

# Indonesian Constitutional Court: Creditor Loss of Right to Self-Help Remedy?

February 2020

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A recent debtor-friendly Indonesian Constitutional Court decision (*putusan*) raises uncertainty as to a creditor's right to exercise its self-help remedy (*parate executie*) in respect of assets subject to fiducia security. While this decision warrants caution on the part of creditors, our view is that it will not significantly impact the sophisticated commercial loan market in Indonesia.

## MK Decision

The Indonesian Constitutional Court ("MK") recently issued a decision interpreting Article 15.2 and Article 15.3 of Law No. 42 of 1999 on Fiduciary Security (the "Fiducia Law") pursuant to a constitutional review of those provisions (the "MK Decision").<sup>1</sup>

Article 15.2 of the Fiducia Law grants a self-help remedy (*parate executie*) to creditors holding a fiducia certificate, which has the same executorial power as a final and binding court decision (*putusan*). Article 15.3 of the Fiducia Law allows creditors to sell the object of the fiducia security themselves without the need for a separate court order (*penetapan*) on the occurrence of the debtor's default.

MK found that the right of the fiducia holder to execution under Article 15.2 of the Fiducia Law favoured the fiducia holder by depriving the fiducia grantor of the opportunity to defend itself against a unilateral determination of its default by the fiducia holder. In order to ensure "balanced" protection for the fiducia grantor and the fiducia holder, MK interpreted Article 15.2 of the Fiducia Law to mean that the executory title contemplated in the fiducia certificate is enforceable and valid only to the extent that: (i) there is a mutual agreement between the fiducia grantor and the fiducia holder as to the occurrence of the default; and (ii) the fiducia grantor willingly surrenders the object of the fiducia to the fiducia holder.

MK also made a constitutional interpretation of Article 15.3 of the Fiducia Law, holding that the occurrence of the debtor's default may not be determined unilaterally by the fiducia holder but by either: (i) a mutual agreement between the fiducia holder and the fiducia grantor; or (ii) a court decision (*putusan*) determining that the default has occurred.

## Analysis

The MK Decision questions the ability of the fiducia holder to unilaterally determine a default and exercise its self-help remedy (*parate executie*) in the absence of either (i) the fiducia grantor's cooperation in coming to a mutual agreement that a default has occurred or (ii) a court decision (*putusan*).

<sup>1</sup> Decision No. 18/PUU-XVII/2019.

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## Mutual Agreement on the Default

The MK Decision's requirement of a "mutual agreement on the default" is unclear as it may be interpreted to mean either: (i) that the fiducia grantor now must provide a confirmation of the default; or (ii) that the fiducia grantor and fiducia holder must simply agree in the underlying agreement as to the circumstances which constitute default. If the former interpretation is applied, it would mean that in the context of fiducia security, the fiducia holder has lost the ability to unilaterally determine a default and exercise its self-help remedy (*parate executie*).

## Requirement of Court Decision

Even prior to the MK Decision, our usual advice was to following demand letters (*somasi*), obtain a court order (*penetapan*) prior to the enforcement of security, in order to minimise the risk of challenge by the fiducia grantor. This was regardless of a fiducia holder's ability to enforce the security unilaterally without court assistance under Article 15.3 of the Fiducia Law. This advice was given based on the enforcement risk and court practice in Indonesia.

However, the MK Decision suggests creditors may now be required to obtain a court decision (*putusan*) if the debtor/fiducia grantor is not cooperative. Obtaining a court decision (*putusan*) is a more onerous process as compared to obtaining a court order (*penetapan*). A court order (*penetapan*) is awarded pursuant to a request for court order (*penetapan*) which proceedings are relatively straightforward and may, in practice, be completed within one to six months. A court decision (*putusan*), on the other hand, requires a civil claim to be filed and pursued which involves a full hearing and adjudication of the merits of the claim, which may take up to 12 months, or longer if appealed. Such court proceedings may also give opportunity for legal maneuvering by the fiducia grantor to frustrate the enforcement proceedings, potentially delaying the execution process against the fiducia object.

## Practical Implications

In our view, the MK Decision warrants caution but will not significantly impact the sophisticated commercial loan market in Indonesia. Court processes, whether obtaining a court order (*penetapan*) or a court decision (*putusan*), have always been challenging in Indonesia for creditors. As such, enforcement through the courts has always been a remedy of last resort—with creditors taking that into account when structuring and pricing transactions. The preference of international creditors has typically been to deploy commercial levers or offshore recourse as primary routes to repayment following default. That said, the MK Decision does warrant creditors reconsidering their posture towards Indonesian deals particularly where there is no longstanding pre-existing relationship with the debtor, or where it is proposed that a transaction will be effected only with onshore recourse and in the absence of structural enhancements to the debt.

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