



## Legal Consequences of Fiduciary Guarantee Execution Post Decision of Indonesian Constitutional Court

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### **Abstract**

Post Constitutional Court's decision regarding the 'executory power' of fiduciary guarantees which changed the rules of the execution of fiduciary guarantees, for those who are in debtor positions, the Constitutional Court's decision may be a solution to the problem of constitutional rights. However, for financing business actors as creditors, the decision is certainly a new obstacle in doing business. This study aims to analyze the juridical implications of the Constitutional Court's decision on fiduciary agreements made before the Constitutional Court's Decision (MK), as well as the juridical implications of fiduciary agreements or on fiduciary executions that have been carried out before the MK Decision Number 18/PUU-XVII/2019. This study found that the ratio of the decision of the MK Decision Number: 18/PUU/XVII/2019 Regarding Fiduciary Guarantees does not apply the principle of balance and has no legal consequences for the fiduciary guarantee agreement made before the decision is enforced. Legislators are expected to make new legal provisions regarding the executorial status in the fiduciary guarantee agreement to provide legal certainty to the parties who will make a fiduciary guarantee agreement regarding whether or not the enforceability of execution in the fiduciary guarantee agreement is recognized.

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

### **Introduction**

A law is all the rules (norms) that must be followed in the behavior of actions in social life with the threat of compensation if violating these rules will endanger oneself or property (Kansil, 1979). One form of law in protecting the interests of community members is civil law. Civil law in a broad sense includes all material private law, or all basic laws that regulate individual interests (Subekti, 2003). In the law of guarantees, there are two types of guarantees, namely guarantees in general and guarantees in particular. Meanwhile, guarantees in particular can still be further divided into material guarantees and guarantees for debt guarantors. Legal guarantees and debt guarantees do not fully provide certainty regarding debt repayment, because the creditor does not have prior rights so that the creditor's position remains as a concurrent creditor to other creditors. Only in material guarantees, the creditor has pre-emptive rights so that he is a privileged creditor who can take advance payment of the collateral without regard to other creditors (Paparang, 2014).

The Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Security (hereinafter referred to as the Fiduciary Security Law), on September 30, 1999, was promulgated by President BJ. Habibie. Fiduciary Guarantee Law is intended to accommodate the needs of the community regarding the arrangement of Fiduciary Guarantees as a means to assist business activities and to provide certainty to interested parties. Fiduciary is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object.<sup>1</sup> Fiduciary is an *accessoir* agreement or an addition attached to the main agreement in the form of a credit agreement. In a fiduciary, there are several parties, including the fiduciary giver and the fiduciary recipient. The fiduciary giver is an individual or corporation that owns the object that is the object of the fiduciary guarantee.<sup>2</sup> While the fiduciary recipient is an individual or corporation that has a receivable whose payment is guaranteed by a fiduciary guarantee. The fiduciary giver is known as the debtor (the party who has a debt due to an agreement or law), while the fiduciary recipient is known as the creditor (the party who has receivables due to an agreement or law).

The execution of fiduciary guarantees by creditors, in practice, is carried out through a third party (debt collector). It is not uncommon for these third-party services to use intimidation and thuggery approaches *pendekatan*.<sup>3</sup> In this case, the debtors feel disadvantaged, because the object of the fiduciary guarantee is forcibly withdrawn by the debt collector who is an extension of the creditor. One of them happened to consumers Aprilliani Dewi and Suri Agung Prabowo who paid for the 2004 Toyota Alphard 2.4 A/T in light gray metallic color (Arifin, 2020). Due to a default, the creditor finally sent a representative with a power of attorney to take the debtor's vehicle. On this treatment, Aprilliani filed an objection, but it was not responded to until some unpleasant treatment was experienced (Arifin, 2020). As a result, the aftermath of the issue of forced withdrawal was brought to the Constitutional Court.

Post decision of the Constitutional Court (MK) regarding the 'executory power' of fiduciary guarantees, changing the rules of the game for the execution of fiduciary guarantees. Through the Constitutional Court Decision Number: 18/PUU-XVII/2019, for those who are in the position of debtors, the Constitutional Court's decision may be a solution to the problem of constitutional rights. The court's execution permit mechanism protects their rights from arbitrary collection or withdrawal methods. For financing business actors as creditors, the decision is certainly a new obstacle in doing business. It is no longer easy for them to reduce the risk of losses caused by defaulting debtors (Elnizar, 2020). However, if examined further, the Court's decision is not without an impact on the court. If every withdrawal of collateral due to breach of contract must go through the courts, then the court has the potential to be flooded with requests for execution of fiduciary guarantees. Transactions for purchasing motor vehicles through financing companies are numerous. This means that the district court must be ready to accept requests for execution of fiduciary guarantees from finance companies. Therefore, the constitutional court clearly stipulates this in its decision, as follows:<sup>4</sup> "...with respect to fiduciary guarantees in which there is no agreement on breach of contract (default) and the debtor objecting to voluntarily surrendering the object as fiduciary security, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions which has permanent legal force".

If there is a clause regarding achievement (what things are done by debtors and creditors) as well as about default by both debtors and creditors, it would certainly result in the execution of the fiduciary guarantee. Based on the Constitutional Court Decision Number 18/PUU-XVII/2019, the default is not only determined by one party (even if the parties violate the provisions of the agreement) but must be agreed upon by the parties regarding the default. If there is no agreement regarding the default, then the

<sup>1</sup> The article 1 Number 1, Law of Fiduciary Guarantee, 1999.

<sup>2</sup> The article 1 Number 5, Law of Fiduciary Guarantee, 1999.

<sup>3</sup> As in the Supreme Court Decision on Case Number 3192K/Pdt/2012, it states: "That the action of Defendant I in collecting credit is an unprofessional act because it prioritizes the use of intimidation and thuggery approaches rather than other approaches that place the customer as a bank partner, and therefore it is appropriate and fair if the Defendant is sentenced to pay compensation to the Plaintiff more weight."

<sup>4</sup> 2nd Decision of the Constitutional Court Number 18/PUU/XVII/2019.

creditor is not allowed to withdraw the object of the fiduciary guarantee and sell the object of the guarantee. Moreover, if there is no default agreement between the parties and the debtor is not willing to submit the object of fiduciary guarantee voluntarily to the creditor, then the execution is carried out based on the procedures and mechanisms for implementing the execution of the decision in court. The decision of the Constitutional Court Number 18/PUU-XVII/2019 was basically made by adding conditions for the execution of fiduciary guarantees to protect the debtor as the fiduciary guarantee provider from execution actions carried out without procedures by the creditor. On the other hand, the Constitutional Court Number: 18/PUU-XVII/2019 with the aim that the object of fiduciary security can be executed, as a form of legal protection for creditors as recipients of fiduciary guarantees.

This research will be divided into two parts. First, it will discuss the background of the considerations given by the judge related to the principle of balance on the rights and obligations of both parties, especially credit agreements that are burdened with fiduciary guarantees made before the Constitutional Court Decision Number 18/PUU-XVII/2019. Furthermore, in the second part, it will describe how the juridical implications of the Constitutional Court Decision Number 18/PUU-XVII/2019 on fiduciary agreements made before the Constitutional Court's Decision Number 18/PUU-XVII/2019 as well as the juridical implications of fiduciary agreements or of fiduciary executions has been carried out before the Constitutional Court Decision Number 18/PUU-XVII/2019. Finally, this research will be closed with conclusions and recommendations based.

### ***Research Method***

This research is categorized in normative juridical research. Normative research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. (Wignyosoebroto, 2002). This study used a statutory approach and a case approach. This approach was carried out by examining all laws and regulations related to legal issues and the philosophical content of a legislation and to study whether there is consistency and conformity with the provisions contained in a law between one law and another (Marzuki, 2009).

Legal research sources can be divided into research sources in the form of primary legal materials and secondary legal materials. Primary legal materials consisted of legislation, official records or minutes in the making of legislation and judges' decisions. The secondary materials were all publications on law which are not official documents. Publications on law included textbooks, legal dictionaries, legal journals, and commentaries on court decisions. The technique applied in collecting the legal materials needed in this study was through library searches, websites, online journals and so on. The technique of analyzing legal materials was conducted using the descriptive analysis method, by systematically compiling and categorizing legal materials (Nasution, 2008).

### ***Results and Discussion***

#### **Implementation of the Principle of Balance of the Parties in the Decency Ratio of the MK Decision**

Article 1 number 1 of Law Number 42 of 1999 concerning Fiduciary Guarantees that what is meant by fiduciary is "The transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are held remains in the control of the owner of the object." As for what is meant by fiduciary guarantees according to article 1 number 2 of law number 42 of 1999 concerning fiduciary guarantees, namely "Guaranteed rights to movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights, as referred to in 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." The purpose of fiduciary registration is to give birth to fiduciary guarantees for fiduciary recipients, to provide certainty to other creditors regarding objects that have been burdened with fiduciary guarantees and to give priority to creditors and to fulfill the principle of publicity because the fiduciary registration office is open to the public. The fiduciary security registration office then records the fiduciary guarantee in the fiduciary register book on the same date as the date of receipt of the registration application. The date of recording the fiduciary guarantee in the fiduciary register book is considered the date of birth of the fiduciary guarantee. On the same day the fiduciary registration office at the judicial regional office at the provincial level (if the fiduciary registration office at the regency/city level does not yet exist) issues/submits a fiduciary guarantee certificate to the applicant or fiduciary recipient.

In practice, although it is not stated in the fiduciary guarantee act, but of course the creditor can take the usual execution procedure through an ordinary lawsuit to the court. Regarding fiduciary executions through ordinary lawsuits, Fuady (2003) indicated that : "even though it is not stated in the fiduciary guarantee act, the creditors do not take the usual execution procedures through ordinary court lawsuits." Because the existence of the fiduciary guarantee law with special execution models is not to abolish the general procedural law, but to add to the provisions in the general procedural law. Another provision that regulates the execution of fiduciary guarantees other than the fiduciary guarantee law is the national police chief regulation number 8 of 2011. In the national police chief's regulation, to carry out the execution of fiduciary guarantees, certain requirements must be met including: 1. there is a request from the applicant, 2. the object has a fiduciary guarantee deed, 3. the fiduciary guarantee object is registered at the fiduciary registration office, 4. the fiduciary guarantee object has a fiduciary guarantee certificate, 5. the fiduciary guarantee is in the territory of the Indonesian state (Salamiah et al., 2017).

Basically, before the constitutional court decision number: 18/PUU-XVII/2019, the fiduciary guarantee institution allowed fiduciary givers to control the objects that were guaranteed, to carry out business activities financed from loans using fiduciary guarantees. In the implementation of financing between creditors and debtors, sometimes there is a default or broken promise. So, when the debtor breaks his promise, the creditor can execute the object that has been guaranteed through a fiduciary guarantee. According to Subekti (2002), what is meant by execution is the effort of the party won in the decision to get what is rightfully theirs with the help of legal force, forcing the defeated party to implement the decision. With a debtor who breaks his promise, the creditor can immediately execute the collateral object that is guaranteed fiduciary by first submitting an execution request to the chairman of the local district court (Abdullah, 2016). Because the fiduciary guarantee certificate contains the provisions of the words "for the sake of justice based on the one and only God". With these words, it has legal force like a court decision. This is in accordance with Law No. 42 of 1999 concerning Fiduciary Guarantee which states, if the debtor or fiduciary giver breaks the promise, the execution of the object that is the object of the Fiduciary Guarantee is carried out in the following manner (Abdullah, 2016): 1) Execution of executive titles by fiduciary recipients; 2) The sale of objects that are objects of fiduciary guarantees on the authority of the fiduciary recipients themselves through public auctions and take repayment of their receivables from the sales proceeds; and 3) Underhand sales are made based on the agreement of the parties if in this way the highest amount of price can be obtained that benefits the parties.

With the existence of a fiduciary guarantee and an executive title that allows for the execution of a fiduciary guarantee directly after a default occurs, it will provide equality between the rights and obligations of the fiduciary giver and recipient, in which the fiduciary guarantee provider is obliged to pay off his debts as protected. by the enforceability of the fiduciary guarantee that can apply if there is a credit agreement as the main agreement, so it is clear that his right to get money/loans will still be protected. On the other hand, the creditor as the recipient of the fiduciary guarantee will have the right to obtain repayment of the debt, he has given to the fiduciary guarantee provider, where this right will be

protected by the right to carry out direct execution if the debtor defaults, so that it will minimize the risk of default by the debtor as a fiduciary guarantee.

The fiduciary guarantee institution allows fiduciary givers to control the objects that are guaranteed, to carry out business activities financed from loans using fiduciary guarantees. At first, objects that became fiduciary objects were limited to movable property in the form of equipment. However, in subsequent developments, objects that become fiduciary objects include intangible assets, as well as immovable objects. In the implementation of financing between creditors and debtors, sometimes there is a default or broken promise. So, when the debtor breaks his promise, the creditor can execute the object that has been guaranteed through a fiduciary guarantee. According to Subekti (2003), what is meant by execution is the effort of the party won in the decision to get what is their right with the help of legal force, forcing the defeated party to implement the decision. In the event that the execution exceeds the value of the guarantee, the fiduciary recipient is obliged to return the excess to the fiduciary giver. If the results of the execution are not sufficient to pay off the debt, the debtor is still responsible for the outstanding debt. However, executions carried out by creditors through debt collector services sometimes create new problems between creditors and debtors. This is because the way debt collectors execute fiduciary collateral by means of violence, intimidation and even by seizing fiduciary collateral on the street, this is what causes resistance from the debtor. Thus, the police made a decision through "regulation of the head of the Indonesian national police number 8 of 2011 concerning security of execution of fiduciary guarantees. The execution of a fiduciary guarantee has the same binding legal force as a court decision that has permanent legal force, so it requires security from the Indonesian national police.

The execution of the fiduciary guarantee has changed in accordance with the constitutional court decision number 18/PUU-XVII/2019 where the constitutional court judge decided that "Article 15 paragraph (2) has permanent legal force" is contrary to the 1945 constitution of the Republic of Indonesia and does not have any legal effect. binding legal force as long as it is not interpreted "with respect to fiduciary guarantees where there is no agreement on breach of contract and debtors object to voluntarily submitting objects that become fiduciary guarantees, then all mechanisms are returned to Law Number 42 of 1999 concerning fiduciary guarantees (State Gazette of the Republic of Indonesia Year 1999). 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executory power" and the phrase "equal to court decisions and legal procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have legally binded".

The constitutional court's decision number 18/PUU-XVII/2019 decided that a fiduciary guarantee certificate has permanent executive power. Default in the execution of a fiduciary agreement must be based on an agreement between the two parties between the debtor and creditor or on the basis of legal remedies that determine that a breach of contract has occurred. In its ruling, the court stated that Article 15 paragraph (2) of law number 42 of 1999 concerning fiduciary security insofar as the phrase "executory power" and the phrase "the same as a court decision with permanent legal force" contradicted the constitution of the Republic of Indonesia. Year 1945 and is not legally binding as long as it is not interpreted "towards a fiduciary guarantee for which there is no agreement on default and the debtor objected to voluntarily surrendering the object that is a fiduciary guarantee, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as execution of court decisions that have permanent legal force" (Suhartoyo, 2020).

In the subsequent ruling, the court stated that Article 15 paragraph (3) of Law Number 42 of 1999 concerning fiduciary guarantees the phrase "breach of promise" is contrary to the 1945 constitution of the Republic of Indonesia and has no binding legal force as long as it is not interpreted that " the existence 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. Because in the explanation of Article 15 paragraph (2) the Fiduciary Guarantee is

also related and becomes the legitimacy of the creditor's executorial rights, the phrase "executory power" becomes unconstitutional as long as it is not interpreted "towards a fiduciary guarantee where there is no agreement on breach of contract and the debtor objected to voluntarily surrendering the object that becomes a fiduciary guarantee, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force. The implementation of the execution execution title under the hands of the execution parate in the court's decision is as follows (Suhartoyo, 2020): a) The form of default has been determined in the agreement; b) Default is not determined unilaterally by the creditor, but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine that a breach of contract has occurred; c) The debtor or fiduciary giver will submit the object of the agreement if the default is in accordance with the agreement; and d) The object of the agreement should not be a tangible movable object.

Execution of the executorial title as referred to in Article 15 paragraph (2) by the recipient--fiduciary Sale of objects that are objects of fiduciary guarantees on the authority of the recipient--fiduciary itself through a public auction. Underhand sales are carried out based on the agreement of the fiduciary giver and recipient if in this way the highest price can be obtained that benefits the parties. That it is important to emphasize, the fiduciary guarantee contains absolute or absolute publicity requirements, which means that the fiduciary guarantee has binding power and is executorial after the fiduciary agreement is registered and a fiduciary guarantee certificate has been issued in which it contains the *irrah-irrah* which reads "for the sake of justice based on Belief in the one and only God". Thus, the fiduciary guarantee certificate has the same executive power as a court decision that has permanent legal force (Suhartoyo, 2020).

Gustav Radbruch in (Huijbers, 1995) in the theory of legal objectives explains that one of the objectives of the establishment of the law is to provide the greatest benefit or happiness for the community. Certainty is not the goal of law but something that must exist if justice and peace are to be created. The author argues that related to the benefits provided to the parties through the legal rules regarding this fiduciary guarantee, it is the debtor as the fiduciary guarantee provider who receives benefits in the form of convenience in receiving credit, because with the guarantee it will be easier for the debtor to convince the creditor in providing loans to him. On the other hand, the Creditor as the recipient of the fiduciary guarantee gets benefits in the form of getting benefits in doing business by managing the finances of the customer, besides that the creditor also gets certainty that the money that has been lent to the debtor will be able to be paid off by the object of the guarantee.

Regarding the default, the debtor can be declared in default if it has been given a subpoena three times in a row. However, without giving a subpoena, it is said to be in default if the debtor himself admits that he has defaulted, so there is no need for a subpoena. Default is a condition in which a debtor does not carry out the achievements required in a contract, which can arise due to the intentional or negligence of the debtor itself and the existence of forced circumstances (*overmacht*) (Simanjuntak, 2007). For example, if the debtor doesn't pay the loan, the debtor himself comes to the creditor and says if he can't pay, it's up to the creditor (whether he wants to sell it anyway), In the agreement the debtor may not do that, when he does so at that time the debtor is said to be in default without having to have a subpoena.

Prior to the court's decision, Article 15 paragraph (2) and paragraph (3) states that a fiduciary certificate has an executorial title which means that the decision can be carried out as a court decision that has permanent legal force without going through the procedures or procedures for execution as carried out in the execution of the court, referred to in article 196 HIR (*Herzien Inlandsch Reglement*) or Article 208 RBg (*Rechtreglement voor de Buitengewesten*). In other words, the execution can be carried out by the fiduciary recipient himself. The provisions of Article 196 HIR or Article 208 RBg in full: "If the defeated party is unwilling or negligent to fulfill the contents of the decision peacefully, then the winning party submits a request, either verbally or by letter, to the chairman, the district court referred to at the time.

The first paragraph of the provisions of Article 195, to carry out the decision, the Chairperson orders the defeated party to summon and warns him to fulfill the decision within the time determined by the chairman, for 8 days.

Based on this explanation, it can be seen that there is a difference between the provisions for the execution of fiduciary guarantees before the constitutional court's decision where the execution of fiduciary guarantees can be carried out immediately if the debtor commits a breach of contract (default). This is because based on the provisions of the Fiduciary Law in the fiduciary guarantee agreement, there is an executorial title which has binding power as the basis for executing the fiduciary guarantee. The executorial title is intended to provide protection to creditors if the debtor is in default so that the rights of the creditor can be maintained. Indeed, all guarantees in credit agreements including fiduciary guarantees have the aim of binding the debtor to pay his debts and on the other hand providing guarantees to the creditors' rights with objects that have a value greater than the nominal issued by the creditor.

The constitutional court's decision regarding the execution of the fiduciary guarantee, according to the author, is not only against the purpose of the law, but also against the nature of the fiduciary guarantee itself. This can be proven by the fact that the fiduciary cannot provide protection for the fulfillment of the rights to the debtor's debt to the creditor quickly without incurring deeper losses to the creditor, both materially and immaterially. Thus, causing fiduciary guarantees like other forms of guarantees in general without providing other benefits that make the position of creditors and debtors of fiduciary security balanced. The parties, especially the creditor as the recipient of the fiduciary guarantee, also eliminates justice for the parties in the fiduciary guarantee agreement.

The constitutional court judge in the constitutional court decision number: 18/PUU-XVII/2019, according to the author, was wrong in considering the problems that occurred between the petitioner and the creditor so that there was no meeting point between the judge's decision and the proper purpose of submitting the petition for reconsideration, namely to provide legal protection for the debtor from the deprivation of the object of the fiduciary guarantee arbitrarily by the creditor. Therefore, the author considers that the constitutional court judge should not create a new concept of default but provide written guidelines regarding the procedure for confiscation of the object of fiduciary security that should be used by creditors. The author argues that the creation of a new concept of default is useless, this is because in the civil code, specifically Article 1243 of the civil code which basically states that "default can occur if some or all of the parties in the agreement do not perform well, have wrong achievements, or are late for achievement" If this understanding is related to the essential elements in the credit agreement as the principal agreement of the fiduciary guarantee, namely "amount of credit, interest rate, amount of installments, time of payment, and total payment" then a default in the credit agreement for the Debtor can occur if: a) The debtor does not pay the specified installments at all; b) The debtor is wrong in paying the installments or the entire amount of the debt (may include interest) as agreed; and c) The debtor is late in paying the installments or the entire amount of the debt (can be with interest) from the agreed time.

The new concept of default, in fact, does not place the execution of fiduciary guarantees as a sanction for violations but on the contrary as a sanction for fulfilling an achievement. This is a new problem because it is inappropriate for someone to be punished for fulfilling an achievement. In addition to the phrase there is no legal remedy, the constitutional court judge did not provide further explanation regarding the use of the phrase. This allows deviations from legal remedies that are carried out by someone who is not harmed by the legal action. Even though the debtor has defaulted, he can still have legal standing in taking legal action to the court on the basis of this constitutional court decision. Thus, the constitutional court's decision number: 18/PUU-XVII/2019 also has an impact on the order of legal remedies which at first can only be submitted by people who feel that they are aggrieved then can be submitted by each debtor if the creditor carries out a fiduciary execution.

Based on the description above, the author argues that although the constitutional court has changed all existing legal arrangements regarding default, execution of collateral objects, and legal remedies, the constitutional court does not provide answers and solutions to the main problems in the problems that occur related to the direct execution of the object of the fiduciary guarantee, namely execution carried out arbitrarily by the creditor. With the implementation of this constitutional court decision, creditors will still be able to carry out executions anytime and anywhere on the object of collateral so that there are no fundamental problems related to "arbitrariness" that occur in the execution of Fiduciary guarantees. Therefore, this constitutional court decision does not provide protection to the debtor and on the other hand also provides losses to the creditor. Judging from the principle of justice, the constitutional court's decision has given justice to both debtors and creditors, but justice here is not in a positive sense but in a negative sense, namely "losses experienced by both parties."

Table 1 Losses of Debtors and Creditors after the Decision of the Constitutional Court Number: 18/PUU-XVII/2019

No	Parties	Losses
1.	Debtors	The debtor does not get legal protection with the opportunity for the creditor to carry out arbitrary execution of the object of fiduciary security because the debtor can still carry out executions anywhere and anytime after the court declares that the debtor is in default.
2.	Creditors	The creditor receives a loss in the form of not being able to receive money in the amount as previously agreed, because it will be reduced by court costs to determine that the debtor has committed an act of default.

The constitutional court's decision caused losses to both parties. This is very sad considering that the creditor's position has been lowered by eliminating the creditor's right to carry out direct execution so that it tends to harm the creditor, but still cannot provide legal protection to the debtor for the arbitrary withdrawal of the object of fiduciary security by the creditor. Therefore, the author will provide solutions to these problems in the form of new rules related to the procedure for withdrawing fiduciary objects, as follow: a) The creditor must give a written warning (subpoena) at least 2 (two) times so that it can be used as a reminder that the debtor has been late in making installment payments or paying off debt which can be used as evidence of a default; and b) The creditor must provide a letter to the debtor containing the time when the fiduciary guarantee object will be withdrawn.

By this rule, the debtor will be more protected from the withdrawal of the object of fiduciary security arbitrarily by the creditor. On the one hand, with a subpoena with a minimum amount of 2 (two) times, it can ensure that the debtor has defaulted, and with a letter explaining the time it was made withdrawals can provide creditors with the opportunity to be prepared to prevent withdrawals from happening where the debtor does not want them.

### Legal Consequences of the Execution of Fiduciary Guarantee Object

The constitutional court requires the execution of objects of fiduciary security that are not submitted voluntarily by the debtor must follow the procedure for executing court decisions which have permanent legal force. In practice, it is often found that there are problems such as debtors who do not want to hand over the object of collateral, forced withdrawals by creditors, and not infrequently the object of collateral has transferred its control to a third party. The owner of the object acts as a fiduciary giver (debtor), while the fiduciary recipient (creditor) is a party who has a receivable whose payment is guaranteed by a fiduciary guarantee. "The fiduciary guarantee certificate which contains the identity of the fiduciary giver and recipient, description of the object, the value of the guarantee, to the value of the object includes the sentence "for justice based on the one godhead" as is written in a court decision".



Regarding the executive title which causes the execution of fiduciary guarantees to be carried out directly after the Debtor has defaulted or failed to pay, it will indirectly place the creditor in a situation where he does not have to spend excessive time and costs unlike the execution after the constitutional court decision which requires the approval of the debtor and court decisions. Thereby, minimizing the cost and time spent which allows certain losses to occur for creditors.

As Hamzah and Manulang (1987) defined fiduciary as a way of transferring property rights from the owner (debtor), based on the main agreement (debt agreement) to the creditor, but only the rights are handed over in a juridical-levering manner and only owned by the creditor in trust (as collateral for the debtor's debt), while the goods are still controlled by the debtor, but no longer as an eigenaar or bezitter, but only as a detentor or houder and on behalf of the creditor-eigenarr. Because of the debt agreement and fiduciary guarantee, if the debtor defaults, i.e., does not fulfill his obligations to pay the debt, then the object that is the object of the fiduciary will be executed. The provisions regarding the execution of this fiduciary guarantee are regulated in Article 29 of the fiduciary guarantee law which basically states that "if the debtor or fiduciary provider is in breach of contract, the execution of the object that is the object of the fiduciary security can be carried out by: implementing the executorial title as referred to in Article 15 paragraph (2) by the fiduciary recipient, the sale of objects that are the object of the Fiduciary Guarantee under the authority of the fiduciary recipient himself through a public auction and take repayment of his receivables from the proceeds of the sale, and underhand sales which are carried out based on an agreement between the giver and the fiduciary recipient so that the highest price can be obtained. benefit the parties."

The sale is carried out after one month has elapsed since it was notified in writing by the debtor and creditor to the parties concerned and announced in at least two newspapers circulating in the area concerned. Referring to these provisions, Article 15 paragraph (2) of the Fiduciary Law is determined that in the fiduciary certificate there is the word "for the sake of justice based on the one godhead" which has the same executorial power as a court decision that has permanent legal force. On that basis, the creditor/fiduciary guarantee recipient has the right to execute, namely selling objects that are the object of the fiduciary guarantee on his own power (parate execution). The sale of the object by the creditor can be done through a public auction or under the hand with the agreement of the debtor. However, because of this, the implementation is carried out after a period of one month has passed since the notification of the interested parties by the debtor and creditor and announced at least within two days in the newspaper.

Constitutional justice Suhartoyo (2020) explained that: "The material in Article 15 paragraph (2) of Law 42/1999 has constitutionality issues. The reason is that the position of debtors who object to submitting the object of fiduciary security is weaker because the creditor can execute it without a court execution mechanism. The judge was of the opinion in his consideration that "unilateral actions have the potential to cause arbitrary and inhumane actions, both physically and psychologically, against debtors who often override the rights of fiduciary givers". In addition, the constitutional court detected unconstitutionality in article 15 paragraph (3) of the fiduciary guarantee law. The phrase "breach of promise" does not explain the factors that cause the fiduciary giver to deny the agreement with the fiduciary recipient, it does not explain that this breach of contract results in the loss of the fiduciary giver's right to defend himself and sell the object at a fair price. Therefore, the constitutional court reinterpreted the constitutionality of Article 15 paragraph (2) in the phrase executive power and is the same as a court decision that has obtained permanent legal force so that: "For fiduciary guarantees where there is no agreement on breach of contract or default and the debtor objected to submitting voluntarily object of a fiduciary guarantee, then all legal mechanisms and procedures in the execution of a fiduciary guarantee certificate must be carried out, and apply in the same way as the execution of a court decision that has permanent legal force." Meanwhile, the phrase breach of contract in Article 15 paragraph (2) of the fiduciary guarantee law must be interpreted as "the existence 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 has resulted in creditors having the convenience of executing fiduciary guarantees. Although it sounds easy, in practice the execution of this fiduciary guarantee often causes problems that end up harming one of the parties. An example is the case of unlawful acts with register number 345/PDT.G/2018/PN.jkt.Sel. The case began with the existence of a multipurpose financing agreement to purchase one car. The plaintiff stated that he had paid the installments on time, but one day the defendant suddenly executed the car which was the object of the guarantee on the premise of breach of contract/default. The plaintiff then filed a letter of complaint regarding the action, but it was not responded to and even received less favorable treatment. This case then ended in court in favor of the plaintiff and stated that the defendant had committed an unlawful act because he carried out an execution that was not in accordance with legal procedures. However, the defendant did not implement the decision on the pretext that the fiduciary certificate has the same executive power as the court decision. In the end, the plaintiff filed a judicial review application to the constitutional court against Article 15 paragraph (2) and (3) of the fiduciary guarantee law. The constitutional court on the petition gave a decision by giving an interpretation of the phrase executorial power and the same phrase as a court decision with permanent legal force, as well as the phrase breach of contract in Article 15 paragraphs (2) and (3) of the fiduciary guarantee law. In essence, the decision of the constitutional court contains 3 (three) things, namely as follows:<sup>5</sup>

1. For fiduciary guarantees where there is no agreement on breach of contract (default) and debtors object to voluntarily submitting objects that are fiduciary guarantees, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have inkraacht;
2. The existence of a default is not determined unilaterally by the creditor but on the basis of an agreement made between the creditor and the debtor or on the basis of legal remedies that determine that the act of default has occurred;
3. For fiduciary guarantees where there is no agreement on breach of contract and debtors object to voluntarily submitting objects that are fiduciary guarantees, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have legal force permanent.

Based on the decision of the constitutional court, it can be concluded that the execution of the fiduciary guarantee is carried out when there is an agreement regarding the breach of contract and the debtor's willingness to surrender the object that is the object of the fiduciary. If there is no agreement regarding the breach of contract and the debtor does not submit the object of collateral voluntarily, then the procedure for executing the fiduciary guarantee will be the same as the execution of a court decision that has permanent legal force, namely by submitting a request for execution to the district court. In addition, breach of contract also cannot be determined unilaterally. There must be an agreement regarding the breach of contract/default determined by both parties or on the basis of legal remedies in the form of a lawsuit stating that one of the parties has committed an act of default.

With the issuance of the constitutional court's decision which results in the execution of fiduciary guarantees cannot be executed directly if the debtor is in default, then this constitutional court's decision has violated the nature of the fiduciary guarantee itself which is basically intended to provide protection to creditors against defaults committed by the debtor. The execution of fiduciary guarantees after the issuance of the constitutional court decision tends to be long-winded. In addition, it can also cause legal uncertainty, where legal certainty, one of which requires the existence of legal rules that do not overlap with one another. The overlapping rules in question are Article 15 paragraphs (2) and (3) of the fiduciary law which states that a fiduciary guarantee has an executorial title which has the same power as a court

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<sup>5</sup> (BP Lawyers Counselors at Law, 2020).

decision which has permanent legal force so that if there is a breach of contract (default) by the debtor, creditors can directly execute by selling the object that is the fiduciary guarantee. However, with the provisions in the constitutional court's decision, the court has indirectly created an irregularity where according to the constitutional court's decision the execution of fiduciary guarantees must be based on a court decision first, this will cause overlapping rules with the executorial title in the fiduciary guarantee agreement itself. With the decision of the constitutional court, the essence of the executorial title cannot be carried out in accordance with the mandate of the laws and regulations, namely "the execution can be carried out immediately in the event of a breach of contract". Meanwhile, further, the executive title as referred to in Article 15 paragraph (2) of the Fiduciary Law is the same as being strengthened by a court decision that has permanent legal force or *inkracht*. Thus, if there is an executorial title, it is not logical to require another court decision on the same subject, execution of the object of guarantee.

The rest, although in the case of the constitutional court's decision, it is a newer rule against the fiduciary law. Thus, based on the principle of *lex priori derogate legi posteriori*, the provisions of the constitutional court's decision will override the provisions of the fiduciary law, which means that the law will continue to develop over time, and distributive justice will apply to the parties involved in the regulation. In the end, it is natural that there should be no equal treatment of creditors holding fiduciary guarantees before and after the issuance of the constitutional court's Decision. However, it is also natural that cumulative justice should be applied to creditors holding fiduciary guarantees related to legal certainty in obtaining protection related to defaults committed by debtors in paying off their debts. Regarding protection against breach of contract, creditors must obtain the same legal certainty without distinction before or after the issuance of the constitutional court decision. Therefore, it is better to provide equal protection to creditors, there should be no overlapping rules that cause confusion in providing such legal protection. Apart from all that, the constitutional court's decision does not necessarily abolish the provisions regarding the executorial title in fiduciary guarantees as regulated in the fiduciary law. Therefore, there are two rules related to the same problem that contradict each other. As explained earlier, when viewed from the time when the two legal rules came into effect, the constitutional court's decision will override the rules for the execution of fiduciary guarantees contained in the fiduciary law. However, the author has a different opinion that the executorial title in the fiduciary agreement is more specific than the constitutional court decision.

The principle of *pacta sunt servanda* or binding force is the principle of binding the agreement for the parties concerned in the agreement. The judge or third party must respect the substance of the contract made by the parties, as befits a law. They must not interfere with the substance of the contract made by the parties (Siddik, 2014). Article 1338 of the civil code (BW) paragraph (2), states that "all agreements made legally apply as laws for those who make them. Therefore, based on this provision, it can be seen that the fiduciary guarantee agreement made legally by the parties based on the provisions of the legislation, including the legal terms of the agreement in Article 1320 of the Civil Code can bind the parties as the law applies. Therefore, the agreed provisions can be considered as a source of law and conflicts with other sources of law, including the previous judge's decision (jurisprudence) may occur. Based on these articles, the agreement is a law for them and other parties in which a third party must respect the agreement that has been made by the parties. The respect clause means that third parties, including judges, may not interfere with the contents of the agreement that has been made by the parties. Meanwhile, not interfering means not adding or subtracting or not removing contractual obligations that have been agreed upon by the parties (Laila, 2016). Regarding the conflict between the executive title in the fiduciary agreement and the Constitutional Court's decision, the *lex specialis derogat legi generalis* principle will apply. In this case, a fiduciary agreement containing an executive title will apply as a more specialist provision because the agreement specifically applies and binds the parties to the agreement only. In other words, the agreement is a provision that specifically applies only to the parties. Therefore, the agreement is *legi specialis* for the parties compared to the jurisprudential provisions (MK Decisions) which are more generalist because of their general nature. Thus, juridical prudence (MK Decision) in this case can be interpreted as a legal provision that is *legi generalist*.

Based on those arguments, it can be said that in addressing the conflict between legal sources related to the execution of this fiduciary guarantee, the principle of *lex priori derogat legi posteriori* cannot be applied solely. Because the provisions in the fiduciary law, especially regarding the executorial title in fiduciary guarantees, have been stated in a new source of law, namely the fiduciary guarantee agreement which is more specific than the constitutional court's decision. In this case, it is more appropriate to apply the principle of *lex specialis derogat legi generalis*. Thus, the provisions of the executorial title in the guarantee agreement are prioritized for their application to the parties by overriding the provisions in the constitutional court decision. Thus, it can be interpreted that the fiduciary guarantee execution regulations in the constitutional court's decision cannot be applied retroactively, precisely to the parties who have previously made a fiduciary guarantee agreement. However, it is still possible if the provisions in the constitutional court decision are applied to the new fiduciary guarantee agreement to be made. However, to provide legal certainty specifically regarding the "status of the executive title" a new legal provision must be made which acts as an affirmation of the enforceability of this executorial title. Because, currently the constitutional court's decision only changes the procedure for the execution of fiduciary guarantees, without changing the sound of the provisions in article 15 paragraphs (2) and (3) of the fiduciary guarantee law.

## Conclusion

The decedential ratio of the constitutional court decision number: 18/PUU/XVII/2019 concerning fiduciary guarantees does not apply the principle of balance. This can be seen from the elimination of the right of the creditor as the recipient of the fiduciary guarantee to execute the object of the fiduciary guarantee directly if the Debtor as the fiduciary guarantee provider breaks his promise. This indirectly eliminates the balance between the rights and obligations that exist between the debtor and the creditor in the credit agreement who also acts as the giver and recipient of the fiduciary guarantee. The constitutional court's decision number: 18/PUU/XVII/2019 concerning fiduciary guarantee has no legal effect on the fiduciary guarantee agreement made before the constitutional court's decision is enforced. Because the constitutional court decision as a source of law is not retroactive (retroactive) so the provisions contained in it only bind the fiduciary guarantee agreement made after the date of the enactment of the constitutional court decision number: 18/PUU/XVII/2019. Thus, the judge is required to decide fairly regarding the breach of contract committed by the debtor as the fiduciary guarantee provider related to the execution of the fiduciary guarantee object. This is intended so that creditors can still get legal protection by minimizing the losses suffered as a result of the enactment of the decision. Furthermore, for the government, especially legislators, it is recommended to make new legal provisions regarding the status of executive titles in fiduciary guarantee agreements. This is intended to provide legal certainty to the parties who will make a fiduciary guarantee agreement regarding whether or not the enforcement of the executorial title in the fiduciary guarantee agreement is recognized. In addition, the public, especially creditors, are required to carefully consider the credibility of the prospective debtor with the aim of reducing the risk of default and default during the credit process.

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