

Crowdfunding-Based Fiduciary Warrant in Providing Capital Loans for Small and Medium Enterprises

Ninis Nugraheni

Faculty of Law, Hang Tuah University, Indonesia. E-mail: ninis.nugraheni@hangtuah.ac.id

ARTICLE INFO

Keywords:

Crowdfunding; Capital Loans; Fiduciary; Small and Medium Enterprises

How to cite:

Nugraheni, N. (2020). "Crowdfunding-Based Fiduciary Warrant in Providing Capital Loans for Small and Medium Enterprises" *Hasanuddin Law Review*, 6 (3): 224-231

DOI:

10.20956/halrev.v6i3.2201

ABSTRACT

Small and Medium Enterprises (SMEs) are organized through people's creativity in developing human and natural resources. However, investment challenges often affect their implementation and production processes, necessitating solutions, such as capital loans from banks and other entities. Crowdfunding is an online loaning service that provides easily accessible loans to SME startups, though a warrant to protect creditors from losing money to ingenuine people is necessary. Therefore, this study examines the appropriateness of a fiduciary warrant as a SMEs collateral object. When fiduciary is used as a loan warrant, debtors are allowed to use collateral objects in their production processes. To make a fiduciary warrant effective, legal protection is required. This study used juridical-normative that relied on legal norms in legislation and court verdicts dealing with societal organizational issues. The results showed that crowdfunding-based credit is an alternative with more straightforward procedures compared to conventional entities.

Copyright © 2020 HALREV. All rights reserved.

1. Introduction

Economy development is attained when potential values are comprehensively applied to society. Furthermore, public economy distribution is essential for prosperity and welfare improvement in Indonesia. However, Small and Medium Enterprises (SMEs) play a critical and strategic role in economic distribution. According to Howkins, creative-economy-based SMEs has grown tremendously over the years, utilizing cultural heritage, creativity, and surroundings as future pillars.¹ Furthermore, in the current situation, countries are developing awareness regarding the importance of improvements in the creative economy through SMEs. However, those with sophisticated industries have implemented rules to protect their human resources through Intellectual Property Rights.

¹ Suryana. (2013). *Ekonomi Kreatif (Ekonomi Baru: Mengubah Ide dan Menciptakan Peluang)*. Jakarta: Salemba Emat, p. 35.

Some of the challenges that SMEs face include limited access to banks for capital funding and lack of credit security. Banks require them to provide fixed assets, such as land or buildings. Additionally, convoluted bureaucracies and administration processes restrict SMEs' capital discretion. To develop solutions for SME capital problems, other funding sources have been created. For instance, crowdfunding is a capital model for creative industries that collects funds using social media networks and provide entrepreneurs with instant or alternative capital loans. When using this model, business actors should be technologically savvy because the financing process depends on internet utilization. To gain financial access, parties only interact through social media platforms. However, this process is challenging hence current the discussions on SMEs' readiness in accessing crowdfunding loans.

Furthermore, this study investigated crowdfunding appropriateness as a capital solution for SMEs to improve the creative economy and how innovation enhance business efficiency in funding activities. Crowdfunding improves decision making in project or event investments. According to Paul Belleflame, *crowdfunding is a financial resource request on and offline in exchange for a reward offered by the creator, such as acknowledgment, experience, or product.*² Therefore, SMEs have better access to business development capital because crowdfunding does not require credit collateral.

The study also investigated the likelihood of providing business properness as a warrant in place of the current SMEs' fiduciary credit warrant. The mechanism of this fiduciary loading is providing the governance of the collateral object on the debtor's hand. Some critical features when using fiduciary guarantees are a property security known as *droit de suite* and material right characteristics. By giving *Droit de Suite* characteristics, the rights of creditors continue to follow the object into whomever it is transferred to, including to third party guarantor. This strategy is very beneficial for SMEs (debtors) because they still use their collateral assets to run businesses. However, there is a likelihood of obstacles in the implementation of this model.

2. Method

This study used jurisprudence-based characters different from social and natural science. The method consisted of critical analysis of legal substances with explorative ideas, inquiry, and interpretation.³ Furthermore, it included a juridical-normative relying on legal norms and court verdicts dealing with societal organizations issues. The statute approach identified the law and other fiduciary warrant regulations, while the conceptual method analyzed the philosophical base of crowdfunding SMEs loans. The results suggested applicable warranties for creative economy-based SME funding.

3. Crowdfunding-Based Funding with Fiduciary Warrant for SMEs

A country's economic development highly depends on the creative production of goods and services. Inventiveness should be accompanied by increased sales and capital goods and services, as well as better infrastructure for companies. Efforts to fulfill public needs are a necessity for country prosperity. Therefore, countries should invest in creating better working environments for creative SMEs.

² Belleflamme, P., Lambert, T., & Schwienbacher, A. (2014). Crowdfunding: Tapping the right crowd. *Journal of Business Venturing*, 29(5), 585-609.

³ J.J Bruggink. (1996). *Rechtsreflecties*. Translation of Arief Sidharta. Bandung: Citra Aditya Bakti, p.10.

SMEs startups need human resources with no educational or skill qualifications to operate their production process because of the assets and technology provisions. In Indonesia, they play an important role in business, employment, and national economic growth. In 2008, the Department of Commerce defined creative industries as startups of people inventiveness, expertise, and skills to develop prosperity and employment by utilizing the existing potency.

Indonesia's Creative industry consist of advertisement, architecture, research, art market, craft, design, fashion, video, film and photography, interactive game, music and shows, publishing and printing, hardware and software services, television and radio, and culinary fields. Industry development in such a broad field creates employment, builds national heritage, and preserves and reinforce hereditary culture, leading to economic growth. Moreover, creative industries will provide opportunities to exploit new sources that affect society positively by improving life and social tolerance.

Assets play a fundamental role in the business growth and development of startups. Capital assets are economic business resources that may shift into cash or part of loans that differ from the interest. Furthermore, research has shown that the amount of money is an absolute factor for every company.⁴ Although SMEs play a fundamental role in the economy chain, less funding challenges affect business progression. Due to capital and funding challenges, SMEs rely on external or internal sources for business loans. Bank credits make up external funding, while the internal sources are from sales. Seemingly, bank credit refers to bank funding access, while sales credit refers to having credit extension toward business partners within their primary economy network, both from upstream and downstream partners and either debit or credit.⁵ SMEs need financing from banks but there are limitations due to required qualification biography and business levels.

According to Bank Indonesia in Palembang, all micro-business debtors were ignored in 2017. Nevertheless, credit improves industry business performance and can be invested in terms of production equipment, business assets, and location of production. Based on banking Act No. 10/ 1998, Article 1 No. 11 and 12 mention that:

Credit refers to providing money or loans based on an agreement between the bank and another pertinent party. The debtor is required to pay their loan during a particular period along with interest.

Act No. 10 of 1998, stated that the banking system in Indonesia is based on economic democracy with the prudence principle to implement production activities and credit provision confidence.⁶ The government provides capital funding to creative businesses, through banking loans using the certificate of IPR and saving certificate as credit warrant. However, these two options are only accessible to officially launched and IPR certified businesses. Therefore, the strategy does not benefit industries whose products are not established or registered.⁷

⁴ Pramono, N. (1997). Sertifikasi Saham PT Go Public dan Hukum Pasar Modal di Indonesia. (Dissertation). Universitas Gadjah Mada, p.54.

⁵ Gao, G.-X., Fan, Z.-P., Fang, X., & Lim, Y. F. (2018). Optimal Stackelberg strategies for financing a supply chain through online peer-to-peer lending. *European Journal of Operational Research*, 267(2), p.587.

⁶ Munir Fuadi. (1996). *Hukum Perikatan Kontemporer*, Bandung: Citra Aditya Bakti, p.21.

⁷ Hariyani, I., and Serfiyani, C.Y. (2015). *Perlindungan Hukum Sistem Donation Based Crowdfunding Pada Pendanaan Industri Kreatif di Indonesia*. (Thesis). Universitas Jember, p.3

To cover the crediting gap, the crowdfunding model was developed to provide capital loans for the creative economy. This model, sources finances from people through social websites to provide capital solutions to startup companies. The primary vision is to provide funding through donations and investments.⁸ Donation provisions are categorized as charity-based which provides funds without expectations and reward-based whereby businesses have to pay back returns. When the donation structure is applied, creditors act as donators depending on willingness and capacity. The analogical structure of crowdfunding is similar to the zakat collection by Department of Amil. However, Zakat refers to religious matters and does not invest in creative profit-driven businesses.

Investment-based Crowdfunding is classified into three categories including (1) stock-based which creditors have shares as profit, (2) loan-based whereby settlement and interest are expected within a given time if an agreement is overdue, and (3) royalty-based which pledges debtors copyrights to the creditor until payment is made.⁹ In case SMEs entrepreneurs do not find crowdfunding categories satisfactory, they propose the projects to alternative conventional financing sources. Additionally, some conventional financing sources offer SMEs promotion facilities to extend their access to product marketing. Based on Article 8 subsection (4) letter (e) PP No. 2013, entrepreneurs can develop by seeking comprehensive capital funding sources. When businesses collect capital from crowdfunding, they are attempting to get more comprehensive in development. Conclusively, online funding is a critical SME empowerment principle, as stated in Article 3 Act.¹⁰

Accessing crowdfunding-based capital loans is much easier than in conventional sources such as a bank that require collateral objects. The online fund service only entails prospective debtors fulfilling particular T&Cs in document attachment forms. Therefore, crowdfunding is easily accessible and relatively instant because an applicant receives the loans within a two weeks duration.¹¹

Creditors in online fund services need to be very prudent to avoid deception and the risk of system hacking. Other challenges facing this service, include losing loan tenor and debtor's contact, and overdue settlement or default loans. Therefore, warranties are needed to confine the debtors and protect the creditors from losses. To SMEs, a fiduciary warrant is considered appropriate since the collateral objects are production and transportation items that debtors may still use. Also, creditors hold the absolute authority of those objects as their legal assurance. Fiduciary warrant recognizes the principle of *droit de suite* stated in Article 20 of Act No. 42 the Year 1999 of Guarantee Law. The warrant principle protects the creditor's repayment rights even though the pledged object has changed hands.¹² From this provision, the use of fiduciary warrant benefits both debtors (SME's) and creditors by providing legal protection.

⁸ Paul Belleflame, et al. *Op.Cit.*, p.2.

⁹ Lutfi, M. A., & Ismail, M. A. (2016). Sadaqah-Based Crowdfunding Model for Microfinancing and Health Care. *Journal of Muamalat And Islamic Finance Research*, p.37.

¹⁰ Indriasari, A., Suryanti, N., and Afriana, A. (2017). Pembiayaan Usaha Mikro, Kecil, Dan Menengah Melalui Situs Crowdfunding "Patungan.Net" Dikaitkan Dengan Undang-Undang Nomor 20 Tahun 2008 Tentang Usaha Mikro, Kecil, Dan Menengah, *Jurnal Hukum Kenotariatan & Ke-Ppat-An*, 1(1): 86-92.

¹¹ Muzdalifa, I., Rahma, I.A., and Novalia, B.G. (2018). Peran Fintech Dalam Meningkatkan Keuangan Inklusif Pada UMKM Di Indonesia (Pendekatan Keuangan Syariah), *Jurnal Masharif al-Syariah: Jurnal Ekonomi dan Perbankan Syariah* 3(1): 17.

¹² Huda, M.K., and Nugraheni, N. (2015). Perjanjian Jaminan Sebagai Accessoir Perjanjian Kredit. *Jurnal Dialogia Iuridica*, 6 (2): 26.

3.1. The Advantages of Fiduciary Warrant for SMEs

Fiduciary or “trust” is a legal relationship between creditor and debtor through entrusting one another. Through trust, creditors give back the collateral object proprietary rights after debtors settle their loans. Furthermore, creditors believe that debtors will never misuse the collateral object which is entrusted to their governance until the settlement of loans.¹³

Before the establishment of fiduciary under Act No. 42, in 1999, its existence had been recognized based on jurisprudence. Conclusively the jurisprudence basis refers to shifting the proprietary right of debtors moving assets to creditors while maintaining its governance based on trust and with a requirement. If the debtor pays credit according to the predetermined due date, the creditor gives back the collateral object’s proprietary rights.¹⁴ The fiduciary agreement brings out several *zekelijk* which refer to restricted proprietary rights that the recipient (i.e., creditor) can hold from the debtor.¹⁵ Such an agreement does not create an absolute proprietary right to creditors because they have no authority to either possess or use objects.

The guarantee objects include tangible and intangible, as well as moving and immovable objects, broadening the options.¹⁶ The fiduciary warrant relates to specific objects in which their proprietary right (*zakelijkrecht*) is on the creditor’s hand. This warrant gives creditors preferences with certain privileges (*Droit de preference*). For instance, on-process products can be used as warrant objects. Any objects attached to fiduciary are a credit warrant of the current account, and it is usually utilized to fund certain products for sales supply. Furthermore, appropriate bills are used for supporting SMEs’ business capital needs. In fiduciary agreement, debtors should explicitly mention either the available or unavailable-yet object, which will act as their warrant.

One criterion for determining the object appropriateness for loan warrants is those with economic scale, including merchandises. There are adherence rights to copyrights stating that every product the creators have made belongs to them. Exclusive collateral object rights are similar to the economy and moral civil liberties. In the economy spring, the creator may get profit from any products attached to their copyrights. To avoid any default of performance in a crowdfunding-based loan agreement, creditors may ask for the collateral object copyright certificate. However, the object remains permanently under the debtor’s governance (i.e., the creator or owner of the copyright). Therefore, the debtor may make a contract of license or franchise with the creditors’ approval to use the collateral object in businesses.

3.2. Intellectual Property Right as an Object of Fiduciary Warrant for SMEs

Small and medium enterprises refer to startup businesses with maximum net assets of IDR 200.000.000,00 after excluding land and building.¹⁷ Due to extensive markets, SMEs in Indonesia have high potency to develop. Their simple procedures of recruiting human sources reflect the supporting factor of their businesses. However, several issues affect

¹³ Tiong, O.H. (1984). *Fidusia Sebagai Jaminan Unsur-Unsur Perikatan*. Jakarta: Ghalia Indonesia, p.55.

¹⁴ Gunawan, W and Yani, A. (2000). *Jaminan Fidusia*. Bandung: Raja GrafindoPersada, p.6.

¹⁵ Kusumaningtyas, R.F. (2016). Perkembangan Hukum Jaminan Fidusia Berkaitan dengan Hak Cipta, *Jurnal Pandecta* 11(1), p.100.

¹⁶ Kurniawan, Y., and Nugraheni, N. (2012). Tinjauan Yuridis Lembaga Jaminan Untuk Saham Dalam Perdagangan Tanpa Warkat (Sricpless Trading). *Jurnal Perspektif Hukum*. 12(2): 63-82.

¹⁷ Nayla, A.P. (2014). *Komplet Akuntansi untuk UKM dan Waralaba*. Jogjakarta: Laksana, p.12.

micro business growth, such as operating management, design, intellectual competences, production structure, and modernity that evokes rival comparators.

As mentioned in Act No. 20/ 2008, through society empowerment, SMEs build both the local and national economy in Indonesia. Moreover, new employment fields develop national economic growth which brings prosperity to people's daily life. A creative economy favors inventive and imaginative human resources to develop a product. Being creative refers to having competencies in inventing objects while being imaginativeness is the capability to develop novels, more sophisticated technology, and designs.¹⁸ People's creativity in intellectual, arts, and literature aspects are protected by IPR in terms of Copyright. Comparably, imaginative competence is protected by Patent, product brand, industrial design, Integrated Circuit Layout Design (DTLST), trade privacy, and Protection of Plant Variety (PVT).

The creative economy design optimizes and improves data clarity and ingenuity by favoring ideas and stock of knowledge from human resources. Currently, the global economy has significant shifts from natural-source-based to human-resource-based, and genetic and extractive era to manufacture. Moreover, the creative economy has shifted data supply services and the latest growth strategies. Intellectual property right derives from human's intellectual efforts bestowed in genuine form products and ideas.¹⁹ The growing SMEs need copyrights to ensure optimum creative business performance. Also, they need a law to protect producers of intellectual goods and services by providing an exclusive right to control their adoption.

The assurance of copyrights is given to any creative works which are special entities, personal in nature and have product originality that comes from skills, expertise, and creativity. Products should also give functional benefits such as foods, beverages, daily items, accessories, and technology. This kind of protection is given to ideas or thought of copyrights which provide explicit legal assurance to the creators in perception of their works. The legal assurance of copyright is seen when a creative product is tangible and registered to make it more powerful.

Creators, designers, and inventors have an exclusive right to use their intellectual proprietary right to work with other parties through a contract of license or franchise. The stipulation of franchise business format is extensively implemented in a variety of creative industry sub-sectors, including music, photography, game, culinary, film, theater, TV programs, computer service, printing, and research and development.²⁰ SMEs have many kinds of products, including

1. **Culinary**, such as food and beverage with innovation.
2. **Fashion**, such as clothes, shoes, and accessories.
3. **Technology**, such as technological tools merchandising.
4. **Cosmetics**, such as powder and lipstick.
5. **Automotive**, such as spare parts for cars and motorbikes.
6. **Souvenirs**, such as batik-motif clothes, unique crafts
7. **Agribusiness**, such as hydroponic planting
8. **Content creation**, such as online product design.

¹⁸ Hariyani, I. (2016). Penjaminan Hak Cipta Melalui Skema Gadai dan Fidusia, *Jurnal Hukum IUS QUIA IUSTUM* 23(2): 297.

¹⁹ Ulinuha, L. (2017). Penggunaan Hak Cipta Sebagai Objek Jaminan Fidusia, *Journal Of Private And Commercial Law*, 1(1):85-110.

²⁰ Serfiyani, C.Y., et al. (2016). *Franchise Top Secret: Ramuan Sukses Bisnis Waralaba Sepanjang Masa*. Yogyakarta: Penerbit Andi, p.1.

Based on the fiduciary warrant in Article 16 of Act No. 28/2014, intellectual proprietary right favors collateral patents since they consist of movable and non-movable objects. Copyright does not need registration since the state income is automatically gained when it launches or markets to the public. However, registering the copyright to the Directorate General of Intellectual Proprietary Right is a must if it is pledged, transferred, or rented.²¹ Conclusively, copyrights are authentic and material, hence can be used as fiduciary warrant objects without additional collateral.

Article 108 paragraph 1 in Act No. 13/2016 stated that patent rights can be used as objects of a fiduciary warrant. Therefore, intellectual property rights are objects of the fiduciary warrant only if they have been registered, approved, and certified to have an economic value. The law regarding Intellectual Property Rights guarantee objects makes legal force for business actors as a basis for capital borrowing. Furthermore, it motivates business persons to create highly productive economic work. A fiduciary warranty is the right security for creditors who address capital problems and also provide smooth running of SME's production.

4. Conclusion

SMEs need supports from both internal and external aspects to improve production. Crowdfunding-based credit is an alternative external source with more straightforward procedures than conventional banks because it does not require collateral objects. However, creditors risk possible online theft or deception by hackers; therefore, having collateral confining both debtors and creditors is vital. From this study, the best collateral object is a fiduciary warrant as debtors may use either production or transportation items as a pledge. Although the pledged object's proprietary rights are transferred to the creditors' hand as their legal protection, debtors continue using the item.

Goods with excellent economic value can be used as collateral objects. Hence SMEs need to register their products for legal protection through copyrights. According to Article 16 of Copyright Law (Act No. 28/ 2014), Intellectual Proprietary objects are classified into either moving or non-moving objects and can be used as a fiduciary warrant. Therefore, the use of fiduciary collateral is suitable and beneficial to crowdfunding and SMEs because creditors are assured of security through retaining copyright certificates until the agreement is settled. Also, debtors benefit by using the fiduciary object to run their production and transportation needs because ownership rights are within their control.

References

- Belleflamme, P., Lambert, T., & Schwienbacher, A. (2014). Crowdfunding: Tapping the right crowd. *Journal of Business Venturing*, 29(5), 585-609.
- Fuadi, M. (1996). *Hukum Perikatan Kontemporer*, Bandung: Citra Aditya Bakti.
- Gao, G.-X., Fan, Z.-P., Fang, X., & Lim, Y. F. (2018). Optimal Stackelberg strategies for financing a supply chain through online peer-to-peer lending. *European Journal of Operational Research*, 267(2), p.587.

²¹ Hariyani, I., *Op.Cit.*, p.314.

- Gunawan, W., and Yani, A. (2000). *Jaminan Fidusia*. Bandung: Raja GrafindoPersada.
- Hariyani, I. (2016). Penjaminan Hak Cipta Melalui Skema Gadai dan Fidusia, *Jurnal Hukum Ius Quia Iustum* 23(2): 297.
- Hariyani, I., and Serfiyani, C.Y. (2015). *Perlindungan Hukum Sistem Donation Based Crowdfunding Pada Pendanaan Industri Kreatif Di Indonesia. (Thesis)*. Universitas Jember.
- Huda, M.K., and Nugraheni, N. (2015). Perjanjian Jaminan Sebagai Accessoir Perjanjian Kredit. *Jurnal Dialogia Iuridica*, 6 (2): 26.
- Indriasari, A., Suryanti, N., and Afriana, A. (2017). Pembiayaan Usaha Mikro, Kecil, Dan Menengah Melalui Situs Crowdfunding "Patungan.Net" Dikaitkan Dengan Undang-Undang Nomor 20 Tahun 2008 Tentang Usaha Mikro, Kecil, Dan Menengah, *Jurnal Hukum Kenotariatan & Ke-Ppat-An*, 1(1): 86-92.
- J.J Bruggink. (1996). *Rechtsreflecties*. Translation of Arief Sidharta. Bandung: Citra Aditya Bakti.
- Kurniawan, Y., and Nugraheni, N. (2012). Tinjauan Yuridis Lembaga Jaminan Untuk Saham Dalam Perdagangan Tanpa Warkat (Sricpless Trading). *Jurnal Perspektif Hukum*. 12(2): 63-82.
- Kusumaningtyas, R.F. (2016). Perkembangan Hukum Jaminan Fidusia Berkaitan dengan Hak Cipta, *Jurnal Pandecta* 11(1): 92-104.
- Lutfi, M.A., and Ismail, M.A. (2016). Sadaqah-Based Crowdfunding Model for Microfinancing and Health Care. *Journal of Muamalat And Islamic Finance Research*, 37.
- Muzdalifa, I., Rahma, I.A., and Novalia, B.G. (2018). Peran Fintech Dalam Meningkatkan Keuangan Inklusif Pada UMKM Di Indonesia (Pendekatan Keuangan Syariah), *Jurnal Masharif al-Syariah: Jurnal Ekonomi dan Perbankan Syariah* 3(1): 17.
- Nayla, A.P. (2014). *Komplet Akuntansi untuk UKM dan Waralaba*. Jogjakarta: Laksana.
- Pramono, N. (1997). *Sertifikasi Saham PT Go Public dan Hukum Pasar Modal di Indonesia. (Dissertation)*. Yogyakarta: Universitas Gadjah Mada.
- Serfiyani, C.Y., et al. (2016). *Franchise Top Secret: Ramuan Sukses Bisnis Waralaba Sepanjang Masa*. Yogyakarta: Penerbit Andi.
- Suryana. (2013). *Ekonomi Kreatif (Ekonomi Baru: Mengubah Ide dan Menciptakan Peluang)*. Jakarta: Salemba Emat.
- Tiong, O.H. (1984). *Fidusia Sebagai Jaminan Unsur-Unsur Perikatan*. Jakarta: Ghalia Indonesia.
- Ulinnuha, L. (2017). Penggunaan Hak Cipta Sebagai Objek Jaminan Fidusia, *Journal Of Private And Commercial Law*, 1(1):85-110.

Conflict of Interest Statement:

The author(s) declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Copyright © 2020 HALREV. All rights reserved.