

LEGAL ALERT

Indonesia
26 February 2020

Author

Leoni Silitonga

Co-Executive Partner
Roosdiono & Partners
(a member of ZICO Law)
leoni.silitonga@zicolaw.com

Sandro M. Panjaitan

Partner
Roosdiono & Partners
(a member of ZICO Law)
sandro.panjaitan@zicolaw.com



Constitutional Court's Interpretation on the Execution of Fiducia Security

Just before the end of 2019, the Indonesian Constitutional Court (the “Constitutional Court”) rendered a decision with regard to the application for judicial review of certain provisions under Law No. 42 of 1999 concerning Fiducia Security (the “Fiducia Law”) through its decision No. 18/PUU-XVII/2019. The Constitutional Court’s decision sets out its interpretation on the statutory right vested in fiducia security grantees (or creditors) to enforce the execution of fiducia security.

In summary, the Constitutional Court ruling that the executory title of fiducia grantees provided in Article 15 paragraph (2) of the Fiducia Law and the phrase “default” provided in Article 15 paragraph (3) of the Fiducia Law are inconsistent with the Indonesian Constitution of 1945 and contradicts with the principle of legal certainty, impartiality and equality. The Constitutional Court’s decision is final, binding and not subject to appeal.

Fiducia Security under Indonesian Law

Fiducia security is a type of security under Indonesian Law created over moveable assets whether tangible or intangible, particularly for assets which cannot be encumbered by either a land mortgage or a hypothec. A fiducia security can also be granted over existing and future assets. The fiducia security grantor remains in possession of the fiducia security object. A fiducia security must be made between the fiducia security grantor and the fiducia security grantee in the prescribed statutory form of a notarial deed. To perfect the security created by a fiducia security, the fiducia security grantee must register the notarial deed at the Fiducia Registration Office, which will issue a certificate of registration as evidence of perfection.

Recent Interpretation on Article 15 paragraphs (2) and (3) of the Fiducia Law

The Constitutional Court provides interpretation of the relevant articles as follows:

- Article 15 paragraph (2) of the Fiducia Law and its elucidation must be interpreted that the fiducia security grantee (or creditor) must apply for a Civil Court’s assistance to possess and sell the fiducia security object if there is no agreement on the occurrence of default and the fiducia security grantor refuses to surrender the fiducia security object voluntarily to the fiducia security grantee (or creditor).
- Article 15 paragraph (3) of the Fiducia Law must be interpreted that the creditor cannot determine the debtor’s default unilaterally, instead the occurrence of default must be based on the parties’ agreement or pursuant to a certain legal action.

Essentially, Article 15 paragraph (2) of the Fiducia Law states that Fiducia Security Certificates have the same executory title that is equivalent to a final and binding court order/decision. Article 15 paragraph (3) of the Fiducia Law further grants a right to fiducia security grantee to do self-execution, allowing the fiducia security grantee to immediately sell the fiducia security object without obtaining a prior court order.



Through its decision, however, the Constitutional Court ruling that the executory title is enforceable only to the extent that: (i) there is a mutual agreement between the fiducia security grantor and fiducia security grantee on the occurrence of default; and (ii) the fiducia security grantor willingly surrenders the fiducia security object to the fiducia security grantee. If the above conditions are not fulfilled, the fiducia security grantee is banned from enforcing its executory title granted under the fiducia certificate. Consequently, the enforcement of the fiducia security should follow the conventional security enforcement process, i.e. through the Indonesian civil court proceedings. The fiducia security grantee will need to apply to the relevant civil court in order to enforce their right to take possession of and sell the fiducia security object.

In line with the Constitutional Court's interpretation of the implementation of Article 15 (2) of the Fiducia Law, the Constitutional Court also made a limitative interpretation of the phrase "default" in Article 15 (3) of the Fiducia Law and ruling that either a mutual agreement between the creditor and the debtor or the commencement of legal proceedings (*upaya hukum*) is required to determine the occurrence of the debtor's default.

Impact of the Constitutional Court's decision

The Constitutional Court's decision has brought a significant impact on the execution of fiducia security. It is known that a lawsuit process in Indonesia is not a simple and quick process and it could last for several years. To legally determine that the debtor is in default, the fiducia security grantee (or creditors) may have to proceed with a time consuming court proceeding. This may also make fiducia security less attractive and favorable as a security option for creditors while, in current practice, a fiducia security (*jaminan fidusia*) is commonly used as this is the closest Indonesian law equivalent to a floating charge.

It also raises a query on how a public auction would be affected. Under prevailing regulation, a public auction for a fiducia security object can be performed once the creditor can submit, among others, evidence that the debtor is in default (i.e. a warning letter). It is now unclear whether the state auction office would also require evidence of the debtor's agreement and that the debtor has voluntarily surrendered the secured object to perform the public auction.

From the above, one may suggest that in order to mitigate the risk of having these issues when it comes to the enforcement of the self-executory title of fiducia security, is to include in the fiducia security agreement (i) covenant from the fiducia security grantor that it is willing to surrender or release its possession of the fiducia security object upon the occurrence of event of default based on the underlying credit or facility agreement; and (ii) an agreement that the occurrence of event of default is to be determined by the fiducia security grantee (or creditor) based on the underlying credit or facility agreement.

If you have any questions or require any additional information, please contact **Leoni Silitonga** and **Sandro Mieda Panjaitan** of Roosdiono & Partners (a member of ZICO Law).

This alert is for general information only and is not a substitute for legal advice.