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Executions of Fiduciary Guarantee Post Constitutional Court Decision No. Nomor: 18/Puu-Xvii/2019

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Article's Information	Abstract
<p>Keywords: <i>Fiduciary Guarantee; Fiduciary Guarantee Execution.</i></p> <p>DOI: https://doi.org/10.25041/constitutionale.v1i2.2173</p>	<p>The background that underlies the conduct of this legal research is the existence of a conflict of norms, namely in the Fiduciary Guarantee Act, direct execution can be carried out if the debtor has committed an injury (also called default), but in the Constitutional Court ruling Number: 18 / PUU-XVII / 2019 This is done immediately after the debtor is injured but requires a statement of voluntary interest from the debtor or through a judicial decision. The problem in this research is related to the essence of the execution of fiduciary guarantees, the development of the fiduciary guarantee execution arrangements before and after the Constitutional Court decision Number: 18 / PUU-XVII / 2019 the implications of the Constitutional Court decision Number: 18 / PUU-XVII / 2019 on the principles of simple, fast, and low cost. The type of research used in this research is juridical normative, using a statutory approach and a case approach, as well as primary and secondary legal materials which are</p>



analyzed by grammatical and systematic interpretation. The results of this study indicate that the essence of the execution of fiduciary guarantees is to sell fiduciary collateral as repayment of debtor's unfulfilled obligations. The creditor has the right to collect the debtor's achievements including to collect all instalments and other fees that have not been paid by the debtor, and has the right to execute the object that is used as collateral without having to return the excess price from the sale of the object. The execution of the fiduciary guarantee prior to the enactment of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 is based on the Fiduciary Guarantee Certificate which contains the words "FOR JUSTICE BASED ON ONE ALMIGHTY GOD". These words indicate that the fiduciary guarantee certificate has executorial power, that is, it has the same power as a court decision which has permanent legal force. The legal implication of the enactment of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 is that a trial must first be held regarding the execution of fiduciary guarantees as a condition for the execution of fiduciary.

A. Introduction

The law recognizes the existence of a dichotomy or division of rights into 2 (two), namely individual rights (*jus in personam*) and material rights (*jus in rem*).¹ *Jus in rem* can simply be interpreted as a right to an object.² Material rights are basically property rights which have absolute characteristics (can be addressed to all people in general) and those who were born earlier have a higher position and are attached to a certain object.³ Therefore, a material right is a right that can be sued against any person related to an object that someone wants, because the material right itself is a right that follows wherever the object is (*droit de suite*).

¹Hans Kelsen, *The General Theory of Law and State*, Harvard University Press, Cambridge, Massachusetts, 1949, pg. 58.

²*Ibid*, pg. 62.

³ J. Satrio, *Perikatan Pada Umumnya*, Alumni, Bandung, 1999, pg. 6-11.

The material rights that follow wherever the object is located have a multilevel character in the sense that there is a material right that has a higher level than other material rights and vice versa that there is a material which has a lower level than other material rights.⁴ The high and low levels of these material rights will have implications for the broad scope of rights to certain objects. For example, there is a material right which only gives to the person who has the property right to control it or use the benefits of the material, and there is also a material right which in addition to giving the right to control the object and use the object to the owner of the property right also gives the right to transfer ownership of the object. One of the ways to transfer ownership of these objects can be done through a Fiduciary guarantee.⁵

Fiduciary in Indonesia has been regulated in Law Number 42 of 1999 concerning Fiduciary Guarantee (hereinafter referred to as the Fiduciary Law).⁶ After the Constitutional Court Decision Number 18/PUU-XVII/2019, hereinafter referred to as the Constitutional Court Decision) regarding the articles in the Fiduciary Law, especially regarding Default and Execution of Fiduciary Guarantees, the interpretation changed. After the Constitutional Court Ruling, default and execution must be interpreted differently. Namely, default must be agreed again at a later date, in case of default. Likewise, the execution must have a voluntary statement from the debtor or through a court decision.⁷

The decision of the Constitutional Court has eliminated one of the characteristics of the fiduciary guarantee, namely the ease of carrying out the execution. If in practice, there is an execution that is not in accordance with the provisions of the Law, then the actions that are not appropriate should be straightened out, not changing legal norms that have already been implemented. The issue of default or default is not a legal issue of guarantee, but a problem with the law of the agreement. If in an agreement it is very clear that the criteria for default are determined, the issue of default does not need to be determined by the court on the understanding of the power of the executorial title so far understood. The decision of the constitutional court makes the title of executorial not necessarily as powerful as a court that has binding legal force under certain conditions according to the late decision. In certain conditions as confirmed in the verdict. Furthermore, it is also necessary to consider that the Constitutional Court Decision raises a similar understanding of other guarantee legal institutions such as mortgages and liens.

The characteristic of fiduciary and other mortgage as fiduciary institution is the same just different with other guaranteed object. Both characteristic is the same in its execution, which is based on the executorial which is represented on the slogan, "*FOR JUSTICE BASED ON ONE ALMIGHTY GOD*". Article 1365 of the Civil Code explains that every unlawful act that causes loss for other people are obligated to replace the loss. From this statement, the parties that experience law must propose a lawsuit, with a slogan of "*FOR JUSTICE BASED ON ONE ALMIGHTY GOD*". This lawsuit is no longer available to execute a guarantee but could be immediately executed.

The system as described can be given an example, namely a credit agreement with the Bank, in the credit agreement at a financing or banking institution there are 5 Cs that must be seen by creditors to be able to accept credit applications from debtors (Character, capacity,

⁴Widjaja EK dan Putra WT, Karakteristik Hak Kebendaan Pada Objek Jaminan Fidusia Berupa Benda Persediaan, Jurnal Mercatoria, 2019, Vol. 12 No. 1, pg. 52.

⁵Fince Ferdalina Huru, Kedudukan Hukum Akta Jaminan Fidusia yang Tidak Didaftarkan, Jurnal Kenotariatan Narotama, 2019, Vol. 01. No. 01, pg. 47.

⁶Riza Purnomo Hadi, Mekanisme Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Dalam Hal Debitur Wamprestasi (Studi di Kantor Bank BPR Kabupaten Sampang), Dinamika Jurnal Ilmiah Ilmu Hukum, 2020, Vol. 26 No. 16, pg. 1903.

⁷Eko Suryo Prasetyo, Implikasi Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Terhadap Pelaksanaan Eksekusi Lembaga Jaminan, Refleksi Hukum Jurnal Ilmu Hukum, 2020, Vol. 5 No. 1, pg. 44.

capital, collateral, condition of economic).⁸ With regards to guarantees, providing guarantees to creditors that the debtor is able to return his debt, because the creditor does not want it if there is nothing that can make the creditor feel confident that the debtor can repay the loan. The guarantee also has a benchmark, it must be safe in the sense that the nominal guarantee can cover the loan amount and is also marketable or easy to sell (until the creditor is willing to lend money to the debtor in order to buy a fiduciary object, in this case a movable object). With the condition that proof of ownership of the fiduciary security object is held by the creditor as collateral for the loan. To make the guarantee safe, there is a publicity principle in which the fiduciary guarantee must be registered, and in the fiduciary guarantee certificate there is an order stating that "FOR JUSTICE BASED ON ALMIGHTY GOD". So that there is a condition of default from the debtor, the creditor will easily be able to auction off the guarantee directly to another party without having to sue in court.

Constitutional court decision stated that the provision on fiduciary in Indonesia especially Article 15 paragraph (2) and (3) of Fiduciary Law that is against Article 1 paragraph (2), Article 28 D paragraph (1), Article 28G paragraph (1), and Article 28H paragraph (4) of 1945 Constitution. The argument is stated in the sentence, "Article 15 Paragraph (2) of Fiduciary Law as long as it has the phrase "executorial power" and phrase "equal with the court decision that is legally binding" that is in contrary with Article 28D paragraph (1) 1945 Constitution and does not have a legal bound as long as it is not defined as, "towards fiduciary guarantee there is no negotiation on default agreement and debtor is objected to give voluntarily object as fiduciary guarantee, then all mechanism and law procedure in executing Fiduciary Guarantee Certificate must be performed with the decision of court which is legally binding and as long Article 15 paragraph (3) of fiduciary law has the legal bound to bind as long there is a default that is not in negotiation yet. The provision of Article 15 paragraph (2) of Law Fiduciary as the executorial strength against the 1945 Constitution and has not bind as long as it is not defined, "towards fiduciary guarantee without no negotiation about default and debtor objection to voluntarily give objects that has become fiduciary guarantee, then all mechanism and law procedure in the execution of Certificate Fiduciary Guarantee to be equal as the court decision that is legally binding.

Article 15 paragraph (3) of Constitutional Court Decision basically explain that "the existence of default promise is not decided by one party of the creditor, yet it is decided through negotiation between creditor and debtor or based on the law that decided on the default of promise". Unfulfilled promise is a default aligned with authentic deeds. Negotiation is marked with signatures of both debtor and creditor. This is the notary's role to explain the negotiation. Debtors tendency is when they have desire, the often agrees instantly. To prevent this, notary must explain it thoroughly before signature. Debtor is allowed to think about the agreement in a period of time.

Based on the description above, it can be seen that there is a conflict between the sources of law regulating the execution of fiduciary guarantees, namely, the Fiduciary Law and the Constitutional Court Decision Number 18 / PUU-XVII / 2019. The conflict occurred in particular in Article 29 paragraph (1) of the Fiduciary Law was concerned with "if the original debtor who gave the Fiduciary suffered a promise, the execution was carried out by the object of fiduciary. 2) by the Fiduciary Recipient (b) the sales of objects that become objects of fiduciary guarantee of power The Fiduciary recipient himself goes through the general training and takes the evaluation of his / her assignments from the results of the design sales (c) prices are obtained that allow the parties," whereas in the Decision of the Constitutional

⁸Pariipurna Sugarda, *Kontrak Standar : Antara Prinsip Kehati-Hatian Bank dan Perlindungan Nasabah Debitur*, Mimbar Hukum, 2008, Vol. 20 No. 2, pg. 63.

Court Number: 18 / PUU-XVII / 2019 it explains that to carry out an execution there must be a voluntary statement from the debtor or through a court decision.⁹ In short, in the Fiduciary Law, direct execution can be carried out if the debtor commits default (also known as default), but in the Constitutional Court Decision, the execution cannot be carried out immediately after the debtor is in default but requires a voluntary statement from the debtor or through a court decision. Thus, it can be seen that there has been a conflict between sources of law (conflict of norms) between the provisions for the execution of fiduciary guarantees in the Constitutional Court Decision Number: 18/PUU-XVII/2019 and the Fiduciary Law. Therefore, the urgency of conducting this research is to provide justice, benefit, and legal certainty to the parties in the fiduciary guarantee agreement by starting with the theory of legal objectives. The contradiction between these sources of law underlies the author to conduct research on the theme of the execution of fiduciary guarantees before and after the Constitutional Court decision. This research was conducted by using normative juridical research, statutory approach and case approach, as well as with primary and secondary legal materials, which were analyzed using grammatical and systematic interpretation techniques.

B. Discussion

1. The Essence of Fiduciary Guarantee Execution

Fiduciary is born as a guarantee of material guarantee as development of mortgage institution which comes from the term *fidus* which means trust. Therefore, the object of the guarantee means moving object both tangible and intangible.¹⁰ Fiduciary has advantage because the rights are given, while the object is still in the possession of creditor. Bank does not need to provide a specific to store fiduciary guarantee on mortgage institutional. Fiduciary guarantee agreement is *accessoir* means fiduciary agreement is an agreement that is born and inseparable.¹¹

Fiduciary agreement happens because of credit bank agreement. It means that if a customer debtor defaults on the agreement which is debt or credit with bank, then bank could take the debt settlement from the fiduciary object sales¹² in its implementation, imposition of objects in fiduciary guarantee is made with a notary deed or the Fiduciary deed that consisted of the parties identities, main data on the fiduciary, values of the object. Fiduciary is based on a credit agreement which is obligated to register at the office of fiduciary guarantee.¹³ Fiduciary guarantee that are not registered are unable to value their benefits according to the provision of fiduciary law that state "based on this provision, the agreement on fiduciary guarantee that are not registered does not possess the rights to be claimed either during bankruptcy."¹⁴

Fiduciary office registration noted fiduciary guarantee in a fiduciary book list on the same date of registration. The office published this list and delivers it to the fiduciary received on the same date of application acceptance.¹⁵ Fiduciary guarantee certificate is a copy of the

⁹James Ridwan Efferin, Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019, *Yuriska : Jurnal Ilmu Hukum*, 2020, Vol. 12 No. 1, pg. 40.

¹⁰Djumhana Muhammad, *Hukum Perbankan di Indonesia*, Citra Aditya Bakti, Bandung, 2003, pg. 416.

¹¹Kamelo Tan, *Hukum Jaminan Fidusia*, Alumni, Bandung, 2004, pg. 196.

¹²Andika Wijaya, Hendro Juandra, Buyung Ageng Islami, Pius Pati Molan, Cakra P. Octavianus, *Perlindungan Hukum Terhadap Kreditor Pemegang Jaminan Fidusia Dalam Kepailitan Debitur*(Studi Kasus Pasca Putusan Mahkamah Konstitusi Nomor : 18/PUU-XVII/2019, *Hukum Bisnis*, 2020, Vol. 4 No. 1, pg 363.

¹³Khifni Kafa Rufaida dan Rian Sacipto, *Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial yang Sah*, *Refleksi Hukum Jurnal Ilmu Hukum*, 2019, Vol. 04 No. 01, pg. 23-24.

¹⁴Saija R., *Rekonstruksi Mekanisme Hukum Kepailitan di Pengadilan Niaga*, *Jurnal Hukum Acara Perdata*, 2016, Vol. 2 No. 1, pg. 36.

¹⁵Wisayari, Ida Ayu Made, *Akibat Hukum Pendaftaran Jaminan Fidusia Dalam Sistem Online*, *Jurnal Acta Comitatus*, 2017, Vol. 2 No. 2, pg. 88.

fiduciary list that contains notes on requirements to register to a fiduciary. The guarantee of fiduciary is created at the same time as it is listed in the fiduciary book list. Fiduciary guarantee is one of the guarantee agencies in Indonesia. Fiduciary is made for tangible objects as in motorcycles and cars. To earn a fiduciary guarantee, the tangible object must be registered. Application of registration is proposed to the minister. Law No. 42 of 1999 concerning fiduciary guarantee state that registration is essential.¹⁶ The fiduciary guarantee registration provides legal certainty towards agreement parties of their interest.

Proposal of fiduciary certificate revision is made 30 days after it is published. In the certificate, there is a slogan “JUSTICE BASE ON THE GOD ALMIGHT”. Fiduciary certificate has an executorial power that is the same with a court decision. Article 4 of Law No. 42 of 1999 concerning Fiduciary guarantee stated that fiduciary is an additional agreement of a primary agreement that causes parties to fulfil a promise.¹⁷ Achievement in this matter means that this provision gives something, executes something, or not executes something that is valued with money. Since fiduciary is an additional agreement, it means there is a primary agreement of fiduciary agreement. For instance, the primary agreement is debt, and then fiduciary agreement is the additional agreement of it.

Regarding to the fiduciary object based on Article 20 of Fiduciary Law regulates that, “the fiduciary guarantee follows the goods as fiduciary’s object in the possessions of where the item is placed, except transfer’s ion on the object supply”. This article follows the *droit de suite* principle and its relation to absolute rights on goods. Goods that are fiduciary guaranteed are the execution of court or deed decree. The fiduciary guarantee execution is seizure and trade of the fiduciary object.¹⁸ I its principle fiduciary guarantee is specific, recalling that the object is in agreement with debtor, therefore the fiduciary’s object is an accommodation for income.¹⁹ Essentially, the purpose of fiduciary is to trade the fiduciary guarantee as a payment of the debtor infilling’s achievement. The creditor has the right collect the debtor’s unfilled achievement. Creditor has the right to collect all payment that are not fulfilled by the debtor and also has the right to execute guaranteed object without returning the surplus of the object’s trade.²⁰

The execution of fiduciary happens when the debtor commit default (fail to fulfil promise/achievement). If in its implementation a default occur by the debtor that causes loss to the leasing company, then according to Article 1239 Civil Code states that the injured party could file for a compensation consisting go cost, losses, and interest.²¹ Grounds on the fiduciary execution is based on Article 29 of Fiduciary Law (herein by UUJF) where if the fiduciary giver commits the default, then the object execution is performed by the receiver of fiduciary. If that happens, then the agreement is considered cancelled before the law. This is aligned with the publicity principle that all mortgage rights must be registered.²² The registration is done in purpose as the third party awareness that the good is still guaranteed. Fiduciary registration is regulated in Article 11 UUJF and Ministry Regulation of Regarding the Fiduciary Guarantee Registration Procedure and Fiduciary Guarantee Fee.

¹⁶Abdullah J., Jaminan Fidusia di Indonesia (Tata Cara Pendaftaran dan Eksekusi), Jurnal Bisnis dan Manajemen Islam, 2016, Vol. 4 No. 2, pg. 78.

¹⁷Benny, Krestian Heriawanto, Pelaksanaan Eksekusi Objek Jaminan Fidusia Berdasarkan Title Eksekutorial, Jurnal Legality, 2019, Vol. 27 No. 1, pg. 43.

¹⁸Rachmadi Usman, Hukum Kebendaan, Sinar Grafika, Jakarta, 2011, pg. 295.

¹⁹ Ni Putu Theresa Putri Nusantara, Eksekusi dan Pendaftaran Objek Jaminan Fidusia Berdasarkan Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia, Jurnal Fakultas Hukum Universitas Udayana , Vol. 02, No. 02, 2018, pg. 10.

²⁰ Ni Kadek Candika Prawani, Nyoman Mas Ariani, Perlindungan Hukum Lessor Terhadap Obyek Leasing Apabila Lessee Wanprestasi, Jurnal Fakultas Hukum Universitas Udayana, Denpasar, Vol. 06, No. 06, pg. 7.

²¹Munir Fuady, Hukum Tentang Pembiayaan, Cetakan kelima, PT Citra Aditya Bakti, Bandung, 2014, pg. 45.

²²*Ibid*, pg. 9.

However, there are still many cases where creditors and debtors who make agreements are not in front of a notary (underhand agreement) and are not registered at the Fiduciary Security Registration Office to obtain a fiduciary guarantee certificate. The execution of fiduciary guarantees is often carried out by force without prior notification to the debtor. This case often occurs in motorbike loans through financing companies, where if the debtor is late in paying instalments, the vehicle will be immediately confiscated by the debt collector directly and forcibly, basically the debt collector does not have the right to execute the object if it is not equipped with a deed or fiduciary guarantee certificate.²³ This is of course contrary to the Fiduciary Guarantee Law and the Indonesian National Police Chief Regulation Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantee. The mechanism that must be taken by the leasing party if it does not have a fiduciary certificate is by providing a warning letter to the debtor experiencing bad credit, after giving a warning letter (SP1) to a warning letter (SP3) if the debtor does not fulfil his obligations then the execution of the fiduciary guarantee can be pursued by submitting a lawsuit, so it must be based on a court decision.

2. Comparison of Fiduciary Before and After the Constitutional Court No. 18/PUU-XVII/2019

According to Article 1238 of the Civil Code, Debtor in negligence and default, still does not fulfil their obligation even after summons, must be considered negligence in the overdue. In the Fiduciary Law (UUFJ), the term default or *wanprestasi* is not used, yet *cidera janji* or breach of contract is used. According to Article 15 paragraph (1), if a debtor performed breach of contract then the fiduciary receiver has the right to trade the object of fiduciary guarantee on their own authority. Furthermore, the execution is regulated in Article 29 paragraph (1) of UUFJ that if a debtor of fiduciary giver performed a breach of contract that it could be settled by ways as follow:

1. Implementation of Executorial title by Fiduciary Receiver.
2. Trade of a fiduciary object on the fiduciary receiver's authority through auction and uses the result of auction to fulfil the debt.
3. Trade under counter based on negotiation between the giver and receiver that obtains the highest price to benefit parties.

There are 3 (three) possibilities of fiduciary auction:²⁴

1. If the execution holds the same value with the guarantee, and then the debts are considered paid. If the execution passes the debt, then the fiduciary receiver must return the surplus to the fiduciary giver.
2. If the result of execution does not fulfil the debt payment, then the fiduciary giver is still responsible on the insufficient payment.

In its practice, the creditor could undergo execution procedure through an ordinary lawsuit through court (even though it is not mentioned in UUFJ). In regards to the ordinary lawsuit, Munir Fuady opined that even though it is not mentioned in the UUFJ, the creditor cannot undergo an ordinary lawsuit to the court.²⁵ Because the existence of UUFJ with the specific execution model is not to negate the general procedural law, but to add provisions in the procedural law's provision. In order to prevent any deviation, it is regulated in Article 29

²³ Ni Kadek Candika Prawani, Nyoman Mas Ariani, *Op.cit.*

²⁴ Titik Triwulan Tutik, *Hukum Perdata dalam Sistem Hukum Nasional*, Kencana, Jakarta, 2008, pg. 187.

²⁵ Munir Fuady, *Hukum tentang Pembiayaan*, Citra Aditya Bakti, Bandung, 2006, pg. 164.

paragraph (1) on UUFJ on the firm prohibition that is against provisions in Article 32 which stated that every promise to perform execution of fiduciary object that is against in Article 29 and Article 31 is cancelled before the law.

If the fiduciary giver is not willing to transfer the fiduciary object during execution, then the fiduciary receiver has the right to collect the fid via object and ask for the authority's assistance if it is necessary. This is aligned it Article 30 of UUFJ which stated that fiduciary giver must deliver the object of fiduciary in execution. And then, Article 34 stated, if execution result is insufficient to the payment, then the minus of it is the fiduciary giver's responsibility. If there is surplus, then the fiduciary receiver must return it to the fiduciary giver.

Other provisions that stated on the fiduciary guarantee are the Regulation of the Indonesia's Head of the Police Department No. 8/2011 (Peraturan Kapolri) that is enforced on 22 June 2011. The aim of this regulation is to organize execution for fiduciary guarantee to be safe, systematic, responsible, and protect the fiduciary parties, also community from acts that causes loss to properties and health. The fiduciary guarantee object according to Peraturan Kapolri are tangible and intangible objects, especially building that cannot be granted a mortgage rights. In this regulation, there are qualifications to fulfil an execution:²⁶

1. Existing Request from the applicant.
2. Object has a deed of fiduciary guarantee.
3. The guarantee object is registered in the fiduciary registry office.
4. The fiduciary guarantee has a fiduciary guarantee certificate.
5. The fiduciary guarantee is from Indonesia

Safety process of execution is regulated in Article 7 of Peraturan Kapolri No. 8/2011 where the applicant's execution safety must be written by the fiduciary receiver or their attorney. The applicant must attach a power of attorney statement if the applicant is proposed by an attorney. For proposal of execution, applicant must attach:²⁷

1. copy of fiduciary deed
2. copy of fiduciary certificate
3. warning letter for debtor to fulfil their obligation
4. identity of execution
5. assignment letter of execution

Basically before the constitutional court decision No: 18/PUU-XVII/2019, fiduciary guarantee institution enables the fiduciary givers to possess an object and perform an activity funded by lending of fiduciary giver. Initially, the fiduciary object is limited to the tangible object in utensils form. However, in its development fiduciary object include tangible and intangible object. In the implementation of budget between creditor and debtor, sometimes a default happens. According to Subekti, execution is an effort of individual that is won through court in obtaining their rights through the assistance of law, which enforce the loss party to execute the decision.²⁸

Debtor that is default enables the creditor to execute guaranteed by fiduciary. Because in the certificate of fiduciary has a slogan, "FOR JUSTICE BASE ON THE GOD ALMIGHTT". With this statement, then it has a legal power the same as a court decision.

²⁶ Munir Fuady, *Jaminan Fidusia*, PT. Citra Aditya Bakti, Bandung, 2003, pg. 62.

²⁷ *Ibid*, pg. 63.

²⁸ Junaidi Abdullah, *Jaminan Fidusia di Indonesia (Tata Cara Pendaftaran dan Eksekusi)*, Kudus, Fakultas Syariah dan Ekonomi Islam STAIN, 2016, pg. 124.

This is aligned with Law No. 42 of 1999 concerning Fiduciary Guarantee (UUFJ) states if a debtor or fiduciary giver defaults, the execution towards fiduciary object is done by:²⁹

1. Executorial title implementation by fiduciary receiver.
2. Object fiduciary trade on the fiduciary receiver authority and by fulfilling payment from the profit.
3. Under counter trade based on negotiation to obtain the highest price.

The execution under counter is done after a month of announcement to the fiduciary parties, and announced publicly two months after. In the UUFJ it is also stated that the fiduciary must deliver the object for execution. In objects that are trades or effects in markets, the trades could be done in certain places according to the regulation. Every promise to execute object but violates the law is considered cancelled. Every promise that gives authority to fiduciary receiver to own the good if the fiduciary giver defaults and it's cancelled before the law.³⁰ In execution that over limits the value of debts; the fiduciary receiver must return the surplus of trade. If it's insufficient, then the fiduciary giver is responsible for the remaining amount. However, the execution done creditor through debt collector causes new problems between creditor and debtor. This is due to the debt collector that is violent and causes defence from debtor.

Therefore the police create the Indonesian National Police Chief Regulation (Peraturan Kapolri) Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantee.³¹ The fiduciary guarantee execution has legally binding power that is aligned with the court; therefore it needs safety from the police. The execution safety is a police action in regards of protection to parties of execution.³² Fiduciary institution enables fiduciary givers to possess the goods. Initially the object of fiduciary is limited to tangible formed object of utensils.³³ However, in its development the object of fiduciary involves tangible and intangible object.³⁴ According to Subekti, execution is an effort of individual that is won through court in obtaining their rights through the assistance of law, which enforces the loss party to execute the decision.

The execution of fiduciary experience a change according to the constitutional court decision No. 18/PUU-XVII/2019 where the judge of the constitutional court decided that, "Article 15 paragraph (2) of Law no. 42 of 1999 concerning fiduciary guarantee as long as it holds "the executorial", "Legally binding as the court", "against the 1945 constitution and does not have a legal bound as long as it is not considered "in the guarantee there is no default negotiation and the debtor objects to handover the item", then all procedure must be the same. The constitutional court decision No. 18/PUU-XVII/2019 decides that fiduciary certificate has an executorial force. As long as default in an execution, fiduciary must be based on a negation between parties. According to the verdict, the court declared that the Article 15 paragraph (2) UUFJH states, as long as it holds "the executorial", "Legally binding as the court", "against the 1945 constitution and does not have a legal bound as long as it is not considered "in the

²⁹*Ibid.*

³⁰*Ibid.*, pg. 125.

³¹Ageng Triganda Sayuti, Yenni Erwita, Lili Nalil Hidayah, Parate Eksekusi Jaminan Fidusia : Urgensi dan Rekonstruksi Hukum Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019, *Soumatara Law Review*, 2020, Vol. 3 No. 2, pg. 185.

³²*Ibid.*

³³Ageng Triganda Sayuti, Yenni Erwita, Lili Nalil Hidayah, Parate Eksekusi Jaminan Fidusia : Urgensi dan Rekonstruksi Hukum Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019, *Soumatara Law Review*, 2020, Vol. 3 No. 2, pg. 185.

³⁴Rufaida KK dan Sapiro R., *Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial Yang Sah*, *Jurnal Refleksi Hukum*, 2019, Vol. 4 No. 1, pg. 38.

guarantee there is no default negotiation and the debtor objects to handover the item”, then all procedure must be the same.³⁵

3. Legal Implication of Constitutional Court Decision No. 18/PUU-XVII/2019 towards the Principle of a Simple, Effective, and Low Cost Court

The Constitutional Court confirmed that the execution of objects of fiduciary guarantees that are not submitted voluntarily by the debtor must follow the procedure for the execution of other court decisions that have permanent legal force. Fiduciary is one of the special guarantees of material that gives creditors the right to advance in obtaining repayment the repayment is obtained from the proceeds from the sale of the debtor's property which has been bound by a fiduciary guarantee in the event of default. As a special guarantee, fiduciary has ease in terms of execution which is an advantage when compared to general guarantee. The form of convenience is that there is a legal right granted by the creditor to sell a fiduciary object with his own power. Even though it sounds easy because creditors can execute this fiduciary guarantee object by themselves, in reality the execution of this execution is not easy.

In practice, problems are found such as debtors that will not handover object, force collection by creditor, and even objects that are in the possession of a third party. The owner of the object as fiduciary giver (debtor), while the one that lends is fiduciary receiver (creditor). Certificate of fiduciary has identities if these parties, description of object, value of guarantee and slogan “for justice based on God Almighty” that resembles the court.³⁶

As a guarantee of goods, the fiduciary does not happen solely but must be agreed by the parties through a primary agreement of debts. If the debtor fails to pay the debt, then the fiduciary object will be executed. This is stated in Article 29 of UUFJ, if a debtor defaults, then the execution of object are as follow”:

1. Implementation of Executorial title by Fiduciary Receiver
2. Trade of a fiduciary object on the fiduciary receiver’s authority through auction and uses the result of auction to fulfil the debt.
3. Trade under counter based on negotiation between the giver and receiver that obtains the highest price to benefit parties

The execution under counter is done after a month of announcement to the fiduciary parties, and announced publicly two months after. In the UUFJ it is also stated that the fiduciary must deliver the object for execution. Referring to this provision, Article 15 paragraph (2) states that in the fiduciary certificate there is a slogan “justice based on the God Almighty” that has the same executorial impact with a court. Based on that, the creditor has the authority to perform an execution on its own power (*parate eksekusi*). This trade is done through auction or under counter through negotiation which is done after a month of announcement to the fiduciary parties, and announced publicly two months after.

Constitutional Court Judge, Suhartoyo opined that Article 15 paragraph 2 of UUFJ indicates that it has a constitutionality issue. Debtor that objects to deliver their goods is weak because the creditor could execute it without a court execution mechanism. The judge then opined that that single part action is potential to cause arbitrary action that could underestimate the fiduciary giver’s right. Besides that the constitutional court detect an unconstitutionality in Article 15 paragraph (3) because the breach of contract does not explain

³⁵Suhartoyo, Hak Eksekutorial Jaminan Fidusia Pada Pasal 15 Ayat (2) dan Ayat (3) Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/Puu-Xvii/2019, Bandung, Disampaikan Pada Acara Seminar Nasional yang Dilaksanakan oleh Pengurus Wilayah Jawa Barat Ikatan Notaris Indonesia (INI), Ikatan Keluarga Alumni Notariat Unpad (IKANO UNPAD), Program Studi Magister Kenotariatan Unpad (Mkn UNPAD), 2020, pg. 7

³⁶ Rufaida KK dan Sapipto R., *Op.cit.*

its indicator of such default an only explains the loss of fiduciary giver's rights. The constitutional court re-interprets Article 15 in the executorial power and aligned with the court by obtaining legal bound:

“With regard to fiduciary guarantees where there is no agreement regarding default or default and the debtor objected to voluntarily surrender the object of fiduciary security, all mechanisms and legal procedures in carrying out the execution of the fiduciary guarantee certificate must be carried out, and apply the same as the execution of court decisions that have permanent legal force.”

“whereas, the breach of contract in Article 15 paragraph (2) of UUFJ Law defines as breach of contract not decided by single party of creditor but both creditor and debtor from a law effort that decided a breach of contract.”

The decision of the Constitutional Court has resulted in creditors having the convenience of executing the fiduciary guarantee. Although it sounds like it is easy in practice, the execution of this fiduciary guarantee often creates problems that end up harming one of the parties. An example is a case of illegal acts with register number 345 / PDT.G / 2018 / PN.jkt.Sel. The case began with a Multipurpose Financing Agreement to purchase a car. The plaintiff stated that he had paid instalments on time, but one day the defendant suddenly executed the car which was the object of the guarantee with the argument of breach of promise / default.³⁷ The plaintiff then submitted a letter of complaint regarding this action, but it was not responded to until it even received unfavourable treatment. This case then ended in court in favour of the plaintiff and stated that the defendant had committed an illegal act because carrying out the execution was not in accordance with legal procedures.³⁸ However, the defendant did not implement the decision on the pretext that the fiduciary certificate has the same executorial power as the court decision. The plaintiff finally filed a judicial review to the Constitutional Court on the 15 paragraphs (2) and (3) of the Fiduciary Guarantee Law.

Fiduciary guarantee does not hold negotiation on breach of contract and the debtor's objection to transfer voluntarily the object that has become the fiduciary guarantee, and then all mechanism and legal procedure in the execution of fiduciary certificate must be done according to the court decision. Based on the constitutional court, fiduciary guarantee is done when there is an agreement regarding the breach of contract and the willingness of debtor to hand over the fiduciary object. If these indicators are not fulfilled then the execution of fiduciary is done the same way as a court's execution which through an application to the district court. According to Ingrid Setiadharna as Vice President Head of Legal Compliance in a funding institution and Khusnuhon as Senior Vice President Corporate Banking Legal Head of CIMB Niaga (cited from hukumonline podcast) stated that through the Constitutional Decision No. 18/PUU-XVII/2019,³⁹ Concept of Statement of Default Unchanged, Changes in Execution Practices of Fiduciary Collateral, Potential Obstacles to Execution of Fiduciary Collateral Objects, Potential Obstacles to Creditor Cash Flow, and Changes in Credit Agreement Formulation.⁴⁰

Based on the description above, it can be seen that the legal implication of the enactment of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 is that a trial must be held first as a condition for the execution of fiduciary guarantees. This trial is conducted when

³⁷*Ibid.*

³⁸*Ibid.*

¹⁰⁸ Ingrid Setiadharna selaku *Senior Vice President Head of Legal Compliance* di Perusahaan Pembiayaan dan Khusnuhon *Senior Vice President Corporate Banking Legal Head CIMB Niaga* disampaikan pada *Podcast Hukumonline Episode 6 dengan Judul Putusan MK Bikin Kreditur Impoten* pada tanggal 19 Februari 2020.

⁴⁰ Vera Rimbawani Sushanty, *Tinjauan Yuridis Terhadap Debt Collector Dan Leasing Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019*, *Gorontalo Law Review*, 2020, Vol. 3 No. 1, pg. 59.

the Debtor objects to the withdrawal of the collateral object which causes the execution of the fiduciary guarantee to not be carried out immediately. This trial aims to prove the existence of default by the debtor as the provider of the fiduciary guarantee. The existence of provisions for conducting a trial as a condition for the execution of the fiduciary guarantee indirectly violates simple, fast and low cost judicial rules, and does not fulfil the objectives of the formation of law, namely legal certainty, justice and benefit.

C. Closing

1. Conclusion

The nature of executing the fiduciary security is aimed at selling the fiduciary security as repayment of the debtor's obligations that have not been fulfilled. The creditor has the right to collect the debtor's performance including collecting all instalments and other costs that have not been paid by the debtor, and has the right to execute the object that is used as collateral without having to return the excess price from the sale of the object. The execution of this fiduciary guarantee occurs if the debtor defaults (fails to fulfil his / her performance) or fails to promise. If in its implementation there is a default by the debtor which causes loss to the creditor, then based on Article 1239 of the Civil Code, the injured party may demand compensation in the form of compensation costs and interest payments from the opposing party.

The execution of the fiduciary guarantee prior to the enactment of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 is based on the Fiduciary Guarantee Certificate which includes the words "FOR JUSTICE BASED ON ONE ALMIGHTY GOD". These words indicate that the fiduciary guarantee certificate has executorial power, that is, it has the same power as a court decision which has permanent legal force. This means that the Fiduciary Security certificate can be directly used as evidence of execution without going through a trial and examination process through the Court and is final and binding on the parties to implement the decision, whereas after the enforcement of the Constitutional Court Decision Number 18 / PUU-XVII / 2019, a trial must be conducted first as a the conditions for the execution of the fiduciary guarantee if the Debtor objects to the withdrawal of the collateral object which causes the execution of the fiduciary guarantee not to be carried out immediately in order to prove the existence of default by the Fiduciary Giver.

The legal implication of the enforcement of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 is that a trial must first be held as a condition for the execution of the fiduciary guarantee. This trial is conducted when the Debtor objects to the withdrawal of the collateral object which causes the execution of the fiduciary guarantee to not be carried out immediately. This trial aims to prove the existence of default by the debtor as the provider of the fiduciary guarantee. The existence of provisions for conducting trials as a condition for the execution of fiduciary guarantees violates simple, fast and low cost judicial rules, and does not fulfil the purpose of the establishment of law, namely to provide legal certainty, justice and benefit

2. Advice

- a. Notaries are required to provide prior socialization to creditors and debtors regarding the new provisions regarding the execution of fiduciary guarantees in the Constitutional Court Decision Number 18 / PUU-XVII / 2019 so that the parties can find out about the risk of loss that will be experienced in the agreement. The notary concerned must implement the provisions of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 to comply with the provisions of the Notary Law Number 2 of 2014 concerning

- Amendments to Law Number 30 of 2004 concerning Notary Position, Article 16 letter (m) is related to the making the deed must be read out in front of the audience and witnesses.
- b. Creditors are required to carefully consider the credibility of the prospective debtor with the aim of reducing the risk of default and default during the credit process. This is intended to minimize the loss of creditors due to the provisions of the Constitutional Court Decision Number 18 / PUU-XVII / 2019 which requires a trial before execution of the collateral object. Where this provision is considered to be detrimental to the creditor and only benefit one party, namely the debtor. Creditors must also comply with the provisions in the Constitutional Court Decision Number 18 / PUU-XVII / 2019 so as to avoid arbitrary and inhuman withdrawal of fiduciary guarantees by Creditors through debt collector intermediaries. For creditors, if you want to apply to court, you can use the E-litigation route so that with this E-Litigation, it is hoped that the judicial process can be faster, be able to bridge geographical constraints, and also reduce the high cost of the case. So that with E-Litigation it can fulfill the provisions of the simple, fast and low cost judicial principles.
 - c. Legislators or legislators are advised to make new legal provisions regarding the status of the executorial title in the fiduciary guarantee agreement. This is intended to provide legal certainty to the parties who will enter into a fiduciary guarantee agreement regarding whether or not the executorial title is recognized in the fiduciary guarantee agreement, because in the Constitutional Court Decision only changes the procedure for executing fiduciary guarantees, but does not change the content in Article 15. paragraph (2) and (3) UJ Fiduciary so that there are overlapping regulations regarding the provisions of the execution of the fiduciary security object.

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