



Legal Certainty of Execution of Fiduciary Guarantees After the Decision of the Constitutional Court Number 18/PUU-XVII/2019 & Number 2/PUU-XIX/2021

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Abstract

The author in this case will try to describe and explain the legal certainty of the execution of fiduciary guarantees after the decisions of the Constitutional Court Number 18/PUU-XVII/2019 & Number 2/PUU-XIX/2021. The decision of the Constitutional Court is a form of legal solution provided by the government so that all parties who have legal relations are guaranteed their rights and legal certainty and all parties are protected from the arbitrariness of other parties in fulfilling their rights. In guaranteeing the Execution of Fiduciary Guarantees through Auctions or Sales of collateral under the hand to fulfill obligations, it is a legal protection for creditors and the delivery of fiduciary objects by the debtor is an obligation if the debtor is in default as stipulated in Article 30 of Law Number 42 of 1999 concerning Fiduciary Guarantees. However, it is very rare for a debtor to voluntarily hand over fiduciary collateral after a default, even after the creditor has asked nicely, the debtor still doesn't want to hand it over, while executions can only occur if the fiduciary collateral exists because it is a series of executions of the fiduciary guarantee. In this case the Constitutional Court Decision No. 2 /PUU-XIX/2021 confirms that the execution of fiduciary guarantees can be submitted to the district court by creditors and this is an alternative. The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of a fiduciary guarantee by the debtor, then the choice of execution cannot be carried out by the creditor himself but asks for assistance from the district court to carry out the execution. Submission to court is not by filing a lawsuit, but in the form of a request for execution by court order.

Keywords: *Legal Certainty; Execution; Fiduciary Guarantee; Decision; Constitutional Court*

Introduction

Banks based on Article 3 of the Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Act Number 7 of 1992 concerning Banking "The main function of the Indonesian banking sector is as a collector and distributor of public funds".(Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking). To guarantee the health of the Bank, a financial institution is required to conduct a special and careful assessment to ensure that the loans provided can be repaid in accordance with the agreement made

(Credit Agreement). To guarantee the repayment of loans provided by the Bank, it is allowed to ask for additional guarantees from the Debtor, both in the form of movable and immovable objects. The definition of a guarantee in this case is a special guarantee, not a general guarantee as stipulated in the articles 1131 of the Civil Code. In the world of banking, banks are prohibited from giving credit without sufficient collateral and this has been regulated in Article 24 of Law number 14 of 1967 concerning Banking Principles which states clearly that "Commercial Banks are prohibited from giving credit to anyone without sufficient collateral"(Article 24 of the Law of the Republic of Indonesia Number 14 of 1967 concerning Banking Principles). Likewise, as in Article 8 of the Banking Law, it is stated that "In providing credit, Commercial Banks are required to have confidence based on an in-depth analysis of the debtor's ability and ability to repay the loan in accordance with the agreement"(Article 8 Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking). In this case, the guarantee submitted by the borrower to the Bank is one of the powerful tools to guarantee the return of the loan in accordance with the agreement that was agreed at the beginning. The Bank as a creditor is always guided by the *Commanditerings Verbood* principle, which means that the Bank does not want to bear the business risk of the credit debtor given (Kopong Paron Pius, 2011:33).

The guarantee contained in the credit agreement is one of the important elements in the banking sector in providing credit where in the distribution of credit. In the approval process for granting credit, banks must pay attention to the principle of bank prudence or also called Prudential Banking. Prudential Banking is reflected in the 5 C, namely Character, Capacity, Capital, Collateral & Condition of economy. From the five aspects of the assessment above, we discuss the collateral or additional guarantees from prospective debtors or debtors who borrow funds in the form of credit from banks. And a credit application with a movable object guarantee is bound by a fiduciary guarantee, the bank's position is as a creditor who is in a fiduciary position as a fiduciary recipient. Financial institutions (Banks) which in carrying out their business wish that their rights can be protected, because the risk is so great and generally the credit given is for the purchase of an object, where the object is still controlled by the debtor, the financial institution to avoid the risk by having a guarantee institution fiduciary (Agus Subandriyo, (Without Issuer and Year):1).

Fiduciary guarantees are material security rights (Article 1 number 2 of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees). With the Fiduciary Guarantee, there is a transfer of ownership rights to an object that is used as collateral from the Fiduciary Giver (debtor) to the Fiduciary Recipient (creditor) without any transfer of physical possession of the object (*constitutumposorium*) so that the owner can still control the object, only the ownership is legal. While turning to the creditor until the debtor settles his debt obligations. Thus, the debtor can still use the object for his daily needs or his business needs, so that the guarantee does not kill the debtor's productivity.

The executive power in the Fiduciary Guarantee Certificate underwent a change in meaning after the Constitutional Court Decision Number 18/PUU-XVII/2019 which examined the constitutionality of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantee (hereinafter referred to as Law No. 42 of 1999), which was proposed by Aprilliani Dewi and Suri Agung Prabowo (hereinafter referred to as the Petitioner) (Adhi Wicaksono, <https://www.cnnindonesia.com/nasional/20200113112552-12-464820/putusan-mk-penarikan-barang-leasing-harus-melalui-pengadilan> :2021). The Constitutional Court (hereinafter referred to as the Constitutional Court) decided the phrase "executory power" and the phrase "which are the same as a court decision with permanent legal force" is unconstitutional if it is not interpreted "against fiduciary guarantees in which there is no agreement on breach of contract (default) and the debtor objected to submitting it voluntarily. If the object becomes a fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the

same as the execution of a court decision that has permanent legal force. Likewise, the phrase "breach of promise" is considered unconstitutional if it is not interpreted that "the existence of a breach of contract is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine that a breach of contract has occurred" (Decision of the Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019).

With this decision, the Fiduciary Guarantee Certificate will lose the same executive power as a court decision that has obtained legal force if it does not meet the first condition, there is an agreement on breach of contract (default) and the debtor voluntarily submits the object of collateral (Y. Sogar Simamora, 2020). The Court is of the opinion, first Article 15 paragraph (2) of Law no. 42 of 1999 does not reflect the provision of a balanced legal protection between creditors and debtors (Decision of the Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019). Second, the substance of norms in Article 15 paragraph (3) of Law no. 42 of 1999 does not provide legal certainty about when the breach of contract is deemed to have occurred and who has the right to determine.

As we know that prior to the issuance of the Constitutional Court's decision, evidence from the holder of a bank fiduciary guarantee, in this case as a creditor, received a fiduciary guarantee certificate. With this certificate, the creditor has the right to sell the guarantee if the debtor defaults or makes a promise. The sale of the guarantee can be carried out because the fiduciary guarantee certificate has executive power which is equivalent to a court decision that has legal force but with the inclusion of *irah-irah* "For Justice Based on God Almighty" on the fiduciary guarantee certificate and after the decision of the Constitutional Court Number 18 /PUU-XVII/2019 there are many debates and multiple interpretations related to legal certainty over the execution of fiduciary guarantees when the debtor breaks a promise. Based on the description above, the author will explore "Legal Certainty of Execution of Fiduciary Guarantees After the Decision of the Constitutional Court Number 18/PUU-XVII/2019 & Number 2/PUU-XIX/2021".

Research Methods

In relation to the type of research used, namely juridical normative, the approaches taken are the statutory-approach approach, the conceptual approach, and the comparative approach (Johny Ibrahim, 2005:391). The normative juridical approach is research that begins deductively by analyzing the articles in the laws and regulations governing a problem (<http://lp3madilindonesia.blogspot.co.id/2011/01/divinisi-penelitian-metode-dasar.html>, 2022). The collection of legal materials used in this research is a library study. Based on the above approach, the data source is obtained from legal materials by selecting legal materials related to the above problems. In normative legal research, data management is essentially an activity to systematize written legal materials. Systematization means making a classification of the written legal materials to facilitate analytical work (Soerjono Soekanto and Sri Mamudji, 1990:251-252). In this case, analyzing legal materials by means of interpretation and construction.

Discussion

Legal Certainty of Execution of Fiduciary Guarantees After the Decision of the Constitutional Court Number 18/PUU-XVII/2019 & Number 2/PUU-XIX/2021

As we all know that fiduciary is the transfer of ownership rights to an object on the basis of trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object. Along with the increasing demand for credit in the community, the registration of fiduciary guarantees should increase. However, in reality there are still many fiduciary guarantees that are not

registered by the creditor. To increase public awareness and understanding of the implementation of fiduciary guarantee registration, the Minister of Finance Regulation Number 130/PMK.010/2012 concerning fiduciary guarantee registration is issued for finance companies that carry out consumer financing for motorized vehicles with fiduciary guarantees charged. Legally, the existence of a fiduciary guarantee as required by the fiduciary guarantee law must be registered at the fiduciary registration office, as further regulated in government regulation number 86 of 2000 concerning procedures for registering fiduciary guarantees and the cost of making a fiduciary guarantee deed. Doubts about whether registration is mandatory or not are reinforced by the fact that the absence of such a time period will reduce the confidence of business actors, especially creditors due to the nature of specialization and publicity as well as preferential rights (*droit de preference*) and disputes if the debtor defaults and has the potential for re-fiduciary. Fiduciary recipients who do not enter into fiduciary engagements are clearly contrary to the legal spirit as regulated in Article 5 paragraph (1) of the Fiduciary Guarantee Law which states that "Fiduciary guarantees are imposed by a Notary Deed in Indonesian and constitutes a Fiduciary Guarantee Deed". Even if a fiduciary engagement is not carried out, it does not contain sanctions based on the fiduciary guarantee law. In this case there is absolutely no legal certainty and interested parties will not get legal protection (Nur Amin Solikhah, Pranoto, and Al Sentot Sudarwanto, 2015). Furthermore, as we know and understand the main purpose of the Fiduciary Guarantee is to guarantee legal certainty or protection for the creditor in the event of a default on the part of the debtor.

The decision of the Constitutional Court Number 18/PUU-XVII/2019 was decided based on the petition submitted by the husband and wife couple Apriliani Dewi and Suri Agung Prabowo. The application is filed in connection with the loss due to the withdrawal of the object of fiduciary security based on Article 15 paragraphs 2 and 3 of the Fiduciary Guarantee Law. The application for a material review of the article is contrary to the 1945 Constitution of the Republic of Indonesia Article 27 paragraph 2: (All citizens have the same position in law and government and are obliged to uphold the law and government with no exceptions." And Article 28D paragraph 1, "Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law".

Prior to the issuance of the Constitutional Court Decision, generally the execution of fiduciary guarantee objects, especially by means of separate executions was always carried out, although it was not uncommon for resistance efforts from the fiduciary guarantee provider (debtor). However, with the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019, it has provided space for the execution of the parade of the execution of objects that are objects of fiduciary guarantees properly. It even opens space for the execution of fiduciary collateral objects solely through the execution of the court's gross fiat deed and even opens space every time there will be an execution of objects that are objects of fiduciary guarantees that must be carried out through a default lawsuit first.

The consideration of the Constitutional Court explained that the material in Article 15 paragraph 2 of the Law number 42 of 1999 concerning Fiduciary Guarantees has unconstitutional issues. According to him, the position of debtors who object to submitting a fiduciary guarantee object is weaker because creditors can execute it without a court mechanism. One-sided actions have the potential to cause arbitrariness and inhumanity, both physically and psychologically to debtors who often override the rights of the fiduciary giver. In addition, the Constitutional Court detects unconstitutionality in article 15 paragraph 3 regarding the phrase "breach of promise", does not explain the factors that cause the fiduciary giver to deny the agreement with the fiduciary recipient, furthermore it says "this results in the loss of the fiduciary giver's right to defend himself and sell the object at a price that is reasonable. Reasonable".

The background behind the decision of the Constitutional Court in determining that the debtor's breach of contract can only be stated to have occurred on the basis of a mutual agreement between the debtor and creditor or based on legal remedies is to provide legal protection to the debtor

from the arbitrariness of the creditor (*eigenrichting*) who unilaterally declares the debtor has defaulted. The form of legal protection granted by the Panel of Judges of the Constitutional Court to debtors is reflected in the legal considerations of the Panel of Judges of the Constitutional Court on page 118, namely: "...This shows, on the one hand, the existence of exclusive rights granted to creditors. And, on the other hand, there has been a neglect of the debtor's rights which should also receive the same legal protection, namely the right to submit/get a chance to defend himself on suspicion of breach of contract (default) and the opportunity to obtain the proceeds from the sale of the object of fiduciary security at a reasonable price. In other words, in this case, the assessment of the occurrence of "breach of promise" is unilaterally and exclusively determined by the creditor (fiduciary recipient) without giving the debtor (fiduciary provider) an opportunity to rebut and or defend himself.

The existence of a breach of contract which can only be stated to have occurred by mutual agreement between the debtor and creditor or through legal remedies as stated in the consideration and decision of the Panel of Judges of the Constitutional Court, in principle confirmed by the Panel of Judges of the Constitutional Court, because in the provisions of the Fiduciary Guarantee Act does not provide a clear legal certainty regarding when the debtor is declared to have defaulted and who has the right to determine whether the breach of contract has occurred. Is it when the debtor is negligent in paying his debt installments according to the specified time or when the debtor is negligent in paying off his debt. This is reflected in the legal considerations of the Panel of Judges of the Constitutional Court on page 119 of the last paragraph to page 120 of the first paragraph, namely: "That the substance of the norm in Article 15 paragraph (3) of Law 42/1999 relates to the existence of an element of a debtor who is "breached" which then gives the right to the fiduciary recipient (creditor) to sell the object that is the object of the fiduciary guarantee on his own power. The problem is when the "breach of promise" is considered to have occurred and who has the right to determine? This is what there is no clarity in the norms of the quo Act. In other words, the lack of clarity brings juridical consequences in the form of legal uncertainty regarding when the fiduciary giver (debtor) has actually committed a "breach of promise" which results in the emergence of absolute authority on the fiduciary recipient (creditor) to sell objects that are objects of fiduciary guarantees. Which is in the hands of the debtor. Thus, it has turned out that in the substance of the norms of Article 15 paragraph (3) of Law 42/1999, there are also derivative constitutional issues that cannot be separated from the same problems with the provisions whose substance is regulated in the norms of Article 15 paragraph (2) of Law 42/1999. , namely legal uncertainty related to the procedure for carrying out the execution and certainty about the time when the fiduciary provider (debtor) is declared a "breach of promise" (default), whether since the installment stages were late or not fulfilled by the debtor or from the maturity date of the debtor's loan which had to be fulfilled. Paid off. Such uncertainty also results in the interpretation that the right to determine the existence of such "breach of promise" rests with the creditor (fiduciary recipient). The existence of such legal uncertainty automatically results in the loss of the debtor's rights to defend himself and the opportunity to obtain the sale of the object of fiduciary security at a reasonable price.

If we look closely at the legal considerations of the Constitutional Court of Justice above, in terms of the agreement theory, it seems that the agreement clause in the fiduciary guarantee principal agreement has been weakened. Because, in the main agreement of fiduciary guarantees, namely debt-receivable agreements, there is always a clause in which the debtor is obliged to carry out achievements in the form of paying installments of his debt to the creditor at a predetermined time until the debtor's debt is declared to have been paid off and usually from the stipulation of the amount of installments that must be paid. Paid by the debtor at a certain time, the agreement has determined that the debtor is obliged to pay off his debt at a certain time.

In addition, in the fiduciary guarantee principal agreement as in the agreement clause in general, it is always accompanied by a mutually agreed clause between the debtor and creditor regarding the circumstances in which the parties, especially the debtor, are declared in breach of contract. This has

even been regulated and confirmed in the provisions of Article 1238 of the Civil Code, which basically states that the debtor is declared negligent (breach of promises) if the debtor is deemed negligent by the passage of the specified time. This means, with the debtor's negligence in carrying out his obligations that have been mutually agreed upon in the agreement letter, then automatically, the debtor at that time has been declared in breach of contract. So that based on the agreement theory without confirmation about when a breach of contract is declared and who has the right to state that a breach of contract has occurred in the Fiduciary Guarantee Act as legal considerations and the decision of the Constitutional Court of Justice, actually has a clear reference when the parties, especially debtors are declared breach of contract and clearly when it is stated that the debtor is in default, which has been mutually agreed upon in the clause of the agreement, actually no longer requires the necessity of an agreement regarding the occurrence of a breach of contract. This is because, this has been mutually agreed upon in the main agreement clause, and with this mutually agreed upon, according to the agreement theory as later confirmed in the provisions of Article 1338 of the Civil Code, which is the legal umbrella for agreements in general (including fiduciary guarantee agreements), it has been stipulated that all a legally made agreement applies as law to those who make it. Thus, with the existence of a clause in the main fiduciary guarantee agreement that regulates breach of contract, it has provided protection regarding when it is stated that the debtor has defaulted.

If we look closely at the legal considerations and the decision of the Panel of Judges of the Constitutional Court in the decision of the Constitutional Court Number 18/PUU-XVII/2019, in fact, the Panel of Judges of the Constitutional Court strongly emphasizes the existence of certain and fair legal protections that are preventive in nature from the execution of fiduciary guarantees. Regulated in the Fiduciary Guarantee Law, in particular the provisions of article 15 paragraph (2) and paragraph (3). However, in the theory of the purpose of law, the presence and existence of law do not merely provide a sure and fair protection, but also the presence and existence of the law aim to realize benefits as emphasized by utilitarianism. For the flow of utilitarianism initiated by Jeremy Bentham which was later developed by Richard B. Brandt, firmly states that an action is morally good, if it is in accordance with the rules that function in the most useful system of moral rules for a society. However, the presence of the Constitutional Court's decision Number 18/PUU-XVII/2019 which resulted in the weak execution of fiduciary guarantees so that it had implications for the supply power or willingness of creditors to provide loan funds for debtors which automatically had implications for the decline in the development of national economic development. the law from the aspect of expediency as promoted by the flow of utilitarianism.

In 2021 the Constitutional Court issued a Latest Decision regarding the Review of Law Number 42 Years 1999 concerning Fiduciary Guarantee to the Constitution of the Republic of Indonesia in 1945. Through MK Decision No.2 /PUU-XIX/2021 dated August 31, 2021, the Constitutional Court has rejected the review of Article 15 paragraph (2) and the Elucidation of Article 15 paragraph (2) of Law No. 42 of 1999 concerning Fiduciary Guarantees related to the execution of fiduciary guarantee certificates. The Constitutional Court's decision number 2/PUU-XIX/2021 was based on an application submitted by Joshua Michael Djami, an employee of a finance company with the position of an internal collector who already has professional certification in the field of collection. He requested a review of Article 15 paragraph (2) of the Fiduciary Law which states, "The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has obtained permanent legal force and is final and binds the parties to implement the decision. So that it can be implemented without going through court. However, the MK assembly considers that there is no issue of the constitutionality of norms. The requested norm has also been decided and considered in the Constitutional Court's Decision No.18/PUU-XVII/2019 dated January 6, 2020. However, the Constitutional Court's Decision No.2 /PUU-XIX/2021 is only an affirmation that there is no difference with the previous Constitutional Court decision (MK Decision No.18/PUU-XVII/2019).

Constitutional Court Decision No. 2 /PUU-XIX/2021 confirms that the execution of fiduciary guarantees can be submitted to a district court by alternative creditors. The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of fiduciary security by the debtor, then the choice of execution may not be carried out by the creditor himself but ask for assistance from the district court to carry out the execution by submitting a request for execution. However, if the debtor has acknowledged a default and voluntarily submits the object of the fiduciary guarantee, then the execution of the fiduciary guarantee can be carried out (easily, ed) by the creditor, or even the debtor himself (who submits it voluntarily) (<https://www.hukumonline.com/berita/a/begini-penjelasan-mk-terkait-putusan-eksekusi-jaminan-fidusia-lt613e2960d6190>, 2021). The Constitutional Court's decision applies to all fiduciary objects, including fiduciary objects to fixed (immovable) objects that are not encumbered with mortgage rights. This is because fiduciary objects are immovable objects that are not encumbered with mortgage rights, one type of fiduciary guarantee object as mandated by Article 1 number 2 of the Fiduciary Guarantee Law.

In the Focus Group Discussion (FGD) monitoring and evaluation of the implementation of the 2021 Constitutional Court Decision which was held in Surakarta on 19-21 November 2021 compiled by Prof. Dr. Jamal Wiwoho, SH, MH, and Prof. Dr. Pujiyono, SH, MH revealed some new data from the follow-up to the Constitutional Court Decision Number 18/PUU-XVII/2009 on the Fiduciary Law. That with the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019 against the Fiduciary Law, the stake holders are required to comply with the said decision and to the National Police Chief Number 18 of 2011 concerning Securing the Execution of Fiduciary Guarantees that debt collectors, or financial institutions as fiduciary recipients cannot play Withdraw the execution without going through a court decision in connection with the issuance of this Constitutional Court Decision, but the Financing Institution as creditor/fiduciary recipient fights that they can keep pulling the vehicle as long as it has been regulated binding in the bundle agreement as referred to in Article 15 paragraph 2 and paragraph 3 of the Law. Number 42 of 1999 concerning Fiduciary Guarantee. The execution of this fiduciary guarantee is included in one of the executions that are excluded from executions that carry out court decisions that have permanent legal force. Where in its implementation, the police can make withdrawals based on court decisions. This is also intended for a fiduciary guarantee certificate that has the same legal force as a court decision which has permanent legal force, so that it can be implemented if the debtor is in default or is in breach of contract.

It is clear from all the provisions above that what is meant by the execution of this fiduciary guarantee is selling goods or objects that are placed under fiduciary security either through public auctions or under the hand in order to fulfill all obligations from the debtor to the creditor. The problem that arises in everyday events is that when executing the collateral, of course, the collateral must be at the auction place or at least in a place of care which is under the authority of the creditor. It is very rare for the public (debtors) to voluntarily hand over fiduciary collateral after default, even after the creditor has asked nicely, the debtor still does not want to hand it over, while executions can only occur if the fiduciary collateral exists because it is a series of executions of the fiduciary guarantee. The process of handing over the objects of fiduciary security is a preparation for the execution of this execution, which is regulated in Article 30 of Law 42 of 1999 which reads as follows: "The fiduciary giver is obligated to hand over the object which is the object of the fiduciary guarantee in the context of the execution of the fiduciary guarantee".

If interpreted, the provisions of Article 30 clearly provide an obligation to the debtor to deliver the fiduciary collateral or give the creditor the right to take the fiduciary collateral in preparation for the execution of the fiduciary guarantee. Article 30 also explains that the submission of the object of fiduciary security is an act that is carried out before the execution occurs and the act that is carried out so that the execution can occur. So on this basis, that the creditor does by withdrawing the fiduciary collateral which is under the authority of the debtor is not an act that is classified as an act of executing a

fiduciary guarantee and is an act of taking that is protected and guaranteed by law.

However, through the Decision of the Constitutional Court number 2/PUU-XIX/2021 dated August 31, 2021, the Court has rejected the review of Article 15 paragraph (2) and the Elucidation of Article 15 paragraph (2) of Law number 42 of 1999 concerning Fiduciary Guarantees related to the execution of guarantee certificates. Fiduciary, In essence, the Constitutional Court's Decision No. 2/PUU-XIX/2021 confirms that the execution of fiduciary guarantees can be submitted to a district court by alternative creditors. The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of fiduciary security by the debtor, then the choice of execution should not be carried out by the creditor alone but ask for assistance from the district court to carry out the execution accompanied by the police whose task is only limited to securing the process. Execution when needed, not as part of the executor.

Conclusion

The Constitutional Court of the Republic of Indonesia has issued Decision Number 18/PUU-XVII/2019 "Decision of the Constitutional Court" which determines that the phrases "executory power" and "the same as court decisions with permanent legal force" in Article 15 Paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, is contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted "towards fiduciary guarantees where there is no agreement on default (breach of promise) and debtors object to voluntarily surrendering objects that are fiduciary guarantees. In addition, the phrase "breach of promise" in Article 15 Paragraph (3) of the Fiduciary Guarantee Law is also stated to be contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted that "the existence of a breach of contract is not determined unilaterally by the creditor but on the basis of an agreement between the parties. Creditor with the debtor or on the basis of legal remedies that determine that a breach of contract has occurred. Thus, the Constitutional Court has given a legal interpretation that the executorial power of the Fiduciary Guarantee Certificate is not immediately enforceable but depends on certain circumstances.

For example, in the case of a breach of contract agreement by a creditor and debtor, and/or the willingness of the debtor to submit the object of a fiduciary guarantee voluntarily. This decision has an impact on creditors because the Fiduciary Guarantee should have an easy nature in execution if the debtor defaults. Elucidation of Article 15 Paragraph (3) of the Fiduciary Guarantee Law, but currently if the debtor refuses to submit the fiduciary object because there is no clear agreement regarding the default or breach of contract, the creditor must obtain a court decision before carrying out the execution.

The problem that arises in everyday events is that when executing the collateral, of course, the collateral must be at the auction place or at least in a place of care which is under the authority of the creditor. It is very rare for the public (debtors) to voluntarily hand over fiduciary collateral after default, even after the creditor has asked nicely, the debtor still does not want to hand it over, while executions can only occur if the fiduciary collateral exists because it is a series of executions of the fiduciary guarantee. The process of handing over the objects of fiduciary security is a preparation in the context of carrying out this execution as regulated in Article 30 of Law 42 of 1999 concerning fiduciary guarantees.

If interpreted, the provisions clearly provide an obligation to the debtor to deliver the fiduciary collateral or give the creditor the right to take the fiduciary collateral in preparation for the execution of the fiduciary guarantee. Article 30 also explains that the submission of the object of fiduciary security is an act that is carried out before the execution occurs and the act that is carried out so that the execution can occur. So on this basis, what the creditor does by withdrawing the fiduciary collateral which is under the authority of the debtor is not an act that is classified as an act of executing a fiduciary guarantee and is an act of taking that is protected and guaranteed by law.

In the Constitutional Court Decision No. 2 /PUU-XIX/2021 confirms that the execution of fiduciary guarantees can be submitted to the district court by creditors and this is an alternative. The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of a fiduciary guarantee by the debtor, then the choice of execution cannot be carried out by the creditor himself but asks for assistance from the district court to carry out the execution. submission to the court is not by filing a lawsuit, but in the form of a request for execution by court order.

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