

ANALYSIS OF THE IMPACT OF THE DECISION OF THE CONSTITUTIONAL COURT NUMBER 2/PUU-XIX/2021 ON FIDUCIARY GUARANTEE IN BATAM

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Abstract

This study aims to determine and analyze the execution of fiduciary guarantees after the Constitutional Court Decision Number 2/PUU-XIX/2021 in Batam and to determine and analyze the impact of these decisions on the legal certainty of fiduciary guarantee certificates. This research is anormative-empirical research. Normative-empirical research combines library research and field research. This research is descriptive. Data was collected using literature studies and field studies. Analysis of the data used in this study is to use qualitative methods. The results showed that the execution of fiduciary guarantees after the Constitutional Court Decision Number 2/PUU-XIX/2021 in Batam was carried out in accordance with Article 29 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees. However, the determination of the debtor's breach of contract must be carried out with legal remedies, namely filing a lawsuit for default if the debtor does not provide an agreement on breach of contract and does not voluntarily submit the object of fiduciary security. The legal certainty of the fiduciary guarantee certificate of validity is reduced due to the implementation of self-execution (*parate executie*) by the creditor can only be carried out if the debtor agrees that he has breached his contract and submits the object of fiduciary security voluntarily.

Keywords: Fiduciary Guarantee, Execution, Executional Title

INTRODUCTION

Fiduciary or *Fiduciary Eigendom Overdracht* or *Fiduciary Transfer of Ownership* comes from the word *fides*, which means the transfer of property rights on the basis of trust. The legal relationship between the fiduciary giver called the debtor, and the fiduciary recipient called the creditor is a legal relationship based on trust.¹ According to Article 1 point 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees (" **Fiduciary Law**"), a 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. So, in this case, the fiduciary only transfers ownership rights. The legal relationship between the fiduciary giver and the fiduciary recipient is a legal relationship based on trust. In this case, the fiduciary giver believes that the fiduciary recipient will return the property rights handed over to him after the fiduciary giver fulfils its obligations, namely paying off the debt. On the other hand, the fiduciary recipient believes that the fiduciary giver will take good care of the collateral object, will not misuse it and maintain the object as a good housewife.² Fiduciary guarantees arise on the basis of the community's need for credit with guaranteed movable objects without physically releasing the objects that are used as collateral. Meanwhile, pawning, known in the Civil Code, requires the submission of movable objects used as collateral to creditors. Therefore, fiduciary guarantees are more in demand than pawn guarantees.

Legal problems that often occur in guarantee law, especially in fiduciary guarantees, are related to the execution of objects that become fiduciary guarantees when the debtor defaults or breaks his promise. The power of an executive title which is the same as a court decision with permanent legal force, as stated in Article 15 paragraph (2) of the Fiduciary Law, is one of the advantages of fiduciary guarantees. The power of the executive title is stated in the fiduciary guarantee certificate. Then it is emphasized again in Article 15, paragraph (3) of the Fiduciary Law that if the debtor breaks his promise, then the creditor has the right to be able to sell the object of collateral under his own power immediately. Selling the collateral object on its own power is also known as *parate executie*. *Parate executie* or direct execution is the authority to sell goods that are the object of collateral on its own power if the debtor breaks his promise without having to ask for *fiat* (approval) from the chairman of the court; therefore, there is a *parate executie* provide certainty and the position of the creditor if the debtor breaks his promise because it seems as if the debtor has paid off part or all of his property for repayment of his debt at a later date. ³ The existence of these provisions in the Fiduciary Law is considered to have given more power to creditors so that it can create the possibility for creditors to act arbitrarily against the debtor if they want to execute the object of the fiduciary guarantee if the debtor is deemed to be in breach of contract.

There are not a few cases of debt collection against debtors using debt collectors, commonly referred to as *debts collector* using coercion using threats and violence. While the debtor in this case does not have the right to defend himself, because the breach of contract is often determined unilaterally by the creditor. Therefore, on February 15, 2019, Suri Agung Prabowo and Aprilliani Dewi, two Indonesian citizens who felt disadvantaged because a finance company pulled a vehicle, together with their legal counsel from the Law Office of Veri Junaidi & Associates, submitted a request related to the executive power in Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Law because it is considered contrary to the 1945 Constitution. Based on the petition submitted, the Constitutional Court, through Decision Number 18/PUU-XVII/2019 ("**MK Decision 18/2019**"), has issued a new interpretation regarding Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Law, which resulted in the need for the debtor's approval and the debtor's volunteerism in surrendering the object that is the object of the fiduciary agreement in the case of the execution of the fiduciary guarantee. The decision certainly raises various debates because the process of executing fiduciary guarantees has the potential to be longer and requires high costs.

As a result of the issuance of the decision, Joshua Michael Dami, who in this case gave power of attorney to Zico Leonard Djagardo Simanjuntak, SH, and Dora Nina Lumban Gaol, SH, on November 27, 2020, submitted a request for a judicial review to the Constitutional Court against Article 15 paragraph (2) of the Fiduciary Law and an explanation of Article 15 paragraph (2) of the Fiduciary Law. He feels that since the MK Decision 18/2019, his income as an internal collector who already has a professional certification in the collection field has decreased. Moreover, he also has

¹A. Hamzah and Senjun Manulang, 1987, *Fiduciary Institutions and Its Application in Indonesia*, Indonesia Hill, Jakarta, p. 32.

²Oey Hoey Tiong, 1985, *Fiduciary As Guarantee Elements Association*, Ghalia Indonesia, Jakarta, p. 21.

³Bimo Prasetyo and Putri Hilaliatul Badriah, "These are Two Alternatives for Executing Pawn Shares", <https://bplawyers.co.id/2017/02/17/ini-dua-alternatif-eksekusi-gadai-Saham/#:~:text=Kecepatan%20about%20Parate%20Executie%20terhadap,determined%20lampau%20or%20if%20no>, accessed 15 July 2022.

difficulty every time he wants to execute a fiduciary guarantee object because debtors often evade it. On August 21, 2021, the Constitutional Court rejected the applicant's application through Decision Number 2/PUU-XIX/2021, meaning that the Constitutional Court still adheres to Decision Number 18/PUU-XVII/2019.

Constitutional Court Decision Number 18/PUU-XVII/2019 and Constitutional Court Decision Number 2/PUU-XIX/2021 have made fundamental changes in fiduciary guarantees. The ease of execution carried out by the inclusion of "For Justice Based on the One Supreme God" on the fiduciary guarantee certificate is questionable whether the issuance of the decision will also result in the legal certainty of the fiduciary guarantee certificate because the power of the executorial title after this decision becomes weak. Based on this background, it is necessary to study and discuss the Impact Analysis of the Constitutional Court Decision Number 2/PUU-XIX/2021 on Fiduciary Guarantees in Batam because Batam is one of the cities in the Kepulauan Riau Province with a fairly high credit score. The easy terms offered by finance companies make the credit number continue to increase. Based on existing data, the percentage of loans in Batam is the highest, from Rp. 3.1 trillion for the Kepulauan Riau, Batam contributes Rp. 2.62 trillion.⁴

RESEARCH METHOD

This study employs a descriptive research design and normative juridical legal research, or *library research*, methodology. Data from numerous legal works of literature, as well as relevant legislation and regulations, were gathered through a literature review. Qualitative analysis is the technique utilized for data analysis.

RESULTS AND DISCUSSION

I. Execution of Fiduciary Guarantees after the Constitutional Court Decision Number 2/PUU-XIX/2021 in Batam

Collateral serves as a guarantor of debtor debt in a credit/financing agreement. One form of collateral is a fiduciary guarantee. Fiduciary guarantees as material guarantees are popular in banking practices because they can meet the community's needs.⁵ This is recognized by the DN Rural Bank ("**BPR DN**") in Batam, which for movable property guarantees, fiduciary is indeed more desirable than pawn guarantees.⁶

In practice, the debtor will be allowed to settle his obligations if credit is declared bad. Suppose the debtor is late in making an instalment payment, then the procedure carried out by the BPR DN to the execution of the fiduciary guarantee before the issuance of the Constitutional Court Decision Number 2/PUU-XIX/2021 ("**MK Decision 2/2021**") is as follows:

1. The BPR DN will contact the debtor by telephone to remind them that the credit instalment is due, and the debtor will be given time to pay the credit instalment.
2. If there is no response from the debtor when the bank has contacted the debtor, the BPR DN will issue three warning letters to the debtor's residence. Furthermore, if the debtor still ignores the third warning letter, the BPR DN will visit the debtor's residence. The visit was made to ensure the existence of the object of the fiduciary guarantee and to find out the debtor's problems related to delays in making payments. If when visited by the debtor and the object of the fiduciary guarantee is at the residence, the bank will negotiate with the debtor to help find a solution so that the debtor can carry out his obligations.
3. After negotiating, the debtor is given time to settle his obligations. If the debtor does not settle his obligations, then within 14 days of the third warning letter being sent, the BPR DN will send a notification letter to settle all arrears.
4. Within seven days after the notification letter to settle all arrears is sent, and the debtor still does not settle his obligations, the bank will send a notification letter for the settlement of credit facilities.
5. Suppose the debtor ignores the notification letter for the settlement of the credit facility, and there is no possibility at all for the debtor to be able to settle his obligations, then within seven days after the letter is sent, the next step carried out by the bank is to execute the object of the fiduciary guarantee itself. The execution of the guarantee object is carried out with a letter of assignment given to bank employees, not a *debt collector* or a third party, which is equipped with financing documents and a fiduciary guarantee certificate.

⁴Batam Pos, "When Credit Is Popular", <https://batampos.co.id/2019/08/19/when-credit-popular/>, accessed July 15 2022.

⁵ Tan Kamelo . 2004, *Guarantee Law Fiduciary Something Coveted Needs*, PT Alumni, Bandung, p . 13.

⁶ Interview results with respondent SH, Legal Manager of PT BPR DN.

6. Furthermore, minutes will be made of the handover of the guarantee object from the debtor to the bank employee, as well as documentation of the condition of the guarantee object when it is submitted

If the BPR DN is unable to execute the object of the fiduciary guarantee because the debtor is not cooperative, the BPR DN will make the following efforts:⁷

- a. If the object of the guarantee and the debtor are not found, the BPR DN will make a police report with the alleged criminal act of embezzlement of the object of fiduciary security. This is also done if the existence of the debtor is found, but the object of collateral is not found; or
- b. If the object of the fiduciary guarantee can still be found, but the whereabouts of the debtor is unknown, then the BPR DN will still forcibly withdraw the object of collateral accompanied by the authorities, in this case, a member of the police.

Based on interviews conducted with respondents SH, the difference that arises in the execution of fiduciary guarantees after the MK Decision 2/2021 is at the stage after the notification letter for the repayment of credit facilities is not responded to by the debtor, then the BPR DN as a fiduciary recipient, if they want to execute the object of the fiduciary guarantee, must request a prior agreement with the debtor, that the debtor has committed a breach of contract and the debtor voluntarily submits the object of the fiduciary guarantee. The agreement is made in the form of a written statement from the debtor. However, if there is no agreement and the debtor does not voluntarily submit the object of the guarantee, then the only step that can be taken by the BPR DN to declare that the debtor is in breach of contract is to take legal action, namely submitting a claim for default to the District Court.

BPR DN often encounters obstacles in executing the object of fiduciary security if the debtor breaks his promise, namely the debtor and the object of the guarantee whose whereabouts are unknown. Since the issuance of the MK Decision 18/2019 and the MK Decision 2/2021, the obstacles have been increasing. A default agreement that must be requested from the debtor in advance results in the longer execution of the object of the fiduciary guarantee because the debtor can be uncooperative by not giving an agreement that he has been in breach of contract.

So far, the efforts made by BPR DN so that debtors are cooperative when executing the object of the fiduciary guarantee are always to establish good relations and communication with the debtor, provide agreed solutions between the debtor and BPR DN in terms of executing the object of fiduciary guarantee, to delivery in a language that is appropriate. Another effort that needs to be considered is by paying attention to the character of the debtor itself, therefore the 5C principle (*character, capacity, capital, collateral, and conditionsof economic*) and the 7P (*personality, party, purpose, prospect, payment, profitability, and protection*) must be implemented by creditors before giving credit to debtors.

The MK Decision 2/2021 is further confirmation and explanation of the MK Decision 18/2019, which had confused. This is evidenced in its legal considerations, that according to the Constitutional Court, the MK Decision 18/2019 has considered juridically and explained comprehensively regarding the execution of fiduciary guarantee certificates. Based on the MK Decision 18/2019, the execution of the object of fiduciary security has changed; the determination of breach of contract is no longer determined unilaterally by the creditor but is based on the will of the debtor and the creditor. Another less important aspect is the voluntary surrender of the object of fiduciary security by the debtor to the creditor. Therefore, if both of these conditions are met, then the object of the fiduciary guarantee can be executed. If the debtor fights by not giving an agreement that he has broken his promise and does not volunteer to surrender the object of his fiduciary guarantee, then the debtor is not allowed to carry out the execution himself, even though a member of the police has accompanied him, so that the next effort that the creditor can do to execute is to obtain a determination that the debtor has defaulted. The determination is obtained through legal remedies, namely by filing a default lawsuit to the District Court under Article 1243 of the Civil Code or resolving it by using alternative dispute resolution routes such as arbitration.⁸

The MK Decision 18/2019 and the MK Decision 2/2021 impact the creditor receiving the fiduciary guarantee, which was originally a preferred creditor, changing its position to become a concurrent creditor. Indeed, the Constitutional Court did not annul the provisions of Article 27 of the Fiduciary Law, which regulates the position of the fiduciary guarantee creditor as a preferred creditor. However, with these two decisions, which impact the need for legal action to declare the debtor in default if it does not provide an agreement, then indirectly, the position of the preferred creditor becomes a concurrent creditor. This is evidenced by the fact that the creditor must first file a default lawsuit against the main agreement to state that the debtor is in default if the debtor does not agree and does

⁷ Interview results with respondent SH, Legal Manager of PT BPR DN.

⁸ Interview results with year respondent, Batam District Court Judge.

not voluntarily submit the object of a fiduciary guarantee. Thus, of course, the position of the preferred creditor in the fiduciary guarantee is relegated to being a concurrent creditor due to the fact that the preferred creditor has its own advantages provided by law in the form of the right to agree to the power to sell the object of the guarantee itself when the debtor defaults without the need to file a lawsuit.⁹ Another impact of the issuance of the Constitutional Court's Decision 18/2019 and the Constitutional Court's Decision 2/2021 is the number of applications for default claims related to fiduciary guarantees submitted to the Batam District Court.¹⁰

II. Impact of Constitutional Court Decision Number 2/PUU-XIX/2021 on Legal Certainty of Fiduciary Guarantee Certificate

Before the issuance of the MK Decision 18/2019 and the MK Decision 2/2021, the fiduciary guarantee certificate had an important role in executing the object of the guarantee. In practice, with the existence of a fiduciary guarantee certificate, if the debtor breaks his promise, the creditor can immediately carry out his own execution based on the executorial title "For the sake of Justice Based on God Almighty", which is stated in the head of the fiduciary guarantee certificate.¹¹ Creditors assume that with the executorial title on the fiduciary guarantee certificate, the certificate has strong validity, so execution can be carried out immediately even though the debtor fights.¹² This is one of the applications of the applicant in the MK Decision 18/2019, point number 2, which states, "That the content material regulated in Article 15 paragraph (2) of the Fiduciary Law should not stop at provisions that equate "fiduciary certificates" with "a court decision that has obtained permanent legal force" without further stipulating how the execution procedure can be carried out so that it is also following the execution mechanism for a court decision that has permanent legal force..." To that matter, the Constitutional Court, in its legal considerations number 3.17 the second paragraph stated that in order to avoid arbitrariness in the execution of the execution, the exclusive authority possessed by the fiduciary recipient remains as long as there is no problem with the certainty of time regarding when the fiduciary giver has broken his promise, and the debtor voluntarily surrenders the object that is the object of the fiduciary agreement to the creditor to do the sales themselves.

In its decision, the Constitutional Court decided that the provisions of Article 15 paragraph (2) of the Fiduciary Law, especially on the phrase "executory power" and the phrase "the same as a court decision with permanent legal force", do not conflict with the constitution and have binding legal force as long as it is interpreted "against Fiduciary guarantees where there is no agreement on breach of contract and debtors object to voluntarily submitting the object of fiduciary security, 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 court decisions that have permanent legal force. So it becomes clear that the fiduciary guarantee certificate can no longer immediately become the basis for execution by creditors.

There are several implementations of the MK Decision 18/2019 in the fiduciary guarantee execution process, namely the decision of the Lahat District Court on May 14, 2020, Number 6/Pdt.GS /2020/PN Lht. In the decision, especially in petitum number eight, the plaintiff's lawsuit essentially orders that if the defendant cannot pay off at once and immediately, then based on the fiduciary guarantee certificate, the panel of judges allows the plaintiff to withdraw and sell the fiduciary guarantee object to cover the losses suffered by the plaintiff for breach of contract committed by the defendant. Then against the petition, the judge of the Lahat District Court rejected the unilateral execution requested by the plaintiff to withdraw and sell the fiduciary guarantee object only based on the fiduciary guarantee certificate. Because if the fiduciary guarantee certificate has an executive title which means that it can be carried out as a court decision with permanent legal force, then the execution of the title of execution in the case must continue through the execution procedure in the district court, namely by submitting a request for confiscation of execution to the chairman of the Lahat District Court. The judge of the Lahat District Court in the case also emphasized that as long as the debtor has acknowledged a breach of contract/default and voluntarily surrendered the object that is the object of the fiduciary agreement, the creditor is fully authorized to carry out his execution (*parate executie*).

So it can be concluded that the legal certainty of a fiduciary guarantee certificate after the MK Decision 18/2019 and the MK Decision 2/2021 have been reduced. This is because the new fiduciary guarantee certificate has strong legal certainty if the debtor agrees that he has broken his promise

⁹ Sri Soedewi Masjchoen S., *Civil Law : Law of Property*, Liberty, Yogyakarta, p. 75.

¹⁰ Interview results with respondent TAHN, Batam District Court Judge.

¹¹ Interview results with respondent SH, Legal Manager of PT BPR DN.

¹² *Ibid*.

and voluntarily submits the object of the fiduciary guarantee. If the debtor does not agree to the breach of contract, then the determination of the default must first be decided through existing legal remedies. However, if the debtor has agreed to the breach of contract he did, but still does not want to submit the object of fiduciary guarantee voluntarily, then the execution must be carried out in accordance with the execution of a court decision which has permanent legal force, namely by obtaining a determination from the District Court in advance as required regulated in Article 196 HIR or Article 208 RBg. If the debtor in question admits that he has breached of contract and voluntarily submits the object of the fiduciary guarantee, then the new creditor is allowed to carry out his own execution. Fiduciary guarantee certificates made before the MK Decision 18/2019 still have the proper executorial power, while fiduciary guarantee certificates made after the MK Decision 18/2019 must adjust to the decision.¹³

CONCLUSION

Based on the description above, it can be concluded that the execution of fiduciary guarantees after the MK Decision 2/2021 in Batam can be done by first contacting the debtor by telephone, sending three warning letters, visiting the debtor's residence, negotiating with the debtor related to problems in paying instalments, sending notification letters to settle arrears, to sending notification letters for repayment of credit facilities. If all these stages have been carried out, but the debtor does not complete his obligations, the execution of the object of a new fiduciary guarantee can be carried out by asking the debtor's agreement that he has broken his promise and voluntarily submitting the object of the fiduciary guarantee. The agreement for default is requested in the form of a written statement at the time after the notification letter for repayment of credit facilities is sent and is not responded to by the debtor. If the debtor fights and does not provide an agreement regarding the breach of contract, then the determination of the breach of contract must be proven through existing legal remedies, namely, filing a default lawsuit to the district court. However, if the debtor agrees that he has breached his contract and voluntarily submits the object of fiduciary security, the creditor can carry out his own execution (*parate executie*) against the guarantee object.

Legal certainty from a fiduciary guarantee certificate containing executive power reduces its validity. The fiduciary guarantee certificate can no longer immediately become the basis for the creditor to carry out the fiduciary guarantee object himself if the debtor does not agree that he is in breach of contract and does not submit the fiduciary guarantee object voluntarily. In this case, if the debtor has agreed that he is in breach of contract but still does not want to surrender the object of the fiduciary guarantee voluntarily, then the execution is carried out the same as the execution of a court decision which has permanent legal force, namely by first requesting a letter of determination of the application for confiscation of execution to the Chief Justice of the District Court.

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¹³ Interview results with respondent TAHN, Batam District Court Judge.

