

LEGAL ISSUES IN IMPLEMENTING THE EXECUTION OF FIDUCIARY COLLATERAL OBJECTS POST THE ISSUANCE OF THE DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA NUMBER 2/PUU-XIX/2021

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ABSTRACT

This study aims to find out and analyze legal protection and certainty over the rights of parties for creditors in Fiduciary guarantees after the Constitutional Court Decision Number 2/PUU-XIX/2021, as well as the process of executing Fiduciary collateral objects by creditors in post-Fiduciary guarantees. Issuance of Constitutional Court Decision Number 2/PUU-XIX/2021. The research method was carried out in a normative juridical manner. The data used is secondary data obtained using a literature study. It is hoped that the research results can serve as input for decision-makers and the public in general related to legal issues in the execution of fiduciary guarantee objects after the issuance of the Ruling of the Constitutional Court of the Republic of Indonesia Number 2/PUU-XIX/20. Based on the results of the research, it can be concluded (1) Legal protection and legal certainty for the rights of Creditors (Fiduciary Recipients) after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021, June 8, 2021, has undergone changes that lead to a potential for less guaranteed protection law and legal certainty of the rights of creditors (Fiduciary Beneficiaries) in exercising their rights to execute collateral Objects. (2) The process of executing Fiduciary collateral objects after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021, June 8, 2021, can be carried out in 2 (two) ways, namely by submitting an application to the District Court and by parate executie as long as it has been there is an agreement regarding default/default since the guarantee agreement was made. The debtor voluntarily surrenders the Collateral Object to be executed.

Keywords: Collateral, Constitutional Court Decision, Execution, Fiduciary, Legal Issues.

INTRODUCTION

In everyday life, the need for funds to move the wheels of the economy is felt to be increasing. On the one hand, some people have excess funds but cannot work on it, and on the other hand, other groups of people can do business but are

hampered by constraints because they have little or no funds. To bring the two together, an intermediary will act as a creditor and provide funds for the debtor.

This is where the loan agreement or credit agreement arises.¹

In providing funds for the debtor's needs, apart from being held by the Bank as a creditor, it is also carried out by other institutions such as Financing Institutions. According to the Regulation of the President of the Republic of Indonesia Number 9 of 2009, a financing institution is a business entity that carries out financing activities by providing funds or capital goods. The existence of financial institutions is no less important than financial institutions because they can be a choice to get injections of funds which also have the potential to support national economic growth, including leasing companies that provide funds to finance the purchase of capital goods. To stimulate this funding effort for the community, a guarantee institution is needed that can provide legal certainty and protection for the parties, primarily the fund provider, to ensure that the funds given to the community can be returned at the time agreed by the parties. The said guarantee institution is needed as collateral for the Creditor when the debtor defaults to exercise the Creditor's rights through the execution of the sale of collateral.

In financing institutions through leasing, the guarantee institution commonly used is a Fiduciary Guarantee. According to Article 1 paragraph (2) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, what is meant by Fiduciary Guarantee is a guarantee right over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be burdened with mortgage rights. as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain in possession of the Fiduciary Giver, as collateral for repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors.

According to Article 11 paragraph (1) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, it is determined that objects burdened with Fiduciary Guarantees must be registered. This registration is required to issue a Fiduciary Certificate which has legal consequences with executive power. According to the provisions of Article 15 paragraph (2) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, the Fiduciary Guarantee Certificate, as referred to in paragraph (1), has the same executive power as a court decision that has obtained permanent legal

¹ Gunawan Widjaja dan Ahmad Yani, 2003 Jaminan Fidusia, Jakarta : PT. Raja Grafindo Persada, Page. 7.

force. Furthermore, in Article 15 paragraph (3) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, it is determined that, If based on this executorial title, then if the debtor defaults, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Guarantee on his power.

In practice, the existence of Article 15 paragraph (2) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees has caused many problems in carrying out executions, causing public unrest caused by actions taken by creditors in carrying out executions such as taking forcing collateral, using police officers to "scare" the debtor, and so on.

Based on the fact that there are many "cases of abuse" of Article 15 paragraph (2), there have been various requests for judicial review of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, especially Article 15 paragraph (2), finally with the issuance of the decision of the Constitutional Court of the Republic of Indonesia Number 2/ PUU-XIX/2021 dated 31 August 2021 regarding the review of Article 15 paragraph (2) of the Law of the Republic of Indonesia Number 42 of 1999 Concerning Fiduciary Guarantees and their explanations, which in essence

reinforces the Decision of the Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019 which reads as follows :

"Declaring Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" and the phrase "same as a court decision which legally enforceable" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not construed "against a fiduciary guarantee where there is no agreement regarding default and the debtor objects to voluntarily surrendering the object that is 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 implementation of the execution of a court decision that has permanent legal force";

"Declaring the Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" is contrary to the

Constitution of the Republic of Indonesia of 1945 and does not have binding legal force as long as it is not interpreted as "against a fiduciary guarantee where there is no agreement regarding default and the debtor objects to voluntarily handing over the object that is a fiduciary guarantee, then all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate must be carried out and applies the same as the implementation of the execution of court decisions that have permanent legal force.

Based on the judicial review of Article 15 paragraph (2) and paragraph (3) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees submitted by the applicant, the Constitutional Court of the Republic of Indonesia with its decision Number 2/PUU-XIX/2021 dated 31 August 2021, has rejected the petition of the applicant in its entirety.

The decision of the Constitutional Court of the Republic of Indonesia with its decision Number 2/PUU-XIX/2021 dated 31 August 2021, has raised legal issues related to the provisions of Article 15, paragraph (2) and paragraph (3) of the Law of the Republic of Indonesia Number 42 of 1999 Concerning Fiduciary Guarantees, especially the implications for legal protection and legal certainty for creditors in exercising the rights of

creditors to execute Fiduciary collateral objects when the debtor has defaulted.

Based on the background described above, the author wishes to conduct research on Legal Issues in the Execution of Fiduciary Guarantee Objects after the Issue of the Ruling of the Constitutional Court of the Republic of Indonesia Number 2/PUU-XIX/2021. This study begins the discussions by reviewing the legal protection and legal certainty of the rights of Creditors in Fiduciary guarantees after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021. It then discusses the process of executing Fiduciary collateral objects by creditors in Fiduciary guarantees after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021.

LEGAL PROTECTION AND LEGAL CERTAINTY FOR CREDITORS' RIGHTS IN FIDUCIARY GUARANTEES AFTER THE ISSUANCE OF THE CONSTITUTIONAL COURT DECISION NUMBER 2/PUU-XIX/2021

Article 1 number 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees stipulates that: Fiduciary Guarantee is a guarantee right over movable objects, both tangible and intangible and immovable objects,

especially buildings that cannot be burdened with mortgage rights as referred to in the Law Number 4 of 1996 concerning Mortgage Rights which remain in possession of the Fiduciary Giver, as collateral for certain debt repayments, which gives the Fiduciary Recipient a priority position over other creditors. Furthermore, number 5 and number 6 in Article 1 above also regulate the following:

- 5) Fiduciary givers are individuals or corporations who own objects of fiduciary guarantees.
- 6) Fiduciary recipients are individuals or corporations with receivables whose payments are guaranteed by a Fiduciary Collateral.

Although this Fiduciary guarantee has only been regulated since 1999 in Law Number 42 of 1999 concerning Fiduciary Guarantees, in practice, this type of guarantee has been running since the colonial era which is known as *Fiduciaire Eigendom Overdraahgt* (FEO), which is usually translated by the term guarantee Based on Trust.

In terms of considering the issuance of provisions regarding Fiduciary Guarantees, this can be seen in the Considering Preamble in Law Number 42

of 1999 concerning Fiduciary Guarantees as follows:

Considering:

- a. that the vast and ever-increasing need for the business world for the availability of funds needs to be balanced with the existence of clear and complete legal provisions governing guarantee institutions;
- b. that Fiduciary Security as a form of guarantee institution is still based on jurisprudence and has not been fully and comprehensively regulated in laws and regulations;
- c. that to fulfill legal needs that can further accelerate national development and guarantee legal certainty, and be able to provide legal protection for interested parties, it is necessary to form complete provisions regarding Fiduciary Guarantees, and these guarantees need to be registered at the Fiduciary Registration Office;

Based on the formulation of the sentences in the Preamble Considering the law above, it can be seen the significance of the issuance of this law, namely:

1. Fiduciary guarantees are a type of guarantee that is very much

needed in line with the developments and needs of the business world, so it is necessary to make rules regarding fiduciary guarantees;

2. The rules regarding Fiduciary guarantees that have been in effect so far are still based on Jurisprudence;
3. To fulfill legal needs that can further accelerate national development, guarantee legal certainty, and provide legal protection for interested parties.

In his capacity to provide legal certainty and legal protection, Lord Lloyd, as quoted by Mirza Satria Buana, said the following: "...law seems to require a certain minimum degree of regularity and certainty, for without that, it would be impossible to assert that what was operating in a given territory amounted to a legal system."² From this view, it can be understood that without legal certainty, people do not know what to do, and ultimately uncertainty arises, eventually leading to violence (chaos) due to the indecisiveness of the legal system. So that legal certainty refers to the application of a

clear, permanent, and consistent law where its implementation cannot be influenced by circumstances that are subjective.³

In line with the principle of providing legal certainty, Law Number 42 of 1999 concerning Fiduciary Guarantees adopts the principle of registration of fiduciary guarantees. The registration is expected to provide legal certainty to fiduciary givers, recipients, and third parties. The purpose of this fiduciary registration is as an effort to provide legal certainty to fiduciary recipients and fiduciary providers as well as interested third parties. Registering a fiduciary will fulfill the principle of publicity in material law. All information relating to objects that are the object of fiduciary guarantees is open to the public, except for inventory items. The registration system for fiduciary contracts also has implications for a principle inherent in material law, namely the *Droit de suite*, which will provide legal protection and certainty to the parties.

In line with the principles of fiduciary guarantees above, J Satrio said that fiduciary contracts, as regulated in Law Number 42 of 1999 concerning

² Lord Lloyd sebagaimana dikutip oleh Mirza Satria Buana dalam Mario Julyano dan Aditya Yuli Sulistyawan, *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum*, *Jurnal Crepido*, Volume 01, Nomor 01, Juli 2019, page 13 - 22

³ R. Tony Prayogo, *"Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang"*, *Jurnal Legislasi Indonesia*, Volume 13, Nomor 2, 2016, hlm.194, dalam Julyano dan Aditya Yuli Sulistyawan, *Ibid*.

Fiduciary Guarantees, contain the following principles.⁴

- a. the principle of legal certainty;
- b. the principle of publicity;
- c. the principle of balanced protection;
- d. the principle of accommodating practical needs;
- e. authentic written principles;
- f. The principle of giving a solid position to creditors

Legal protection for creditors in this Fiduciary guarantee agreement is reflected in Article 20 of Law Number 42 of 1999 concerning Fiduciary Guarantees, which regulates the principle of *Droit de suite*/ the direction of following the object, which stipulates that: "Fiduciary Collateral continues to follow the Object which is the object of the Fiduciary Guarantee in the hands of whoever the Object is in, except for the transfer of inventory objects which are the object of the Fiduciary Guarantee."

Likewise, the provisions stipulated in Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees also provide legal protection for the Debtor, which determines as follows:

Article 23 paragraph (2)

Fiduciary Givers are prohibited from

transferring, mortgage, or renting to other parties Objects that are objects of Fiduciary guarantees that are not inventory objects, except with prior written approval from the Fiduciary Recipient.

Furthermore, Article 24 of Law Number 42 of 1999 concerning Fiduciary Guarantees stipulates that: The Fiduciary Recipient shall not be liable for the consequences of the actions or omissions of the Fiduciary Giver, whether arising from a contractual relationship or arising from an unlawful act in connection with the use and transfer of the object. Fiduciary Guarantee.

Suppose the Debtor does not heed the provisions of Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees above. In that case, the Debtor will be subject to sanctions as stipulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees as follows:

Article 36

A Fiduciary Giver who transfers, mortgages, or leases Objects which are objects of the Fiduciary Guarantee as referred to in Article 23 paragraph (2) which is carried out without the prior written consent of the Fiduciary Recipient, shall be punished with imprisonment for a

⁴ J. Satrio, 2002, *Hukum Jaminan Hak Jaminan Kebendaan*, PT. Citra Aditya Bakti, Bandung, page 32.

maximum of 2 (two) years and a maximum fine Rp 50.000.000,-

In addition to the legal protection reflected in the articles above, there are still arrangements regarding legal security and legal certainty for creditors' rights regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees, as regulated in Article 27 of Law Number 42 of 1999. 1999 about Fiduciary Guarantees as follows:

Article 27:

- (1) Fiduciary Recipients have priority rights over other creditors.
- (2) The right that takes priority, as referred to in paragraph (1), is the right of the Fiduciary Recipient to collect payment of his receivables for the execution of objects that are objects of Fiduciary Collateral.
- (3) The priority rights of the Fiduciary Recipient are not deleted due to bankruptcy and/or liquidation of the Fiduciary Giver.

With the issuance of Decisions of the Constitutional Court Numbers 18/PUU-XVII/2019 and Numbers 2/PUU-XIX/2021, changes have been made to the execution of fiduciary guarantees so that

the creditor's position has changed from before the issuance of the two decisions. The existence of requirements for creditors in carrying out the execution of fiduciary guarantee objects and the determination regarding changes in default makes creditors unable to execute fiduciary guarantee objects immediately. This raises issues related to the certainty of creditors in conducting fiduciary collateral objects and the extent of creditor rights in managing fiduciary collateral objects.⁵

By looking at the Constitutional Court Decision Number 2/PUU-XIX/2021, it can be understood that the implications of the Constitutional Court's decision have reduced legal protection and certainty for the rights of Fiduciary Recipients/Creditors in executing collateral objects. On the contrary, based on the KM decision above, it has provided legal protection for the Fiduciary Giver/Debtor from the arbitrariness of the Creditor in executing Fiduciary collateral objects. This can be seen from the winding process of implementing the Collateral Object, which must go through an application to the District Court if the debtor does not voluntarily hand over the Fiduciary collateral object to the Creditor

⁵ Nurul Ma'rifah, Kepastian Hukum terhadap Kreditur Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 dan Nomor 2/PUU-XIX/2021, Notary Law Journal, Volume 1 No 2 Tahun 2022, page 205.

and there is no agreement regarding default since the deal was agreed. Not to mention the requirement that court decisions can be implemented if they have permanent legal force (Inkracht Van Gewijsde). This execution process will be longer if the debtor continues to buy time by making legal efforts such as prorogation, appeal, cassation, and others.

THE PROCESS OF EXECUTING FIDUCIARY COLLATERAL OBJECTS BY CREDITORS IN FIDUCIARY GUARANTEES AFTER THE ISSUANCE OF THE CONSTITUTIONAL COURT DECISION NUMBER 2/PUU-XIX/2021

Fiduciary guarantees, as part of material guarantees, have characteristics and characteristics attached to material contracts. One of the characteristics and characteristics of material contracts that make material guarantees more frequently used is the ease of execution, which gives creditors a priority position compared to creditors who do not hold material agreements. In the business world, fiduciary contracts are preferred because the characteristics of securities, especially fiduciary goods, are easy to execute. This is based on the consideration that in a unique material guarantee, the debtor has bound himself with the creditor to provide specific guarantees to the creditor in the

form of particular objects belonging to the debtor to guarantee the debtor's obligations as stated in the credit agreement as the principal agreement.⁶

In Law Number 42 of 1999 concerning Fiduciary Guarantees, it is said that debtors and creditors in a fiduciary guarantee agreement are obliged to fulfill achievements. In a contrario, it can be said that if the debtor or creditor does not satisfy the obligation to make achievements, one of the parties is said to be in default.⁷

The provisions of Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees stipulate that if the debtor defaults, the creditor is given the right to sell on his own behalf the object that is guaranteed by the fiduciary guarantee. This right is then called parate execution.

In general, execution is the implementation of a court decision or deed. Execution of fiduciary guarantees is confiscating and selling objects used as objects of fiduciary contracts. In principle, the execution of the Fiduciary Guarantee is unique, considering that the debtor had

⁶ Cut Nabilla Sarika, 2021, Analisis Yuridis Pelaksanaan Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/Puu-Xvii/2019, Tesis, Program Studi Magister Kenotariatan Fakultas Hukum Universitas Sumatera Utara Medan, page. 67.

⁷ Tan Kamelo, 2018, Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan, Bandung:PT Alumni, page. 237.

previously agreed upon the thing, so regardless of the condition of the Fiduciary Guarantee object, even though the item is a means of earning a living, it will still be executed.⁸ s for what Parate execution means: the right of a creditor to make a sale under his power or as if it were his own, objects that have been pledged by the debtor for repayment of his debt, in public with the conditions that generally apply, very simply because without involves the debtor and without (fiat) judge's permission and executorial title⁹

Article 15 reads in full as follows:

(1)The Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1) includes the words "DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA".

(2)The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force.

⁸ 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, Tahun 2018, page 10.

⁹ Rose Panjaitan, Pengaturan dan Pelaksanaan Parate Eksekusi Diluar Hukum Acara Perdata, Justitia Jurnal Hukum, Volume 2, No.2 Oktober 2018, page 294.

(3)If the debtor defaults, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Collateral on his own authority.

The strength of the Fiduciary Guarantee Certificate as regulated in Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees mentioned above has previously been regulated in Article 42 HIR/RIB as follows:

Article 42 HIR

Original letters of mortgage and debentures strengthened before a notary in Indonesia and the head of which uses words "Atas nama Undang-undang" has the same force as a judge's decision, if such a letter is not complied with in a peaceful manner, then the matter of carrying it out is carried out by order from the chairman of the district court in whose jurisdiction the debtor is silent or resides or chooses his place of residence in the manner stated in Articles the article above in this section, but with the understanding that corporal coercion can only be carried out if it has been permitted by a judge's decision. If the matter of carrying out the decision must be carried out completely or partly

outside the jurisdiction of the district court, whose chairperson orders it to be carried out, then the provisions in Article 195 paragraph two and the following are followed.

Furthermore, in the elucidation of Article 42 HIR it regulates as follows:

Explanation:

1. Article 224 explains that letters deemed to have definite power to be executed are like a judge's decision, namely:

- a. debt securities using mortgages.
- b. debt securities made before a notary (notarial deed) whose head uses the former words "Atas nama Raja", then successively changed to "Atas nama Republik Indonesia", "Atas nama Undang-undang" and now based on article 4 of the Basic Law on Justice No. 14/1970 be "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa".

2. If the documents mentioned above are not complied with peacefully, then it will be carried out as an ordinary judge's decision, which is carried out by

order and led by the chairman of the district court in whose jurisdiction the debtor is silent or resides or chooses his place of residence. , but about coercion of the body (*sanders = gijzeling*) can only be carried out if it has been permitted by a district court decision.

The method of executing fiduciary guarantees is regulated in Article 29 to Article 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. What is meant by the execution of fiduciary contracts is the confiscation and sale of objects that are objects of fiduciary agreements. What causes the execution of this fiduciary guarantee is because the debtor or fiduciary giver defaults or does not fulfill his achievements on time to the fiduciary recipient, even though they have been given a subpoena.¹⁰ Following are the ways of executing fiduciary collateral objects according to the provisions of Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees:

Article 29

¹⁰ Cut Nabila Sarika, Analisis Yuridis Pelaksanaan Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019, Tesis, Program Studi Magister Kenotariatan Fakultas Hukum Universitas Sumatera Utara Medan, 2021, page. 71

(1) If the debtor or Fiduciary Giver defaults, the execution of the Object which is the object of the Fiduciary Collateral can be carried out by means of:

- a. Implementation of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient.
- b. The sale of objects which are objects of the Fiduciary Collateral on the authority of the Fiduciary Recipient himself through a public auction and collects the settlement of the receivables from the proceeds of the sale;
- c. Sales under the hands carried out based on the agreement of the Fiduciary Giver and Recipient if in this way the highest price that benefits the parties can be obtained.

(2) Sales implementation as referred to in paragraph (1) letter c is carried out after the expiration of 1 (one) month after being notified in writing by the Fiduciary Giver and or

Recipient to interested parties and announced in at least 2 (two) newspapers spread across the region concerned.

With the issuance of Decisions of the Constitutional Court Numbers 18/PUU-XVII/2019 and Numbers 2/PUU-XIX/2021, changes have been made to the execution of fiduciary guarantees so that the creditor's position has changed from before the issuance of the two decisions. The existence of conditions for creditors in carrying out the execution of fiduciary guarantee objects and the determination regarding default changes makes creditors unable to execute fiduciary guarantee objects immediately.¹¹

In the Legal Considerations of the Constitutional Court Decision Number 2/PUU-XIX/2021, the Constitutional Court has provided legal considerations relating to the main substance of the object of the request for material review of the norms of Article 15 paragraph (2) and Explanation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee as follows:

Whereas the norms of the law being petitioned for constitutional review in the a quo petition are the norms of Article 15 paragraph (2) and the Elucidation of Article 15 paragraph (2) of Law 42/1999

¹¹ Nurul Ma'rifah, Op. Cit.

as interpreted by the Constitutional Court in the Constitutional Court Decision Number 18/PUU-XVII/ 2019, the formulation of which is as follows:

Article 15 paragraph (2) Law 42/1999

The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has permanent legal force..

Which has been interpreted by the Constitutional Court in the Constitutional Court Decision Number 18/PUU-XVII/2019 as follows:

Stating Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to State Gazette of the Republic of Indonesia Number 3889) throughout the phrase “kekuatan eksekutorial” and phrase “sama dengan putusan pengadilan yang berkekuatan hukum tetap” contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as it is not construed “for fiduciary guarantees where there is no agreement regarding breach of contract (default) and the debtor objects to voluntarily handing over

objects that become fiduciary guarantees, then all legal mechanisms and procedures in implementing the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as executing court decisions that have been enforced permanent law;

Explanation of Article 15 paragraph (2) of Law 42/1999

In this provision, what is meant by “kekuatan eksekutorial” is directly enforceable without going through a court and is final and binding on the parties to implement the decision.

Which has been interpreted by the Constitutional Court in the Constitutional Court Decision Number 18/PUU-XVII/2019 as follows:

Stating the Explanation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to State Gazette of the Republic of Indonesia Number 3889) throughout the phrase “kekuatan eksekutorial” contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not construed as “against a fiduciary guarantee where there is no

agreement regarding default and the debtor's objection to voluntarily handing over objects that are fiduciary guarantees, then all legal mechanisms and procedures in implementing 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;

When compared, the execution of fiduciary collateral objects before and after the issuance of Constitutional Court Decision Number 18/PUU-XVII/2019 and Constitutional Court Decision Number 2/PUU-XIX/2021 can be explained as follows.:

1. Execution before the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019 and the Constitutional Court's Decision Number 2/PUU-XIX/2021

(1)The implementation of the execution of this fiduciary collateral object is regulated in Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees as follows: If the debtor or Fiduciary Giver defaults, the execution of the object, which is the object of the

Fiduciary Collateral can be carried out by:

- a. Implementation of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient.
- b. The sale of objects of the Fiduciary Collateral on the authority of the Fiduciary Recipient himself through a public auction and collects the settlement of his receivables from the proceeds of the sale.
- c. Sales under the hands are carried out based on the agreement of the Fiduciary Giver and Recipient if, in this way, the highest price that benefits the parties can be obtained.

(2)Sales implementation, as referred to in paragraph (1) letter c, is carried out after the expiration of 1 (one) month after being notified

in writing by the Fiduciary Giver and or Recipient to interested parties and announced in at least 2 (two) newspapers spread across the region concerned.

Based on the provisions of Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees above, it can be understood that if the Fiduciary Giver/debtor has defaulted, the Fiduciary Recipient/creditor can execute Fiduciary collateral objects in 3 (three) ways, namely:

- a. Done based on executorial title by the Fiduciary Recipient, namely the creditor as stipulated in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees;
- b. The sale of fiduciary collateral objects is carried out by the Fiduciary Recipient/creditor on the authority of the Fiduciary Recipient (*parate executie*) through a public auction and collects the settlement of his receivables from the proceeds of the sale. *Parate executie* is the right of the first creditor to sell certain goods belonging to the debtor by auction without obtaining a court fiat.

- c. Underhand sales are carried out based on the agreement of the Fiduciary Giver and Recipient if, in this way, the highest price that benefits the parties can be obtained. This mechanism is carried out after the expiration of 1 (one) month after being notified in writing by the Fiduciary Giver and or Recipient to interested parties and announced in at least 2 (two) newspapers spread across the area concerned.

2. Implementation of the execution after issuing the Constitutional Court's decision Number 18/PUU-XVII/2019 and the Constitutional Court's Decision Number 2/PUU-XIX/2021.

After the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019 and the Constitutional Court's Decision Number 2/PUU-XIX/2021, the execution of this Fiduciary guarantee object has changed, which in essence can be divided into 2 (two) ways as follows.:

- a. Recipients of Fiduciary Guarantees or creditors cannot necessarily carry out their execution (*parate executie*) but must apply to execution to the

District Court. Furthermore, if there is already a District Court Decision, "Berkekuatan Hukum Tetap" (Inkracht Van Gewijsde), then the Fiduciary Recipient can carry out the execution.

- b. Execution is carried out using parate executie if, from the beginning of the agreement, there has been an agreement regarding default/default between the creditor and the debtor (Fiduciary Beneficiary and Fiduciary Giver) and the Fiduciary Guarantee Provider (the debtor) is willing to hand over the fiduciary collateral object voluntarily.

CONCLUSION

Based on the results of the research and outcomes as previously described, the researcher can conclude the following legal protection and legal certainty for the rights of Creditors (Fiduciary Recipients) after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021, dated June 8, 2021, has undergone changes leading to the potential for less guaranteed legal protection and legal certainty of rights the right of the

creditor (Fiduciary Beneficiary) in exercising his right to execute the Collateral Object. The process of executing Fiduciary Collateral objects after the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021, June 8, 2021, can be carried out in 2 (two) ways, namely by submitting an application to the District Court and by parate executie as long as it exists agreement regarding default/default since the guarantee agreement was made. The debtor voluntarily surrendered the Collateral Object to be executed. However, several recommendations to the Ministry of Law and Human Rights, especially the Directorate General of AHU, to continue to socialize stakeholders (Notaries, Financing Companies, Lawyers) in each Regional Office regarding the process of executing this Fiduciary Guarantee Object.

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