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THE EXISTENCE OF THE PRINCIPLE OF BALANCE IN FIDUCIARY AGREEMENTS

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ABSTRACT

The fiduciary gives the creditor the right to parate execution of the debtor's fiduciary object without waiting for a court decision as stipulated in Article 29 paragraphs (1) and (2) of the Fiduciary Law. The Constitutional Court Decision Number 18/PUU-XVII/2019 in its decision states that there are 2 conditions that must be met by creditors to carry out parate executions, namely the debtor must admit that he is in default, and the debtor must voluntarily surrender the object that is a fiduciary object. Then how about the existence of the principle of freedom of contract and the principle of balance in a fiduciary agreement after the Constitutional Court's decision Number 18/PUU-XVII/2019. This research uses a normative juridical method with a statute approach and conceptual approach. The decision of the constitutional court in limited the rights of creditors. The clause on default and parate execution is certainly considered Contrary to the decision of the constitutional court and results in the position of the creditor being unbalanced because the debtor becomes the dominant position because the creditor can only execute parate execution if it fulfills 2 conditions.

Keyword: Fiduciary. Parate_Executie. Constitutional_Court_Decision.

1. Introduction

The development of the world's economy, which is currently quite broad with intense competition, is increasingly encouraging the faster flow of money flowing, both money saved and money flowing to meet the demand for public credit. For countries that are starting to develop, economic development is one of the country's goals that must be achieved, and credit here has a role in development in the economic field itself. Currently, credit itself has an increasingly broad meaning to meet capital needs in trade, industry, or to meet community needs ranging from primary to tertiary needs. The more widespread and increasingly high public interest in using credit services also

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affects the development of guarantees that always follow the credit agreement itself.

Financial institutions in Indonesia are divided into non-bank financial institutions and banking financial institutions. Each of these financial institutions also has a product distribution of funds in the form of credit. Bank financial institutions have an obligation to maintain public trust, and that trust will be maintained if the banking sector is carefully managed and managed to maintain its health at all times. To achieve this, Bank Indonesia is also obliged in this regard to provide advice and assistance to banks under the auspices of Bank Indonesia in accordance with Article 29 paragraph 1 of Law Number 10 of 1998 concerning Amendments to Act Number 7 of 1998. 1992 concerning Banking. The relationship between banks and bank customers must be based on the principle of partnership so that they have an equal position so that they must be based on the principle of trust (fiduciary principle), the principle of prudence (prudential principle), and the principle of confidentiality (confidential principle) and most importantly the bank must also apply the know your customer principle.[2]

Banks have high risk in running their business, reputation risk as an effect of public trust in banks, operational risks of banks in running their business, legal risks, and concentrated transaction risks. Therefore, the bank always applies the precautionary principle in carrying out its business operations.

Non-bank financial institutions are also not much different from bank financial institutions. One form of a non-bank financial institution that also channels funds such as banks is a financing institution. Financial institutions in the form of consumer finance are also often one of the institutions that help people who want to buy consumptive needs in people's lives by way of credit. And with the increasing variety of people's consumptive needs, also triggers the demand for credit from the public to also increase. In this case, the creditor must apply very strict rules in addition to providing convenience for the

[2]Djoni S Gahzali, Hukum Perbankan, Sinar Graphic: Jakarta, 2010, page 26

community to get credit but still not eliminating the precautionary principle itself in providing credit facilities to the public as debtors. In the credit agreement as to the main agreement, it is often followed by a guarantee agreement as an additional agreement or also known as an *accesoir agreement.* Collateral has an important meaning in a credit agreement concerning certainty and confidence in the repayment of the loan or credit by the debtor by a predetermined or agreed period. The definition of guarantee as contained in article 1 number 23 of law number 10 of 1998 concerning amendments to law number 7 of 1992 concerning banking, is " *additional guarantees, submitted by debtor customers to banks to obtain credit or financing facilities based on sharia principles* ". Based on this definition, the purpose of the existence of a guarantee is as an additional aspect which also has an important meaning to facilitate obtaining credit facilities from banks, so that this guarantee agreement cannot stand alone because it is an accesoir or additional agreement that follows the main agreement, namely a credit agreement.

Conceptually, the types of guarantees consist of material guarantees and individual guarantees. According to Sri Soedewi Masjchoen Sofwan, material guarantees are *"collaterals in the form of absolute rights to an object that has the characteristics of having a direct relationship to certain objects, from the debtor it can be defended against anyone, always follows the object (Droit de suit) and can be transferred."*[3]. This type of guarantee is generally used in credit agreements because it has economic value. The classification of objects according to the civil law system in force in Indonesia is movable objects and immovable objects, and that also applies to material guarantees, so that there are movable guarantees and immovable guarantees. For immovable collateral, it can be done by using a mortgage or mortgage, while for movable objects it can use a pledge or fiduciary.

[3] sri soedewi masjchoen sofwan, ,Hukum Jaminan Di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan, National Legal Development Agency Ministry of Justice: Jakarta, 1980, pp. 46-47

The binding guarantee with the Fiduciary system is one of the guarantee systems that is often used in financing agreements by consumer finance companies. Law Number 42 of 1999 concerning Fiduciary Security in Article 1 number 1 states that fiduciary guarantees are a " *guaranteed right to movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in the Act. - Law Number 4 of 1996 concerning Mortgage Rights that remain in the control of the Fiduciary Giver, as collateral for the repayment of certain debts, which gives priority to the Fiduciary Recipient over other creditors".* From the description of the definition in the article, it can be explained *that* the elements of a fiduciary guarantee are from the object side, it is a movable object, whether tangible or intangible, and can also be an immovable object that cannot be guaranteed by using a mortgage guarantee. Physically, the position of the object of the fiduciary guarantee is in the control of the fiduciary giver (the debtor), while the ownership rights of the object are with the fiduciary recipient or creditor, so that the fiduciary object may not be transferred without the permission of the fiduciary recipient or creditor because the object of the fiduciary guarantee is used to pay off the debtor's debt to the debtor. creditor. The creditor who first receives the right to control the fiduciary guarantee, in this case, has a preferential right in possession of the object compared to other creditors or later, so that in terms of repayment, it is prioritized.

The main concept in the implementation of fiduciary guarantees as well as other guarantees, namely "trust", the difference is that the fiduciary recipient (the creditor) actually entrusts movable goods which are the object of the fiduciary guarantee to be held and used by the fiduciary giver (the creditor) and this is in accordance with The meaning of the word fiduciary itself comes from the word *"fiduciair"* or *"fides"* which means "trust". In the fiduciary guarantee agreement, the fiduciary recipient or creditor has the right to carry out his own execution (parate execution) of the debtor's fiduciary object which is declared to have defaulted, and this is done without having to wait for a

court decision. This is contained in Article 29 paragraphs (1) and (2) of Law Number 42 of 1999 which states " *If the debtor or Fiduciary Provider is in breach of contract, the execution of the object that is the object of the Fiduciary Guarantee can be carried out by:*

a. *the implementation of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient;*
b. *sale of Objects that become the object of Fiduciary Guarantee on the authority of the Fiduciary Recipient himself through public auctions and take the settlement of his receivables from the proceeds of the sale; c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties.*

The decision of the Constitutional Court Number 18/PUU-XVII/2019 dated January 6, 2020, in which the Constitutional Court, in its consideration of the decision, stated that it did not want to eliminate the characteristics of the execution of the fiduciary guarantee which could be carried out by means of self-execution (parate execution). There are 2 (two) conditions that must be met by the fiduciary recipient (the creditor) to carry out the execution himself, namely: (1). The fiduciary giver (the debtor) must admit that he has defaulted (breach of promise), and (2). The fiduciary giver (the debtor) must voluntarily surrender the object that is the object of the fiduciary agreement,

The Constitutional Court's decision explicitly states that if the fiduciary rights giver (the debtor) acknowledges that he has committed a "breach of promise" (default) and voluntarily surrenders the object that is the object of the fiduciary agreement, then the new fiduciary recipient (the creditor) has the authority to obtain perform its own execution (parate execution). In the event that the fiduciary rights giver (the debtor) does not acknowledge the existence of a "breach of promise" (default) and objects to voluntarily surrendering the object that is the object of the fiduciary agreement, the fiduciary right recipient (the creditor) cannot carry out the execution himself and must submit a request for execution. to the district court. According to the constitutional court, the rights of the giver of fiduciary rights (debtors) and recipients of fiduciary rights (creditors) are protected in a balanced way. But if you look at the risk

side, in this case, the fiduciary recipient (the creditor) as the recipient of the greatest risk of his rights is not protected, because the execution cannot be carried out quickly, while the parate execution is carried out in order to carry out the execution quickly without having to wait for a court order.

So with the decision of the constitutional court, the execution of the fiduciary guarantee can only be carried out through the district court if the fiduciary giver (the debtor) admits he has defaulted and voluntarily surrenders the object that is the object of the fiduciary guarantee. Meanwhile, if the fiduciary giver (the debtor) does not want to admit that he is in default and does not want the object that is the object of the fiduciary guarantee to be given to the fiduciary recipient (the creditor), then the fiduciary recipient (the creditor) can only execute the object of the fiduciary guarantee through court procedures. Problems arise with the decision of this constitutional court whether the decision can be applied when the agreement through the principle of freedom of contract provides a balanced position for the parties where the creditor should be able to parate execution without using a court decision, if the creditor and debtor have agreed in the agreement clause or in the agreement. Fiduciary guarantee deed by stating that if within the specified period the debtor is unable to pay off his debt to the creditor and the debtor declares himself to be in default and is voluntarily obliged to provide the object of the fiduciary guarantee to the creditor.

This certainly does not rule out the possibility of this happening in practice, and whether the agreement is still valid in the eyes of the law. This of course gives rise to multiple interpretations, because the presence of a party entering a clause in an agreement is the same as entering a clause that is prohibited in an agreement, and of course this is contrary to Article 1320 of the Civil Code. However, on the contrary, it is also possible that this is allowed because inserting this clause in an agreement does not conflict with Article 1320 of the Civil Code and it is based on the principle of freedom of contract. And in this case the creditor is only trying to protect his rights as the

one who has the main position over the object of the fiduciary guarantee that is under his control.

Therefore, based on this description, this paper will examine and discuss related to the enactment of the Constitutional Court's decision and what about the existence of a balanced position of the parties in an agreement and in this case especially a fiduciary agreement. And based on the description of the background above, the main issues that will be discussed in this paper, namely how the existence of the principle of balance in a fiduciary agreement after the enactment of the decision of the Constitutional Court Number 18/PUU-XVII/2019.

The purpose of this paper is to examine the existence of agreement principles that provide a balanced position in a fiduciary agreement after the fall of the Constitutional Court's decision Number 18/PUU-XVII/2019. In addition, it can explain the principles of the agreement that provide a balanced position in a fiduciary agreement and its existence after the decision of the Constitutional Court Number 18/PUU-XVII/2019 was passed.

2. Reseach Method

The research method used in this research is normative juridical, namely research that focuses on the study of the application of rules or norms in applicable positive law. The normative juridical method is carried out by examining formal legal rules such as laws, regulations and literature containing theoretical concepts which are then linked to the subject matter under study. This legal research uses a legal approach *(statue approach)* and a concept approach (conceptual approach). The statutory approach is used to study the consistency and suitability of a law with other laws [4]and in this case adjust the concepts contained in the fiduciary guarantee law and the concept that is the goal of the decision of the Constitutional Court Number 18/PUU-XVII/2019, which is further linked in the principles of the agreement.

[4] Peter Mahmud Marzuki, Penelitian Hukum , Prenada Media Group, Jakarta, 2005, p.93.

3. Results and Discussion

The word balanced is interpreted to refer to the understanding of a state of load sharing on both sides being in a balanced state [5]. Balance refers to the understanding of the state of the distribution of the burden of the two sides being in the same condition so that in the agreement that the promise between the parties will only be considered binding as long as it is based on the principle of a balanced relationship between the interests of both parties as expected by each party. [6]

The principle of balance means that no one party should dominate, because this domination is possible to cause injustice and harm to one party, thus making one party unable to carry out its achievements. The principle of balance is a principle in Indonesian Covenant Law which is a continuation principle of the principle of equality which requires a balance of rights and obligations between the parties to the agreement. The principle of balance, in addition to having certain characteristics, must also be consistently focused on concrete truths [7]. In general, in contract law there are several legal principles that are always the basis of an agreement, namely the freedom of contract as contained in Article 1338 of the Civil Code, the principle of consensualism and the principle of binding force contained in Article 1331 of the Civil Code. The principle of freedom of contract means that people are free to enter into contracts with anyone but are not absolutely free, there are still certain limitations to protect the public interest [8]. The principle of freedom of contract means that the agreement occurs at every will of the parties, meaning that since there is an agreement or what is known as the principle of consensuality, from then on the agreement will be binding like a

[5]Herlien Budiono, Asas Keseimbangan Bagi Hokum Perjanjian Indonesia :Hukum Perjanjian Berlandasakan Asas-Asas Wigati Indonesia) , Citra Aditya Bakti, Bandung, 2006, page 304

[6]Ibid, p. 305

[7]Aryo Dwi Prasnowo, Siti Malikhatun Badriyah, Implementasi Asas Keseimbangan Bagi Para Pihak dalam Perjanjian Baku, Udayana Master Law Journal, Vol. 8 No. May 1, 2019, page 65

[8]Herlien Budiono, Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan, Citra Aditya bakti : bandung, 2000, pages 12-13

law, and each party has the same rights and obligations so that the position balanced parties.

A balanced position is one of the important principles in the agreement. In a credit agreement, the principle of balance also has a very important point so that no party is stronger and the other party is weak, and if these criteria are not met, then according to law, the credit agreement becomes invalid. The principle of balance can be used as an indicator if one day there is an imbalance in position between the parties in an agreement. So the principle of balance as a principle that is currently developing should be considered in addition to the principle of agreement (consensus), the principle of binding force (pact sunt servanda) and the principle of freedom of contract (freedom of contract).

The balance criteria in an agreement will be seen during the process of making and the content of the agreement. A reciprocal agreement or two parties should give rise to rights and obligations to each party. The purpose of the principle of balance is to achieve justice for both parties because balance implies harmony and there are no elements or elements that dominate each other, especially the control of the strong against the weak. A bank credit agreement must also be formed by referring to the balance criteria which can refer that there is no Dominating Party.

This often happens in bank credit agreements between the Bank as the creditor and the debtor. Banks always occupy a dominant position and tend to be stronger than debtors, this can be seen in the form of bank credit agreements which are standard agreements, so the clauses of the agreement have been determined unilaterally by the bank. This situation seems to "force" the debtor to choose " *take it or leave it* " and that certainly gives the debtor a weak position. The imbalance of position between the parties in an agreement, often causes the party whose position is lower or weaker to experience less favorable conditions. The imbalance in the agreement can be exploited by the dominant party, thereby triggering the abuse of

circumstances[9]. For example, the credit agreement contains an exoneration clause in the form of adding rights and or reducing bank obligations, or reducing rights and or increasing debtor customer obligations.

John Rawls refers to the term equality of position and rights, not in the sense of equality of results that can be obtained by everyone, but a condition that everyone is equal or equal in law (agreement) [10]. Inequality of position and performance in the standard contract of bank credit between the bank as the creditor and the debtor customer should legally be able to file a claim for cancellation of the agreement on the grounds of the invalidity of the agreement as a result of inequality. As the opinion of Herlien Budiono who said the legal consequences of inequalities of achievement in reciprocal agreements.[11]

> "If the stronger position affects the relationship between one's achievements and the other, and this disrupts the balance in the agreement, this for the aggrieved party will be a reason to file a claim for the invalidity of the agreement. As long as the promised performance reciprocity presupposes equality, then in the event of an imbalance, attention will be paid to equality in relation to how the agreement is formed, and not to the final outcome of the performance offered on a reciprocal basis."

The statement above means that the imbalance occurs because of the emergence of an unequal position because there are parties who dominate an agreement. The dominant position will certainly affect the reciprocal achievements made or the rights and obligations imposed on each party. The doctrine of inappropriate or unbalanced influence (undue influence) teaches that a contract is void or can be canceled on the grounds of not achieving conformity of will due to the efforts of one party having a more dominant position. Standard contracts may contain things that are inappropriate

[9] Dwi Ratna Indi Hapsari, Kukuh Dwi Kurniawan, "Consumer Protection in the Banking Credit Agreement in Accordance with the Principle of Proportionality under Indonesian Laws" , Fiat Justisia: Jurnal Ilmu Hukum,Vol. 14 No. 4 2020, p. 339, http://jurnal.fh.unila.ac.id/index.php/fiat/article/view/1884

[10] Agus Yudha Hernoko, Hukum Perjanjian : Asas Proporsionalitas Dalam Kontrak Komersial, Kencana, Jakarta, 2010, p. 58 .

[11]Herlien Budiono Asas Keseimbangan Bagi Hukum Perjanjian Indonesia : Hukum Perjanjian Berdasarkan Asas-Asas Wigati Indonesia, loc.cit, p. 318

influences, unfair relationships between the two parties, and clauses that can harm the other party in an agreement.

Mariam Darus Badrulzaman also argues that the principle of balance is to place the parties in equality, there is no difference, even though there are differences in skin, nation, wealth, power, position and others [12]. This position reinforces that in an agreement where each party agrees without any coercion without anyone being dominant or feeling more powerful over one of the parties, and that's when the principle of balance is seen. However, in a standard agreement, in practice the implementation of an agreement using a standard agreement will more or less close the door of negotiation between the parties for each of them wanting the contents of the agreement, while the principle of legal equality requires that each party in an agreement requires the contents of the agreement made.[13]

Fiduciary is an agreement similar to an agreement for safekeeping of goods in which the transfer of an object is carried out for the benefit of the owner of the object, but what distinguishes it from an agreement for safekeeping of goods in this type of fiduciary is followed by a transfer of ownership followed by a promise by a friend who will return the ownership of the object if the original owner wishes it. . In the Civil Code there is no known fiduciary guarantee, but in its development when the existence of mortgage and pawn guarantee institutions was not considered sufficient to overcome the problems that arose at that time, mortgages on land were not in great demand and pawns were recognized as having weaknesses making it difficult for the guarantee owner, an alternative guarantee was born, namely fiduciary.

Fiduciary guarantees are divided into 2 types, namely *fiduciary cum creditore* and *fiduciary cum amico* which are born from an agreement called *pactum fiduciae* which is followed by the transfer of rights or *in iure cessio* .

[12]Mariam darus Badrulzaman, Perjanjian Kredit Bank, Alumni, Bandung, 1978, p. 48

[13]Muidhur Rahman, Perlindungan Hukum Bagi Debitur Dalam Perjanjian Pembiayaan Dan Fidusia (Studi Kasus Di Fif Pasuruan) , Dinamika Jurnal Ilmah Hukum Vol. 26 No. 13 of 2020, http://riset.unisma.ac.id/index.php/jdh/ article/view/7510

Fiduciary cum creditore contracta is linguistically defined as a promise of trust made by the creditor, while in terms it is an agreement based on the belief that the creditor will re-transfer ownership of the object to the debtor, after the debtor transfers ownership of the object as collateral for the debt and pays off the creditor in full. the debt he had promised. While *fiduciary cum amico contracta* is defined as a promise of trust made with friends, this agreement is different from the first type of fiduciary which is a fiduciary which is not agreed as a guarantee institution, but has similarities to the first fiduciary because there is an element of *fides* or *trust* in it [14].

Law Number 42 of 1999 concerning Fiduciary is the legal basis for fiduciary guarantees. Fiduciary as a guarantee institution continues to develop and is practically agreed upon by the community even though in different forms, where according to Roman law the guarantee holder is declared the owner of the object of the guarantee while the recipient of the guarantee is currently only understood as the guarantee holder. At first, the object of fiduciary security was only in the form of movable objects, but now in line with the enactment of Law Number 42 of 1999 concerning Fiduciary Guarantees, fiduciaries recognize fixed (immovable) objects as collateral objects.

According to Article 1 point 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

> "A fiduciary is the transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object".

According to A. Hamzah and Senjun Manulang, a fiduciary is a method of transferring property rights from the owner (the debtor in the main agreement) based on the debt agreement to the creditor, but only the rights are handed over in a juridical-levering manner and are only owned by the creditor in trust (as debtor guarantee), while the goods are still controlled by the

[14]Benny Krestian Heriawanto, Pelaksanaan Eksekusi Objek Jaminan Fidusia Berdasarkan Title Eksekutorial, Legality, ISSN: 2549-4600, Vol. 27, No.1, March2019-August2019, page 57, https://ejournal.umm.ac.id/index.php/legality/article/view/8958/6738

debtor, but not as an eigenar or as a bezitter, but only as a detentor or houder and on behalf of the creditor-eigenar [15].

Based on the above understanding, a fiduciary is an institution that gives birth to a legal relationship that was born due to an act of transfer of property rights, but it is not followed by a transfer of power over the object, which transfer is accompanied by trust. fiduciary to the transferor, so that it can be stated that the transferee cannot be referred to as an eigenar/bezitter but can only be referred to as a houder/detentor. Due to his position as a houder/detentor, the transferee is prohibited from transferring his ownership to another party unless it has been agreed to do so.

The transfer begins with the main agreement which is generally in the form of a debt agreement. However, in the interest of execution, the object of the fiduciary guarantee based on the laws and regulations is under the authority of the debtor and considering that the object of the fiduciary guarantee is in the form of a movable object, it is not impossible if the object of the fiduciary guarantee cannot be executed by the creditor.

Execution in a fiduciary agreement is regulated in Article 15 Paragraph (1) of the Fiduciary Law where in the article it is stated that the fiduciary guarantee certificate includes *irrah-irah* "For the sake of Justice Based on God Almighty". These *irrah-irah* are certainly not without meaning, with the irahs in the fiduciary guarantee certificate showing that the fiduciary guarantee certificate has the same executorial power as court decisions that have permanent legal force. A court decision is said to have obtained permanent legal force (*in kracht van gewijsde*), if the decision has been closed for legal action. So a person who holds a Fiduciary Guarantee Certificate is equated with a person who has won a case in Court, based on a Court Decision which has permanent legal force [16].

[15] Salim.HS, Perkembangan Hukum Jaminan DI Indonesia, Rajagrafindo: Jakarta , 2004, p. 56

[16]Raja Bonar Wansi Siregar, Quo Vadis Pelaksanaan Parate Eksekusi Jaminan Fidusia Pasca Putusan Mk Nomor 18/Puu-Xvii/2019, https://www.pn-kotamobagu.go.id/index.php?option=com_content&view=article&id=85: quo-vadis-implementation-parate-execution-fiduciary-guarantee&catid=86:article&Itemid=650

The existence of an executorial title in the Fiduciary Guarantee certificate, then the consequence is that if the debtor breaks his promise, the Fiduciary recipient has the right to sell the object that is the object of the Fiduciary Guarantee on his own power and this is clearly contained in Article 15 paragraph 3 of the Fiduciary Law. Execution by selling on its own power is known as "Parate Execution" and this execution is nothing new in Indonesian guarantee law. Execution is basically the last step used by creditors to protect their rights when the debtor is no longer able to settle his obligations.

Parate execution is only one form of execution and there are several ways of execution that are contained in Article 29 of the Fiduciary Law. In addition to parate execution, objects that are objects of fiduciary guarantees can be executed by [17]:

3.1. The implementation of the executive title as referred to in Article 15 paragraph (2) by the fiduciary recipient.

3.2. The sale of objects that are objects of fiduciary guarantees on the power of the fiduciary recipients themselves through public auctions.

3.3. Underhand sales are made based on an agreement between the fiduciary giver and the fiduciary recipient, if thus the highest price can be obtained that benefits the parties

With regard to fiduciary executions in the form of parate executions as contained in the fiduciary law, the constitutional court has handed down the Constitutional Court Decision Number 18/PUU-XVII/2019 dated January 6, 2020. The Constitutional Court's Decision Number 18/PUU-XVII/2019 refers to the provisions Article 15 of the Fiduciary Guarantee Law, and states that there are different meanings to Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. Based on the decision, related to the implementation of Article 15 paragraph (2) and paragraph (3) of the Fiduciary

[17]Vivi Lia Falini Tanjung, Implementasi Asas-Asas Umum Hukum Kebendaan Dalam Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia, De Lega Lata Legal Journal, Volume 2, Number 1, January – June 2017, page 220

Guarantee Law, it is stated that it is still valid and has legal force, but the meaning or meaning of these articles is limited by the execution of the object of the fiduciary guarantee. namely [18]:

3.1. There needs to be an agreement between the two parties, (between the fiduciary giver and the fiduciary recipient) regarding breach of contract or default between the parties. If there is no agreement regarding the breach of contract, one of the parties can take legal action through a lawsuit to the court to determine/decide that the breach of contract has occurred.

3.2. The debtor or fiduciary giver does not object, to voluntarily submit the object of the fiduciary guarantee. In relation to the provisions of Article 15 paragraph (2) of the Fiduciary Guarantee Act as long as the phrase executorial power and the phrase is the same as a court decision which has permanent legal force, it is unconstitutional as long as it is not interpreted as a fiduciary guarantee in which there is no agreement on breach of contract and the debtor objected to voluntarily submitting the object of the fiduciary guarantee, then all legal mechanisms and procedures for the execution of the object of the Fiduciary Guarantee must be carried out and apply the same as the execution of court decisions that have permanent legal force.

So the implementation of the execution of the fiduciary guarantee which can be carried out by means of self-execution *(parate execution)* according to the Constitutional Court's decision through its decision says there are 2 (two) conditions that must be met by the fiduciary recipient (creditor) to carry out his own execution, namely:

3.1. The fiduciary giver (debtor) must admit he has defaulted (breach of promise),

3.2. The fiduciary giver (debtor) must voluntarily surrender the object that is the object of the fiduciary agreement,

[18]Yeyen Wahyuni Parate Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Republik Indonesia Nomor 18/PUU-XVII/2019, , Interdisciplinary Journal On Law, Social Sciences And Humanities, Volume 02, Issue 1 (2021), pp. 55-56

So the execution of the object of guarantee can only be carried out through the execution procedure in the district court and if the fiduciary giver (debtor) admits to having defaulted (breach of promise) and object to voluntarily submitting the object of the fiduciary guarantee to the creditor, then. Constitutional Court Considerations:

> "That thus it is clear and clear as long as the fiduciary rights giver (debtor) has acknowledged the existence of a "breach of promise" (default) and voluntarily surrenders the object that is the object of the fiduciary agreement, then it becomes the full authority of the fiduciary recipient (creditor) to be able to perform its own execution (parate execution). However, if the opposite happens, where the fiduciary rights giver (debtor) does not acknowledge a "breach of promise" (default) and object to voluntarily surrendering the object that is the object of the fiduciary agreement, then the fiduciary right recipient (creditor) may not carry out executions. itself, but must submit an application for execution to the district court. Thus the constitutional rights of the fiduciary giver (debtor) and the fiduciary right recipient (creditor) are protected in a balanced way."

From the description of the considerations above, it can be concluded that the execution of a fiduciary guarantee can only be carried out through a district court if the fiduciary giver (debtor) admits he has defaulted and voluntarily submits the object that is the object of the fiduciary guarantee. Meanwhile, if the fiduciary giver (debtor) does not want to admit that he is in default and does not want the object that is the object of the fiduciary guarantee to be given to the fiduciary recipient (creditor), then the fiduciary recipient (creditor) can only execute the object of the fiduciary guarantee through court procedures. There are conditions as stated in Decision Number 18/PUU-XVII/2019, the debtor does not have the obligation to submit the object of collateral to the creditor if the debtor objected to submitting it. The creditor no longer has coercive power on the basis that the debtor can refuse the delivery. The principle of droit de preference or the right to sell and take precedence over other creditors is no longer the main privilege granted to

creditors considering the increasing role of state court clerks in conducting auctions of collateral objects if they go through a judicial process [19].

The Constitutional Court is of the opinion that the norm of Article 15 paragraph (2), (3) of the Fiduciary Guarantee Law is that there is no legal certainty either with respect to the execution procedure or the time when the fiduciary giver (debtor) is declared "breach of promise" (default) and the loss of opportunity for the debtor to receive the sale of the object. fiduciary guarantee at a reasonable price. Besides often causing coercion and violence by fiduciary recipients (creditors) as well as degrading the dignity of the debtor. This is clearly a matter of unconstitutional norms in Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. For the Constitutional Court, the exclusive authority of the recipient of fiduciary material rights (creditors) can still be attached as long as there is no problem with the certainty of the time when the fiduciary rights giver (debtor) has "breached the promise" (default). And the debtor voluntarily submits the object of the fiduciary agreement to the creditor for selling himself. This means that the fiduciary giver (debtor) admits that he has "breached his promise", so there is no reason not to hand over the object of the fiduciary agreement to the fiduciary recipient (creditor) to sell it himself.

Article 15 paragraph (3), in particular the phrase 'breach of promise' can only be said to be constitutional as long as the meaning of a breach of contract 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 remedies that determine that a breach of contract has occurred. The decision of the Constitutional Court with an emphasis on the phrase breach of contract (wanprestais) which should not be determined unilaterally by the creditor but on the basis of an agreement is a decision that does provide protection for the constitutional rights of the debtor but on the other hand also distances the protection of creditors with the involvement of the court to determine the

[19]Darmiwati, Eksekusi Terhadap Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor.18/Puu-Xvii/2019, Das Sollen Journal, Volume 6, Number 2, December 2021, page 142, https://ejournal.unisi.ac.id/index.php /das-sollen/article/view/1835/1091

breach of contract/default that was committed, moreover the prerequisites for the Fiduciary Certificate indicate that the fiduciary institution does not provide complete protection to creditors having the right to fulfill the achievements in the fiduciary agreement, either the main agreement or the additional agreement, so that from an economic point of view it is feared that it will hinder the investment climate in moving capital in the instrument of fiduciary guarantee institutions [20]. This decision does not necessarily eliminate the enactment of laws and regulations related to the execution of a fiduciary guarantee certificate which aims to provide legal protection to the parties as long as it is in line with the considerations of this decision.

Therefore, in the implementation of this decision of the Constitutional Court, it will lead to multiple interpretations, because there may be parties who interpret that including the clause in the agreement is the same as entering the prohibited clause in an agreement, thus contradicting Article 1320 of the Civil Code. However, this can also be interpreted otherwise if according to the panel of judges in the district court inserting this clause in an agreement does not conflict with Article 1320 of the Civil Code because of the principle of freedom of contract.

In this case, the principle of freedom of contract and the principle of balance in an agreement does not exist. The existence of the Constitutional Court's decision basically tries to provide a balanced position for the parties, both the creditor as the recipient of the fiduciary and the debtor as the fiduciary giver, but it will create new problems when the debtor has bad faith, it will certainly create new difficulties for the creditor. to obtain his rights through execution.

The decision of the constitutional court does not abolish the existence of the right to execute the debtor by the creditor, but the execution becomes inefficient and may take a long time, because the creditor cannot immediately get his rights and must wait for the court's decision itself. In connection with

[20]Iwan Riswandie, Eksekusi Jaminan Fidusia Berasaskan Keadilan Pasca Putusan Mk No. 18/Puu-Xvii/2019, Indonesian Journal of Law Enforcement, Vol. 2 Issue 3, p. 381, https://ojs.bdproject.id/index.php/jphi/article/view/48/27

the principle of freedom of contract in the agreement, the existence of the decision of the constitutional court, of course, provides new limits for creditors in making agreements related to clauses regarding default and execution parate, because even though the clauses were made, of course they cannot be implemented with the decision of this constitutional court, so that the fulfillment of creditors' rights become obstructed. This is a new form of imbalance in the fiduciary agreement, because the debtor becomes the dominant position, and the creditor can only execute if the debtor admits he is in default or if he does not have to go through a court decision, this is certainly inefficient and takes a long time.

4. Conclusion

The principle of balance in the credit agreement has a very important role. The existence of a clause regarding fiduciary execution in the form of parate execution as contained in the fiduciary law is a form of protection of creditor rights from the debtor's bad faith. With the decision of the Constitutional Court Number 18/PUU-XVII/2019 dated January 6, 2020, the rights of creditors are limited. The Constitutional Court through its decision said there are 2 (two) conditions that must be met by the fiduciary recipient (the creditor) to carry out his own execution, namely the fiduciary giver (the debtor) must admit that he has defaulted (breach of promise), and the fiduciary giver (the debtor) must voluntarily surrender the object that is the object of the fiduciary agreement. So it can be said that if the fiduciary giver (the debtor) does not admit to having defaulted (breach of promise) and object to voluntarily submitting the object of the fiduciary guarantee to the creditor, then the execution of the object of the guarantee can only be carried out through the execution procedure in the district court.

The decision of the constitutional court basically tries to provide a balanced position for the parties, both the creditor as the fiduciary recipient and the debtor as the fiduciary giver, but it will create new problems when the debtor has bad intentions, it will certainly create new difficulties for the

creditor to obtain their rights through execution. The decision of the constitutional court made the execution inefficient. In connection with the principle of freedom of contract in the agreement, the existence of the decision of the constitutional court, of course, provides new limits for creditors in making agreements related to clauses regarding default and execution parate, because even though the clauses were made, of course they cannot be implemented with the decision of this constitutional court, so that the fulfillment of creditors' rights the agreement becomes unbalanced, because the debtor becomes the dominant position, and the creditor can only execute if the debtor admits he is in default or if he does not have to go through a court decision.

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