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Constitutional Court Decision on Fiduciary Security Execution: A Step Backward

Based on the new interpretations under this decision, fiduciary grantees are no longer at liberty to immediately execute their fiduciary objects.

Overview

On 6 January 2020, the Constitutional Court rendered Decision No. 18/PUU-XVII/2019 ("**Decision 18/2019**"),[1] which declared that Article 15 (2) and Article 15 (3) of Law No. 42 of 1999 on Fiduciary Security ("**Fiduciary Security Law**") were to be considered partially unconstitutional.[2] The decision itself was rendered in relation to a petition which was submitted by Aprilliani Dewi and Suri Agung Prabowo (collectively referred to as "**Petitioners**"), who claimed that their constitutional rights had been violated by the provisions set out under the relevant articles.[3]

Originally, Article 15 (2) of the Fiduciary Security Law stated that fiduciary security certificates had the same executorial titles as legally binding court decisions, while Article 15 (3) of the Fiduciary Security Law authorized fiduciary grantees to sell fiduciary objects upon defaults by fiduciary grantors. However, these provisions were deemed prone to result in arbitrary actions from fiduciary grantees.

For background information, the Petitioners entered into a fiduciary security agreement with PT Astra Sedaya Finance in order to lease a car. However, as the fiduciary security object, said car was taken in an allegedly violent manner by debt collectors without the production of any proper underlying documentation on behalf of PT Astra Sedaya Finance, as the fiduciary grantee, who claimed that the Petitioners were in default. In response, the Petitioners filed a lawsuit at the South Jakarta District Court which argued that such actions were unlawful and that the fiduciary grantee was thus guilty. However, the fiduciary grantee

[1] This decision was briefly discussed in ILB No. 3783.
[2] Section 5, Decision 18/2019, p.126.
[3] Para. [1.1], Decision 18/2019, p.1.

continued to impound the fiduciary object in question, claiming that the relevant fiduciary security agreement was valid and binding based on Articles 15 (2) and (3) of the Fiduciary Security Law.[4]

Such cases are common in relation to leasing transactions. In fact, based on data obtained from the Indonesian Consumer Institution Foundation (*Yayasan Lembaga Konsumen Indonesia* – "YLKI"), complaints regarding leasing transactions dominate the cases which are handled by the YLKI, while said complaints predominantly revolve around the following areas: 1) Non-performing loans which result in the seizure of fiduciary objects; 2) The use of debt collectors who act unlawfully during the execution of such seizures; and 3) The failure of consumers to read their leasing agreements carefully, resulting in said consumers being subject to unfamiliar or even disadvantageous provisions.[5]

Siding with the Petitioners in the case outlined above, the Constitutional Court ultimately declared the following:[6]

1. The phrases "executorial title" and "equal to a legally binding court decision", as set out under Article 15 (2) of the Fiduciary Security Law, shall be deemed unconstitutional if the foregoing does not mean that the execution of a fiduciary security certificate shall be implemented through the use of the same legal mechanisms and procedures as employed for the execution of a court decision if there has been no agreement as to what constitutes default and if the debtor is reluctant to release the fiduciary object; and
2. The phrase "default", as set out under Article 15 (3) of the Fiduciary Security Law, shall be deemed unconstitutional if the foregoing is not interpreted to mean that the occurrence of a default shall be based on an agreement which is made between the debtor and creditor or through certain legal proceedings which ultimately determine that a default has occurred.

The handing down of Decision 18/2019 ultimately sparked debate among stakeholders regarding its various underlying considerations and also regarding possible future mechanisms for the execution of fiduciary objects. Against this background, this edition of Indonesian Law Digest (ILD) will specifically address the following matters:

I. Fiduciary Security in General:
   A. Scope of Fiduciary Security;
   B. Fiduciary Security in Effect;
II. Execution Aspects:
   A. Execution Based on Executorial Title;
   B. *Parate Executie*;
III. Default Aspects.

[4] Para. [2.1], Decision 18/2019, p.5-6.
[5] Para. [2.2], Decision 18/2019, p.17.
[6] Section 5, Decision 18/2019, p.125-126.

I. Fiduciary Security in General

Historically, the word, "fiduciary" derives from the word, "*fides*", a Roman word that means, "trust". In both the Dutch and English languages, the word "fiduciary" refers to the transfer of ownership based on trust. Indeed, the parties to a given fiduciary security require trust to be extended in order for this mechanism to be employed, since the fiduciary grantors (debtors) are allowed to retain possession of the relevant fiduciary objects while trying to settle their debts to the relevant fiduciary grantees (creditors).[7]

In practice, this type of security has been long been employed in Indonesia and primarily emerged here as a result of businesses' need to obtain credit facilities while simultaneously allowing them to retain control of the relevant fiduciary objects and thus continue to run their businesses.[8] In other words, fiduciary security emerged as an alternative to pledge security, which requires the transfer of the pledged object.[9]

However, prior to the enactment of the Fiduciary Security Law, this mechanism was characterized by a lack of legal certainty, since fiduciary securities were not required to be registered, thus leading to the possibility that fiduciary grantors could encumber fiduciary objects to various parties, in turn negatively affecting the rights of the relevant creditors.[10]

A. Scope of Fiduciary Security

By definition, fiduciary security refers to security rights over movable goods, regardless of whether said goods are tangible or intangible, as well as immovable goods, particularly objects which cannot be encumbered with mortgage securities.[11] Unless otherwise agreed upon by the relevant parties, fiduciary securities also include the following:[12]

1. Any proceeds deriving from goods which are being encumbered as fiduciary objects; and
2. Any insurance claims, if the relevant fiduciary objects are insured.

Fiduciary security is specially created in order to ensure the settlement of debt. The range of debts that may be secured:[13]

1. Existing debts;
2. Certain amounts of debt which will exist in the future and which were previously agreed upon by the relevant parties; and
3. Debts which exist at the time of execution and which amount may be determined based on principal agreements (*perjanjian pokok*) that include obligations to fulfill certain actions.

[7] Para. [2.3], Section III, Decision 18/2019, p.29-30.
[8] General Elucidation, Fiduciary Security Law.
[9] J. Satrio, "*Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*", p.8-12.
[10] *Ibid*.
[11] Art. 1 (2), Fiduciary Security Law.
[12] Art. 10, Fiduciary Security Law.
[13] Arts. 1 (2) and 7, Fiduciary Security Law.

B. Fiduciary Security in Effect

In general, the encumbrance of an object for fiduciary security should be based on notarial deeds which should be drawn up in the Indonesian language and which should specifically address the following matters:[14]

1. Identity of the fiduciary grantor and grantee;
2. Principal agreement to which the fiduciary security is attached;
3. Description of the fiduciary security object;
4. Security value; and
5. Fiduciary object value.

The encumbered object must then be registered in order for the fiduciary security to be in effect.[15] The registration requirements and procedures are generally outlined under Regulation of the Government No. 21 of 2015 on the Registration Procedure for Fiduciary Securities and Tariffs for the Drawing up of Fiduciary Security Deeds ("**Regulation 21/2015**"). Pursuant to Regulation 21/2015, registration applications must be submitted within 30 days of the relevant fiduciary security notarial deed being drawn up.[16]

The applicant for the registration of the fiduciary security must then settle the registration fee through a designated bank. After the settlement of the registration fee has been completed, the fiduciary security will then be recorded electronically in the Fiduciary Registration Office database and the encumbrance will thus come into force.[17]

Aside from bringing the fiduciary security into effect, the registration process also serves several other purposes, which include the fulfillment of the publicity principle and the granting of preference rights to the fiduciary grantee.[18] The publicity principle confirms to the fiduciary grantee that the relevant object is to be used solely for the purpose of ensuring the settlement of the relevant debt. The Fiduciary Security Law strictly prohibits the re-encumbrance of any fiduciary security in relation to the same object simultaneously.[19]

[14] Arts. 5-6, Fiduciary Security Law.
[15] J. Satrio, "*Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*", p.242.
[16] Art. 4, Regulation 21/2015.
[17] Art. 6 and its elucidation, Regulation 21/2015.
[18] Arts. 11 and 27 (1) and their respective elucidations, Fiduciary Security Law.
[19] Art. 17, Fiduciary Security Law.

II. Execution Aspects

The Fiduciary Security Law guarantees that fiduciary objects may be executed if the fiduciary grantors are in defaults. The execution may be taken through the following measures:[20]

1. Execution by fiduciary grantees based on their executorial titles;
2. The sale of any fiduciary object by the sole power of the fiduciary grantee through public auction;
3. Privately completed sale based on agreement between grantor and grantee if this method proves more beneficial to both parties.

If a fiduciary object consists of trade goods or securities tradable through the marketplace or through the stock exchange, then sales can be completed through such places in accordance with the prevailing laws and regulations.[21]

For the execution purposes, the fiduciary grantors are required to provide the fiduciary objects to the fiduciary grantees. If the fiduciary grantors fail comply with said obligation, the fiduciary grantees are entitled to take over the fiduciary objects from the fiduciary grantors and even request assistance from authorized parties to do so.[22]

Any execution which is not completed in accordance with the above-stated provisions will be considered null and void.[23] This section of ILD will highlight the discussion on the execution of fiduciary objects through measures outlined in points (1) to (3) above.

A. Execution Based on Executorial Title

As previously mentioned, the encumbrance of a fiduciary security will come into force upon its registration. Moreover, any such registration will be proven through the issuance of a fiduciary security certificate which sets out the executorial title and which is considered equal to a legally binding court decision.[24]

Any legally binding court decision should be interpreted as a decision for which no legal remedy is available in order to contest it.[25] Thus, holders of fiduciary security certificates reserve the same rights as the holders of legally binding court decisions, which are ultimately uncontestable through appeal or cassation.[26] By having said titles, creditors are not required to file for execution application to the court and are therefore saved from undergoing a lengthy and expensive process.[27]

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[20] Art. 29, Fiduciary Security Law.
[21] Art. 31, Fiduciary Security Law.
[22] Art. 30, Fiduciary Security Law
[23] Art. 32, Fiduciary Security Law.
[24] Arts. 14 (1) and 15 (1-2), Fiduciary Security Law.
[25] J. Satrio, "*Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*", p.256.
[26] *Ibid*.
[27] Para. [2.3], Section IV, Decision 18/2019, p.47.

Since a given fiduciary agreement will state the fulfillment of a certain obligation, then the relevant fiduciary security certificate will reflect this and will thus be considered *condemnatoir* in nature.[28] A *condemnatoir* court decision is any court decision that requires one of the disputing parties to complete certain actions.[29]

Nevertheless, an issue may arise when the execution of a fiduciary security based on executorial title is conducted. The Petitioners argued that the phrases, "executorial title" and, "equal to a legally binding court decision" have ultimately created legal uncertainty due to their leading to the following multiple interpretations:[30]

1. The creditor (as fiduciary grantee) is able to execute the fiduciary object without following any legal procedures, which would thus empower the creditor to take unlawful actions when executing fiduciary objects;
2. The execution process is construed as the same process as for the execution of a legally binding court decision, whereby the execution must first be requested from the Chairman of the District Court; and
3. The executorial title of any fiduciary security certificate is able to override a court decision which addresses the principle agreement that a given fiduciary guarantee is subject to.

Conceptually speaking, the validity of executorial titles in Indonesia has long followed Article 224 of the H.I.R. In essence, the substance of these provisions breaks down as follows:[31]

1. Both of the original copies of the hypothec, as well as the acknowledgment of debt, all of which have been drawn up in a notarial deed bearing the phrase, "In the Name of God Almighty" are equal to a legally binding court decision;
2. If such an execution can't be conducted properly due to the debtor being reluctant to hand over the relevant security object, then any further action must be based on an order of the district court.

However, the enforceability of the above provisions is limited to the hypothec and deed of acknowledgment of the debt.[32] Meanwhile, the acknowledgment of debt has a different characteristic to that of a fiduciary security. The pivotal discrepancy in this regard is that the acknowledgment of debt is only an acknowledgment of a current and existing debt, while a fiduciary security may also encompass future debt.[33]

Despite the different characteristics of fiduciary security and the acknowledgment of debt, the concept of execution based on executorial title, as referred to in Article 224 of the H.I.R, may essentially reflect the idea of executorial title based on a fiduciary security certificate.[34]

[28] *Ibid*.
[29] Yahya Harahap, "*Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*", p.873.
[30] Para. [2.1], Decision 18/2019, p.9-12.
[31] Art. 224 and its elucidation, H.I.R.
[32] J. Satrio, "*Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*", p.255.
[33] Munir Fuady, "*Hukum Bisnis dalam Teori dan Praktek, Buku Kedua, Volume 2*", p.56.
[34] J. Satrio, *Op.Cit*, p.260.

The move to explicitly reflect Article 224 of the H.I.R on executorial title for fiduciary security certificates has now been accommodated by the Constitutional Court. Thus, the rendered decision further states that the phrases, "executorial title" and, "equal to a legally binding court decision", as set out under Article 15 (2) of the Fiduciary Security Law, shall be deemed unconstitutional if the foregoing is not interpreted to mean that the execution of a fiduciary security certificate shall be implemented through the use of the same legal mechanisms and procedures as for the execution of a court decision if the debtor is reluctant to release the fiduciary object and if an agreement as to what constitutes default remains unavailable.[35]

B. Parate Executie

The Fiduciary Security Law stipulates that upon the default of a debtor, the creditor is entitled to sell the fiduciary object through the sole power of the creditor.[36] This concept is commonly known as a *parate executie*, which refers to an execution that does not require an executorial title and which thus does not require any assistance from a court or any cooperation with a bailiff.[37]

The *parate executie* concept was essentially created in order to accommodate the interests of creditors in the event of any default. As outlined in the beginning, fiduciary securities exist in order to address the fundamental nature of pledge securities and fiduciary securities are in essence based on trust. The term, "fiduciary" refers to trust regarding the transfer of ownership rights to a security object where control over a given object remains in the hands of the relevant debtor. That being said, this concept essentially creates an equal bargaining position between creditor and debtor, where the debtor remains in full control of the object and thus their ability to run their business through the use of said objects is assured, while concurrently, the creditor possesses assurance as regards the settlement of the relevant debt.

One of the underlying background issues behind Decision 18/2019 was the ability of fiduciary grantees to implement *parate executie*. While the execution of executorial title requires fiduciary grantees to apply for court's order before exercising coercive measures, *parate executie* addressed under Article 15 (3) of Fiduciary Security Law enables fiduciary grantees to sell the fiduciary objects independently through auction or privately and does not require said parties to ask for court's assistance in enforcing coercive measures.[38]

The Petitioners then considered *parate executie* as uncertain hence prone to result in an abuse of power by the fiduciary grantees. In their case, the abuse of power takes form of the use of debt collectors. On the other hand, the government argued that essentially this issue resulted from the lacking of regulatory

[35] Section 5, Decision 18/2019, p.125.
[36] Art. 15 (3), Fiduciary Security Law.
[37] J. Satrio, "*Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*", p.261.
[38] Para. [2.3], Section IV, Decision 18/2019, p.48-50.

frameworks regarding the procedures for the implementation of *parate executie*,[39] not the *parate executie*. In fact, *parate executie* is deemed as the best practice for the execution of security rights.[40]

In response to this issue, the Constitutional Court deems that the provisions regarding *parate executie* under Article 15 (3) of Fiduciary Security Law relate with the executorial title outlined under Article 15 (2) of Fiduciary Security Law, which provides the rights for fiduciary grantees to immediately sell fiduciary objects upon defaults of the fiduciary grantors. However, such discretion is not supported with clear provisions on indicators of and mechanism to determine a default, while default is the key factor in determining whether fiduciary grantees may implement *parate executie* mechanism or not. As a consequence, the creditors have absolute authority in selling fiduciary objects.[41]

Based on such considerations, the Constitutional Court believes that executorial title which enables fiduciary grantees to implement *parate executie* mechanism is subject to the execution procedures set under Article 196 H.I.R or Article 208 Rbg. These articles require fiduciary grantees to request for execution order from the court if the fiduciary grantors refuse to hand over the fiduciary objects voluntarily.[42] In this context, the refusal may occur upon the determination of the occurrence of default.

[39] As additional information regarding the government's argument above, the Financial Services Authority (*Otoritas Jasa Keuangan* – "**OJK**") had actually addressed the activities of debt collectors under Regulation No. 35/POJK.05/2018 on the Organization of Financing Company Businesses ("**Regulation 35/2018**"). Pursuant to this regulation, financing companies may cooperate with third parties in order to implement debt-collecting functions.[39] However, all such third parties must meet the following criteria: 1) Must take the form of legal entities; 2) Must secure licenses; 3) Must maintain certified human resources within the debt-collection sector which have been certified by professional certification institutions operating within the finance sector. (Art. 48 [1] and [3], Regulation 35/2018)

[40] Para. [2.3], Section IV, Decision 18/2019, p.66-70.

[41] Para. [3.16], Decision 18/2019, p.119-120.

[42] Para. [3.17], Decision 18/2019, p.120-122.

III. Default Aspects

As discussed in the previous section, *parate executie* outlined under Article 15 (3) of the Fiduciary Security Law may only be executed upon the default of the debtor. However, from the Petitioners' perspective, the Fiduciary Security Law offers little clarity as regards the various indicators which should be used in order to assess a given default.[43]

Responding to the Petitioners' claim, the Constitutional Court has now determined that the phrase, "default", as featured in Article 15 (3) of the Fiduciary Security Law, shall be deemed unconstitutional if the foregoing is not interpreted to mean that the occurrence of a default shall be based on an agreement of the debtor and creditor or through certain legal proceedings which ultimately determine that a default has occurred.[44]

Essentially, the threshold for the determination of defaults is regulated under the Indonesian Civil Code. Specifically, the Indonesian Civil Code states that a debtor will be deemed in default upon the issuance of a reprimand or any similar form, or based on the enforceability of the relevant agreement which is further based on a stipulation in the agreement stating that the debtors must have been declared in default.[45]

From the above provisions, it seems clear that if default provisions are not clearly stated in an agreement, then the issuance of a reprimand will enforce any determination of default.[46] Thus, a determination of default based on legal proceedings is arguably unnecessary due to the fact that the issuance of a reprimand will prevail as a determination of default.

[43] Para. [2.1], Decision 18/2019, p.12-15.
[44] Section 5, Decision 18/2019, p.125.
[45] Art. 1238, Indonesian Civil Code.
[46] J. Satrio, "*Hukum Perikatan*", p.105.

Conclusion

Since the handing down of Decision 18/2019, fiduciary grantees are required to obtain execution orders from a district court if the fiduciary grantors are reluctant to release the relevant fiduciary objects. Moreover, if there has been no agreement as to what constitutes a default, then the execution is ultimately for the district court to decide, specifically a decision as to whether a default has occurred or not. Therefore, fiduciary grantees are now no longer at liberty to immediately execute their fiduciary objects.

These interpretations are expected to result in a longer and more costly execution process, which cause more burdens for creditors and may trigger more reluctance from the creditors in providing credit facilities. More importantly, this decision may also inspire the implementation of similar interpretations for other types of security in Indonesia which, if happens, may create more hassles for creditors hence prevent them even more from providing credit facilities which may be needed by businesses in Indonesia to grow.[VN]

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