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JURIDICAL ANALYSIS OF CONSTITUTIONAL COURT DECISIONS NO. 18/PUU-XVII/2019 RELATED TO THE "LEASING" ANnotATION CAN STILL WITHDRAW COLLATERAL

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Abstract: The Constitutional Court's decision regarding the withdrawal of goods by leasing must go through the courts. according to MK spokesman Fajar Laksnono who stated that the contents of the Constitutional Court's decision "... there may no longer be withdrawals of leasing goods directly to creditors,". In addition, it also contains, "If there is a breach of contract or default, the execution of the fiduciary guarantee cannot be carried out by the fiduciary recipient (creditor), but must submit an application to the District Court,". It is this decision that makes pros and cons and makes its own interpretation. Regarding the "leasing" annotation, you can still withdraw. 18/PUU-XVII/2019 Regarding the "Leasing" Annotation You Can Still Withdraw Fiduciary Guarantees. And the Legal Consequences of the Constitutional Court Decision Regarding Fiduciary No. 18/PUU-XVII/2019, can creditors still carry out direct execution of fiduciary guarantees? By using the normative juridical research method, the results of the Juridical Analysis of the Constitutional Court's Decision on Fiduciary No. 18/PUU-XVII/2019 Regarding the "Leasing" Annotation You Can Still Withdraw Fiduciary Guarantees. Withdrawal of Leasing Goods Must Go Through Court". stated that the contents of the Constitutional Court's decision "... there may no longer be withdrawals of leasing goods directly to creditors,". In addition, it also contains, "If there is a breach of contract or default, the execution of the fiduciary guarantee cannot be carried out by the fiduciary recipient (creditor), but must submit an application to the District Court,". You Can Still Withdraw Fiduciary Guarantees as long as the execution is carried out based on Article 29, Article 30 and Article 31 of the Fiduciary Law and is subject to other relevant laws and regulations, including but not limited to POJK 035/POJK.05/2018. And the Legal Consequences of the Constitutional Court Decision Regarding Fiduciary No. 18/PUU-XVII/2019 That is, whether creditors can carry out direct execution of fiduciary guarantees. leasing in withdrawing fiduciary guarantees and changing the way to deal with problems arising from bad loans can be done in two ways, including the following: 1) Non Litigation 2) Litigation OJK has also issued regulations related to the execution of collateral objects by Financing Companies, including: 1) Based on the provisions of Article 21 to.d. Article 23 and Article 51 of the Financial Services Authority Regulation Number 29/POJK.05/2014 concerning the Conducting of a Financing Company Business, stipulate provisions concerning the imposition of fiduciary guarantees by Financing Companies. 2) Based on the provisions of Article 49 of the Financial Services Authority Regulation Number 30/POJK.05/2014 concerning Good Corporate Governance for Financing Companies, a cooperation mechanism has been set up between Financing Companies and other parties to perform the collection function to debtors.

Keywords: Constitutional Court Decision, Leasing, Fiduciary Guarantee.

1. Introduction

The existence of a leasing company was first regulated with the issuance of a Joint Decree of Three Ministers, namely the Minister of Finance, Minister of Industry and

Minister of Trade of the Republic of Indonesia Number Kep-122/MK/IV/2/1974, 32/M/SK/2/1974, 30/ Kpb/i/1974 dated 7 February 1974 concerning Licensing for Leasing Businesses.

Fiduciaries at that time were generally bound by making financing agreements by submitting fiduciary guarantees made privately. The financing agreement made underhand still contains big weaknesses and risks because there is no legal certainty for the creditor, so that many items that have been fiduciary collateral are found to be sold or transferred, while for execution if the debtor resists, the creditor it is not justified to carry out confiscation by taking the law into their own hands, but must file a lawsuit with the court, so this requires a long time and a lot of money, even though in general what is guaranteed fiduciarily is goods of low value, so this can hinder the automotive industry and financial industry guaranteed by fiduciary.

Fiduciary guarantees are different from fiduciaries before the issuance of the Fiduciary Guarantee Law because fiduciary guarantees must be made in the form of a notarial deed and given a new right, namely in the form of an executorial title, whereby an execution parate can be carried out immediately by the creditor without going through a permanent court decision without going through an interpreter. court seizure. For this reason, in order for the fiduciary guarantee to apply and have permanent legal force, the fiduciary guarantee deed must be registered and a fiduciary guarantee certificate is issued in which there is an injunction "For the sake of Justice based on Belief in the One and Only God", so that the fiduciary guarantee can be carried out immediately with parate execution.

In carrying out the execution of guarantees, the leasing company (credit provider) can execute the object of credit guarantees based on Article 29 of Law Number 42 of 1999 concerning Fiduciary guarantees. But the reality is many the leasing company as the lender in carrying out the execution of the collateral object in the event of a breach of contract does not comply with the applicable legal procedures. The leasing company as the lender carries out unilateral executions without prior notification when the debtor defaults. Creditors (leasing) carry out arbitrary actions, forcibly withdraw vehicles as objects of fiduciary guarantees by using the services of debt collectors which lead to criminal acts. The debtor who defaults is faced with the debt collector who must forcibly surrender his vehicle to the debt collector. Debtors who are in a weak position are out of balance with creditors in an economically strong position dealing with debt collectors hired by leasing companies[1]

This is like the case filed by two parties, namely First Apriliani Dewi and second, Suri Agung Prabowo as the first and second applicants. He didn't accept that the Alphard he had bought was suddenly withdrawn by the leasing party. Feeling that they were not being treated fairly, they sued using the Fiduciary Guarantee Law to the Constitutional Court (MK). "According to the multipurpose financing agreement, Petitioner I has an obligation to pay debts to leasing in the amount of IDR 222,696,000.00 which will be paid in installments for 35 months starting from 18 November 2016,[2] explained the applicant. During 18 November 2016 to 18 July 2017, the applicant pays the installments in a

[1] Syafrida Ralang Hartati, Execution of Fiduciary Guarantees After Constitutional Court Decision No.18/PUU/XVII/2019, Journal of Law, Faculty of Law, Tama Jagakarsa University, p.112

[2] Application for Case Number 18/PUU-XVII/2019

compliant manner. However, on November 10 2017, the leasing party sent a representative with a power of attorney from the leasing to take the Petitioner's vehicle on the pretext of default. Regarding this treatment, Aprilliani filed an objection, but there was no response to the subsequent unpleasant treatment. Not accepting this, Aprilliani asked the Constitutional Court for justice.[3]

Aprilliani Dewi and Suri Agung Prabowo are a debtor couple who were victims of allegations of default as imposed by a financing company as a creditor named PT Astra Sedaya Finance. The default accusation itself occurred because the two debtors had not paid their bad loans. Instead of sending subpoenas beforehand, PT Astra Sedaya Finance actually sent several debt-collectors directly to their residences which of course violated the method of collecting debts as stipulated in OJK Regulation Number 35/PJOK.05/2018 concerning Conducting Finance Company Businesses.

For the actions of PT Astra Sedaya Finance, Dewi and Agung then filed a lawsuit against the South Jakarta District Court and the lawsuit was granted by the panel of judges. In this case, PT Astra Sedaya Finance was declared to have committed an unlawful act. However, PT Astra Sedaya Finance remains adamant that it will carry out the execution of fiduciary objects controlled by the two debtors, thus comparing the decisions of the South Jakarta District Court to the DKI Jakarta High Court.

After the Constitutional Court Ruling, "Leasing" Can Still Withdraw Assets (Fiduciary Guarantee) Annotation of MK Decision No. 18/PUU-XVII/2019 in one of the onlinecnnindonesia.com media on January 13, 2020 carried news with the title "Decision of the Constitutional Court: Withdrawal of Leasing Goods Must Go Through Court". The contents of the news included an explanation from the spokesman for the Constitutional Court, Fajar Laksnono, who stated "... there may no longer be withdrawals of leasing goods directly to creditors,". in another section also contains an explanation, "If there is a breach of contract or default, the execution of the fiduciary guarantee cannot be carried out by the fiduciary recipient (creditor), but must submit an application to the District Court,". If you read the news, of course the conclusion is that the finance company (Lessor/Creditor) is currently no longer allowed to tow vehicles, except with a prior application to the District Court. In my opinion, this conclusion is not quite right or maybe because I do not agree. To find out more, at least it is necessary to know the legal norms that were reviewed by the Constitutional Court in Decision 18/PUU-XVII/2019, namely the norms of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law)[4]

At present there are still many forced withdrawal practices by finance companies and/or creditors, this is contrary to the Constitutional Court's decision and whether leasing can still withdraw collateral after the Constitutional Court's decision. therefore the authors are interested in conducting research with the title: Juridical Analysis of the Constitutional Court Decision No. 18/PUU-XVII/2019 Regarding the "Leasing" Annotation Can Still Withdraw Fiduciary Guarantees

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[3] https://oto.detik.com/berita/d-4858379/bermula-alphard-diarik-mk-decised-leasing is not allowed on one side. accessed May 23, 2022 at 23.01

[4] https://ercolaw.com/wp-content/uploads/2020/01/%E2%80%9CLEASING%E2%80%9D-MASIH-BISA-TARIK-ASET-ANOTASI-PUTUSAN-FIDUSIA.pdf accessed on date June 2, 2022 at 20.00 WIB

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From the description of the background of the problem above, the authors formulate the problem as follows:

1. What is the juridical analysis of the Constitutional Court decision No. 18/PUU-XVII/2019 regarding the annotation "leasing" can you still withdraw fiduciary guarantees?
2. The legal consequences of the Constitutional Court decision no. 18/PUU-XVII/2019, can creditors still carry out direct execution of fiduciary collateral?

2. Method

The method used in this research is normative juridical. Statute Approach[5]. conducted by reviewing all laws and regulations related to legal issues and issues being handled. Apart from that, this research also uses a conceptual approach. This approach departs from the views and doctrines that have developed in the science of law.

1. Primary legal materials are legal materials that have binding legal force[6] In this case, the primary legal materials will be:

a) Civil Code (burgerlijk wetboek);

b) The 1945 Constitution

c) Law Number 42 of 1999 concerning fiduciaries.

d) Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019 Concerning executor powers and phrases. Jakarta, 2020.

2. Secondary legal materials

Secondary legal materials are materials that are closely related to primary legal materials, and can help analyze and understand primary legal materials.[7] Secondary legal materials in this research are books, literature, papers, research results, articles, and other scientific works related to this research, such as:

a) Research results;

b) Scientific works of legal experts.

c) Legal reading books or textbooks;

d) Journals;

Analysis using legal interpretation or interpretation is only one of the methods of legal discovery (rechtsvinding) and apart from that there are several methods of legal discovery that can be used by jurists. In normative research, namely what should be done related to the legal issues of this research, descriptive, namely describing the content or meaning of positive legal rules, provisions of laws and regulations.

3. Juridical Analysis of the Constitutional Court Decision No. 18/PUU-XVII/2019 regarding the "Leasing" Annotation Can Still Withdraw Fiduciary Guarantees.

The Constitutional Court's decision regarding the withdrawal of goods by leasing must go through the courts. according to MK spokesman Fajar Laksnono who stated that the contents of the Constitutional Court's decision "... there may no longer be withdrawals of leasing goods directly to creditors,". In addition, it also contains, "If there is a breach of contract or default, the execution of the fiduciary guarantee cannot be

[5] Peter Mahmud Marzuki. Legal Research. Jakarta, Kencana Prenada Media Group, 2005, p.93.

[6] Suratman and Philips Dillah, Legal Research Methods, Bandung, Alfabeta, 2014, p. 67

[7] Suratman and Philips Dillah, Legal Research Methods, Bandung, Alfabeta, 2014, p. 67

carried out by the fiduciary recipient (creditor), but must submit an application to the District Court,". It is this decision that makes the pros and cons and makes its own interpretation regarding the "leasing" annotation that can still withdraw fiduciary guarantees[8]

On January 6, 2020, the Panel of Judges of the Constitutional Court pronounced a Decision on a Case reviewing Legislation, namely Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution).). This decision "Partially grants the petition of the Petitioners" and further states that several phrases and their explanations contained in Article 15 paragraph (2) and their explanations and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees are contrary to the 1945 Constitution as long as they are not interpreted according to the interpretation given by the Panel of Judges of the Constitutional Court contained in the related Decision. The phrases referred to are, first, the phrase "executive power" and "same as a court decision that has permanent legal force" (along with its explanation) contained in Article 15 paragraph (2) and second, namely the phrase "default" contained in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees[9]

DECISION

Number 18/PUU-XVII/2019

FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Those who try constitutional cases at the first and last levels, pass a decision in the case of reviewing Law Number 42 of 1999 concerning Fiduciary Guarantees against the 1945 Constitution of the Republic of Indonesia, which was filed by:

3. Name : Aprilliani Dewi
Occupation : Entrepreneur
Address : Jalan H. Wahab II Number 28 A, Jatibening, Bekasi, West Java.
Hereinafter referred to as ------------ Petitioner I

4. Name : Suri Agung Prabowo
Occupation : Entrepreneur
Address : Jalan H. Wahab II Number 28 A, Jatibening, Bekasi, West Java.
Hereinafter referred to as -------------------- Petitioner II

In this case based on a special power of attorney dated March 24 2019, authorizing Veri Junaidi, S.H., M.H., Muh. Salman Darwis, S.H., M.H.Li and Slamet Santoso, S.H. Advocate/Legal Consultant and Assistant Advocate at the Law Office of Veri Junaidi & Associates who are domiciled at Jalan Tebet Timur Dalam VIII Q Number 1, Tebet, South Jakarta, either individually or jointly acting for and on behalf of the power of attorney.

Furthermore, Petitioner I and Petitioner II are referred to as ---------- Petitioners

5. AMAR DECISION Number 18/PUU-XVII/2019

Judging:

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[8] https://finance.detik.com/moneter/d-4894009/leasing-masih-bisa-sita-kendaraan-without-decision-pentrial. Accessed on November 2, 2022 at 22.00 WIB.

[9] https://www.djkn.kemenkeu.go.id/kpknl-bekasi/baca-artikel/12953/PUTUSAN-MAHKAMAH-KONSTITUSI-NOMOR-18PUU-XVII2019-APA-IMPLIKASINYA-BAGI-PROSES-BISNIS-ELANG.html at access on November 3, 2022 at 08.00 WIB

1. Partially grant the petition of the Petitioners;
2. Declare Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" and the phrase "same as a court decision which has permanent legal force" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not construed "against a fiduciary guarantee where there is no agreement regarding default and the debtor objects to voluntarily surrendering the object that is a fiduciary guarantee , then all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate must be carried out and apply the same as executing court decisions that have permanent legal force";
3. Declare Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "default" is contrary to the Constitution of the Republic of Indonesia Republic of Indonesia of 1945 and does not have binding legal force as long as it is not 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 a legal remedy that determines that a breach of contract has occurred".
4. Stating the Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" is contrary to the Constitution The Republic of Indonesia of 1945 and does not have binding legal force as long as it does not mean "against a fiduciary guarantee where there is no agreement regarding default and the debtor objects to voluntarily surrendering the object that is a fiduciary guarantee, then all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate must carried out and applies the same as the execution of a court decision that has permanent legal force";
5. Ordering the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate;
6. Rejecting the petition of the Petitioners for other than and the rest.

Thus it was decided in the Judge Deliberation Meeting by nine Constitutional Justices, namely Anwar Usman as Chairman concurrently Member, Aswanto, Suhartoyo, I Dewa Gede Palguna, Enny Nurbaningsih, Arief Hidayat, Manahan M.P.Sitompul, Saldi Isra, and Wahiduddin Adams, each as a Member, on Monday, the twenty-fifth, November, year two thousand and nineteen which was pronounced in the Plenary Session of the Constitutional Court open to the public. nine Constitutional Justices namely Anwar Usman as Chairman concurrently Member, Aswanto, Suhartoyo, I Dewa Gede Palguna, Enny Nurbaningsih, Arief Hidayat, Manahan M.P.Sitompul, Saldi Isra, and Wahiduddin Adams, each as Member, assisted by Ria Indriyani as Registrar Substitute, and attended by the Petitioners/their proxies, the President or their representatives, and the House of Representatives or their representatives

Regarding the Constitutional Court (MK) Decision Number 18/PUU-XVII/2019 regarding Fiduciary (Decision 18/PUU-XVII/2019) which was pronounced at the MK plenary session on January 6 2020, making some financing companies ("Leasing"/Lessor/ Creditors) are worried, because they are no longer allowed to carry out self-execution (parate execution) of Fiduciary Assets/Guarantee goods, while on the other hand it is as if the Financing Consumer (Lesse/Debtor) wins" because under certain conditions "assumes" he can defend the goods he controls from direct execution by creditors.

With another meaning that the finance company (lessor/creditor) is currently no longer allowed to withdraw vehicles, except with a prior application to the district court. According to the author, this conclusion is not quite right or maybe because I do not agree. To find out more, at least it is necessary to know the norms of the laws that were reviewed by the MK in Decision 18/PUU-XVII/2019, namely the norms of Article 15 paragraph (1), (2) and paragraph (3) of Law Number 42 Year 1999 concerning Fiduciary Guarantees (Fiduciary Law),

with the following quotation:

(1) The Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1) includes the words "FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD".

(2) The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has permanent legal force[10].

(3) If the debtor defaults, the Fiduciary Recipient has the right to sell the Object which is the object of the Fiduciary Collateral on his own power[11]

Explanation of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees Article 15 Paragraph (2) In this provision, what is meant by "executive power" is that it can be implemented directly without going through a court and is final and binding on the parties to implement the decision[12]

The basis for consideration of the Constitutional Court Decision Number 18/PUU-XVII/2019 if the author analyzes it is as follows:

The phrase interpreted by the Constitutional Court is limited to the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in

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[10] Since Monday, January 6, 2020, the provisions of Article 15 paragraph (2) along 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 conditionally as long as they are not construed " for fiduciary guarantees where there is no agreement regarding breach of contract (default) and the debtor objects to voluntarily surrendering objects that become fiduciary guarantees, then all legal mechanisms and procedures in implementing the execution of Fiduciary Guarantee Certificates must be carried out and apply the same as executing court decisions that have been enforced permanent law" based on Constitutional Court Decision Number 18/PUU-XVII/2019.

[11] Since Monday, January 6 2020, the provisions of Article 15 paragraph (3) along with the phrase "default" are contrary to the 1945 Constitution and do not have conditionally binding legal force as long as they do not mean that "the existence of a default is not determined unilaterally by the creditor but on based on an agreement between the creditor and the debtor or on the basis of a legal effort that determines that a breach of contract has occurred" based on the Decision of the Constitutional Court Number 18/PUU-XVII/2019.

[12] Since Monday, January 6 2020, the provisions of the Elucidation of Article 15 paragraph (2) along with the phrase "executive powers" are contrary to the 1945 Constitution and do not have conditionally binding legal force as long as they do not mean "against fiduciary guarantees where there is no agreement regarding default and the debtor objects to voluntarily surrendering the object that is a fiduciary guarantee, then all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate must be carried out and apply the same as executing court decisions that have permanent legal force" based on Constitutional Court Decision Number 18/PUU-XVII/ 2019.

Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees and the phrase "default" in Article 15 paragraph (3) of the Fiduciary Law. Taking into account Decision 18/PUU-XVII/2019, in my opinion the juridical issues and legal considerations put forward include:

1) According to the Constitutional Court, in Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees there are problems of unconstitutionality because there is no legal certainty, related to the procedure for carrying out executions as well as regarding the time when the giver fiduciary (debtor) is declared "default" (default), as well as loss of opportunity for the debtor to obtain the sale of fiduciary collateral objects at a fair price. This is explained in the consideration of decision 18/PUU-XVII/2019 as follows:

[3.17] Considering that there is no legal certainty, both with regard to the execution procedures and with respect to the time when the fiduciary giver (debtor) is declared "default" (default), and the loss of the opportunity for the debtor to obtain the sale of a fiduciary guarantee object at a fair price , in addition to often causing acts of "coercion" and "violence" from people who claim to be parties who have the power to collect loans from debtors, can even have given rise to arbitrary acts committed by fiduciary recipients (creditors) and degrading the dignity debtor. This is clearly evidence of the existence of unconstitutional issues in the norms regulated in Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees. This is because, even if the fiduciary certificate has an executorial title which means it can be implemented as a court decision that has permanent legal force, the procedure or procedures for executing the said fiduciary certificate must follow the execution procedures as referred to in Article 196 HIR or Article 208 RBg. In other words, the execution may not be carried out by the fiduciary recipient alone but must submit an application to the district court. The full provisions of Article 196 HIR or Article 208 RBg are:

"If the defeated party is unwilling or negligent to comply with the contents of the decision peacefully, then the winning party submits a request, either orally or by letter, to the chairman, the district court referred to in the first paragraph of Article 195, to carry out the decision. order to summon the defeated party and warn, so that he fulfills the decision within the time determined by the chairman, which is a maximum of eight days.

Whereas it is further important to emphasize the Court, without intending to ignore the fiduciary characteristics that give material rights to fiduciary holders or recipients (creditors), so that fiduciary holders or recipients (creditors) can carry out their own execution of goods which are formally his own, for the sake of certainty law and a sense of justice, namely the existence of a balance in the legal position between the fiduciary right giver (debtor) and the fiduciary recipient (creditor) and to avoid arbitrariness in the implementation of executions, the Court is of the opinion that the exclusive authority possessed by the fiduciary right recipient (creditor) can remain attached as long as there is no problem with the certainty of time regarding when the fiduciary right (debtor) has "default" (default) and the debtor voluntarily surrenders objects that are the object of the fiduciary agreement to creditors for self-sale. In other words, in this case, the fiduciary giver (debtor) admits that he has "defaulted" so there is no reason not to hand over the object which is the object of the fiduciary agreement to the fiduciary recipient (creditor) to be sold by the fiduciary recipient (creditor) himself. . Whereas thus it is clear and bright as long as the fiduciary right giver (debtor) has acknowledged the existence of a "default" (default) and voluntarily surrenders the object which is the object of the fiduciary agreement, it becomes the full authority for the fiduciary recipient (creditor) to be able to carry out self-execution (parate execution). However, if the opposite happens, where the fiduciary right (debtor) does not admit that there is a "default" (default) and objects to voluntarily surrender the object that is the object of the fiduciary agreement, then the fiduciary right recipient (creditor) may not execute but must submit a request for execution to the district court. Thus the constitutional rights of the fiduciary right giver (debtor) and the fiduciary right recipient (creditor) are equally protected[13]

The explanation according to the author that:

a) According to the Constitutional Court, in Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees there are problems of unconstitutionality because there is no legal certainty, related to the procedure for carrying out executions as well as regarding the time when the giver fiduciary (debtor) is declared "default" (default), as well as the loss of the debtor's opportunity to obtain the sale of fiduciary collateral objects at a fair price

Thus the authors argue that in practice the execution of fiduciary guarantees often results in acts of "coercion" and "violence" from people who claim to be parties who have the power to collect loans from debtors, even giving birth to arbitrary acts committed by fiduciary recipients (creditors).) as well as degrading the dignity of the Debtor.

b) Furthermore, the Constitutional Court stated, without intending to ignore the fiduciary characteristics that give material rights to fiduciary holders or recipients (Creditors), so that fiduciary holders or recipients (Creditors) can carry out their own execution of goods which are formally his own, for the sake of legal certainty and a sense of justice, namely the existence of a balance in the legal position between the fiduciary right giver (debtor) and the fiduciary recipient (creditor), and to avoid arbitrariness in the implementation of the execution, the Constitutional Court believes that the exclusive authority possessed by the fiduciary right recipient (creditor) can remain attached, as long as there is no problem with the certainty of time regarding when the fiduciary right giver (Debtor) has "default" (default) and the Debtor voluntarily surrenders the object which is the object of the fiduciary agreement to the Creditor for self-sale. In other words, in the event that the fiduciary giver (Debtor) admits that he has "Default", there is no reason not to hand over the object which is the object of the fiduciary agreement to the fiduciary recipient (Creditor) to be sold by the fiduciary recipient (creditor).

2) Based on these considerations, the Constitutional Court is of the opinion that there are sufficient reasons to state in Decision 18/PUU-VII/2019, in Number 3.18 as follows:

[3.18] Considering whereas with the legal considerations as described above, there are sufficient reasons for the Court to state that the norm of Article 15 paragraph (2) of Law 42/1999, in particular the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" is only can be said to be constitutional insofar as it is interpreted that "for fiduciary guarantees where there is no agreement about the occurrence of "default" (default) and the debtor objects to voluntarily handing over objects that are fiduciary guarantees, all mechanisms and legal procedures in executing

[13] Vide: page 120 Decision 18/PUU- XVII/2019, Number 3.17 accessed on 5 November 2022 at 22.30. pm

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the Fiduciary Guarantee Certificate must be carried out and applies the same as the implementation of the execution of a court decision that has permanent legal force. Meanwhile, regarding the norms of Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees, 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 creditors with the debtor or on the basis of a legal remedy which determines that a breach of contract has occurred", as will be set forth in full in the amar decision of the case a quo; Whereas the position of the Court as will be emphasized in the injunction of the a quo case decision does not automatically eliminate the validity of laws and regulations relating to the execution of fiduciary guarantee certificates which aim to provide legal protection to parties bound in fiduciary agreements, as long as they are in line with the considerations and standing of the Court a quo. Thus, both executions carried out by the creditors themselves because there has been an agreement with the debtor or executions submitted through a district court, assistance from the police is still possible on the grounds of maintaining security and order in the execution process. Such assistance is commonplace in every district court carrying out its function in implementing court decisions that have permanent legal force in civil cases in general.[14]

The author is of the opinion of the Constitutional Court's considerations as follows:

a) The phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, can only be constitutional as long as they are interpreted "against fiduciary guarantees where there is no agreement regarding the occurrence of "default" (default) and the Debtor's objection to voluntarily surrendering the object that is a fiduciary guarantee, the consequences for this matter are all legal mechanisms and procedures that apply the same as the implementation of the execution of a court decision that has permanent legal force".

b) The phrase "default" in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees 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 a legal remedy that determines that a breach of contract has occurred";

3) According to the Constitutional Court, the decision in this case does not necessarily eliminate the validity of laws and regulations relating to the execution of fiduciary guarantee certificates which aim to provide legal protection to parties bound by fiduciary agreements, as long as they are in line with the considerations and stance of the Constitutional Court.

Thus, both executions carried out by the creditor himself because there has been an agreement with the debtor, as well as executions submitted through a district court, assistance from the police is still possible on the grounds of maintaining security and order in the execution process.

[14] Vide: page 122 Decision 18/PUU- VII/2019, Number 3.18 accessed on 5 November 2022 at 22.30. pm

In the decision, there are several legal principles related to the level of practice that cause the execution of fiduciary guarantees to apply the same as the execution of court decisions that have permanent legal force (BHT), namely:

1. Ruling on Decision No. 2. (Cumulation of Conditions) The phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in Article 15 paragraph (2) are not legally binding on:

a. For fiduciary guarantees where there is no agreement regarding default; And

b. The debtor objects voluntarily surrendering the object that is a fiduciary guarantee. If these two conditions are met, then the mechanism and legal procedure for executing the Fiduciary Guarantee Certificate must be carried out the same as executing a court decision that has BHT.

2. In Rule of Decision No. 3 The phrase "Default" in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees is only binding as long as it is interpreted:

a. 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

b. On the basis of a legal remedy that determines a breach of contract has occurred

3. In Rule of Decision No. 4 The phrase “executive power” Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees is not binding on:

a. Fiduciary guarantee that there is no agreement regarding default; And

b. The debtor objects to voluntarily surrendering the object that is a fiduciary guarantee. If these two conditions are met, then the mechanism and legal procedure for executing the Fiduciary Guarantee Certificate must be carried out the same as executing a court decision that has BHT.

According to the author, the sentence formulation used by the Constitutional Court in this decision is inefficient and ineffective. Although, the formulation of the sentence on the considerations is quite clear containing the reasons and considerations, the editorial instructions for the decision are difficult to understand. In the position of the Constitutional Court as an interpreter of laws, it should pay attention to this, bearing in mind that the interpretation of the Constitutional Court is the final interpretation that will be used by all parties in understanding laws.

If one pays attention to the Amar of Decision 18/PUU-XVII/2019, in my opinion the Amar does not provide a legal breakthrough that fundamentally changes the principles of Fiduciary Guarantees, in short the Constitutional Court only formulates practical solutions related to execution, when the Fiduciary Guarantee does not clearly agree on a breach of contract and the Debtor objects submit collateral voluntarily. In my opinion, it should be sufficient to resolve this matter through a general court because the substance in question relates to technical operational law.

However, the Constitutional Court as an institution has the authority to examine/assess the constitutionality of a law. This means that the Constitutional Court can assess whether a law is contrary to the 1945 Constitution of the Republic of Indonesia or not (constitutional or unconstitutional).[15]

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[15] Syawaluddin Hanafi, "The Authority of the Constitutional Court in Interpreting the 1945 Constitution of the Republic of Indonesia" Exposes Volume 16, Number 1, January - June 2017, page, 349.

In connection with several opinions regarding the Decision 18/PUU-XVII/2019, the question that then arises is "How is the implementation of the execution of Fiduciary Guarantees that have agreed that there is a clear and definite breach of contract (default), but the Debtor objects to voluntarily surrendering the fiduciary object , at the time of default”

If the author of the analysis is related to this matter, it is necessary to ensure in advance whether the Fiduciary Guarantee reflects the opinion of the Constitutional Court "The Fiduciary Guarantee Agreement must fulfill the principles of legal certainty and a sense of justice, in the form of a balance of legal rights between the fiduciaries (Debtors) and fiduciary recipients (Creditors[16]

With regard to Fiduciary Guarantees, the implementation of this principle is manifested in the form of the formulation of a clause regarding "voluntary surrender of objects that are objects of Fiduciary Guarantees" from the Debtor to the Creditor as a result of the occurrence of an event of "default/default" must be based on "agreement"/not based solely on The "obligation" of the Fiduciary Provider to submit the Collateral object, as stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantees.

Thus, in the event that the said Fiduciary Guarantee Agreement has adopted these principles and clauses, however "the debtor objects to voluntarily surrendering the object that becomes a fiduciary guarantee at the time of Default", then in my opinion, the Executorial Power of the Guarantee Certificate as referred to in Article 15 Paragraph (2)) Law Number 42 of 1999 concerning Fiduciary Guarantees, remains binding and its execution is subject to Article 29, Article 30 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

This is based on the following considerations:

a) The Clause/Agreement Has fulfilled the Principle of Proportionality;

By formulating the clauses "default/default" and "voluntary surrender of objects that are objects of Fiduciary Guarantees" based on an agreement not based solely on "the obligations of one of the parties mentioned in Law Number 42 of 1999 concerning Fiduciary Guarantees" this has placed the parties in the preparation of the fiduciary guarantee agreement are in a balanced position, so that agreements that occur in these circumstances must be respected legally, as a binding rule for the parties based on Article 1338 of the Civil Code.

So that the Debtor's objection to voluntarily hand over the object that is a fiduciary guarantee at the time of "default/default" is no longer relevant for consideration, considering that from the start the agreement has fulfilled the principles of legal certainty and a sense of justice, in the form of a balance of legal rights between the right giver fiduciaries (debtors) and fiduciary recipients (creditors)[17]

b) The Clause/Agreement Has Fulfilled the Principle of Good Faith. An agreement or contract as a vessel that brings together the interests of one party to another party actually demands a fair and proper form of exchange of interests which must be carried out based on good faith, this is an important point of view that explains the close

[16] Decision 18/PUU-XVII/2019, Number 3.17, p. 121.

[17] Decision 18/PUU-XVII/2019, Number 3.17, p. 121

correlation between Article 1338 paragraph (3) of the Civil Code and Article 1339 of the Civil Code.

Thus this article is the basis for the application of the Good Faith Principle to all agreements made under Indonesian law, as well as limiting the understanding of the Freedom of Contract Principle and the Consensualism Principle.

The principle of freedom of contract cannot be interpreted only for the benefit of one of the parties (especially the benefit of the party who has defaulted on the voluntary delivery of the object), but must reasonably guarantee the fulfillment of the interests of the other party in implementing the agreement according to the principle of good faith.

According to Agus Yudha Hernoko[18]states that "the purpose of the Agreement must be carried out in good faith, namely, the agreement is carried out according to decency and justice". In addition, the opinions of legal experts have been raised regarding good faith[19]which essentially explains one of the main ideas regarding the function of good faith, namely "teaching that contracts must be interpreted properly and fairly (fairly)".

Based on this principle, according to the author, the action to "protect the interests of the Debtor" who objected to handing over the object of collateral voluntarily at the time of default, even though he had previously agreed, was an improper and unfair/unfair action and contrary to the Good Faith Principle. In addition, the Debtor's actions have actually injured the creditor's rights arising from the agreement and have prevented the creditor's rights from exercising his authority based on Article 29, Article 30 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

c) If the "Executorial Power" is considered non-binding for all conditions, it will be contrary to the principle of justice;

In addition, if the Creditor and Debtor have agreed to voluntarily hand over the collateral object at the time of the event of "default/default", then by law, the existence of the agreement must be recognized and its implementation must be protected. Abandonment of the agreement instead of protecting the Debtor's right to obtain a fair price for the sale of a fiduciary collateral object, actually violates the agreement made by the Creditor with the Debtor and violates the universal principle of justice which is recognized as a generally accepted legal principle, including in the realm of law. civil[20]

The debtor's objection to surrendering the collateral object in the event of a "default/default" event even though it has been agreed beforehand, is a form of deviation and violation of the agreement. This shall not prejudice the creditor's right to carry out the execution of the collateral object based on Article 29, Article 30 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

Furthermore, if you consider "Executorial Power" in the Constitutional Court Ruling No. 2 is not binding for all conditions including the Fuduciary Agreement as described above, this would in fact violate the principle of universal justice, as well as a violation of the principle of legal certainty contained in Article 29, Article 30 and Article 31 of Law

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[18] Agus Yudha Hernoko, "Law of Agreement Principle of Proportionality in Commercial Contracts" Edition 1, 1st Print Jakarta, Kencana Prenada Media Group 2010, page, 15

[19] P.L Werry, "Development of Law Regarding Good Faith in the Netherlands", published by the Republic of Indonesia State Printing Year 1990, pp. 10-18.

[20] Journal of the Constitution Volume 13 Number 1, March 2016, published by the Registrar and Secretariat General of the Constitutional Court of the Republic of Indonesia, p. 43

Number 42 of 1999 concerning Guarantees Fiduciary, while this norm is not a norm that is tested by the Constitutional Court, it is even still valid today. Based on these considerations, according to the author, the implementation of execution based on the Fiduciary Guarantee Agreement as described above, does not need to follow mechanisms and procedures such as execution of court decisions that have permanent legal force, even though there are objections to the Debtor to surrender the collateral object voluntarily at the time of default.

Based on the discussion and explanation above, Juridical Analysis of the Constitutional Court Decision Regarding Fiduciary No. 18/PUU-XVII/2019 Regarding the Annotation "Leasing" You Can Still Withdraw Fiduciary Guarantees carried out by "Leasing" to withdraw "Assets"/objects of fiduciary guarantees, the agreement as described above can still be carried out, as long as the execution is carried out based on Article 29 , Article 30 and Article 31 of Law Number 42 of 1999 concerning Fiduciary Guarantees and subject to other relevant laws and regulations, including but not limited to POJK 035/POJK.05/2018.

4. Legal Consequences of Constitutional Court Decision No. 18/PUU-VII/2019, can creditors still carry out direct execution of fiduciary collateral?

After the decision of the Constitutional Court No. 18/PUU-XVII/2019 leasing in withdrawing fiduciary guarantees and changing how to deal with problems arising from bad loans can be done in two ways, including the following:

1) Non-Litigation Efforts, among others:

First, the Standardization of the Standard Agreement which contains the determination of the dispute settlement agreement in the agreement clause.

This dispute resolution authority is an attributive authority belonging to the relative competence of the dispute resolution institution as stated in Article 118 Paragraph (4) HIR[21]

Alternative dispute resolution as a dispute resolution mechanism outside the court Alternative dispute resolution models are quite diverse, and refer to Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. In Law no. 30/1999 in Article 11 paragraph (2) stipulates that "The District Court is obliged to refuse and will not intervene in a dispute settlement that has been determined through arbitration, except in certain matters stipulated in this law." This application for confiscation of collateral can be submitted together with a statement of claim or filed in an application filed at the Arbitration Court according to the Respondent's domicile based on Article 1 point 4 of Law no. 30/ 1999, where the competent court is the court whose jurisdiction covers the residence of the respondent.

Second, Debt Renewal (Novation) based on the provisions of Article 1381 of the Civil Code it has been emphasized that one of the events that causes agreements to be written off is due to Debt Renewal. To be able to say that a novation must indeed fulfill the elements of the agreement in Article 1320 and the elements of the novation because this

[21] Erlangga Kurniawan, After the MK Leasing Decision You Can Withdraw Assets (Fiduciary Guarantee) Annotation of MK Decision Number 18/PUU-XVII/2019. Newsletter Volume 2 Number 3 January 2020 Erco Law Firm p. 8

novation is an agreement, first the elements of the agreement must be fulfilled and secondly the elements of the novation must be fulfilled Articles 1413-1424[22]

2) Third. Consensus Deliberation for Underhanded Execution.

This execution can be based on Article 29 Article 30 and Article 31 of the Fiduciary Law and is subject to other relevant laws and regulations including but not limited to POJK 035/POJK.05/2018[23]Execution under the hand can take place as long as there is evidence in the form of an acknowledgment of the treatment of default committed by the debtor, which is usually carried out with an agreement regarding the agreement on the rights and obligations of the debtor, as well as conditions that can lead to treatment of default by the debtor in the agreed leasing agreement by debtors and creditors prior to the conflict2) Litigation Efforts, namely:

First, submit a breach of contract to court. Through a lawsuit submitted to the General Court, a Petitum can be included. The formulation of the petitum must have a clear link with the formulation of the posita[24]

An example of a petitum in a debt and credit case, the main petitum reads, punishing the defendant to pay a debt of several Rupiah to the plaintiff. Then Petitum subsidiary or additional, for example: demands that the defendant be punished to pay court fees, demands that the decision can be carried out first (uitvoerbaar bij voorraad), demands that the defendant be punished with forced payments.[25]

In the lawsuit process to determine the default must be considered the balance of the parties to the agreement. It is necessary to examine in advance whether the debtor has been identified as having defaulted. Because it has reached the stage of carrying out the execution of the vehicle unit which is a fiduciary guarantee, it has previously gone through various stages as regulated by statutory provisions.[26] Example of Decision Number /Pdt.G.S/2020/PN.Lht that the imposition of default must be approved by both of them, not only by the creditor.

Second, the Petitioner Submits Confiscation. There is a confiscation action, namely as regulated in article 227 HIR jo. Article 720 Rv. Materially regarding confiscation is also regulated in article 1131 of the Civil Code, namely that all movable and immovable property belonging to the debtor, both existing and future, shall become collateral for the debtor's individual agreement. The request for confiscation must be based on a strong reason (Article 227 HIR) and the request for confiscation can be submitted during the trial examination as long as a decision that has legal force has not been issued (Article 127 HIR). Decision regarding confiscation. An example is the creditor (leasing) applying for the execution of a fiduciary guarantee.

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[22] Rainidya Nada Andika Y., The Leasing Company's Efforts to Obtain Their Rights After the Constitutional Court Decision Number 18/PUUXVII/2019, Study Program : Legal Science Special Program : Economic and Business Law Faculty of Law, University of Atma Jaya Yogyakarta 2020 p. 46.

[23] Nyoman A. Martana, Textbook of Civil Procedure Law and Practice, Section of Procedural Law, Faculty of Law, Udayana University, 2016 p.10

[24] Nyoman A. Martana, Ibid., p. 11.

[25] https://m. Hukumonline.com/berita/baca/lt5e143b3b9f4df/pasca-decision-mk--pengaturan-jaminan-fidusia-erlu-ditata-ulang/ Accessed on November 2, 2022, 22.00 WIB

[26] Nyoman A. Martana, Textbook of Civil Judicial Procedure and Practice, Section of Procedural Law, Faculty of Law, Udayana University, 2016 p. 39

Third, Submit Execution. Execution is the official implementation of a court decision under the leadership of the head of the court[27]

Types of execution or execution of court decisions in civil procedural law are execution of paying a sum of money, execution for committing an act or real execution. The provision of assistance for the execution of Fiduciary collateral objects is also regulated in the Chief of Police Regulation Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees (Perkap 8/2011).

With the decision of the Constitutional Court mentioned above, it turns out that the practice of withdrawing fiduciary guarantees with problematic credit still has different interpretations in the execution process, some argue that it is clearer that the execution or withdrawal is mandatory through the court, while some others consider that the execution or withdrawal may be carried out directly by the creditor or through the debt collector as long as there is an agreement regarding the breach of contract and the agreement to surrender the fiduciary guarantee or the vehicle. This does not completely close the door for the Dept. collector to carry out direct execution of fiduciary guarantees as long as 1) there is an agreement regarding default 2) the debtor provides fiduciary guarantees voluntarily.

5. Conclusion

1. Juridical Analysis of the Constitutional Court Decision No. 18/PUU-XVII/2019 regarding the "Leasing" Annotation Can Still Withdraw Fiduciary Guarantees. Withdrawal of Leasing Goods Must Go Through Court". It is this decision that makes the pros and cons and makes its own interpretation of the Annotation "Leasing" You Can Still Withdraw Fiduciary Guarantees as long as the execution is carried out based on Article 29, Article 30 and Article 31 of the Fiduciary Law and is subject to other relevant laws and regulations, including and not limited POJK 035/POJK.05/2018.

a. The Constitutional Court's decision on leasing can execute fiduciary guarantees if the debtor defaults, and the debtor must surrender voluntarily without coercion

b. Leasing can be executed immediately as long as it is stated in the agreement or agreement of the debtor and creditor if the debtor defaults, then the leasing can be executed immediately. this is stated in articles 29,30 and 31. Number 42 of 1999 concerning Fiduciary Guarantees

2. The legal consequences of the Constitutional Court decision no. 18/PUU-XVII/2019, can creditors still carry out direct execution of fiduciary collateral items, in this case the creditor can still directly execute fiduciary guarantees as long as 1) there is an agreement regarding default 2) the debtor provides fiduciary guarantees voluntarily 3) fiduciary guarantees are registered / there is a fiduciary guarantee certificate 4) there is a court decision.

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