

## RECONSTRUCTION OF LAWS AND REGULATIONS ON CREDITORS' RIGHTS IN THE EXECUTION OF FIDUCIARY COLLATERAL - (REVIEW OF ARTICLE 15 OF LAW NO. 42 OF 1999 CONCERNING FIDUCIARY GUARANTEE)

ANTONIUS AGUS RAHMANTO <sup>1</sup>, BUDI SANTOSO <sup>2</sup> and ERY AGUS PRIYONO <sup>3</sup>

<sup>1</sup> Doctoral Program in Law, Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, SH., Tembalang, Semarang. Email: antoniusagusrahmanto@students.undip.ac.id.

<sup>2,3</sup> Lecturer in Doctoral Law Program, Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, SH., Tembalang, Semarang.

### Abstract

The purpose of this study is to analyze: 1) What is the creditor's right to execute fiduciary collateral? 2) How does the crime of embezzlement of fiduciary security occur and what are the legal sanctions? 3) How is the reconstruction of creditors' rights in the execution of collateral in the Fiduciary Guarantee Act?. The research method used is empirical juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) When the debtor defaults, the creditor can seek compensation to the debtor through the execution of fiduciary guarantees. Default here can be in the form of the debtor's failure to fulfill his repayment obligations when the debt is ripe for collection, or not fulfilled promises to be promised, both in the principal agreement and guarantee agreement, even though the debt itself at that time is not yet ripe for collection. In such an event, the creditor (fiduciary recipient) can execute the fiduciary collateral. If the debtor and fiduciary are two different people, the debtor's default of course there is a principal agreement, while the fiduciary promises to the guarantee agreement. In this position, the position of the Fiduciary Act lays down certain obligations for fiduciaries. 2) The criminal act of embezzlement is a criminal offense against objects that cause material harm to the victim, the crime of embezzlement comes from the trust given but misused due to low honesty. The criminal act of embezzlement is regulated in Article 372 of the Penal Code, and Article 36 Jo. Article 23 paragraph (2) of RI Law No. 42 of 1999 concerning fiduciary guarantees. 3) The execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Where execution has the meaning of carrying out a court decision, the purpose of which is none other than the execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

**Keywords:** Reconstruction, Regulation, Legislation, Creditor Rights, Execution of Goods, Fiduciary Guarantee

## INTRODUCTION

### Background

The term fiduciary first appeared in Indonesia during the Dutch government era in 1932, after the *Hooggerrechtshof* (HGH) decision dated August 18, 1932 on a civil lawsuit filed by *Bataafsche Petroleum Maatschappij* (BPM) as a plaintiff against *Pedro Clignett as a defendant known as BPM-Clignett Arrest*.<sup>1</sup>

Unlike mortgages and mortgages, the birth of this fiduciary institution is an alternative credit or debt receivable secured by movable property that remains controlled by the debtor because it is still needed to be used, or credit with immovable property guarantees that cannot be tied

to a mortgage, for example buildings that stand on land owned by others, as regulated in Law No. 16 of 1985 concerning Flats and Law No. 4 of 1992 concerning Housing and Settlements.<sup>2</sup>

The existence of a fiduciary institution is very beneficial for the debtor, because in addition to obtaining the necessary funds, the goods used as credit collateral are still in the possession and utilized by the debtor. Such conditions require good faith from the debtor to fulfill its obligation to pay its credit installments according to the agreement that has been made and maintain or maintain the condition of the collateral in good condition. To guarantee that the debtor will fulfill its obligation to pay its credit installments and to guarantee that the creditor can withdraw the collateral if the debtor defaults, in a fiduciary agreement agreed between the debtor and creditor there is an agreement to transfer ownership rights of fiduciary security from the debtor to the creditor known as *constitutum possessorium*, meaning The collateral transfers its ownership rights from the debtor to the creditor even though the collateral is still in the name of the debtor and is in the possession and utilization of the debtor.<sup>3</sup>

The new fiduciary institution was first regulated in the provisions of Indonesian law in Law Number 16 of 1985 concerning Flats, State Gazette of the Republic of Indonesia of 1985 Number 75 and Supplement to the State Gazette of the Republic of Indonesia Number 3318. In Article 12 paragraph (1) of Law Number 16 of 1985, it is stipulated: Flats along with the land on which the building stands and other objects that constitute or are united with the land can be used as debt security by:

- a. encumbered with a mortgage, if the land is freehold land or building use rights;
- b. Burdened by a fiduciary, if the land is a right-of-use land on state land.

Furthermore, on September 30, 1999, Law Number 42 of 1999 concerning Fiduciaries, State Gazette of 1999 Number 168 and Supplement to the State Gazette Number 3889 were passed, which regulate credit agreements with movable property guarantees. Uniquely, although Law Number 42 of 1999 has been enacted since it was signed and promulgated, finance companies that provide credit for the purchase of movable goods have not implemented the provisions in Law Number 42 of 1999. For example, in Article 5 paragraph (1) it is stipulated: The encumbrance of objects with Fiduciary Guarantee is made by notarial deed in Indonesian and is a deed of Fiduciary Guarantee, and in Article 11 it is stipulated: Objects encumbered with Fiduciary Guarantee must be registered. In practice, the finance company as a creditor makes an agreement with the debtor in the form of an underhand agreement and never registers the object encumbered with fiduciary guarantees. Finance companies are "forced" to implement the provisions in Law Number 42 of 1999 concerning fiduciaries, after the Minister of Finance issued Minister of Finance Regulation Number: 130 / PMK.010 / 2012 dated August 7, 2012 concerning Registration of fiduciary guarantees for finance companies that carry out financing. The Minister of Finance regulation requires finance companies to encumber objects with fiduciary guarantees by notarial deed and requires them to register the encumbrance of fiduciary guarantees.

Based on data from the Financial Services Authority (OJK) of the Republic of Indonesia<sup>4</sup>, specifically for motor vehicle purchase transactions on credit with fiduciary guarantees, every year there are an average of around 19,000,000 (nineteen million) four-wheeled and 2-wheeled motor vehicle loan transactions and have been registered with the Ministry of Law and Human Rights, of which there are only 0.25 percent of loans that are problematic due to the debtor's delay in paying installments or the debtor diverting goods collateral to other parties without the knowledge of creditors.

The more frequent the news appears about the process of withdrawing collateral by creditors as if it was done by force or force, the more it gives the impression that something is wrong and contrary to the law in the process of withdrawing collateral. So that on the application of *Judicial Review* on article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciaries submitted by Apriliani (fiduciary debtor), a Decision of the Constitutional Court of the Republic of Indonesia (MK RI) Number: 18 / PUU-XVII / 2019 was pronounced on the sixth, January, year two thousand twenty with a judgment.

Starting from this background, this study is intended to write with the title "**Reconstruction of Laws and Regulations on Creditors' Rights in the Execution of Fiduciary Guarantees (Review of Article 15 of Law No. 42 of 1999 concerning Fiduciaries)**"

### **Problem Statement**

1. What are the creditor's rights in executing fiduciary collateral?
2. How does the criminal act of embezzlement of fiduciary security occur and what are the legal sanctions?
3. How is the reconstruction of creditors' rights in the execution of collateral in the Fiduciary Guarantee Law?

### **Theoretical Framework**

#### **1. Treaty Theory**

In essence, an agreement is made for the mutual benefit of the parties. Good *faith* at the time of initiating the contract proves that the agreement is done at the willingness of the parties. The agreement entered into and agreed by the parties will be in force as law when the agreement is performed, so the parties have their respective obligations to fulfill the performance.<sup>5</sup> When the agreement has been agreed and signed by the parties and has fulfilled the legal conditions of the agreement as stipulated in Article 1320 of the Civil Code, then according to the provisions in Article 1338 of the Civil Code, the agreement becomes a law that must be obeyed and implemented by the parties (*principle pacta sunt servanda*).

The principle of *pacta sunt servanda* is not only a moral issue in the agreement, but a legal issue that will occur if achievements cannot be achieved by one party, especially the debtor. In fact, if brought to court, the judge cannot interfere with the content of the agreement made by the parties. The main force in the content of the agreement is the parties themselves as lawmakers.<sup>6</sup>

## 2. Theory of Justice

According to Hans Kelsen "justice is a certain social order under the protection of efforts to seek truth can develop and flourish, this is because justice according to him is the justice of freedom, justice of peace, justice of democracy, and justice of tolerance". The above understanding can be concluded that justice can be achieved if the structure in society of each citizen gets guarantees that are his right. The theory of justice in this study is related to the parties to the Fiduciary Agreement.<sup>7</sup>

## 3. Theory of Legal Certainty

Fairness in fiduciary guarantee agreements can provide legal certainty to debtors. Certainty is defined as the condition, provision, determination of something certain. The working of the law is realized when the law is fair and carried out definitely. Legal certainty, according to Rato, is a question mark that can be answered through normative, not sociology. Normatively, legal certainty occurs when regulations are formed and promulgated and implemented with certainty because they regulate clearly and logically.<sup>8</sup>

According to Soerjono Soekanto: legal certainty requires the creation of general regulations or generally accepted methods, in order to create a safe and peaceful atmosphere in society.<sup>9</sup> Thus, it can be concluded that legal certainty can be realized by law through legal rules that are then obeyed by the community. These legal rules exist, not necessarily for the purpose of realizing justice or expediency, but solely for certainty. When related to the Fiduciary Guarantee Law and Constitutional Court Decision Number 18/PUUXVII/2019, this legal certainty is clearly needed to provide clarity and at the same time protection in carrying out legal actions when the agreement is enforced. This is done in the event of a default that results in the execution of fiduciary guarantees.<sup>10</sup>

## Research Methodology

This research is included in the type of Non-Doctrinal research, where the approach method used is empirical juridical.<sup>11</sup> Law that applies at a certain time and place, that is, a written rule and norm officially established and promulgated by the ruler, in addition to written laws that effectively regulate the behavior of members of society.<sup>12</sup>

The empirical juridical approach is an approach that is carried out based on field research or based on the dynamics of legal developments that occur in society.

Then the primary data is analyzed based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research.<sup>13</sup>

The type of research used in solving this is the descriptive juridical research method of analysis, which is research conducted by examining library materials (secondary data) or library legal research, then described in the analysis and discussion.<sup>14</sup>

## RESEARCH RESULTS

### Creditor's Rights in Executing Fiduciary Collateral

Fiduciary guarantee is a conventional product that is applied to provide protection for creditors in particular. The financing institution provides movable goods requested by consumers then on behalf of the consumer as the debtor, where the debtor submits to the creditor (creditor) on a fiduciary basis. That is, the debtor as the owner on behalf of the goods becomes a fiduciary to the creditor who is in the position of fiduciary beneficiary. A simple practice in fiduciary guarantees is that the debtor/party who owns the goods submits financing to the creditor, then both parties agree to use fiduciary guarantees against the debtor's property.<sup>15</sup> When a debtor defaults, the creditor may seek damages from the debtor through execution of fiduciary guarantees. Default here can be in the form of the debtor's failure to fulfill his repayment obligations when the debt is ripe for collection, or not fulfilled promises to be promised, both in the principal agreement and guarantee agreement, even though the debt itself at that time is not yet ripe for collection. In such an event, the creditor (fiduciary recipient) can execute the fiduciary collateral. If the debtor and fiduciary are two different people, the debtor's default of course there is a principal agreement, while the fiduciary promises to the guarantee agreement. In this position, the position of the Fiduciary Act lays down certain obligations for fiduciaries.<sup>16</sup> Through fiduciary registration, the execution of collateral can be carried out immediately without waiting for a court decision. This condition makes it easy for financial institutions to collect compensation from financing provided to customers. In general, companies or financing institutions in carrying out the sale of movable goods to consumers using agreements that include fiduciary guarantees for fiduciary collateral objects, but it turns out that in practice many of the agreements made by these companies are not made in notarial deeds (notarial deeds) and are not registered at the Fiduciary Registration Office.

Execution is a legal action carried out by the court to the losing party in a case is and the procedure for continuing a case examination process. Therefore, execution is nothing but a continuous proceeding of the entire civil procedural legal process.<sup>17</sup> When the question of execution is related to a fiduciary issue, one of the characteristics of a strong fiduciary guarantee is that it is easy and certain in the execution of its execution, if the debtor (fiduciary) defaults or has bad faith. Good faith in a subjective sense can be interpreted as one's honesty in doing a legal deed, that is, what lies in one's inner attitude at the time of the legal act.<sup>18</sup> Although in general the provisions regarding execution have been regulated in the civil procedural law as already described, in this case it is considered necessary to include specifically the provisions on execution in the provisions of the fiduciary law, namely regarding *the institution of parate execution* contained in the provisions of the law.<sup>19</sup> Based on the provisions of Article 14 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees (UUJF), new fiduciary guarantees are born on the same date as the date on which the Fiduciary guarantee is recorded in the Fiduciary Register Book. Then Article 15 paragraph (1) of Law No. 42 of 1999 concerning Fiduciary Guarantee: "In the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1) the words "For Justice Based on the One and Only Godhead" are included. Furthermore, Article 15 paragraph (2) of Law No. 42 of 1999



concerning Fiduciary Guarantee: "*The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executory power as a court decision that has obtained permanent legal force.* Article 15 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantee: "*If the debtor defaults, the Fiduciary Recipient has the right to sell the Object that is the object of the Fiduciary Guarantee in his own power.*"<sup>20</sup> On the basis of the above provisions, if the debtor breaks the promise, the creditor can immediately execute the collateral guaranteed by the fiduciary. The execution carried out by creditors through *debt collector* services sometimes causes new problems between creditors and debtors. This is because the way *debt collectors* execute fiduciary security by violence, intimidation and even by seizing fiduciary collateral on the road, this is what causes resistance from the debtor. For this reason, the police made a decision through the Regulation of the Chief of the Indonesian National Police Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees.<sup>21</sup>

The execution process of the Fiduciary Guarantee institution allows the fiduciary to take possession of the pledged object, to conduct business activities financed from the loan using fiduciary guarantees. In the beginning, objects that became fiduciary objects were limited to the wealth of movable objects tangible in the form of equipment. However, in subsequent developments, objects that become fiduciary objects include the wealth of intangible movable objects, as well as immovable objects. The implementation of financing between creditors and debtors, sometimes defaults or broken promises. So, when the debtor breaks the promise, the creditor can execute objects that have been guaranteed through fiduciary guarantees. According to Subekti, what is meant by execution is the attempt of the party won in the judgment to obtain what is due to him with the help of legal force, forcing the defeated party to carry out the verdict.<sup>22</sup> Debtors who break promises, then creditors can immediately execute collateral guaranteed by fiduciaries. 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 the force of law like a court decision. This is in accordance with Law Number 42 of 1999 concerning Fiduciary Guarantee which states, if the debtor or fiduciary defaults, the execution of the object that is the object of fiduciary guarantee can be carried out by:

1. Execution of executory title by the fiduciary beneficiary
2. Sale of objects that are the object of fiduciary guarantee on the fiduciary beneficiary's own power through public auction and take repayment of receivables from the proceeds of the sale.
3. An underhand sale made pursuant to the agreement of the fiduciary grantor and beneficiary if in such a way the highest price in favor of the parties can be obtained. The sale of the handstring is carried out after the lapse of 1 (one) month since it is notified in writing by the grantor and / or fiduciary recipient to the interested parties and announced in at least 2 (two) newspapers circulating in the area concerned. The fiduciary guarantee law also clarifies that the fiduciary must deliver the object of the fiduciary guarantee in the context of carrying out the execution of the fiduciary guarantee.<sup>23</sup>

## **The criminal act of embezzlement of fiduciary collateral occurs and what are the legal sanctions**

The criminal act of embezzlement is a criminal act against objects that cause material harm to the victim, the crime of embezzlement comes from the trust given but misused due to low honesty. The criminal act of embezzlement is regulated in Article 372 of the Penal Code, and Article 36 Jo. Article 23 paragraph (2) of RI Law No. 42 of 1999 concerning fiduciary guarantees.<sup>24</sup>

There are two elements of a fiduciary grantor, mortgaging or leasing the object of the fiduciary guarantee as referred to in Article 23 paragraph (2), which is done without the prior consent of the fiduciary recipient;

- a. The Fiduciary as explained by Article 36 of Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciaries is as follows:
  1. Givers are all Debtors / Customers in the Finance Company in accordance with the provisions applicable to the Finance Company.
  2. The grantor is a person who is given trust, authority and responsibility regarding objects whose ownership rights are in accordance with the agreement and / or agreement made between the two parties.
- b. What is meant by transferring, or leasing objects that are the object of Fiduciary guarantee is as follows:
  1. Transferring, or leasing is an act of transferring receivables secured by a fiduciary resulting in the transfer by law of the rights and obligations of the fiduciary beneficiary to a new creditor;
  2. Transferring rights to receivables in this provision is known as "*cessie*" , namely transferring receivables made by authentic deed or deed carried by hand; Transferring, or renting is an intentional act by realizing the possibility (*doluseventualis*), that the perpetrator realizes the action he is doing may bring other consequences besides the main effect
- c. What is meant without the prior written consent of the Fiduciary recipient is: Create, make or produce, conduct, carry out activities to transfer the object of goods unilaterally without information to the holder of the Fiduciary collateral object.<sup>25</sup>

The regulation of embezzlement in the Criminal Code is regulated in Article 372 of the Criminal Code. Article 372 of the Penal Code states that "*Whoever knowingly and unlawfully possesses something wholly or partly belongs to another person, but which is in his power not for a crime shall be punished with embezzlement, with imprisonment for not more than four years or a fine of not more than 15 times sixty rupiah.*" To declare an act or act to fall into the category of embezzlement, the elements in Article 372 of the Criminal Code must be proven and fulfilled as a whole and must be proven through the judicial process.<sup>26</sup>

## **Reconstruction of creditors' rights in the execution of collateral in the Fiduciary Guarantee Law**

Credit agreements involving creditors as lenders and debtors as borrowers of funds have reciprocal interests, the main foundation in lending to debtors is trust. One of the material guarantees based on trust is fiduciary. Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantee states that the definition of fiduciary is "Transfer of ownership rights of 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>27</sup>

Fiduciary guarantees exist as an answer to overcome deficiencies in collateral in the lien process whose execution is carried out through the release of objects from the lien / creditor (*inbezitstelling*) for the validity of the lien, which means the existence of the object is in the lien, (Civil Code) so that the lien cannot enjoy the object. While in fiduciary power remains with the owner of the object, the transfer of property rights from property is based on (Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantee, Supplement to the State Gazette of the Republic of Indonesia Number 3889, 1999), so what is handed over from the owner of the object is only evidence of ownership rights of the object that is the fiduciary guarantee so that it means that juridically the object pledged to the creditor is his ownership right while The object can be economically enjoyed and remain in the possession of its owner.

The execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Where execution has the meaning of carrying out a court decision, the purpose of which is none other than the execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Where execution has the meaning of carrying out a court decision, the purpose of which is none other than forcible. Efforts in the form of forced actions to realize the verdict to those entitled to receive from the party burdened with the obligation which is execution.<sup>28</sup> Meanwhile, fiduciary guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with dependent rights as referred to in Law Number 4 of 1996 concerning Dependent Rights that remain in the control of the Fiduciary, as collateral for the repayment of certain debts, which gives priority to the Fiduciary Recipient over other creditors.<sup>29</sup>

The transfer of ownership rights in a fiduciary is based on the legal relationship of the agreement that makes it a follow-up agreement or *accessoir* from the agreement of accounts receivable, borrowing, or other agreements as the principal agreement. Its validity is also based on the validity or invalidity of the main agreement, and with conditions that can only be implemented when the conditions hinted at in the main agreement have been fulfilled or not, as a conditional agreement that can only be implemented if the conditions required in the main agreement have been or are not fulfilled.



The transfer of the right to ownership of the object that is used as an object pledged in the fiduciary is carried out through the mechanism *of constitutum possessorium* (transfer of ownership of the object not through physical delivery of the object), namely the transfer of ownership of a material object through the process of continuing control over the object as intended which has implications for the fiduciary who will then control the property right to the grantee's interest in the fiduciary<sup>30</sup>.

In Constitutional Court Decision Number 18/PUU-XVII/2019 the Constitutional Court partially granted the petition from the applicant with the following core ruling: 1) The Constitutional Court ruled that Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee as long as the phrase "executory power" and the phrase "the same as a court decision with permanent legal force" are considered contrary to the norms of the Constitution of the Republic of Indonesia Year 1945 and have no force binding law as long as in its meaning is not interpreted as "to a fiduciary guarantee where there is no agreement on default and the debtor objects voluntarily to surrender the object of the 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 a court decision that has permanent legal force"; 2) Furthermore, the Constitutional Court considers that Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantee as long as the phrase "default" is considered incompatible with the Constitution of the Republic of Indonesia Year 1945 and has no binding legal force in this case as long as it is not interpreted as "the existence of a default is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies which determines the occurrence of a default"; and 3) The Constitutional Court also ruled that the explanatory provisions of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees as long as the phrase "executory power" is contrary to the Constitution of the Republic of Indonesia Year 1945 and has no binding legal force as long as it is not interpreted as "against a fiduciary guarantee where there is no agreement on default and the debtor objects to voluntarily surrender the object that being a fiduciary guarantee, all mechanisms of legal procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of a court decision that has permanent legal force".<sup>31</sup>.

The existence of a guarantee institution has the aim that the parties have legal certainty, namely between creditors and debtors so that they have confidence that the rights and obligations of each party are well protected, without this belief, the legal relationship cannot work, especially in the guarantee law is in the realm of engagement law related to the field of property law. Furthermore, in the case of execution of objects that become fiduciary guarantees with *parate*, execution aims to provide legal certainty, both from creditors and debtors. From the *creditor* side, *Parate Execution* guarantees legal certainty for the fulfillment of achievements that must be fulfilled by the debtor in an efficient way compared to the process through the court, the procedure through procedural law formalities takes a long time and the process is not simple raises concerns about creditors' reluctance to provide credit, especially when the amount of bills is not too large so that it is felt that there is no balance between the efforts made with bad credit bills.<sup>32</sup>

Easy and fast execution is a peculiarity possessed by fiduciary guarantees as a manifestation of property belonging to the category of movable objects with ease of transfer as fiduciary guarantees, based on this the Law provides parate execution mechanisms to carry out execution appropriately, effectively and efficiently without the need to involve the court.<sup>33</sup>

Article 30 of Law No. 42 of 1999 concerning Fiduciary Guarantee

*"The Fiduciary shall deliver the Thing that is the object of the Fiduciary Guarantee in the course of the execution of the Fiduciary Guarantee".*

Article 31 of Law No. 42 of 1999 concerning Fiduciary Guarantee

*"In the event that the objects of the Fiduciary Guarantee consist of trading objects or securities that can be sold on the market or on the exchange, the sale can be carried out in these places in accordance with applicable laws and regulations".*

Article 32 of Law No. 42 of 1999 concerning Fiduciary Guarantee.

*"Any promise to execute the Thing that is the object of the Fiduciary Guarantee in a manner contrary to the provisions referred to in Article 29 and Article 31, is null and void".*

Article 33 of Law No. 42 of 1999 concerning Fiduciary Guarantee

*"Any promise authorizing the Fiduciary to possess the Thing that is the object of the Fiduciary Guarantee in the event of the debtor's default, is null and void".*

Article 34 of Law No. 42 of 1999 concerning Fiduciary Guarantee

- 1. In the event that the execution proceeds exceed the guarantee value, the Fiduciary shall return the excess to the Fiduciary.*
- 2. If the result of execution is insufficient for repayment of the debt, the debtor remains liable for the outstanding debt.<sup>34</sup>*

## CONCLUSION

The results showed that;

- a. When a debtor defaults, the creditor may seek damages from the debtor through execution of fiduciary guarantees. Default here can be in the form of the debtor's failure to fulfill his repayment obligations when the debt is ripe for collection, or not fulfilled promises to be promised, both in the principal agreement and guarantee agreement, even though the debt itself at that time is not yet ripe for collection. In such an event, the creditor (fiduciary recipient) can execute the fiduciary collateral. If the debtor and fiduciary are two different people, the debtor's default of course there is a principal agreement, while the fiduciary promises to the guarantee agreement. In this position, the position of the Fiduciary Act lays down certain obligations for fiduciaries.

- b. The criminal act of embezzlement is a criminal act against objects that cause material harm to the victim, the crime of embezzlement comes from the trust given but misused due to low honesty. The criminal act of embezzlement is regulated in Article 372 of the Penal Code, and Article 36 Jo. Article 23 paragraph (2) of RI Law No. 42 of 1999 concerning fiduciary guarantees.
- c. The execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Where execution has the meaning of carrying out a court decision, the purpose of which is none other than the execution of fiduciary guarantees is regulated in articles 29 to 34 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

#### Foot Notes

- 1) Sastro, *Law of Fiduciary Property Guarantee*, Citra Aditya Bhakti, Purwokerto, 2005, p. 111
- 2) Trisandini Prasastinah Usanti and Leonora Bakarbesy, *Banking Law Reference Book Guarantee Law*, Revka Petra Media, Surabaya, p 87
- 3) Celina Tri Siwi K, "Legal Aspects of Immovable Objects as Objects of Fiduciary Guarantee", *Notary Journal*, Vol. 1, No. 2, May 2017, 13-22
- 4) Director of OJK Financing Institution Supervision, Juridical Action and Fiduciary Dispute Handling to Realize Legal Protection Certainty for the Community, paper in Metro Police Legal Socialization, Jakarta, November 30, 2022
- 5) Sinaga, Niru Anita, "The Role of Covenant Law Principles in Realizing the Purpose of Covenants". *Jurnal Binamulia Hukum*, Vol. 7 No. 2, 2018, p. 111
- 6) Budiwati, Septarina, "The principle of pacta sunt servanda and its binding power in business contracts transcendent perspective". *Proceedings of the National Seminar on Transcendental Law*, 2019, pp. 42-43.
- 7) Novia Betsy Clarissa, Siti Malikhatun Badriyah, "The Effectiveness of Online Registration of Fiduciary Guarantees by Notaries", *Notary*, Vol.16 No.1, 2023, p 429
- 8) Novia Betsy Clarissa, Siti Malikhatun Badriyah, loc.cit.
- 9) Soerjono Soekanto, *Some Legal Problems in the Framework of Development in Indonesia (a sociological review)*, fourth printing, Jakarta: University of Indonesia, 1999, p. 55.
- 10) Novia Betsy Clarissa, Siti Malikhatun Badriyah, op.cit., pp 429-430
- 11) Abdulkadir Muhammad, *Law and Legal Research*, Citra Aditya Bakti, Bandung, 2004, p. 134.
- 12) Johan Nasution, *Legal Research Methods*, Bandung: Mandar Maju, 2008), p. 81.
- 13) Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Banyumedia Publishing, 2006), p. 299.
- 14) Ediwarman, 2010, *Monograph, Legal Research Methodology*, Graduate Program of University of Muhammadiyah North Sumatra, Medan, p. 24
- 15) Apul Oloan Sipahutar, Implementation of Fiduciary Guarantee Execution in Practice on Default Debtors, *USM Law Review Journal* Vol 5 No 1 of 2022
- 16) J. Satrio, *Law of Fiduciary Property Guarantee Rights* (Bandung: Citra Aditya Bakti, 2000).
- 17) M. Yahya Harahap, *The Scope of Civil Execution Problems* (Jakarta: Sinar Grafika, 2014).

- 18) Miftah Arifin, "Building an Ideal Concept of Application of the Principle of Good Faith in Treaty Law," *Journal of Ius Constituendum* 5, no. 1 (2020): 66
- 19) Harahap, *the scope of the problem of execution in the civil field*.
- 20) Fandy Ahmad, *The Validity of the Power to Sign a Deed by the Suatau Fiduciary Guarantee Financing Institution Review of Government Regulation Number 21 of 2015*, *Journal of Ius Constituendum* Volume 3 No 2, 2018, Semarang, Master of Law Postgraduate University of Semarang. p. 149.
- 21) Junaidi Abdullah, *Fiduciary Guarantee in Indonesia (Procedures for Registration and Execution)*, Business, Volume 4, Number 2, December 2016, p. 125
- 22) Junaidi Abdullah, *Fiduciary Assurance (Procedures and Execution Registration)* *Journal of Islamic Business and Management*, Vol. 4, No. 2, December 2016, Padang, UIN Imam Bonjol, p. 217
- 23) Soegianto, *Execution of Fiduciary Guarantees in the Study of Law Number 42 of 1999 concerning Fiduciary Guarantees*, *Journal of Ius Constituendum | Volume 4 Number 2 October 2019*
- 24) Vidianti Putri & Tami Rusli, *Legal Effects of the Transfer of Fiduciary Guarantee Object Lease from the Point of Criminal Law Study Based on Tanjungkarangkelas Ia District Court Decision Number: 831/Pid.Sus/2021/Pn.Tjk*, *Maleo Law Journal* volume 7 Issue 1 April 2023, p15
- 25) Andi Rahma & Nur Rismawati, *Juridical Review of the Criminal Act of Embezzlement of Fiduciary Guarantees in Makassar City*. *Alauddin Law Development Journal (ALDEV) | Volume 2 Number 3 November 2020*
- 26) Sintong Agum Gumelar Butarbutar, *Juridical Review of Embezzlement in Fiduciary Guarantee Cases in Indonesia (Case Study of Pn Purwakarta Decision Number 227/Pid.B/2012/Pn.Pwk)*, *Journal of Rectum*, Vol. 5, No. 1, (2023) January : 16 - 31
- 27) Hawer Trimaryanto, "Legal Protection From Creditors As The Fiduciary Security In A Financing Associated With The Award Constitutional Court No. 18/PUU-XVII/2019," *To-Ra Law Journal* 7, no. 3 (2021): 355–86
- 28) Djazuli Bachar, *Execution of Civil Case Decisions, Legal Aspects and Law Enforcement*, Raja Grafindo Persada, Jakarta, 2000, p. 6
- 29) Law Number 42 of 1999 concerning *Fiduciary Guarantee*, Article 1 point 2
- 30) Suraji, S., & Mugiyati, M. (2007). *Legal Research on the Development of Guarantee Institutions in Indonesia*. National Legal Development Agency of the Ministry of Law and Human Rights of the Republic of Indonesia
- 31) Constitutional Court Decision Number 18/ PUU – XVII/2019, Pub. L. No. Constitutional Court Decision Number 18/ PUU – XVII/2019 (2019).
- 32) Suryoutomo, M., Hendroyono, A., & Maryam, S. (2014). Implementation of the Parate Executie Model of Fiduciary Assurance: (Test of Fiduciary Assurance Execution Model). *Implementation of the Parate Executie Model of Fiduciary Assurance: (Test of Fiduciary Assurance Execution Model)*, 43(4), 497–504
- 33) Ageng Triganda Sayuti, *Parate Execution of Fiduciary Guarantee: The Urgency and Reconstruction of Law After the Constitutional Court Decision Number 18/PUU-XVII/2019*, *SOU MATERA LAW REVIEW* Volume 3, Number 2, 2020
- 34) Joni Alizon, *Reconstruction of the Execution of Fiduciary Guarantees After the Constitutional Court Decision Number 18/Puu-XVII/2019*, *Execution*, Vol. 2 No. 1. June 2020, p 70

## Bibliography

- 1) Abdulkadir Muhammad, *Law and Legal Research*, Citra Aditya Bakti, Bandung, 2004
- 2) Ageng Triganda Sayuti, Parate Execution of Fiduciary Guarantee: The Urgency and Reconstruction of Law After the Constitutional Court Decision Number 18/PUU-XVII/2019, *Soumatara Law Review* Volume 3, Number 2, 2020
- 3) Andi Rahma & Nur Rismawati, Juridical Review of the Criminal Act of Embezzlement of Fiduciary Guarantees in Makassar City. *Alauddin Law Development Journal (ALDEV) | Volume 2 Number 3 November 2020*
- 4) Apul Oloan Sipahutar, Implementation of Fiduciary Guarantee Execution in Practice on Default Debtors, *USM Law Review Journal* Vol 5 No 1 of 2022
- 5) Budiwati, Septarina, "The principle of pacta sunt servanda and its binding power in business contracts transcendent perspective". *Proceedings of the National Seminar on Transcendental Law*, 2019
- 6) Celina Tri Siwi K, "Legal Aspects of Immovable Objects as Objects of Fiduciary Guarantee", *Notary Journal*, Vol. 1, No. 2, May 2017
- 7) Director of OJK Financing Institution Supervision, Juridical Action and Fiduciary Dispute Handling to Realize Legal Protection Certainty for the Community, paper in Metro Police Legal Socialization, Jakarta, November 30, 2022
- 8) Djazuli Bachar, *Execution of Civil Case Decisions, Legal Aspects and Law Enforcement*, Raja Grafindo Persada, Jakarta, 2000
- 9) Ediwarman, 2010, *Monograph, Legal Research Methodology*, Graduate Program of Muhammadiyah University of North Sumatra, Medan
- 10) Fandy Ahmad, *The Validity of the Power to Sign a Deed by the Suatu Fiduciary Guarantee Financing Institute Study of Government Regulation Number 21 of 2015*, *Journal of Ius Constituendum* Volume 3 No 2, 2018, Semarang, Master of Law Postgraduate University of Semarang.
- 11) Harahap, *the scope of the problem of execution in the civil field*.
- 12) Hawer Trimaryanto, "Legal Protection From Creditors As The Fiduciary Security In A Financing Associated With The Award Constitutional Court No. 18/PUU-XVII/2019," *To-Ra Law Journal* 7, no. 3 (2021): 355–86
- 13) J. Satrio, *Law of Fiduciary Property Guarantee Rights* (Bandung: Citra Aditya Bakti, 2000).
- 14) Johan Nasution, *Legal Research Methods*, Bandung: Mandar Maju, 2008)
- 15) Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Banyumedia Publishing, 2006).
- 16) Joni Alizon, Reconstruction of the Execution of Fiduciary Guarantees After the Constitutional Court Decision Number 18/Puu-XVII/2019, *Execution*, Vol. 2 No. 1. June 2020
- 17) Junaidi Abdulah, Fiduciary Assurance in Indonesia (Procedures for Registration and Execution), *Business*, Volume 4, Number 2, December 2016
- 18) Junaidi Abdullah, Fiduciary Assurance (Procedures and Execution Registration) *Journal of Islamic Business and Management*, Vol. 4, No. 2, December 2016, Padang, UIN Imam Bonjol
- 19) M. Yahya Harahap, *The Scope of Civil Execution Problems* (Jakarta: Sinar Grafika, 2014).
- 20) Miftah Arifin, "Building an Ideal Concept of Application of the Principle of Good Faith in Treaty Law," *Journal of Ius Constituendum* 5, no. 1 (2020): 66

- 21) Novia Betsy Clarissa, Siti Malikhatun Badriyah, "The Effectiveness of Online Registration of Fiduciary Guarantees by Notaries", *Notary*, Vol.16 No.1, 2023
- 22) Constitutional Court Decision Number 18/ PUU – XVII/2019, Pub. L. No. Constitutional Court Decision Number 18/ PUU – XVII/2019 (2019).
- 23) Sastro, *Fiduciary Property Guarantee Law*, Citra Aditya Bhakti, Purwokerto, 2005
- 24) Sinaga, Niru Anita, "The Role of Covenant Law Principles in Realizing the Purpose of Covenants". *Journal of Binamulia Hukum*, Vol. 7 No. 2, 2018
- 25) Sintong Agum Gumelar Butarbutar, Juridical Review of Embezzlement in Fiduciary Guarantee Cases in Indonesia (Case Study of Pn Purwakarta Decision Number 227/Pid.B/2012/Pn.Pwk), *Journal of Rectum*, Vol. 5, No. 1, (2023) January : 16 – 31
- 26) Soegianto, Execution of Fiduciary Guarantees in the Study of Law Number 42 of 1999 concerning Fiduciary Guarantees, *Journal of Ius Constituendum | Volume 4 Number 2 October 2019*
- 27) Soerjono Soekanto, *Some Legal Problems in the Framework of Development in Indonesia (a sociological review)*, fourth printing, Jakarta: University of Indonesia, 1999
- 28) Suraji, S., & Mugiyati, M. (2007). *Legal Research on the Development of Guarantee Institutions in Indonesia*. National Legal Development Agency of the Ministry of Law and Human Rights of the Republic of Indonesia
- 29) Suryoutomo, M., Hendroyono, A., & Maryam, S. (2014). Implementation of the Parate Executie Model of Fiduciary Assurance: (Test of Fiduciary Assurance Execution Model). *Implementation of the Parate Executie Model of Fiduciary Assurance: (Test of Fiduciary Assurance Execution Model)*, 43(4), 497–504
- 30) Trisandini Prasastinah Usanti and Leonora Bakarbesy, *Banking Law Reference Book Guarantee Law*, Revka Petra Media, Surabaya
- 31) Law Number 42 of 1999 concerning *Fiduciary Guarantee*, Article 1 point 2
- 32) Vidianti Putri & Tami Rusli, Legal Effects of the Transfer of Fiduciary Guarantee Object Lease from the Point of Criminal Law Study Based on the Tanjungkarangkelas Ia District Court Decision Number: 831/Pid.Sus/2021/Pn.Tjk, *Maleo Law Journal* volume 7 Issue April 1, 2023