

## **Legal Strength of Fiducia Post-Decision Court Decision Number 18/PUU-XVII-2019 about Fidusian Guarantee**

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### **Abstract**

The Supreme Court issued a decision in the case of judicial review of article 15 paragraph (2) and (3) of Law Number 42 of 1999 concerning Findusia Guarantee. The decision of the Constitutional Court states that Article 15 paragraph (2) of the Fiduciary Guarantee Law insofar as the phrase "executorial power" and the phrase "is the same as a court decision which has permanent legal force" contradicts the 1945 Constitution and has no binding legal force as long as it is not interpreted "against the fiduciary guarantee. There is no agreement regarding default and the debtor objected to voluntarily handing over the object which 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 execution of court decisions which have permanent legal force ". How is the legal power of fiduciary guarantee after the Constitutional Court decision Number 18/PUU-XVII-2019 concerning Fiduciary Guarantee? The research method used is normative legal research, namely collecting data by literature study. The conclusion of this study is The legal power of fiduciary guarantees after the Constitutional Court decision Number 18 of 2019 concerning Fiduciary Guarantees it turns out in letter "b", the execution of fiduciary collateral is through auction. This is confirmed by the provision of Article 6 of the Minister of Finance Regulation Number 27/PMK.06/2016 concerning the Auction Implementation Guidelines which categorize the Fiduciary Guarantee Execution Auction as one of the types of Execution Auction.

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### **Abstrak**

Mahkamah agung mengeluarkan putusan dalam perkara uji materiil terhadap pasal 15 ayat (2) dan (3) Undang-Undang Nomor 42 tahun 1999 tentang Jaminan Findusia. Putusan Mahkamah Konstitusi menyatakan bahwa Pasal 15 ayat (2) UU Jaminan Fidusia sepanjang frasa "kekuatan eksekutorial" dan frasa "sama dengan putusan pengadilan yang berkekuatan hukum tetap" bertentangan dengan UUD 1945 dan tidak mempunyai kekuatan hukum mengikat sepanjang tidak dimaknai "terhadap jaminan fidusia yang tidak ada kesepakatan tentang cidera janji dan debitur keberatan menyerahkan secara sukarela objek yang menjadi jaminan fidusia, maka segala mekanisme dan prosedur hukum dalam pelaksanaan eksekusi Sertifikat Jaminan Fidusia harus dilakukan dan berlaku sama dengan pelaksanaan eksekusi putusan

pengadilan yang telah berkekuatan hukum tetap". Bagaimanakah kekuatan hukum jaminan fidusia pasca putusan Mahkamah Konstitusi

Nomor 18/PUU-XVII-2019 Tentang Jaminan Fidusia?. Metode penelitian yang digunakan adalah penelitian hukum normatif yakni mengumpulkan data dengan studi pustaka. Kesimpulan dari penelitian ini adalah Kekuatan hukum jaminan fidusia pasca putusan Mahkamah Konstitusi Nomor 18 Tahun 2019 Tentang Jaminan Fidusia sebagaimana ternyata dalam huruf "b", maka eksekusi terhadap barang jaminan fidusia adalah melalui cara lelang. Hal ini dipertegas dengan adanya ketentuan Pasal 6 Peraturan Menteri Keuangan Nomor 27/PMK.06/2016 tentang Petunjuk Pelaksanaan Lelang yang mengkategorikan Lelang Eksekusi Jaminan Fidusia sebagai salah satu dari jenis Lelang Eksekusi.

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## INTRODUCTION

The fiduciary is one of the special guarantees for material that gives special rights to the recipient of the guarantee, including the right of creditors to sell the guarantee by themselves without having to have a court decision or being called a parate implementer in the event of default. Not long ago, the Constitutional Court issued a decision in the case of judicial review of Law Number 42 of 1999 concerning Fiduciary Guarantee. The article petitioned for review in the case is Article 15 paragraph (2) and (3) of the Fiduciary Security Law which regulates the authority of the executor of fiduciary certificates and parates of execution.<sup>1</sup>

For the debtor, a good form of guarantee is a form of guarantee that will not cripple his daily business activities, while for creditors a good guarantee is a guarantee that can provide a sense of security and legal certainty, that the credit given can be recovered on time. One of the guarantee institutions known in the guarantee law system in Indonesia is the fiduciary guarantee institution.<sup>2</sup>

The issuance of the quo Constitutional Court Decision certainly has an impact on various interested parties, either directly or indirectly. Of the many interested parties, one can call it the Directorate General of State Assets cq the Auction Directorate or in practical terms the State Property and Auction Service Office (KPKNL) which organizes the auction business process in their daily lives. This statement is certainly not an exaggeration, because Article 29

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<sup>1</sup><https://www.kompasiana.com/himakum92183/5e5bf46b097f36732c70f8d2/power-executive-guarantee-fiduciary-post-decision-court-constitution-number-18-puu-xvii-2019> accessed March 31, 2020

<sup>2</sup>Sri Ahyani, "Legal Protection for Creditors Through a Fiduciary Guarantee Agreement", *Journal of Legal Insights* 24 No. 1, (2011): 65.

of the Fiduciary Law also stipulates that if a debtor fails to promise, the implementation of the Fiduciary Guarantee Object can be carried out in several ways, namely:<sup>3</sup>

1. the exercise of the executor's rights as referred to in Article 15 paragraph (2) by the Fiduciary Recipient;
2. sale of objects that are the object of the Fiduciary Security under the authority of the Fiduciary Holder through a public auction and collection of receivables from the sale proceeds;
3. Underhand sales are made based on an agreement between the Giver and the Receiver of Fiduciary if in this way the highest price that benefits the parties can be obtained.

Referring to this provision, as seen in the letter "b", the implementation of fiduciary security shall be carried out by auction. This is also strengthened by the provisions of Article 6 of the Minister of Finance Regulation Number 27/PMK.06/2016 concerning Guidelines for Auction Implementation (PMK 27/2016) which categorizes the Fiduciary Guarantee Implementation Auction as a type of auction. Auction Execution, and it is known that this type of Execution Auction can only be carried out by Category I Auction Officials who incidentally are only available at KPKNL. So it can be understood that the Constitutional Court Decision Number 18 of 2019 will have little or more implications for the auction business process carried out by KPKNL. This is because Article 15 paragraph (2) and paragraph (3) of the Fiduciary Law, according to the Decision of the Constitutional Court Number 18 of 2019, is a fundamental norm. Because, from the norms contained in the article, the power of execution which can be exercised by the Fiduciary Security Holder (the creditor) himself is issued which then creates many problems, both related to the constitutionality of norms and the implementation that governs the government. execution of fiduciary guarantees. Meanwhile, one way of implementing fiduciary guarantees is through an auction which can only be conducted by KPKNL. both related to the constitutionality of norms and implementation governing the implementation of fiduciary security. Meanwhile, one way of implementing fiduciary guarantees is through an auction which can only be conducted by

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<sup>3</sup>[https://www.djkn.kemenkeu.go.id/kpknl-bekasi/baca-artikel/12953/PUTUSAN-MAHKAMAH\\_KONSTITUSI-NOMOR-18PUU-XVII2019-APA-IMPLIKASINYA-BAGI-PROSES-BISNIS-LELANG.html](https://www.djkn.kemenkeu.go.id/kpknl-bekasi/baca-artikel/12953/PUTUSAN-MAHKAMAH_KONSTITUSI-NOMOR-18PUU-XVII2019-APA-IMPLIKASINYA-BAGI-PROSES-BISNIS-LELANG.html), accessed 9 Jun 2020

KPKNL. both are related to the constitutionality of norms and implementation governing the implementation of fiduciary security.<sup>4</sup>

In its decision, the Constitutional Court stated that Article 15 paragraph (2) of the Fiduciary Guarantee Law insofar as the phrase "executor power" and the phrase "the same as a court decision that has permanent legal force" contradicts the 1945 Constitution and has no binding legal force as long as it does not mean "contradicting. with a guarantee. fiduciary, where there is no agreement regarding default (default) and the debtor objects to voluntarily hand over the object which is the fiduciary guarantee, then all legal mechanisms and procedures for implementing the Fiduciary Guarantee Certificate must be carried out and applied the same as the implementation of court decisions which have permanent legal force". Not only that, the Court also stated that the phrase "breach of promise"<sup>5</sup>

Concerning fiduciary guarantees where there is no agreement of default and the debtor objects to voluntarily hand over the object of the fiduciary guarantee, all legal mechanisms and procedures in the implementation of the Fiduciary Guarantee Certificate must be implemented and apply the same as the implementation of court decisions which have permanent legal force. However, this decision led to various responses and interpretations in the community, both academics, legal practitioners, consumers, and business actors who in their activities act as recipients of fiduciary guarantees. then all legal mechanisms and procedures in the implementation of the Fiduciary Guarantee Certificate must be carried out and apply the same as the implementation of court decisions that have permanent legal force. However, this decision led to various responses and interpretations in the community. academics, legal practitioners, consumers, and business actors who in their activities act as recipients of fiduciary security. then all legal mechanisms and procedures in the implementation of the Fiduciary Guarantee Certificate must be carried out and apply the same as the implementation of court decisions that have permanent legal force. However, this decision led to various responses and interpretations in the community, both academics, legal practitioners, consumers, and business actors who in their activities act as recipients of fiduciary guarantees. then all legal mechanisms and procedures in the implementation of the Fiduciary Guarantee Certificate must be carried out and apply the same as the implementation of court decisions that have permanent legal force. However, this decision led to various

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

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From the description of the background of the problem, the researcher intends to research with the following problem formulations How is the legal power of fiduciary guarantee after the Constitutional Court decision Number 18/PUU-XVII-2019 regarding Fiduciary Guarantee?

## **EXECUTION OF FIDUCIARY GUARANTEE ACCORDING TO LAW NUMBER 42 OF 1999 CONCERNING FIDUCIARY (BEFORE THE CONSTITUTIONAL COURT DECISION)**

Fiduciary guarantees are conventional products that are applied to protect creditors in particular. When the debtor defaults, the creditor can ask for compensation from the debtor through the execution of a fiduciary guarantee. With fiduciary registration, execution of collateral can be carried out immediately without waiting for a court ruling. Such conditions make it easier for financial institutions to collect compensation from financing provided to customers.<sup>7</sup>

The conventional based guarantee model does not necessarily apply to Islamic financial institutions. Research conducted by Rusni Hassan (et al.) Proves the constraints of implementing the Islamic financial system in the modern financial system.<sup>8</sup>Indonesia uses a Western legal system (inherited from the Netherlands), while Islamic economics uses an Islamic legal system. Likewise, Malaysia, using a dual banking system and dual law system, Islamic law, and English Common Law.

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<sup>6</sup>*Ibid.*

<sup>7</sup>Muhammad Maksum, "Application of the Fiduciary Guarantee Law \*In the Sharia Financing Contract ", *Journal of Cita Hukum* 3 No.1 (2015), 1-10.

<sup>8</sup>Rusni Hassan, Aishath Muneeza and Ismail Azzam Wajeeh, "Legal Obstacles Facing Islamic Banking in Malaysia", *World Journal of Social Sciences* 1 No. 5, (2011), 128-129.

Fiduciary security has a material nature and applies the *droit de suite* principle, except for the transfer of inventory objects that are the object of fiduciary security, but otherwise fiduciary security objects that are not registered do not have the benefits guaranteed in the Fiduciary Guarantee Act, namely the existence of preferent rights or rights. take precedence, as described in Article 27 of the Fiduciary Guarantee Act, which states that:

1. The recipient of Fiduciary has precedence over other creditors,
2. (2) The priority rights as referred to in paragraph (1) are the rights of the Fiduciary,
3. To collect the account receivable on the result of the execution of the object that becomes the object. Fiduciary Guarantee. The prioritized rights of the Fiduciary Recipient are not canceled due to bankruptcy and or liquidation of the Fiduciary.

For debtors, a good form of guarantee is a form of guarantee that will not cripple their daily business activities, while for creditors a good guarantee is a guarantee that can provide a sense of security and legal certainty, that the credit given can be recovered on time. One of the guarantee institutions known in the guarantee law system in Indonesia is the fiduciary guarantee institution.<sup>9</sup> In the interests of creditors holding a hearing, the law provides targeted guarantees for all creditors and regarding all debtors' assets. The existence of a guarantee for the debtor is for the sake of capital security and legal certainty for the capital provider, this is where the guarantee institution is important. The formation of a fiduciary institution that grows in practice because there is a need for a material security institution for movable objects in the form of business capital objects without the need to hand over the collateral and it is sufficient to simply hand over property rights in trust.<sup>10</sup>

Execution is the realization of the party's obligation to be defeated in the judge's decision, to fulfill the achievements stated in the judge's decision. In other words, the execution of a judge's decision which is legally enforceable remains the final process in a civil or criminal case process in court. A decision that has permanent legal force, can be requested for execution by the winning party, provided that the losing party does not sincerely want to implement the verdict in question. Whereas what can be requested for execution is only the verdict that punishes (condemnatory), while declaratory and constitutive decisions cannot be

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<sup>9</sup>Sri Ahyani, "Legal Protection for Creditors Through a Fiduciary Guarantee Agreement", *Journal of Legal Insights* 24 No. 1 (2011): 65.

<sup>10</sup>Winda Pebrianti, "Legal Review of the Execution of the Fiduciary Collateral Object through the Execution Parate If the Object of the Collateral Turns to a Third Party or Has Been Lost", *Law Supremacy* 21 No. 1, (2012)

requested for execution. The decision which has permanent legal force can be in the form of:<sup>11</sup>

1. A decision of the court of the first instance that was not requested for appeal or cassation because it was accepted by both parties
2. An appeal court decision that has not been appealed to the Supreme Court
3. Court decision at the cassation level from the Supreme Court or a decision on reconsideration from the Supreme Court
4. Unverzeted verstek rulings from the first instance court
5. The decision on the outcome of the conciliation of all litigant parties.

Legally binding execution decisions must be complete, meaning that all verdicts must be carried out. In this case, it must be followed by the delivery of goods or money from the object of execution to the entitled parties. Included in this is the writing of a complete report accompanied by handover signatures by the parties and witnesses. Furthermore, completing the physical delivery on a certain day, date, month, and year.

This execution is an attempt by the party won in the decision to get what is due to him with the help of legal force, forcing the defeated party to implement the sound of the verdict.<sup>12</sup> It is further argued that the meaning of execution or implementation of a decision means that the defeated party does not want to implement the decision voluntarily so that the decision must be enforced on him with the help of legal force. To take the object of collateral from the hands of a third party whose whereabouts are not yet known, the Fiduciary Holder before committing a civil suit can carry out verification in the field until the specified time limit. The Fiduciary Holder has the right to take the object of the fiduciary guarantee if the Fiduciary Giver fails to fulfill his obligations even though he has been given a warning letter by the provisions in Article 30 of the Fiduciary Guarantee Law which states that "the Fiduciary Giver is obliged to hand over the object which is the object of the fiduciary guarantee in the context of executing the Fiduciary Guarantee."<sup>13</sup>

Article 29 of Law Number 42 of 1999 states that:

1. If the debtor or the Giver of Fiduciary breaches the promise, the execution of the object which is the object of the Fiduciary Guarantee can be carried out by:

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<sup>11</sup>Nur Adi Kumaladewi, "Motor Vehicle Execution as Fiduciary Guarantee in Third Parties", *Repertorium Journal* 2 No. 2 (2015): 68.

<sup>12</sup>R Subekti, *Civil Procedure Law* (Bandung: Bina Cipta, 1989), 128.

<sup>13</sup>Winda Pebrianti, *Loc. Cit.*

- a. The execution of the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient. Regarding the position of the fiduciary guarantee certificate in terms of execution of the guarantee object;
  - b. Sale of objects that are the object of fiduciary security under the authority of the recipient of the fiduciary himself through a public auction as well as taking repayment of the debt from the sale proceeds;
  - c. Underhand sales are made based on an agreement between the giver and recipient of the fiduciary if in this way the highest price that is favorable to the parties can be obtained.
2. The sale as referred to in paragraph (1) letter c is carried out after 1 (one) month has passed since being notified in writing by the fiduciary or recipient of the fiduciary to interested parties and announced in at least 2 (two) newspapers circulating in the regions. concerned.

Based on the explanation of the article, the execution can be carried out by executing the title of execution, which means that the execution can be carried out immediately, or through an execution parate institution in which the sale of objects of fiduciary security at its power through a public auction as well as making the payment of the proceeds from the sale. The benefits provided by the Fiduciary Guarantee Act become invalid because the fiduciary security object is not registered or the agreement made by the creditor with the debtor is only an underhand agreement. Fiduciary collateral that is only charged with an underhand deed, means that the creditor as a fiduciary is only an ordinary creditor,

The submission of fiduciary collateral is mandatory, as explained in Article 30 of Law Number 42 of 1999, that the Fiduciary Giver is obliged to hand over the Objects that are the object of the Fiduciary Guarantee in the framework of the execution of the Fiduciary Guarantee.

## **THE LEGAL POWER OF FIDUCIARY GUARANTEES AFTER THE CONSTITUTIONAL COURT DECISION NUMBER 18/PUU-XVII-2019 REGARDING FIDUCIARY GUARANTEE**

The fiduciary registration office records the fiduciary security in the fiduciary register on the same date as the receipt of the application for registration. After fiduciary registration is carried out, the fiduciary registration office issues and submits to fiduciary



holders a fiduciary guarantee letter which is a copy of the fiduciary register book containing records of the matters listed in the registration of fiduciary security, and fiduciary security for birth on the same date as the registration date of fiduciary security, fiduciary register book. The fiduciary guarantee certificate contains the words: "For the sake of justice based on the only Godhead".<sup>14</sup>

A fiduciary guarantee certificate has the same executorial power as a court decision which has permanent legal force. If there are changes in the things stated in the fiduciary guarantee certificate, the fiduciary must apply for registration of the changes to the fiduciary registration office. The fiduciary registration office, on the date of receipt of the application for amendments, records changes to the fiduciary register and issues a statement of change which is an integral part of the fiduciary certificate.

Economic development and the need for guarantee institutions that can accommodate people's credit needs, need to be balanced with the expansion of existing guarantee institutions. This guarantee institution needs to be immediately included in the laws and regulations, especially considering that in Indonesia:<sup>15</sup>

1. Small companies, shops, retailers, restaurants need credit to grow their business with collateral for their merchandise.
2. Small employees, households need credit for household needs with household tools as collateral.
3. Tobacco and rice companies need credit to expand their businesses with collateral for warehousing and manufacturing.
4. Agricultural businesses need credit to increase their agricultural output with collateral for their agricultural tools.

The facts above show the importance of fiduciary institutions as guarantee institutions that can accommodate credit needs that cannot be reached through other guarantee institutions. Fiduciary security agencies are gaining popularity in the hearts of the public. They need credit facilities for household interests, corporate needs, business interests, trade, and industrial expansion. This guarantee institution is generally used as collateral in banking practices, in savings and loan institutions at cooperative offices, at importers, exporters,

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<sup>14</sup>Article 15 Law number 42 of 1999 concerning Fiduciary Security

<sup>15</sup>*Ibid*, 74.

suppliers, and others. For small credit in banking practice, usually, the fiduciary agreement is stipulated in a particular bank model. while for large loans it is usually stated in a notary deed.

The legal principle as stated in article 1131 of the Civil Code states that all debtor objects which become joint guarantees for all creditors cannot be overruled by the parties. Other creditors who feel aggrieved by Pauliana's actions can ask to cancel the agreement. therefore. It is considered to contain an object that cannot be determined (onbepaalbaar) because the object at that time does not exist. Therefore it is necessary to have restrictions, to protect other creditors.

Whereas to be valid and legally enforceable in a credit agreement with fiduciary security, things that must be fulfilled/done include: <sup>16</sup>

The credit agreement must meet the validity requirements of the agreement by Article 1320 of the Civil Code, namely: the agreement between the parties who bind themselves to the agreement; Ability to make deals; certain things promised; and legitimate purposes;

1. Credit agreement signed by the authorized party;
2. Enter into a credit guarantee agreement (Fiducia di Notary);
3. The fiduciary guarantee deed (AJF) is an additional agreement/follow-up/accesoir from the PK, so AJF must contain: the identity of the guarantor and recipient of the guarantee; PK number and date and all changes thereof where the credit is extended; description of goods that are the object of fiduciary security. Inclusion of the data must be by the data contained in the PK attachment. This is intended so as not to cause disputes / legal problems for banks and customers in the future.

Apart from granting preference rights to Fiduciary Guarantee recipients, the Fiduciary Guarantee Law also contains provisions that provide other protections for the interests of banks/creditors receiving Fiduciary Security against third parties. The provisions that protect the recipient of the Fiduciary Guarantee against these third parties can be seen in the following articles:<sup>17</sup>

1. Article 17: The fiduciary is prohibited from returning fiduciary objects which are registered objects of the Fiduciary Guarantee. Article forces the

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<sup>16</sup>Fatma Paparang, "Implementation of Fiduciary Guarantee in Providing Credit in Indonesia", *Journal of the LPPM for the Field of Social and Political Sciences* 1 No. 2 (2014): 63.

<sup>17</sup>*Ibid.*

bank/creditor receiving the Fiduciary Guarantee to register the object of the Fiduciary Guarantee as soon as possible. This is important not only for the protection of banks / Fiduciary Guarantee recipients but also for legal certainty for the public and third parties who have good faith.

2. Article 20 Fiduciary Security still follows the object which becomes the object of the Fiduciary Guarantee in the hands of whoever the object is located, except for the removal of the inventory object that becomes the object of the Fiduciary Guarantee. This provision adheres to the *droit de suite* principle and deviates from the provisions of Article 1977 of the Civil Code. The provisions of article 20 require a registration system that is accurate, reliable, and easily accessible as well as relatively low cost.
3. Article 22: Buyers of objects that are objects of Fiduciary Guarantee which are objects of shares are free from prosecution even though the buyer is aware of the Fiduciary Guarantee provided that the buyer has paid the selling price of these objects according to market prices. With this provision, if a debtor commits a performance default which gives the Bank/creditor the right to implement the Fiduciary Guarantee, the Bank/creditor may sue the third party who has purchased the inventory object that is the object of the Fiduciary Guarantee. Fiduciary Guarantee at prices below market prices.
4. Article 23 (2): Fiduciary holders are prohibited from transferring, pawning, or leasing to other parties items which are the object of the Fiduciary Guarantee which are not a bending of supplies, except with the prior written consent of the guarantee recipient. To protect their interests, the third party who receives the assignment, pledge, or lease rights over the object of the Fiduciary Guarantee, must want the written approval of the Fiduciary Guarantee to be given in the form of a notary.
5. Article 24: Fiduciary is not responsible for the consequences of actions or negligence of fiduciary holders either arising from contractual relationships or arising from illegal acts in connection with the use and diversion of items which are the object of the Fiduciary Guarantee.

Regarding the legal power of fiduciary guarantees in credit guarantees as discussed above, it can be concluded that the things that concern banks/creditors about collateral bound by the Fiduciary Guarantee agreement are: <sup>18</sup>

1. Checking and controlling the physical goods to be collateralized;
2. Checking and controlling the debtor's business and finances.
3. The accuracy in making the Fiduciary Guarantee agreement, especially regarding:
  - a. Description and/or clear identity of the goods announced;
  - b. Inclusion of clauses that contain requirements related to the provisions of the Article of the Fiduciary Guarantee Law and other legal provisions intended to protect the interests of Banks/creditors;
  - c. Inclusion of a statement from the party providing the Fiduciary Guarantee regarding the status of the goods which are the object of the Fiduciary Guarantee agreement related to the provisions of the Article in the Fiduciary Guarantee Law and other related legal provisions;

The process for enforcing receivables on movable objects when the debtor defaults on the obligations guaranteed by the objects. The enforcement mechanism should include the possibility of carrying out executions outside of court. Besides, in the Ease of Doing Business survey, the parameter of ease of execution for collateral for moving objects is also one of the important elements measured in the survey. The Getting Credit sub-Index parameter of the Strength of Legal Rights (strength of legal right index) specifically asks, Does the law allow parties to agree on out of court enforcement at the time a security interest is created? Does the law allow the secured creditor to sell the collateral through the public auction or private tender, as well as, for the secured creditor to keep the asset in satisfaction of the debt? (Does the law allow the parties to agree to an out-of-court execution at the time of the formation of the guarantee agreement? Does the law allow the Creditor holding the guarantee to sell the collateral through a public auction or a private tender sale, and also for the creditor holding the guarantee to control the asset as debt settlement?).<sup>19</sup>

The aspect of ease of execution is a very important factor in setting the movable property guarantee regime. Even the element of execution without going through the role of a

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<sup>18</sup>*Ibid.*

<sup>19</sup>Constitutional Court Decision Number 18 / PUU-XVII-2019 Concerning Fiduciary Guarantee, 62.

court is a feature specifically required by these international best practice guidelines. It should be noted that based on the 2019 EoDB Survey it is known that at least 133 countries surveyed have provisions in their movable property security system that allow the execution of movable property collateral to be carried out without going through court, in the case of defaulters, this number is an increase of 30% from the 2010 EoDB Survey. , which at the time noted that only 100 countries were known to have terms of execution without trial.<sup>20</sup>

In other countries, the process of withdrawing material guarantees is a highly regulated aspect. In the Netherlands, for example, the withdrawal of guarantees in case of default, debt collection can only be done by the bailiff, who is a public official specifically appointed for that. A bailiff is a strictly regulated profession, and to become a full bailiff requires years, which includes an obligation to undertake education, an internship, and be subject to ethical and behavioral requirements. In Australia, the withdrawal of the guarantee can be made immediately by the Creditor or his representative. Article 123 of the Personal Property Security Act 2009 stipulates that a creditor is allowed to confiscate collateral, in a manner permitted by law, if the debtor fails to promise in the guarantee agreement. The majority of collateral withdrawals are made by debt collectors. The debt collection industry itself is regulated by the government. Several states have specific regulations on debt collection services and enforce certification for the profession.<sup>21</sup>

Speaking The execution of collateral is subject to various regulations, for example, the Australian Consumer Law, the Australian Securities and Investment Commission Act 2001, and the Personal Property Securities Act 2009. Regulations include the prohibition of using force or coercion to do appropriate, harassment, misdirection or fraud, take advantage of a particular weakness, disability, or situation. Execution that violates the law can be challenged in court. In the United States, Book 9, Article 609 of the Universal Commercial Code (UCC) stipulates that a guarantee right holder can withdraw bail through a judicial process or without a judicial process if it is done without disturbing the peace (without breach of peace). In Indonesia itself, the Execution Parate Procedure is not specifically regulated. So far, the procedures for the execution of collateral are usually subject to the general provisions

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<sup>20</sup>Constitutional Court Decision Number 18/PUU-XVII-2019 Concerning Fiduciary Guarantee, 63.

<sup>21</sup>Constitutional Court Decision Number 18/PUU-XVII-2019 Concerning Fiduciary Guarantee, 66.

of criminal law and civil provisions for illegal acts. Forced withdrawal of collateral can be categorized as a criminal offense under Article 368 (1) of the Criminal Code.<sup>22</sup>

It can also be referred to the Chief of Police Regulation Number 8 of 2011 concerning Securing the Execution of Fiduciary Security. This regulation is not intended to involve the Police for withdrawal, but the purpose of this regulation regulates the role of the police as:

- a. the implementation of the execution of Fiduciary guarantees in a safe, orderly, smooth, and accountable manner; and
- b. the safety and security of Fiduciary Guarantee Recipients, Fiduciary Giver, and/or the public from actions that can cause property loss and/or life safety.

Meanwhile, the withdrawal itself remains the responsibility of the Creditor. Recently, the Financial Services Authority began to issue regulations on procedures for withdrawing collateral objects. The Financial Services Authority Regulation (POJK Number 35/POJK.05/2018 concerning Business Conduct of Financing Companies. Article 29 POJK 035/POJK.05/2018 stipulates that in executing fiduciary collateral objects, the Financing Company must fulfill the following conditions:

1. The debtor is proven to be in default (what is meant by default is the debtor's inability to fulfill the obligations as stated in the agreement)
2. The debtor has been given a warning letter by the financing agreement
3. The finance company has a fiduciary certificate.

OJK has indeed begun to touch on the arrangement of the collateral object withdrawal mechanism, based on POJK 035/2018 Financing Companies are required to have internal guidelines regarding the execution of fiduciary collateral objects. Furthermore, OJK has the authority to request the Financing Company to adjust internal guidelines regarding the execution of fiduciary collateral. Although the OJK regulates that a finance company can collaborate with other parties to carry out collection and withdrawal functions to debtors, the Financing Company is fully responsible for all impacts arising from cooperation with these other parties. The problem is, this POJK only applies to finance companies, does not apply to banking, and guarantee transactions are not carried out by other than financing companies.<sup>23</sup>

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<sup>22</sup>Constitutional Court Decision Number 18/PUU-XVII-2019 Concerning Fiduciary Guarantee, 67.

<sup>23</sup>Constitutional Court Decision Number 18/PUU-XVII-2019 Concerning Fiduciary Guarantee, 68.

The auction of fiduciary guarantees is one way or execution to return problematic financing or non-performing loans from financing or leasing company debtors. Fiduciary collateral objects can be in the form of movable objects such as motorized vehicles, factory machinery to stocks, and immovable objects such as land and buildings. The distribution of objects for fiduciary security is stated in Law Number 42 of 1999 concerning Fiduciary Security.

Head of Sub-Directorate for Bina Auction III, Directorate General of State Assets (DJKN) of the Ministry of Finance (Kemenkeu), Eko Laksito, explained that the auction of fiduciary guarantees can be carried out when the debtor or provider of fiduciary breaches the promise. The auction can be done through public auctions or underhand sales. The government, through the Ministry of Finance, has auction institutions scattered in various regions called the Office of State Wealth and Auction Services (KPKNL).<sup>24</sup>

The types of auctions consist of an execution auction, a mandatory non-execution auction, and a voluntary non-execution auction. An executable auction is an auction to implement a court decision or order, other documents that are equivalent to a court or implement statutory provisions. A mandatory non-executable auction is an auction to carry out the sale of goods that are required by law to be sold by auction. Meanwhile, the voluntary non-execution auction is an auction of goods owned by private companies, individuals or legal entities, or businesses that are auctioned voluntarily. (Read: DJKN: The Court's Decision Regarding Fiduciary Guarantee Has No Impact on the Auction Process).<sup>25</sup>

Fiduciary security auction is one type of execution auction because it implements a court decision or order or other documents equivalent to it and or implements provisions in legislation. There are additional requirements that must be met when submitting a bid for fiduciary security. The tender submission document must be accompanied by a statement letter from the seller that the item being auctioned is under the control of the seller because it has been voluntarily submitted, and the debtor has agreed to default and there is no objection from the debtor.

In practice, some creditors have complied with the declaration of the debtor's willingness. However, when the debtor disagrees, the court's decision becomes a requirement for filing documents for the auction of the fiduciary guarantee. Other tender provisions still

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<sup>24</sup><https://m.hukumonline.com/berita/baca/lt5ef5c9a0b1b4f/mengenal-proses-pelelang-jaminan-fidusia-pasca-putusan-mk?page=2> Accessed August 29, 2020

<sup>25</sup>*Ibid.*

refer to Regulation of the Minister of Finance (PMK) Number 27/2016 concerning Instructions for Auction Implementation and the required documents are by Regulation of the Director-General of State Assets Number 2/2017 concerning Technical Guidelines for Auction Implementation.

## CONCLUSION

The legal power of fiduciary guarantees after the Constitutional Court decision Number 18 of 2019 concerning Fiduciary Guarantees it turns out in letter "b", the execution of fiduciary collateral is through auction. This is also confirmed by the provision of Article 6 of the Minister of Finance Regulation Number 27 / PMK.06 / 2016 concerning Instructions for Auction Implementation (PMK 27/2016) which categorizes the Fiduciary Guarantee Execution Auction as one of the types of Execution Auction, and it is known that the implementation of this type of The Execution Auction can only be conducted by Class I Auction Officials which incidentally are only found at KPKNL.

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