Fiduciary Security Execution Redefined: The Indonesian Constitutional Court Ruling on Article 15 (2) And (3) of The Fiduciary Security Law

A. Background

On 15 February 2019, a petition for a judicial review was submitted by two individuals ("Petitioners"), claiming that their constitutional rights had been violated by Article 15 (2) and Article 15 (3) of Law No. 42 of 1999 on Fiduciary Security ("Fiduciary Security Law"). Under Article 15 (2) of the Fiduciary Security Law, fiduciary security certificates have the same executorial title as legally binding court rulings while Article 15 (3) of the Fiduciary Security Law authorizes fiduciary grantees to sell fiduciary objects in the event of default by the fiduciary grantors.

By this petition, the Petitioners asked the Constitutional Court to declare the provisions unconstitutional on the ground that according to them, that they focus solely on protecting the rights of creditors and are prone to result in arbitrary actions by creditors against debtors. Further, the Petitioners claimed that the provisions violated their constitutional rights as debtors, as they failed to uphold the principles of legal certainty and equity before the law and to protect their ownership rights, all of which are guaranteed under the 1945 Constitution of the Republic of Indonesia.

The background to the petition for a judicial review was that the Petitioners had entered into a fiduciary security agreement with a multi finance company to lease a motorcar. However, the motorcar (as a fiduciary security object) was taken in an allegedly violent manner by debt collectors without producing any underlying documentation on behalf of the multi finance company, as the fiduciary grantee, who claimed that the Petitioners were in default. In response, the Petitioners filed a lawsuit in the South Jakarta District Court which argued that these actions were unlawful and that the fiduciary grantee was therefore guilty. However, the fiduciary grantee impounded the fiduciary object, claiming that the relevant fiduciary security agreement was valid and binding under Article 15 (2) and (3) of the Fiduciary Security Law.

At the beginning of 2020, the Constitutional Court handed down Ruling No. 18/PUU-XVII/2019 (“Ruling No. 18 of 2019”) on the petition for a judicial review, which declared Article 15 (2) and (3) of the Fiduciary Security Law partially unconstitutional by ruling that:

1. the phrase “executorial title” and “equal to a legally binding court ruling” in Article 15 (2) of the Fiduciary Security Law and its elucidation must be interpreted to mean that the execution of a fiduciary security certificate must be implemented through the use of the same legal mechanisms and procedures as employed for the execution of a court ruling 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 “loan default” in Article 15 (3) of the Fiduciary Security Law must be deemed unconstitutional if the foregoing is not interpreted to mean that loan defaults cannot be unilaterally determined by the creditor without the consent of the debtor but must be jointly agreed to by the debtor and the creditor under an agreement or through certain legal proceedings which ultimately determine that a default has occurred.

B. The Implications of Ruling No. 18 of 2019 on the Existing Practice

Ruling No. 18 of 2019 has the following 2 (two) major implications for the existing fiduciary security execution practice:

1. Restrictive power of a fiduciary security certificate

Originally, under Article 15 (2) of the Fiduciary Security Law, fiduciary security certificates had the same executorial title as legally binding court ruling. Therefore, holders of fiduciary security certificates had the same rights as holders of legally binding court rulings, which are ultimately incontestable through an appeal to the High Court or an appeal to the Supreme Court, and they are not required to apply for their execution to the courts. This was designed to provide ease and expedite the enforcement procedure, and creditors were therefore saved from lengthy and expensive proceedings.

However, now under Ruling No. 18 of 2019, Article 15 (2) of the Fiduciary Security Law now determines that all mechanisms and procedures for executing fiduciary security must be the same as for executing a final and binding court ruling if the debtor does not voluntarily surrender the fiduciary object. Consequently, holders of fiduciary security certificates no longer have the authority to execute as if they already had a legally binding court ruling, but require the support of the court with jurisdiction.

2. A loan default cannot be unilaterally determined; it must be agreed to between the debtor and the creditor

Before the Constitutional Court handed down Ruling No. 18 of 2019, under Article 15 (3) of the Fiduciary Security Law an event of default gave the receiver of the fiduciary security the right to sell the fiduciary object on the receiver's own behalf, through a mechanism called parate executie. Parate executie refers to execution that does not require executorial title and therefore does not require any assistance from a court or cooperation with a bailiff, in order to accommodate the interests of creditors in the event of default.

This means that before Ruling No. 18 of 2019 came into effect, creditors had the right to unilaterally determine whether a default had occurred in accordance with the terms of the loan agreement and if the debtor refused to acknowledge the loan default under a fiduciary agreement, the creditor could execute the fiduciary security without a an order from the District Court with jurisdiction to sell the fiduciary security object under its parate executie power.

However, since Ruling No. 18 of 2019 was handed down, an event of a default now requires an agreement between the parties or legal proceedings. This means that whether an event of default has occurred must be agreed to by the debtor and the creditor. It cannot be unilaterally determined by the creditor. Therefore, the creditor must obtain the agreement of the debtor It cannot exercise its right of parate executie without the cooperation or agreement of the debtor or a court order from the District Court with jurisdiction. Constitutional Court Ruling No. 18 of 2019 means that the debtor can either simply object and ask the court to rule on whether an event of default has occurred or not, or willingly hand over the fiduciary secured asset to the creditor.

C. Conclusion

Constitutional Court Ruling No. 18 of 2019 found Article 15 (2) and (3) of the Fiduciary Security Law partially unconstitutional. Therefore:

1. the creditor must now obtain an executionary order from a District Court through summary proceedings if the debtor does not voluntarily surrender the fiduciary object; and
2. if the creditor and debtor have no agreement as to what constitutes an event of a default, the creditor can no longer immediately execute the fiduciary object; it is up to the District Court to decide whether an event of a default has occurred or not.

However, to date, no implementing regulation on Constitutional Court Ruling No. 18 of 2019 has been issued on the implications for the existing fiduciary security execution practice for

further guidelines. It would be also interesting to see the attitude of Indonesian courts of whether they will fully implement Constitutional Court Ruling No. 18 of 2019 or they will strictly continue enforcing the Fiduciary Security Law.

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Contacts:

Cynthia Yunita Ilyas: cynthia.ilyas@makarim.com
Lia Alizia: lia.alizia@makarim.com