

The Executorial Title of Fiduciary Guarantee in the Digitalization Era for Business Needs

Martua Eka Wijaya Tambunan, Grace Natalia Hengki Famdale,
Syamsuddin and Abraham Pangihutan Sinaga

martua.eka.wijaya-2021@fh.unair.ac.id

Universitas Airlangga

Abstract

This paper aims to address the issue of executorial title in Indonesia regarding the latest regulations in fiduciary whether it is still relevant to the development of increasingly advanced information technology. The number of fiduciary disputes in the Supreme Court brings out the fact that fiduciary regulation still does not fulfill the needs of the parties involved. With regard to that matter with the issuance of the Constitutional Court's Decision Number 18/PUU-XVII/2019, the executorial title of the fiduciary certificate seems to be dwarfed. It is important that we identify and address the issues of fiduciary guarantee which are related to the regulation of the governance system in utilizing technology to facilitate and provide protection for investors to make the atmosphere of investment in Indonesia more interesting. The methodology that will be adopted in conducting this study would be a normative legal analysis of all laws and regulations regarding fiduciary guarantees that will provide insight to society and the government, especially stakeholders who are involved in the fiduciary guarantee agreement. We hope to recommend through this paper that specific legislation be created to improve the social and legal protection of business people in order for them to be able to conduct safely and freely business activities in the investment climate of the financial industry which has the potential to boost the Indonesian economic growth.

Keywords: Fiduciary Guarantee; Executorial Title; Business Needs.

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Introduction

Trusts have been used in Indonesia since the Dutch colonial era as a form of certainty that emerged from the jurisdiction. This form of warranty is widely used in lending and borrowing because the loading process is considered simple, easy and quick, but it does not guarantee legal security. The fiduciary guarantee facility allows the fiduciary lender to dispose of the collateral and use the fiduciary guarantee to carry out the business funded by the loan. Initially, the target was limited to movables in the form of devices. However, in future developments, the items to be guaranteed include not only immovables but also

many intangibles. The Fiduciary Guarantee Law aims to address the needs of the community related to the issuance of fiduciary guarantees as a means of supporting business activities and providing legal certainty to stakeholders. As mentioned earlier, the fiduciary guarantee provides convenience to the parties who use it, especially the fiduciary giver. On the other hand, since the fiduciary guarantee is not registered, it does not guarantee the person who receives the fiduciary guarantee. The fiduciary giver can guarantee other items that interfere with the trust without the debtor's knowledge.¹

On the other hand, the need for credit has increased recently. Businessmen have made a lot of efforts to increase their capital to create a growing business. The community is beginning to recognize that capital, along with other requirements, marketing, is now an important requirement for business development. Attempts by many businessmen and the general public to raise additional capital consist primarily of borrowing. Loans are obtained from Indonesian banks or guarantors. Guarantee offices are needed by economics, entrepreneurs, or business people. Trust is the basis of the agreement, and the agreement itself is strengthened by concrete guarantees.

Guarantee as a legal system creates the principles of civil law that play an important role in commercial law. One of the growing guarantees in Indonesia is fiduciary guarantee. Trust literally comes from the word "fides" which means trust.² Under these circumstances, the legal relationship between the debtor (fiduciary giver) and the creditor (fiduciary recipient) is one of trust. The underlying principle of the relationship between the two is the principle of trust. The debtor expects to return the property deposited by the creditor after the debt is paid off, and conversely, the creditor believes that the debtor will not misuse the securities at hand. Fiduciary is a form of guarantee created outside the scope of the law to fill the shortage of the deposit system. The evolving needs of the community require

¹ M Jamil, 'Fiduciary Security Arrangements and Issues in Indonesia' (2021) 1 Journal of Human Rights, Culture and Legal System.[110].

² Sri Redjeki Hartono, *Hukum Ekonomi Indonesia* (Bayumedia Publishing 2007).[163-164].

a form of collateral that allows people to obtain collateral credit while using the collateral for daily business purposes.³

Fiduciary is considered more appropriate and in line with the development of the times and the needs of society. In the construction of the fiduciary guarantee, the property of the property or the property is transferred from the debtor to the creditor. In addition, in the fiduciary sector, if the debtor is able to repay the debt, the ownership of the security must be returned to the debtor. In general, the development of trust in Indonesia is driven by the needs of the community and the enactment of Indonesian Basic Agricultural Law. Depending on the recognized needs of the community, the escrow process is simpler, more flexible, cheaper, faster, and most importantly, the debtor in both immovable and immovable settlement. You can continue to use the asset for everyday use or work. Based on Law Number 42 of 1999 on Fiduciary, it aims to meet the needs of the community in terms of trust arrangements to support business operations and provide legal certainty to stakeholders.⁴

Fiduciary guarantee could be a form of means from the authorities to facilitate the implementation of funding efforts. With the enactment of the Fiduciary Guarantee Law, the binding of debt guarantees created through fiduciary guarantees have to be compelled to observe the provisions of its laws. Before the supplying of the Fiduciary Guarantee Law, the matter of registering fiduciaries is not a responsibility but a matter that had to be carried out. The Fiduciary Guarantee Law regulates the duty to sign in fiduciary guarantees for you to produce legal reality to fascinated events and also the registration of fiduciary ensures this fiduciary assure provides privilege to the fiduciary recipient. Fiduciary guarantees are typical products that are applied to produce protection for humans in particular. Once someone defaults, the creditor could request damages to the debtor through execution on fiduciary guarantees. With fiduciary registration, the

³ Yuli Prasetyo Adhi, 'Characteristics and Problems of Online Fiduciary in the Imposition of Fiduciary Guarantee in Indonesia' (2014) 4 South East Asian Journal of Contemporary Business Economics and Law.[55].

⁴ Rachmadi Usman, *Hukum Jaminan Keperdataan* (Bumi Aksara 2017).[153].

execution of bail products are often meted out right away while not awaiting a court decision. This sort of condition makes it easier for money establishments to withdraw compensation from funding provided to customers.⁵

The fiduciary guarantee is one in all the materials guarantees. Thus, fulfilling the characteristics as material security. Specific laws concerning this fiduciary guarantee are contained within the Fiduciary Guarantee Law. The regulation of fiduciary guarantee during this law is in line with the principles of fiduciary guarantee at intervals the overall provisions in the Book of Civil Code. Article 1131 of the Book of Civil Code states that "all objects of an individual, every movable and immovable, each existing and new ones will exist in the future, turning into a guarantee for all human personal engagements such". In Article 1131 of the Book of Civil Code is ordered down the ultimate principle of somebody's rights against human rights. Thus, all debtors' wealth becomes collateral for debtors to creditors. The article shows that everyone is in charge of their debts, this responsibility is within the form of providing their assets, each movable and immovable object, and if necessary, they are oversubscribed to pay off their debts. The fiduciary guarantee establishment has been celebrated to the general public supported the Law Number 42 of 1999 regarding Fiduciary Guarantee in Article 1 states that "fiduciary is that the transfer of possession rights to things based on trust, however what's transferred continues to be with the owner of the object".⁶

The passage explains the purpose of the fiduciary guarantee law, which is to provide businesses and their investors with assurance that their financial interests will be protected. Article 1 of Law Number 42 of 1999 regulates restrictions on the transfer of fiduciary property rights. This article allows people to keep control of fiduciary property if it is supported by a trust or if it is an object whose possession rights are transferred. The trust means that one thing that is guaranteed will

⁵ Muhammad Maksum, 'Implementation of Fiduciary Law in Sharia Financing Contract' (2015) 3 Jurnal Cita Hukum-Indonesian Law Journal.[1].

⁶ Fani Martiawan Kumara Putra, 'Pendaftaran Online Jaminan Fidusia Sebagai Suatu Fasilitas Kredit Dengan Potensi Lemahnya Perlindungan Kreditor' (2019) 24 Perspektif: Kajian Masalah Hukum dan Pembangunan.[95].

continue to be under the debtor's authority, this is what the individual fears once the debtor appears to be in default. Similar to other debt guarantee agreements, a fiduciary guarantee agreement represents an agreement between two parties. In Article 29 Paragraph (1) of the Fiduciary Guarantee Law, it is stated that this type of agreement typically includes a master and final agreement. If the parties fail to meet the debtor's promise, it should be resolved right away.⁷

The breach of contract or default is often within the style of the individual failing to satisfy its reimbursement obligations inside the maturity of debt assortment or failing to fulfill the master agreement and guarantee agreement commitments, although the debt itself has not matured. If the due date between the two parties has passed then a fine can be imposed and a warning can be given two times a week, which is if the primary warning is mostly soft and is still being ignored, then the aggrieved party can provide a second warning that's firmer than before. Once the second warning does not offer a settlement and the individual remains not responsible, a third warning is given by giving two choices which is to pay damages (compensation) or be sued. Execution is an in progress action of all civil procedural laws. Therefore, the legal basis for execution is an indivisible part of implementing the foundations contained within the HIR or RBG. This includes pointers for applying the rules that refer to the statutory arrangements laid out in the HIR and RBG. Relating to the execution of a fiduciary object of the execution procedure in Article 15 Paragraph (2) of Fiduciary Guarantee Law, it is stated that the fiduciary guarantee certificate following the objectives in Paragraph (1) has identical social control power as a court call that has already been issued and have the permanent legal force. The creditor's right to directly ask for responsibility of the debtor's default is given inside the deadline allowed by law without or before asking for court intervention. However, if the debtor does not actively pay into a debt that had been recorded, in that case, the creditor has the right to use the debtor's assets as collateral to demand the execution of his receivables (right of recovery and right of execution).

⁷ J Satrio, *Wanprestasi Menurut KUHPerdara, Doktrin, dan Yurisprudensi* (PT Citra Aditya Bakti 2012).

Executing creditors can be done through requesting assistance from parties who have the authority to enforce fiduciary guarantees. The Fiduciary Guarantee Law, Article 15, Paragraph (2), states that “the fiduciary guarantee certificate has the same executorial power as a Court’s Decision which has permanent legal force.” This means that, if the debtor is in default, the fiduciary can carry out direct execution without court mediation. This is regulated in Article 29 of the Fiduciary Guarantee Law, which provides three ways creditors can execute objects of fiduciary guarantees without court mediation if the debtor defaults.

Breach of contract (default) is the implementation of an obligation that is not on time or is carried out inappropriately. Default can occur because of errors, negligence and or deliberate actions. In general, default occurs after the debtor is declared negligent as stated in Article 1243 of Book of the Civil Code, the power of the fiduciary recipient to carry out the act of execution is reinforced by among others the terms and conditions in the fiduciary agreement which read as follows: “in the event that the fiduciary and or debtor does not implement or fulfill any of the provisions in this deed and or one of the provisions in the credit agreement, especially in the case of the fiduciary giver and or debtor being negligent, the negligence is solely proven by the passage of time. That is determined, without which there is no need for a bailiff’s warning letter or other similar letter, then in his own power the fiduciary has the right to sell the object of the fiduciary guarantee based on the executorial title or through public tenders, or through an under-hand sale made based on the agreement between the fiduciary giver and the recipient, in this way the highest favorable price can be obtained to the parties”.

Article 30 of the Fiduciary Guarantee Law states that the guarantee provider is obliged to provide the subject of the guarantee within the context of the execution of the fiduciary guarantee. Therefore, in a fiduciary guarantee agreement, one of the terms of the contract usually includes a clause confirming that the fiduciary recipient uses the rights granted as agreed. The fiduciary giver shall be able to deliver the coverage of the fiduciary guarantee to the fiduciary recipient in a well-preserved state after receiving the notice or warning of the fiduciary recipient

within a specified period at the time of concluding the contract. If the fiduciary recipient still fails to meet its obligations within the set time period, then with the elapsed time without the need for a bailiff's warning letter or other similar letter, the fiduciary recipient or his legal proxies are entitled to observe the applicable laws and regulations, the fiduciary recipient or its statutory agent has the right to take or order to take over the coverage of the fiduciary recipient's warranty after the expiration of the period.

In its implementation, debtors often forget their responsibilities to pay their bill. To triumph over this hassle, the most common method used by creditors is through collection offers. The Constitutional Court issued a decision stating that bad behavior by a debt collector can be addressed by issuing a court order. The decision is that the execution mechanism for the object of fiduciary protection will be amended with the help of the Constitutional Court as long as it is not voluntarily provided by the debtor. Previously, the Fiduciary Law allowed lenders to execute the object of fiduciary guarantee themselves, but now to perform the execution, lenders must submit an application to the District Court. However, if the debtor admits there is a default or default in his agreement with the creditor, then the implementation of direct execution without going through the district courtroom can be accomplished.⁸ This circumstance is contrary to the principles of fiduciary security and the Fiduciary Guarantee Law which makes it easy for creditors to execute the object of fiduciary guarantee if the debtor is in default. This is very detrimental to creditors and creates legal uncertainty in the execution of the fiduciary guarantee.⁹

The current regulations on fiduciary guarantees may no longer be relevant to the ongoing system of business competition between finance companies or the disruption of the rights of the debtor as the borrower. The weak execution aspects

⁸ Sofyan Wimbo Agung Pradnyawan and others, 'Execution of Fiduciary Collateral Based on the Decision of the Constitutional Court Number 18/PUU-XVII/2019' (2020) 1 Indonesian Journal of Law and Policy Studies.[142].

⁹ Siti Malikhatun Badriyah and others, 'Implementation of the Constitutional Court Decision Regarding the Execution of Fiduciary Guarantees and Inclusion of Default Clauses in Indonesia' (2021) 10 International Journal of Criminology and Sociology.[33].

of fiduciary guarantees raise their own problems. From 2018 to 2019, not a few cases were reported to the Police but there was a lack of evidence so that they could not be followed up. In the majority, the cases are related to Article 35 and 36 of the Fiduciary Guarantee Law. The rapid financing business progress must certainly be balanced by clear regulations from the government in order to create a comfortable business atmosphere for all parties, especially creditors and debtors. The reason is that the creditor certainly hopes that the financing provided to the debtor has a level of security from various risks that will occur, especially the non-payment of debts that have been lent to the debtor. The debtor also hopes that there will be fairness and a sense of security in the financing process so that the debtor feels protected from unilateral efforts from creditors in the process of providing debts to the payment of debts or the process of settling receivables themselves.¹⁰

The dynamics of business development in Indonesia, which is triggered by advances in science and technology which have now entered the latest industrial era, brings changes to the development of trade which can currently be done electronically through digital electronics, artificial intelligence, big data and robotics. Technological advances on the one hand can make a positive contribution to the improvement of welfare, progress and changes in human civilization that cause unlimited world relations (borderless) and this can cause significant socioeconomic and cultural changes. It also increased company investment, increased productivity and quality at the same time can cause a shift in the role of conventional in the market, the emergence of disputed competition, as well as the emergence of unlawful acts of business actors. This process will continue to run amid ability or even incompetence, especially to the negative impacts that may be caused. Thus, the government's ability can be observed by society to regulate business patterns with the latest technological advances such as the digital era in buying and selling transactions and so on.

¹⁰ *ibid.*[34].

Fiduciary Guarantee Regulations Regarding Technology Utilization

In developing countries such as Indonesia, financing by bank and non-bank institutions is well known as credit. Trust in the ability of the debtor to be able to provide counter performance in receivables as an achievement in the form of money owed. This modern credit has several purposes, namely to provide benefits to creditors obtained through interest in conventional credit agreements or in the form of margins in financing agreements. On the other hand, the customer also gains benefits, especially if the credit is intended to support the business continuity of the debtor where the credit is made for the purpose of developing the business development and development of the debtor to easily obtain the required objects. The second objective is to encourage national development in various sectors so that through credit it can increase the amount of tax revenue, open or expand job vacancies, increase the number of goods and services needed by the community, as well as the amount of foreign exchange. However, a loan agreement is a “preliminary agreement” for the delivery of money if the provision is the result of an agreement or understanding of the legal relationship between the lender and the borrower. Laws are formed to achieve one of the legal purposes: the existence of legal certainty. Legal certainty as one of the purposes of the law itself must be felt by all communities, not just one group. In other words, the law has the universal character that everyone is treated equally before the law. The Fiduciary Guarantee Law requires legal certainty over the implementation of fiduciary guarantee object activities so that special rights can arise from the issuance of a fiduciary guarantee certificate. As regulated in Article 1 Paragraph (2) of the Fiduciary Guarantee Law, which is the emergence of a position that is prioritized for fiduciary recipients over the creditors. However, this can be obtained by fulfilling the provisions of the Fiduciary Guarantee Law.¹¹

Economic development requires the existence of a state of attitude to manage underutilized economic resources, as well as being oriented and integrated to

¹¹ Recky Rizkiryanto Permana, 'Legal Certainty on Fiduciary Guarantee Deed Based on Power of Attention Under The Leasing Agreement' (2021) 2 International Journal of Latin Notary.[19].

improve people's well-being. Article 33 Paragraph (4) of the Constitution of the Republic of Indonesia in 1945 states "The national economy is based on economic democracy, with the principles of reciprocity, fairness, efficiency, environmental sustainability, independence, as well as by maintaining a balance of economic progress and national unity". This is the basis of Indonesia's constitutional economic development, which focuses on improving people's well-being as the highest sovereignty of its owners.¹²

The opportunity to apply technology on fiduciary guarantee is wide open with the existence of arrangements in several laws and regulations that apply and support including Article 15 Paragraph (3) Law Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning Notary Position, which here in after we call it Law on Notary Position Amendment. It is stated that in addition to the authority as referred to in Paragraph (1) and Paragraph (2),¹³ Notaries have other authorities stipulated in the legislation. The explanation states that what is meant by other authorities stipulated in the legislation includes the authority to certify transactions conducted electronically (Cyber Notary) such as making waqf deed certificates and aircraft mortgages. The optimization of the use of information technology in licensing services has succeeded in increasing the ease of doing business index in several countries such as Singapore, Malaysia, Hong Kong, Taiwan and South Korea. Singapore uses a system called *Bizfile*, an internet-based system starting from online registration, submission and information retrieval. Meanwhile, South Korea introduced an online-one stop shop and *Star Biz*. The achievement of the ease of doing business index of several countries that utilize IT is consistently far above Indonesia. Especially Singapore which has always occupied the top three in the last five years.¹⁴

¹² Grees Thelma Mozes and others, 'Legal Certainty in the Pawn Guarantee System in Indonesia in Anticipation of Opportunities and Challenges of Global Economic Competition' (2016) 6 Public Policy and Administration Research.[51].

¹³ Agus Suhariono and others, 'Sistem Publikasi Pendaftaran Tanah (Kajian Sistem Publikasi Negatif Bertendensi Positif)' (2022) 5 Notaire.[17].

¹⁴ Muhammad Syafiq, 'Birokrasi Di Era Revolusi Industri 4.0:(Studi Kasus Pelayanan Perijinan Memulai Usaha Di Indonesia)' (2019) 1 Journal of Social Politics and Governance (JSPG).[14].

The paradigm shift in State administration starting from the Old Public Administration (OPA), New Public Management (NPM), and New Public Service (NPS) has also colored the shift in bureaucratic values. The Old Public Administration (OPA) was heavily influenced by Max Weber's view of the ideal bureaucracy. The Old Public Administration (OPA) places the government at the center of government administration. Guy Peter summarizes the six principles adopted in the OPA paradigm, namely : the civil service is apolitical; hierarchy and rules; resilience and stability; institutionalized civil service; internal settings; and equality (internal and external to the organization). Among others, Government Regulation Number 21 of 2015 concerning Fiduciary Guarantee Registration Procedure and Deed of Fiduciary Guarantee Fee. This regulation was enforced to replace Government Regulation Number 86 of 2000 on the same subject. From a substantial standpoint, there is no significant difference between the two. However, the drafting of Government Regulation Number 21 of 2015 was a step to harmonize some technical regulations relating to the fiduciary guarantee. Among these regulations were The Decree of Ministry of Law and Human Rights Number 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Guarantee and Number 10 of 2013 concerning The Procedure of Electronic Registration of Fiduciary Guarantee. The efforts to harmonize these regulations must be done as Government Regulation Number 86 of 2000 did not accommodate electronic registration of fiduciary guarantee. This means there is an absence of law which underlies the practice of electronic registration for fiduciary guarantee. The problem is, this deficiency was not followed by amending Fiduciary Law up until this point. As a legal consequence, there exists flaws in the legality of the electronic registration of fiduciary guarantee. Surely, there exists weakness from the aspect of legal certainty. From a normative aspect, there is no harmony between the Fiduciary Law and the provisions in Article 3 of the Decree of The Ministry of Law and Human Rights Number 9 of 2013. In other words, there is an inconsistency in

the Ministerial Decree towards the Fiduciary Law.¹⁵

The fiduciary guarantee is a legal document that establishes special rights for the fiduciary, such as the right to receive the pledged collateral first. If there is no priority among creditors, the fiduciary guarantee can be sold or confiscated by another party, which would mean that the lender loses its priority and only enjoys its rights with other creditors at the same time.¹⁶

The fiduciary institutions currently in use are simple, easy, and fast, but they lack legal certainty. This is because the fiduciary institution regulation provides different interpretations from one party to another. The provisions in this agreement create legal uncertainty, which could harm both parties. As Gustav Radbruch has noted, the main aim of law is to ensure legal certainty, ensure justice, and provide benefits for all involved. Legal rules can provide benefits and justice when they provide legal certainty in their execution. The law of fiducia arises when the debtor fails to keep his promises to the creditor, which causes the creditor to take legal action. The execution of guarantees is regulated in Article 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantee:

1. The execution of the executorial title by the fiduciary recipient is able to carry out the executorial title just like a court decision that has obtained permanent legal force;
2. The sale of objects that are subject to fiduciary security or the power of the recipient of the fiduciary itself through a public auction is a common occurrence. This is because these objects are often valuable and, as such, it is important that they be sold in a timely manner so that the rightful owner can be compensated;
3. Underhanded sales made under an agreement between the fiduciary giver and recipient, ensuring the best interests of both parties are always met.

¹⁵ Maria Pranatia, 'Strengthening Legal Certainty on the Electronic Registration System of Fiduciary Deed in Indonesia' (2021) 1 Global Legal Review.[53].

¹⁶ Rudyanti Dorotea Tobing, *Hukum Lembaga Pembiayaan: Asas Keadilan Dalam Perjanjian Pembiayaan* (Laksbang Pressindo 2017).[115].

Meanwhile, there are five types of execution of fiduciary guarantees apart from the other three, namely as follows¹⁷:

1. Offer an alternative to the traditional auction process, where our fiduciary executors will carry out the sale without going through the auction office. This provides a more direct and efficient way to sell your property;
2. Provide fiduciary execution byclaim to ensure that your interests are always protected;
3. Provide fiduciary execution of tradable goods and securities that can be traded. Committed to providing superior service and ensuring that your investments are managed in the best possible way;
4. A fiduciary is someone in a position of trust, such as a trustee or caretaker, and when they act in the best interest of the beneficiary, they are said to be acting in a fiduciary capacity. This is especially important in the context of a lawsuit, as the fiduciary standard of care requires that the party who is being sued take reasonable steps to protect their interests. This can include things like hiring an attorney, preparing a defense, and arranging for witnesses to testify on their behalf;
5. Fiduciary execution according to Law Number 16 of 1985 on flats, means that a fiduciary must carry out their duties in accordance with the law. This includes ensuring that the interests of the beneficiary are always taken into account, and that any transactions carried out are fair and reasonable.

The Fiduciary Guarantee Law regulates the practice of parate execution, which is the use of forced force to settle a dispute. This law is based on three provisions that protect the rights of the party being forced to settle the dispute. First, Article 15 paragraph (1) gives the party the freedom to choose how to settle the dispute, including through parate execution. Second, Article 15 paragraph (2) protects the party from being forced to settle the dispute in a way that is not in their best interest. Third, Article 15 paragraph (3) guarantees that the party forced to settle the dispute will receive the same rights and benefits as if they had settled the dispute voluntarily. Based on those principles, with the debtor's default, the creditor who receiving the fiduciary should be able to carry out the execution based on Article 29 Paragraph (1) which states that "if the debtor or fiduciary giver fails to promise, the execution of the object which is the object of the Fiduciary Guarantee can be carried out by : implementation of the executorial

¹⁷ Ahmad Fauzi, 'Benda Bergerak Sebagai Jaminan Hutang Dalam Praktek Leasing' (2017) 3 Jurnal Notarius.[15].

title as referred to in Article 15 Paragraph (2) by the fiduciary recipient; the sale of objects which are the object of the fiduciary guarantee under the authority of the fiduciary himself through a public auction and collect the receivables from the sale proceeds; underhand sales made based on the agreement of the giver and recipient of fiduciary if in this way the highest price that is favorable to the parties can be obtained”.

The determination of default to carry out execution as stipulated in the law should be simplified. The Constitutional Court mechanism which states the execution process against collateral in which the debtor does not recognize if it has defaulted to have to go through the court procedure is considered to slow down the business process with the swelling costs and the length of time taken to find common ground about the execution of the guarantee that it is clear that the debtor has not paid the loan expressly and frankly as stated in his credit agreement. Later, it is expected that the government will make special regulations that determine when a debtor is actually declared a default so that with the help of technology the creditor can report online that the debtor has defaulted and has been given a written warning. so that if it has been inputted in the official government system, the object of guarantee that has received approval online for the execution process, the creditor can immediately execute following the execution pattern which of course must also be regulated so as not to cause multiple interpretations in the community regarding legal execution methods and not make people restless in the community.

The Relevance of the Latest Regulation on Executorial Title of Fiduciary Guarantee in Indonesia with the Development of Advanced Information Technology

One of the unresolved legal issues that are still being addressed quickly and are being considered today is in the area of security law. Security law is closely related to property law and banking law. In the banking sector, the function of banks is to collect and distribute public lending funds. Moreover, credit for a country's

economic development is a fundamental requirement for economic development. This means that credit is important in many aspects of development such as trade, industry, housing and transportation. Credit also protects weak economic groups in developing their business. The credit sector is one way to accumulate capital in the business world.¹⁸

For entrepreneurs, taking on debt (credit or loan) is an integral part of their business life. Loans to entrepreneurs are always dangerous for banks. In return, this requires the necessary safety measures. The security factor, along with the harmonization (sustainability) and profit (profitability) factors, is one of the basic principles of credit loans. In banking, the form of credit guarantee takes the form of a binding guarantee. Insurance agents are a community need for business actors and entrepreneurs. The basic stages of the agreement and the beliefs in the agreement itself are confirmed by more specific guarantees. Guarantee is a legal system created in accordance with the legal principles stipulated in the Civil Code and occupies an important position in economic law. There are various forms of security services, including product guarantees (collateral) such as pledge, fiduciary, mortgage and encumbrance. There is also a guarantee of outside material (*borgtocht*) consisting of a company guarantee and a personal guarantee. On September 30, 1999, Law Number 42 of 1999 on Fiduciary was enacted, a legal requirement that could promote national development and ensure legal certainty, legal protection, and justice of stakeholders. Based on Article 1 Paragraph (1) of the Fiduciary Guarantee Law, the transfer of ownership of an object on the basis trust with the provisions of the objects that the transferred ownership rights remain in the control of the owner of the object.¹⁹

The role of the notary is to quickly and cheaply obtain a fiduciary certificate in order to assist with the legal field of trust. This includes parties such as the debtor, creditor, and collection bank. The goal of this change is to make the process

¹⁸ H Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan yang Didambakan* (Penerbit Alumni 2022).[5].

¹⁹ Lathifah Hanim, 'Improving Human Resources In Law (Fiduciary Guarantee) Professional Competence To Face The Global Trend', *IMC 2016 Proceedings* (2017).

more efficient and accurate. The principle of disclosure is one of the hallmarks of modern loan guarantees, which means that the creditor knows or has access to important information regarding the loan. This means that the debtor avoids lying to the creditor or potential creditor. The binding force of the fiduciary guarantee is an obligation arising from the contract, as provided in Article 1338 of the Book of Civil Code. This allows freedom of contract and the contract must not violate the law, but must still be in good faith. With the development of information technology, the notary's role is also changing. Fiduciary has undergone a change in which the current registration process for fiduciaries has already been switched from the manual or conventional to electronic or online systems.²⁰

Fiduciary executorship would give finance companies and receivers the legal certainty and guaranteed rights they need to perform their duties effectively. Without it, creditors could exercise their unilateral rights and justify their arbitrariness, and the item could come into both creditor and debtor ownership. If the execution doesn't go through an official price assessment agency or public tender agencies, it could lead to legal problems. The problem is that beneficiaries don't always have a good chance of getting a fiduciary guarantee, which can lead to them being reported as the performers of deprivation. This makes it difficult for financial institutions to act as fiduciary executors, which would give them legal certainty and guaranteed rights.

The executorial power of a fiduciary certificate has an equal executorial power as a court judgment, which is a permanent legal power. Executorial on fiduciary certificate such as fiduciary executive with executorial title, execution by parate execution in the general auction or execution in parate underhand. There are obstacles to the execution of fiduciary guarantee, which are collateral held by the fiduciary and not provided by the debtor; the collateral has been transferred to a third party; there is no security progress; the value of the fiduciary guarantee price will be changed; and the higher price of the auction costs. The court's decisions

²⁰ *ibid.*[1053].

are reflected in the development of new rules and regulations to ensure justice and legal certainty for all. Based on the executorial title, the holder of the fiduciary bond reserves the right to claim the bond-based right to pay the full amount of the claim that cannot be resolved by bankruptcy and liquidation of fiduciary giver. A fiduciary guarantee object with the executorial title has a law power to the collateral in bankruptcy and needs a description about the preferential position of fiduciary holder.²¹

The Need for Specific Regulations of Fiduciary Guarantee to Improve Social and Legal Protection for Business Actors

The Indonesian Fiduciary Guarantee Law, number 42 of 1999, meets the general requirement for fiduciary guarantee arrangements as a means of supporting commercial activities and promoting legal certainty of all parties involved. Article 1 of the Fiduciary Guarantee Law states that restrictions on the transfer of fiduciary property rights are regulated under the trust and the object to which the property right is transferred is under the control of the guarantor. This law helps lend creditors legal protection in the event that a debtor defaults, by recognizing the needs of the growing business community and providing capital.²²

With today's globalization, everyone needs tools to support their efforts to achieve their goals. Third-party financial institutions certainly benefit from differences in prices and interest rates. When lending to a consumer known as a debtor, the financial institution requires fiduciary security. The fiduciary guarantee was created to meet the needs of the entire community, as the need for community guarantees has been updated and is in fact freely used or controlled by the debtor. Therefore, it is very clear that the biggest difference between fiduciary bonds, liens and mortgages lies in managing the coverage of the guarantee.²³

²¹ Khifni Kafa Rufaida, 'Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial Yang Sah' (2019) 4 Refleksi Hukum: Jurnal Ilmu Hukum.[21].

²² Kamello (n 18).

²³ Ahmad Sanusi, 'Pendaftaran Jaminan Fidusia Dan Akibat Hukumnya (Suatu Tinjauan Normatif) the Registration of Fiduciary and the Legal Consequences (a Review of Normative)' (2017) 7 Jurnal Ilmiah kebijakan hukum.[73].

The Constitutional Court has decided that the standard guarantee items will be executed in a different way from now on. This has nothing to do with the development of new norms about execution patterns that are covered by fiduciary security. It introduces legal uncertainty and ambiguity in the execution of fiduciary guarantees. The peak of public opposition to the pattern of executions by financial institutions for the purpose of fiduciary security is the petition for rehearing under Article 15 Paragraph (2) and Paragraph (3) of the Law Number 42 of 1999 concerning Fiduciary Guarantees. The Constitutional Court's Decision Number 18/PUU-XVII/2019 on the pattern for enforcing the fiduciary guarantee implements all legal mechanisms and procedures for enforcing the fiduciary guarantee if the guarantor does not refuse to enforce it, they have to already permanently applied to prove how the final court decision was enforced. The pattern for enforcing a permanently legally binding court decision must be based on the execution procedures regulated by Article 196 of HIR and Article 208 of RBG.²⁴

Prior to the issuance of this Constitutional Court's decision, execution of the subject of the Fiduciary Guarantee was carried out directly by the financial institution through the collecting agency without agreement between the parties when the breach of contract (default) occurred. The seizure of items from the debtor was compulsory. This has created public opinion about the pattern of execution of fiduciary guarantee property properties. Therefore, Article 15 Paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee, interpreted by the Constitutional Court is still valid today. According to the Constitutional Court's interpretation, executions are required. If at the time of parate execution of the object of fiduciary guarantee, in the contract there is an agreement regarding breach of contract (default), and at the time of parate execution, the debtor does not object or voluntarily submits the object of the fiduciary guarantee to the creditor then execution of the fiduciary guarantee can be performed upon them. This is

²⁴ Rosyidi Hamzah and Fadhel Arjuna Adinda, 'The Existence of A Norm Regarding The Execution of Fiduciary Guarantees After The Issuance of The Constitutional Court Decision Number 18/Puu/Xvii/2019' (2022) 22 *Jurnal Penelitian Hukum de Jure*. [81].

because the debtor admits that he has failed to meet his obligations and the debtor deliberately submits the subject of the warranty without the threat or intervention of either party²⁵

The legal norms of entrepreneurial activity provide security and protection to the parties to a business transaction. The rules of law in business must have economic characteristics that are efficient, effective and have economic value. Of course, businessmen are always looking for fast, cheap and easy dispute resolution patterns. But in reality, dispute resolution standards are still slow, costly and highly complex. It is absolutely necessary to update the legal norms that support our business activities. Business activities play a very fundamental role in people's well-being and business relationship patterns are evolving very rapidly. On the one hand, legal progress is progressing very slowly. The law is always lagging behind current developments. Therefore, there is a lot of legal uncertainty in the pattern of commerce because there is no law and the legal event can not be resolved. The number of businessmen who settle business disputes outside the court such as arbitration and alternative dispute resolution are evidence that the court was unable to meet its business challenges. Meanwhile, on the other hand, a financial institution as a creditor receives legal certainty regarding the subject of fiduciary guarantee such as non-transferable guarantees (individual execution) that can be carried out promptly without judicial intervention in the event of default by the debtor and creditors which prefers and provided that the fiduciary guarantee is registered. Fiduciary agencies are facilities that support business activities and provide legal certainty to stakeholders. The emergence of the parate execution norm in Law Number 42 of 1999 concerning Fiduciary Guarantees is regulated in Article 15 paragraphs (1), (2), and (3).

This standard for parate execution produces legal and capital gains, income security from loans and lending transactions. Creditors face risks in providing loans

²⁵ Andi Risma, 'Perlindungan Hukum Pembeli Kendaraan Dalam Perjanjian Pembiayaan Konsumen Dan Pelaksanaan Eksekusi Jaminan Fidusia' (2020) 16 *Jurnal Pemikiran dan Penelitian Ilmu-ilmu Sosial, Hukum*. [16].

to borrowers with both capital loss and profits. In order to maintain profits and capital in loans and lending transactions, creditors must be guaranteed the ability to enforce execution on the subject matter of the trust by Fiduciary Guarantee Law without judicial intervention. The Constitutional Court, which was initially tasked with reviewing the law only in the event of a conflict with the Constitution, has in fact become a positive legislature capable of producing new norms from the laws considered by the institution. New norm standards that are expected to exist in the pattern of execution of fiduciary guarantees can be created at least by a Supreme Court Circular Letter or a Supreme Court Regulation because the Common Court is subordinate to the Supreme Court. The execution of objects of fiduciary guarantees is certainly different from other executions so the characteristics of the Fiduciary Guarantee Law still exist in lending and borrowing transactions with fiduciary guarantees. Of course, the emergence of Constitutional Court's Decision Number 18/PUU-XVII/2019 must be legally answered for proper application.²⁶

Creating new norms to support the dynamics of law is absolutely essential. Following the development of society, the development of law is also necessary. The substance of legal norms need to be strengthened by dynamic patterns of community development. An effective, efficient and economically useful fiduciary security execution pattern should be implemented immediately after Constitutional Court's Decision Number 18/PUU-XVII/2019. The new standards for execution of fiduciary guarantees must be able to provide creditor protection from an economic perspective. To achieve legal certainty, swift and efficient execution measures need to be backed by strong legal grounds. The legislation created must support entrepreneurial activity. The birth of Law Number 42 of 1999 on Fiduciary Guarantee philosophically helps business actors obtain funding to develop and operate their businesses. Apart from that too, substantial execution rules need to be synchronized with the formal requirements of HIR or RBG as a formal law.²⁷

²⁶ *ibid.*[89].

²⁷ Jumiadi, Dewi Astutty Mochtar and Diah Aju W., 'The Existence of a Mortgage Guarantee Institution with Ship Objects in the Guarantee Legal System in Indonesia' (2023) 6 International Journal of Latest Research in Humanities and Social Science (IJLRHSS).[288].

Conclusion

The fiduciary institutions that have been used in the past have been simple and easy to use, but they are not legally certain. This is because the fiduciary institution regulation provides a loophole that can be interpreted differently by different parties. This creates legal uncertainty which, in turn, can harm the parties. There are flaws in the legality of the electronic registration of fiduciary guarantees. Implicitly, the Fiduciary Guarantee Act regulates the institution of parate executions. Its basis is by Law Number 42 of 1999 on Fiduciary in Article 15 Paragraph (1), Paragraph (2) and Paragraph (3) which provides freedom of action or executorial title which gives rise to an executory provision of a forced force. Based on these principles, with the debtor default, the creditor receiving the fiduciary should be able to carry out the execution. To create legal certainty regarding the execution of objects of fiduciary guarantee after the Constitutional Court's Decision Number 18/PUU-XVII/2019, new norms or regulations that relating to technology are needed, either in the form of Supreme Court Circular Letter or Supreme Court Regulations regarding the pattern of object's execution of fiduciary guarantees which is effective and efficient. The content of those norms or regulations aim to distinguish the pattern of execution of other civil cases from the object's execution of fiduciary guarantees so that every business actor can carry out business activities safely and freely, as well as provide a sense of security for the investors.

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