Fiduciary Security Execution after Constitutional Court Decision

R. Suharto[1], Siti Malikhatun Badriyah[1], Marjo[1], Muhammad Shafiyuddin Wafi[1], Muhammad Haidar Fakhri Allam[1]

[1]Lecturer at Diponegoro University, Indonesia

Abstract

Fiduciary collateral is one of the material guarantees, thus giving a fiduciary recipient a strong position. This is the main principle of fiduciary collateral, one of which is if the debtor defaults then the fiduciary collateral object can be executed. With the decision of the Constitutional Court No. 18/PUU-XVII/2019, there are various conflicting opinions. This study aims to find evidence and analyze with legal studies relating to the execution of fiduciary guarantees after the existence of the decision. The research method used is socio legal. From the results of the study it can be seen that the existence of the Constitutional Court decision lead to a variety of different interpretations. It is assumed that fiduciary recipients can no longer carry out executions based on their own power because they have to go through court. On the other hand, it is of the view that if the fiduciary recipient does not have the right to carry out executions based on the power of the fiduciary recipient himself and must go through a court of law then this is contrary to the principle of material security. The difference in interpretation can lead to legal uncertainty and lack of legal protection for fiduciary recipients who should have a strong position. Among other things in the case of debtor defaults, execution should be carried out without having to go through court.

Keywords: *execution, guarantee, fiduciary, constitutional court decision, default*

Introduction

As a material guarantee, fiduciary security is a strong guarantee and easy to implement. Therefore, if the debtor defaults, execution can be carried out on the object of fiduciary security in accordance with Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantee. The granting of fiduciary guarantees is done through a process called the Constitutum Procedure (the transfer of ownership of objects without giving up the physical object). In connection with this fiduciary guarantee, the physical object remains in the hands of the owner or debtor[1]. Article 1 number 1 number 2 Law No. 42 of 1999 concerning Fiduciary Security states that Fiduciary is the transfer of ownership rights of an object on the basis of trust provided that the object whose ownership rights are transferred remain in the possession of the object owner. Based on the provisions of Article 1 number 2 of Law No. 42 of 1999, fiduciary guarantee is the right of guarantee for movable objects both tangible and intangible and immovable objects, especially buildings which cannot be encumbered by mortgage rights as referred to in Law No. 4 of 1999 concerning Mortgage Rights which remain in the possession of the Fiduciary Giver, as collateral for the settlement of the debt, which gives priority position to the Fiduciary Recipient of other creditors. The emergence of the fiduciary guarantee institution as it is known today in the form of fiduciare eigendomsoverdracht or FEO is related to the provisions in Article 1152 paragraph (2) Civil Code that require that the authority over the mortgaged object may not be in the hands of the pledge (inbezitstelling requirements). The birth of a fiduciary guarantee was basically born as an effort to anticipate a deadlock from having to move the collateral object in a pawn[2].

Corresponding author:
Siti Malikhatun Badriyah,
Lecturer at Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, Tembalang, Semarang, Central Java 50275, Indonesia,
email: smbadriyah.undip@gmail.com

For fiduciary creditors, fiduciary guarantees benefit because they can guarantee the security of their receivables. For fiduciary givers, this fiduciary guarantee is beneficial because the object can still be used for daily needs, especially if the object is an item for the purposes of running a business[3,4]. The benefits of fiduciary guarantees for the development of the business world cannot be denied. However, on the other hand there are often various problems that arise in the regulation, implementation and enforcement of fiduciary guarantee laws, including the issue of execution of fiduciary guarantees[5]. As one of the material guarantees, it gives authority to creditors to carry out the execution of fiduciary guarantees in accordance with what is regulated in Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees which covers 3 ways of execution. With regard to the right to execute in the case of debtor default, these problems often arise, even though they are explicitly regulated in the Fiduciary Security Act. One of them is related to Article 15 Paragraph (2) Fiduciary Guarantee Certificates stating that fiduciary guarantees have the same executorial power as court decisions that have permanent legal force. This even caused a dispute between the parties that ended in the process in court. There is a judicial review of the Article to the Constitutional Court, which in the end the Constitutional Court makes a decision namely decision No. 18/PUU-XVII/2019. This decision raises pros and cons in their implementation and various interpretations in society.

This study uses the socio legal research method with library research to obtain secondary data relating to the regulation of fiduciary guarantee execution and field research to obtain primary data by examining the implementation of fiduciary guarantee in public life after the Constitutional Court Decision Number 18/PUU-XVII/2019. The concepts and theories that will be used as analysis knives are the Fiduciary Guarantee concept, the concept of Execution of material guarantees, the concept of material rights, and the concept of property rights. This study raised the issue of legal study of the Constitutional Court's decision on the implementation of fiduciary guarantee execution.This study is aimed at uncovering and analyzing the legal consequences of the Constitutional Court decision on the implementation of fiduciary guarantees.

Literature Review

Collateral is everything that is received by creditors and handed over by the debtor to guarantee a debt receivable in the community or guarantee the security of creditors' debts. Thus in principle the guarantee is an accessoir because its main function is to guarantee the fulfillment of the achievements that arise from an engagement[6]. In Article 1131 Civil Code stated that all debtors, both movable and immovable, both existing and new will later become guarantees for all debtor's personal commitments the. The civil code can be seen that everyone is responsible for his debt, this responsibility in the form of providing his wealth both movable and immovable objects, if necessary sold to pay off his debts (the principle of schuld and haftung)[7].

In Article 1131 Civil Code laid the general principle of a creditor's rights to his debtor[8]. Thus, all debtors' assets are collateral for debtors' debts to creditors. General principles contained in Article 1131 The Civil Code is further described in Article 1132 Civil Code, which states that the material preformance in Article 1131 is a joint guarantee for creditors, and the results of the auction of the material are divided between creditors balanced according to the size of their respective receivables unless there are valid reasons to put the receivables from one another.

From the provisions of Article 1132 of Civil Code can be seen that in the event that a creditor has several creditors, the position of the creditors is the same (the principle of creditorium parity). If there is not enough wealth to pay off his debts, the creditors get paid based on the principle of balance/equality, that is, each gets a payment proportionally according to the size of the credit of each creditor. Thus contained a general principle that is the equality of the rights of creditors to the assets of the debtor, these legal reasons as referred to in Article 1133 Civil Code, if there are debts with privileges, liens and mortgages. These debts must be paid in full[3].

Receivables whose repayment must take precedence over other receivables are called preferred receivables, while receivables which are settled according to the principle of balance are called concurrent receivables[9]. Fiduciary guarantee is one of the special guarantees which are material guarantees. The Fiduciary Guarantee Institute was actually very old and was well known and used in Roman legal society. In Roman law, this guarantee institution is known as the fiduciary cum creditore contracta (that is, a promise of trust made with a creditor). The contents of the promise made by the debtor with his creditor is that the debtor will surrender ownership rights to an object to his creditor as collateral

for his debt with an agreement that the creditor will transfer the ownership back to the debtor when the debt has been paid in full. Such relationships are called fides or fiduciary relationships[10].

In addition to the guarantee agency, in Roman law there is also a depositary institution known as fiducia cum amico contracta (that is, a promise of trust made with a friend). With the two fiduciary institutions mentioned above, to avoid misunderstanding in the Fiduciary Guarantee Act it is emphasized that what is regulated is a fiduciary guarantee institution, so the title of the law is "Fiduciary Guarantee", while in the brief title it is sufficient to mention the Law about Fiduciary. Usually guarantees in business relationships, especially in financial institutions are made in the form of fiduciary transfer of ownership[11]. The granting of fiduciary guarantees is done through a process called the Constitutum Procedure (transfer of ownership of objects without giving up the physical object)[1]. In connection with this fiduciary guarantee, the physical object remains in the hands of the owner or debtor.

Fiduciary security institutions have characteristics[12]. First, fiduciary guarantees have the nature of accessoir, meaning that fiduciary guarantees are not independent rights but the birth of their existence or removal depends on the principal agreement. Second, giving a preferential position to the fiduciary creditor recipient over other creditors (Article 27 of the Fiduciary Guarantee Act), meaning that the creditor has the right to take the settlement of his receivables over the results of the execution of objects which become fiduciary objects take precedence over other creditors. Third, it always follows the object guaranteed in the hands of whoever that object is (droit de suite) (Article 20 of the Fiduciary Guarantee Law). Execution of the Fiduciary Guarantee is regulated in Articles 29-34 of the Fiduciary Guarantee Act.

Method

This study uses the socio legal research method with library research to obtain secondary data relating to the regulation of fiduciary guarantee execution and field research to obtain primary data by examining the implementation of fiduciary guarantee in public life after the Constitutional Court Decision Number 18/PUU-XVII/2019. The concepts and theories that will be used as analysis knives are the Fiduciary Guarantee concept, the concept of Execution of material guarantees, the concept of material rights, and the concept of property rights.

Decision of the Constitutional Court Relating to the Execution of Fiduciary Guarantees

The Constitutional Court on January 6, 2020 decided in its ruling that among other things stated that "Article 15 paragraph (2) of the Fiduciary Security Law as long as the phrase" executive power "and the phrase" equals a court decision with permanent legal force "contradicts the Law Basic of the Republic of Indonesia in 1945 and does not have binding legal force insofar as it is not interpreted "to fiduciary guarantees that there is no agreement on breach of contract (default) and debtors object to voluntary submission of objects that become fiduciary guarantees, then all legal mechanisms and procedures in the execution of execution Fiduciary Security Certificates must be carried out and apply the same as the execution of court decisions that have permanent legal force.

In practice there are various interpretations of the Constitutional Court's ruling which ultimately results in legal uncertainty in its implementation. One of the reasons for the presence of the concept of seizure executives against moving material security was because of the uncertainty in the execution of civil decisions in Indonesia. The number of financial institutions that are not small in Indonesia will certainly give rise to potential disputes in the courts arising from the decision of the Constitutional Court so that it will cause new problems. It will also cause problems related to the efficiency of dispute handling which is likely to occur in court between creditors and debtors if the value of the fiduciary collateral is not so great if it must be done through the realm of the Court which will take up to three months which of course will require a lot of bailiffs to that the Constitutional Court Ruling above mentioned that the Act No. 42 of 1999 concerning Fiduciary Guarantee becomes raw again, because the spirit of this fiduciary law was revoked. According to Kelvin Wiratno, Chairperson of the Indonesian Financial Services Association (APPI), the Constitutional Court's Decision clarifies Article 15 of Law No. 42/1999 concerning Default or Injury Promise between Debtor and Creditors. Hence, the leasing can still pull the vehicle from the defaulted debtor that was previously warned, provided the procedure has been carried out.

It should be based on the legal principles of the agreement, if the debtor does not carry out the obligations stipulated in the agreement, there will be a default. Therefore, even though the default clause was not formulated, the debtor had failed to fulfill the promise (default). With the debtor default, the fiduciary recipient should be executed based on the legal principle of the fiduciary material security of the recipient according to Article 29 Paragraph (1) stating that "if the debtor or Fiduciary Giver fails the promise, the execution of the object which becomes the object of the Fiduciary Guarantee can be carried out by implementation of the executorial title referred to in article 15 paragraph (2) by the Fiduciary Recipient; sale of objects which become the object of the Fiduciary Guarantee at the authority of the Fiduciary recipient himself through a public auction and take the payment of the receivables from the proceeds of the sale; underhanded sales made under the agreement of the Fiduciary Giver and Receiver if in this way the highest price is obtained that benefits the parties".

Furthermore Article 29 Paragraph (2) states that the sale as referred to in paragraph (1) letter c is conducted after 1 month has passed since written notice by the Fiduciary Giver and or Recipient to the parties concerned and announced at least in 2 newspapers circulating in the relevant region. Article 30 of the Fiduciary Guarantee Law states that fiduciary givers must submit objects that are objects of Fiduciary Security in the context of carrying out the execution of Fiduciary Guarantees. Decision of the Constitutional Court relating to the default clause must be formulated in the deed in advance is actually not quite right and does not provide legal protection to the creditor receiving the material guarantee, in this case the fiduciary guarantee. In addition, relating to the execution of fiduciary guarantees also gives rise to various interpretations. Some argue that the execution of fiduciary guarantees must be carried out through the mediation of the court. On the other hand, there are those who argue that they can still execute without the mediation of the court. This makes legal uncertainty in the implementation of fiduciary guarantees.

Conclusion

Decision of the Constitutional Court Number 18/PUU-XVII/2019 gives rise to different interpretations in the implementation of the execution of fiduciary guarantees. On the one hand there is an assumption that after the decision of the Constitutional Court, the fiduciary creditor can no longer carry out his own execution, but must go through the court. On the other hand, not all executions of fiduciary guarantees must go through court. This creates legal uncertainty and lack of legal protection for fiduciary recipients. The difference in interpretation can lead to legal uncertainty and lack of legal protection for fiduciary recipients who should have a strong position. Among other things in the case of debtor defaults, execution should be carried out without having to go through court. Therefore, execution should be carried out based on the authority of the fiduciary recipient by public auction. Therefore, there are still 3 ways of execution as regulated in Article 29 of the Fiduciary Security Act.

Acknowledgments: The authors would like to thank the Rector of Diponegoro University, Dean of the Faculty of Law of Diponegoro University, the Institute of Research and Community Service, and all those who have provided assistance, advice and input.

Ethical Clearance: This research was ethically approved by Faculty of Law, Universitas Diponegoro, Semarang, Indonesia

Funding: This research receives Research Grants for the 2020 fiscal year from Faculty of Law, Universitas Diponegoro, Semarang.

Conflict of Interests: There are no conflict of interests

References

[1] Fuady M. Introduction to business law: Organizing modern business in the global era. Citra Aditya Bakti; 2002.

[2] Simanjuntak R. Legal Agreement in Business Contract Design Engineering. Jakarta:Gramedia;2018.

[3] Badriyah SM. Problematic of Fiduciary Guarantee in the Consumer Finance Agreement without a Notarial Deed. The International Journal of Humanities & Social Studies. 2015;3(2).

[4] Badriyah SM, Mahmudah S, Soemarmi A, Kamello T. Leasing Agreement on Financing SMEs in Fisheries Industry. Journal of Legal, Ethical and Regulatory Issues. 2019;22(3):1-7.

[5] Yoga, P. Pascaputusan MK Tentang Fidusia, Leasing Masih Bisa Tarik Kendaraan. Infobanknews.com, January 30, 2020. Retrieved

from http://infobanknews.com/headline/pascaputusan-mk-tentang-fidusia-leasing-masih-bisa-tarik-kendaraan/.

[6] Bahsan M. Indonesian Banking Credit Guarantee Assessment. Rejeki Agung; 2002.

[7] Badrulzaman MD. Look for the National Legal System. Alumni;1991.

[8] Kamelo, T. Fiduciary guarantee law: a coveted requirement: history, its development, and its implementation in bank and court practice. Alumni;2004.

[9] Badriyah, S. M. (2018). The Re-Orientation of Use Option Right in the Financial Lease Contract for Small and Medium Enterprises Development in Indonesia. International Journal of Mechanical Engineering and Technology. 2018, March;9(3):581–591,

[10] Satrio J. Legal guarantees, material security rights, mortgage rights. Citra Aditya Bakti;1998.

[11] Fuady M. Debt Guarantee Law. Erlangga;2013.

[12] Patrik, P, Kashadi HJ. Guarantee Law. Universitas Diponegoro;2000.