in the form contained in Article 15 UUHT, so is not the case with Fiduciary, because it is not regulated in UUJF, in its implementation it causes a lot of losses on one party in the implementation of an agreement, the financing agreement involves the creditor and debtor. . In practice, these two parties enter into an agreement or consumer financing agreement whose contents have been determined in advance by the creditor, in the agreement there is a clause regarding the granting of power under the hand so that the creditor can impose a fiduciary object without the presence of the debtor. on each side, sometimes the bargaining position between the two parties is not balanced, the debtor is in a state of urgency and in dire need of financing occupies an economically weak position while the creditor has an economic advantage with a stronger bargaining position determining a fairly large interest. In such conditions the formation of the will to agree from both parties is not achieved.

Asikin Kusumah Atmadja defines abuse of circumstances as a factor that limits or interferes with the existence of free will to determine the agreement between the two parties. Misuse of circumstances basically consists of two elements, namely causing a very large loss to one party and abusing the opportunity. In practice the imposition of fiduciary guarantees through the power of attorney obtained from the standard form does not meet the elements of Article 4 UUJF which is a requirement for the content of the Fiduciary Guarantee Deed to be made before a Notary, because the loading carried out by creditors is sometimes not desired by the debtor, so it does not also meet Article 1320 the Civil Code regarding the terms of the validity of the agreement.

CONCLUSION

1. The use of an underhand power of attorney as the basis for encumbering/making a fiduciary deed is “illegitimate”. Which leads to arbitrary acts, even though there are no provisions governing it, this does not mean that the use of a power of attorney under the hand is permissible or can be done. National guarantee law has systemically placed fiduciary as part/sub-system of material security law that adheres to closed and coercive principles (dwingendrecht). Therefore, the absence of regulation regarding power of attorney in UUJF cannot simply be filled by the lastgeving provision in the contract law sub-system that adheres to the open and complementary principle (aanvullendrecht). Instead, systemically and by analogy, the provisions of power regulated in the legal system of material guarantees should be used, namely power in "authentic form". The UUJF that was formed is not just a collection of stand-alone rules/norms, but its existence has an important meaning in relation to the legal regulations of material security as a whole, which are built on the principles of the rule of law, to form a unity in the system. property security law.
2. Legal certainty on the Fiduciary Deed based on a Power of Attorney under the hand in a leasing agreement, is not achieved by using a power of attorney as the basis for loading/making a fiduciary deed, then based on the teaching of causality the validity of the fiduciary deed will depend on the validity the power of attorney. Therefore, if a

creditor commits an irregularity by encumbering/making a fiduciary deed based on an underhand power of attorney, it will result in "null and void" against the fiduciary deed made, in which the cancellation of the fiduciary deed will also have the same effect on the fiduciary deed. the resulting fiduciary certificate. So that in this kind of event, actually the special rights owned by the creditor receiving the fiduciary have never been born or existed. Even though the creditor has held a fiduciary certificate, the right to claim that the creditor has on the object of the guarantee is only as a concurrent creditor.

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