



## Fiduciary Collateral Object Execution Mechanism Post Constitutional Court Decision Number 2/PUU-XIX/2021

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### **Abstract**

Fiduciary guarantees have existed in society since the Dutch colonial era because of the flexibility of objects that can be burdened with fiduciary guarantees, the more there is a need for legal certainty over fiduciary guarantees. The Fiduciary Guarantee Act (UUJF) requires registration of the imposition of fiduciary guarantees. Registration is carried out at the Fiduciary Registration Office with a working area covering the entire territory of the Republic of Indonesia and is within the scope of duties of the Ministry of Law and Human Rights to obtain a fiduciary guarantee certificate. The fiduciary guarantee certificate contains the head of the decision which is interpreted as having the power of execution, so that the execution can be carried out immediately without going through a court and is final as described in Article 15 paragraph (2). In practice, this article often becomes a polemic in the community, causing acts against the law and even criminal acts when the fiduciary recipient wants to execute the fiduciary guarantee. After the Decision of the Constitutional Court Number 2/PUU-XIX/2021, in its decision, it redefines Article 15 paragraph (2) and paragraph (3) of the UUJF. This decision is an explanation and confirmation of the previous Constitutional Court Decision Number 18 /PUU-XVII/2019. This study will discuss the power of administering fiduciary guarantees after the Constitutional Court Decision Number 2/PUU-XIX/2021. With the research method using a statutory (normative) approach, as well as a conceptual approach, it is concluded that the execution clause in the fiduciary guarantee certificate does not change, only as a legal consequence arising from the decision of the Constitutional Court number 2/PUU-XIX/2021, namely the mechanism for implementing the guarantee certificate execution. Fiduciary is carried out by equating it with the mechanism for implementing the execution of a court decision that has permanent legal force (*incracht*), if the guarantor does not voluntarily surrender the object of the fiduciary guarantee under his control. In addition, there must be an agreement between the parties regarding the default. And in the Decision of the Constitutional Court Number 2/PUU-XIX/2021 as an explanation and confirming the multiple interpretations in the public of the previous Constitutional Court decision, that the execution of a fiduciary guarantee certificate through a court decision is an alternative that can be taken in the event that there is no agreement between the creditor and the the debtor, both in relation to default and the voluntary surrender of the object of guarantee from the debtor to the creditor. The default clause must be specified in the principal agreement or in the fiduciary guarantee certificate.

**Keywords:** *Constitutional Court; Execution; Fiduciary; Guarantee*

## ***Introduction***

The imposition of fiduciary guarantees since 1999 has had a legal basis with the promulgation of Law Number 42 of 1999 concerning Fiduciary Guarantees, hereinafter referred to as UUJF. The fiduciary recipient, as Article 15 UUJF paragraph (2), states that a fiduciary guarantee certificate has the same executive power as a court decision that has permanent legal force. And it is further explained that if the debtor defaults, then the fiduciary recipient, namely the creditor, has the right to sell fiduciary objects on his own power without going through court procedures, but it turns out that the meaning that arises in the paragraph allegedly makes the fiduciary giver lose, because the fiduciary recipient as a fiduciary guarantee holder feels above the wind and with all efforts to withdraw fiduciary objects.

On March 24, 2019, a request was filed for a judicial review of the UUJF against the 1945 Constitution of the Republic of Indonesia to the Constitutional Court, until finally the Constitutional Court decided on the request on January 6, 2020. In its decision, it changed the meaning of Article 15 paragraph (2) and paragraph (3). The Constitutional Court's decision regarding the interpretation of Article 15 paragraph (1-3) UUJF in terms of breach of contract (default) in the execution of fiduciary guarantees continues to be a topic of conversation in society. Initially, this article was interpreted as if the debtor (consumer) breaks his promise, the fiduciary recipient (leasing company) has the right to sell the collateral object under his own power (at auction) as is the case with an *inkracht* court decision. However, after the publication of the Constitutional Court decision Number 18/PUU-XVII/2019 dated January 6 2020, the Constitutional Court gave a different interpretation to the previous article. Now, the fiduciary guarantee certificate, which contains the head of the decision "For the sake of Justice Based on Belief in the One and Only God", no longer automatically has executive power. Even though after the publication of this decision there were several parties in society who had different views and had raised debates due to the multiple interpretations themselves.

Then the Constitutional Court dated August 31, 2021 through the Constitutional Court Decision No.2/PUU-XIX/2021 concerning the implementation of the execution of fiduciary guarantees, on the decision on the lawsuit filed by Joshua Michael Djami, the contents of which clarify and reinforce the previous decision, namely the Constitutional Court Decision Number 18/PUU -XVII/2019. The request for judicial review is the aftermath of the Constitutional Court Decision Number 18/PUU-XVII/2019, according to Joshua Michael Djami that the contents of the Constitutional Court Decision Number 18/PUU-XVII/2019 are related to clarity related to the process of executing fiduciary guarantee objects, there are a number of sentences with multiple interpretations for several parties.

This paper will then examine the legal consequences of the Constitutional Court Decision Number 2/PUU-XIX/2021 on the execution of fiduciary guarantee objects. Related to the implementation of the execution of the fiduciary guarantee certificate which assumes that it must be executed with a District Court decision or not. Then it becomes a problem when the financing institution (leasing) in carrying out the financing agreement includes the words guaranteed by fiduciary. But ironically it was not made in a notarial deed and was not registered at the Fiduciary Registration Office to obtain a fiduciary guarantee certificate. Such a deed can be called a private fiduciary guarantee deed.

To answer these problems, legal research methods are used which examine primary legal materials as the main legal materials. This study uses two approaches, namely the statutory approach and the conceptual approach. The statutory approach (statute approach) is an approach taken by examining all laws or regulations that are related to the legal issues being handled. The conceptual approach (conceptual approach) is an approach that departs from the views and doctrines that have developed in the science of law by studying the views and doctrines in the science of law.

## ***Research Methods***

Legal research is a scientific activity based on certain methods, systematics and thoughts, which aims to study one or several specific legal phenomena by analyzing them [Suteki and Galang Taufani, 2018]. This research is descriptive in a normative juridical manner, using secondary data, primary and secondary legal materials. Problem solving in this study uses a statutory approach, a case approach, and a conceptual approach with literary data collection techniques and analyzed qualitatively (G. Gunawan Suryoputro & et al, 2012).

## ***Discussion***

### **Decision of the Constitutional Court Number 2/PUU-XIX/2021**

The diversity of types of objects that can be pledged as collateral in fiduciary adds to the flexibility of society in using fiduciary. Article 1 number 4 UUFJ explains the objects that can be charged to fiduciaries, namely everything that can be owned and transferred, both tangible and intangible, registered and unregistered, movable and immovable that cannot be encumbered with rights. mortgage or mortgage. Property rights are attached to objects, material rights are absolute rights to an object where the right gives direct power over the object and can be defended against anyone. Material rights can be distinguished between material rights that provide enjoyment both for the object itself and for objects belonging to other people, for example eigendom rights/property rights, property rights and material rights that are guarantees, for example mortgages, mortgages and fiduciaries (R. A. Mumek, 2017).

The executorial power on the fiduciary guarantee certificate as stipulated in the UUFJ before the Constitutional Court Decision Number 18/PUU-XVII/2019, the executorial power on the fiduciary guarantee certificate means that the execution can be carried out immediately/directly, that is, the execution is carried out without going through a court and is final and binding on the parties. parties to implement the decision. Fiduciary recipients can directly sell objects that are fiduciary objects on their own authority (J. Satrio, 2002). This is done by fiduciary recipients on a legal basis referring to Article 15 paragraph (2) and paragraph (3) UUFJ. J. Satrio (2002) explained that based on the executorial title on the fiduciary guarantee certificate, the creditor (fiduciary recipient) can directly execute through a public auction of fiduciary collateral objects without going through a court, besides that UUFJ also provides ease of execution to fiduciary recipients through an execution parate institution. As stated by Soerjono which was re-quoted by Retno, that the executorial power of a fiduciary certificate gives the right to a fiduciary recipient to be able to execute his fiduciary guarantee on condition that the debtor or fiduciary giver defaults. Credits owed on agreements that have been made with fiduciary guarantees can be billed. Billing on credit is done in two ways, namely billing outside the court and through the court. This is based on the elucidation of Article 15 paragraph (2) of the UUFJ, namely that execution can be carried out directly without going through a court and is final and binding on the parties to carry out the decision.

On March 24, 2019, Mrs. Aprilliani Dewi and her husband Suri Agung Prabowo gave power of attorney to Veri Junaidi, S.H., M.Hum, Salman Darwis, S.H., M.H.Li and Slamet Santoso, S.H submitted a request for judicial review of the UUFJ against the 1945 Constitution of the Republic of Indonesia. With the diversity of meanings that occur from Article 15 paragraph (3) then the Constitutional Court examines the petition of the applicant and sets it forth in the Constitutional Court decision Number 18/PUU-XVII/2019(2019). In its decision, it states that in Article 15 paragraph (2) of the UUFJ, the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" are contrary to the 1945 Constitution and do not have binding legal force as long as they are not interpreted "against fiduciary guarantees that do not there is an agreement regarding breach of contract (default) and the debtor's objection to voluntarily surrendering the object that is a fiduciary guarantee. So all legal

mechanisms and procedures in executing the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force”.

Then the Constitutional Court dated August 31, 2021 through the Constitutional Court Decision No.2/PUU-XIX/2021 concerning the implementation of the execution of fiduciary guarantees, on the decision on the lawsuit filed by Joshua Michael Djami, the contents of which clarify and reinforce the previous decision, namely the Constitutional Court Decision Number 18/PUU -XVII/2019. The Constitutional Court Decision No.2/PUU-XIX/2021(2021) provides confirmation that the execution of fiduciary guarantees can be submitted to a district court by alternative creditors (not required). The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of the fiduciary guarantee by the debtor, then the choice of execution may not be carried out by the creditor himself, but ask for assistance from a district court to carry out the execution. The interpretation of the norms in the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in the norms of Article 15 paragraph (2) and Elucidation of Article 15 paragraph (2) of Law 42/1999 is correct. Meanwhile, regarding the norms of Article 15 paragraph (3) of Law 42/1999 in particular the phrase "default" can only be said to be constitutional as long as it is interpreted that the existence of a default 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 action. determining whether a breach of contract has occurred.

This has provided a form of legal protection, both legal certainty and justice for the parties involved in the fiduciary agreement. In a Fiduciary Guarantee agreement whose objects are movable and/or immovable objects as long as they are not encumbered with mortgage rights and there are legal subjects in the said agreement (creditors and debtors), then legal protection in the form of legal certainty and justice must be given to the three elements, namely creditors, debtors, and objects of mortgage rights.

## **Fiduciary Guarantee Certificate**

To provide legal certainty, Article 11 UUJF requires objects burdened with fiduciary guarantees to be registered at the Fiduciary Registration Office. Registration is carried out at the place of domicile of the fiduciary giver and the registration includes objects, both objects that are inside and outside the territory of the Republic of Indonesia to fulfill the principle of publicity, as well as being a guarantee of certainty to other creditors regarding objects that have been burdened with fiduciary guarantees. According to Prof. Mariam Darus Badruzaman, with fiduciary registration, fiduciary guarantees acquire the character of "goods rights" and are no longer as agreements. As goods rights, fiduciary guarantees carry principles including guaranteeing the following rights to goods, having a primary position in relation to other creditors, and collateral not being included in bankrupt assets if the debtor is declared bankrupt.

By registering a fiduciary guarantee object to the Fiduciary Registration Office, the creditor's position becomes stronger, the creditor's rights are material rights that can be defended against anyone [B. D. Lambok, 2008]. So in accordance with UUJF, fiduciary registration is a must. This means that the position of a creditor as a holder of a fiduciary guarantee is only valid if the fiduciary guarantee used to guarantee the credit he disburses has been registered at the Fiduciary Registration Office. However, in practice, creditors, both bank financial institutions and other (non-bank) financial institutions, such as leasing institutions, which thrive like mushrooms in the rainy season, do not comply with the provisions regarding the obligation to make a fiduciary guarantee deed with a notary deed and provisions the obligation to register a fiduciary guarantee. Even though it is very understandable that the purpose of fiduciary registration is to protect and provide legal certainty for the guarantees it holds (T. Kamello, 2014).

## Conclusion

Through the Constitutional Court Decision No.2/PUU-XIX/2021 dated August 31, 2021, it is an affirmation and reinforcement of the previous decision, namely the Constitutional Court Decision Number 18/PUU-XVII/2019. The Constitutional Court Decision No.2/PUU-XIX/2021 provides confirmation that the execution of fiduciary guarantees can be submitted to a district court by an alternative creditor. The alternative in question is an option if a default agreement is not reached and there is no voluntary surrender of the object of the fiduciary guarantee by the debtor, then the choice of execution may not be carried out by the creditor himself, but ask for assistance from a district court to carry out the execution. In this case submitting an application for execution by order of the District Court. Whereas for debtors who have acknowledged a breach of contract and voluntarily surrendered the fiduciary guarantee object, the execution of the fiduciary guarantee can be carried out by the creditor or even the debtor himself.

Obstacles in making a fiduciary guarantee certificate include the large cost of charging and registering the fiduciary guarantee deed, the Fiduciary Registration Office until now has only been found in the Capital City of the Province, so to register a fiduciary guarantee deed in addition to being charged a deed fee, of course there is also an administration fee to the KPF by Notary Public. There is still a lack of facilities and infrastructure for registration. And what is equally important is that the time limit for mandatory registration and sanctions if the fiduciary guarantee is not registered are not explained, it is not regulated in the UUJF.

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