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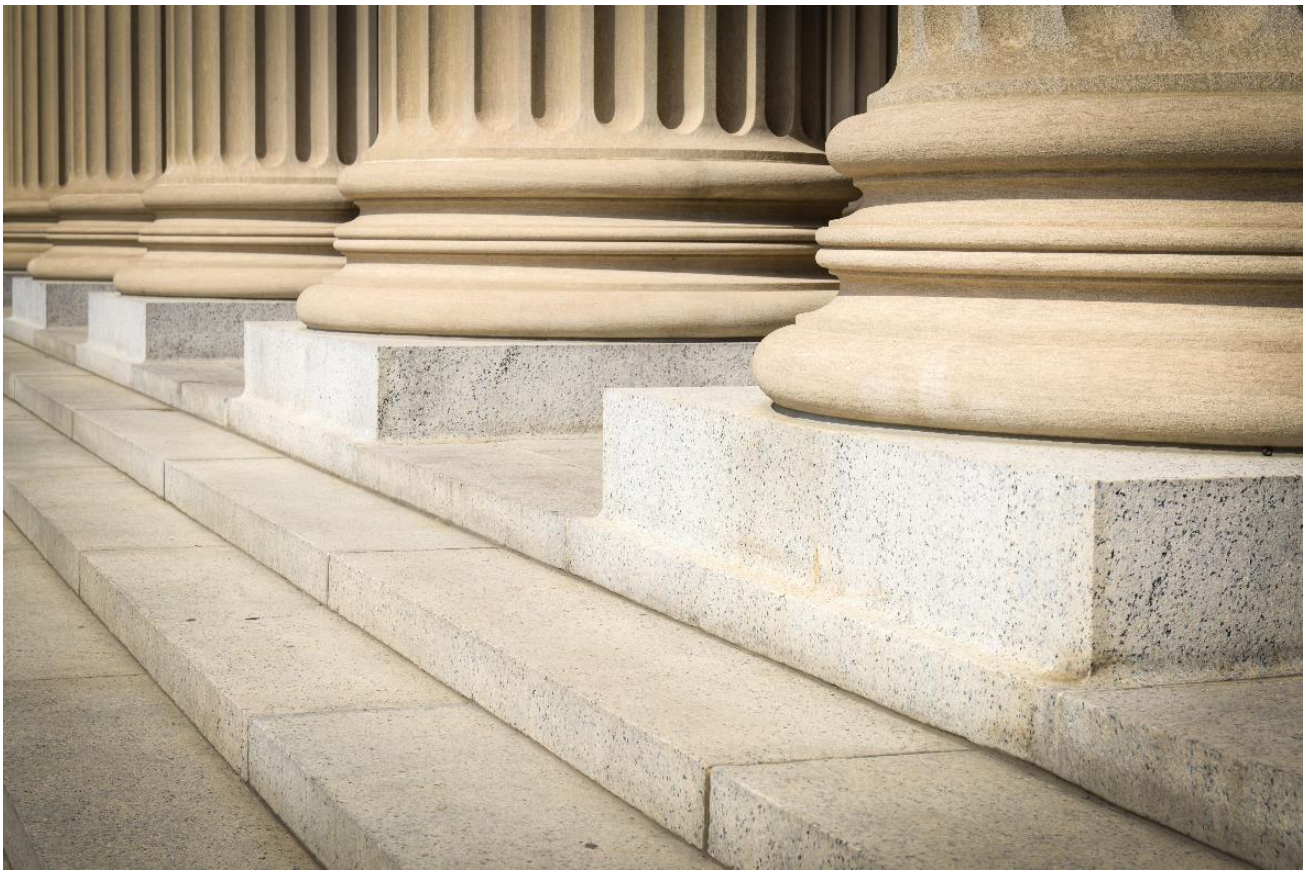
24 January 2020
January 2020



Client Alert January 2020

Enforcement of Indonesian Fiduciary Security

On 6 January 2020, the Constitutional Court of the Republic of Indonesia issued the Constitutional Court decision Number 18/PUU-XVII/2019 relating to judicial review against Law No. 42 of 1999 on Fiduciary Security ("**Decision 18/2019**") which sets out interpretation and procedures on how Indonesian fiduciary security should be enforced. The following alert briefly discusses certain immediate impacts of such decision, particularly to creditors/lenders/parties holding Indonesian fiduciary security that secure related credit lines and financing facilities.

Overview

At the outset, holders of Indonesian fiduciary security would expect a swift enforcement of such security when there is a default in associated financing and credit agreements, so that applicable default exposures can be remedied as soon as possible. This, to some extent, is being represented by the executorial title provided under applicable Indonesian fiduciary security certificate of which, theoretically, is equivalent with a legally binding court decision. In other words, holders of Indonesian fiduciary security may not necessarily have to take the route of lengthy court proceeding to

remedy default exposures given the executorial title in the relevant Indonesian fiduciary security certificate that they are holding.

By virtue of the Decision 18/2019, the Constitutional Court provided its interpretation on existence of borrower's default and executorial power of fiduciary certificates (as provided for under Articles 15 (2) and (3) of Law No. 42 of 1999 on Fiduciary Security ("**Fiduciary Law**")) and, essentially, concluded that:

- call for borrower's default shall be based on mutual consent between such borrower and lender – or – if there is no mutual consent, based on a legally binding court decision determining that such borrower is actually in a default situation; and

- in case of enforcement, Decision 18/2019 refrained the Indonesian fiduciary security holder/lender from enforcing the secured asset(s) unilaterally without any court decision. In this respect, such enforcement would need to be carried out in accordance with the applicable procedures for execution of court decision.

Full Indonesian language text of the Decision 18/2019 can be found in the Constitutional Court's website through this link: https://mkri.id/public/content/persidangan/putusan/putusan_mkri_6694.pdf.

In a typical loan documentation (especially, those dealing with retail borrowers), there is normally a set of provisions which would provide rights for the lender to administer loan and interest repayments, take preventive actions when there is a shortfall in repayments (including, sending warning letters, asking for top-up of security, etc.) prior to determining an existence of default and taking any acceleration action (including enforcing associated security) and these would normally have been pre-agreed by the borrower.

Clearly, the ability and flexibility of lenders to take acceleration actions and enforce the Indonesian fiduciary security are affected with this Decision 18/2019 as borrowers may simply raise their disagreement and ask the court to determine if they are actually in default situation and/or do not, willingly, hand over the fiduciary secured asset to the lender (e.g. on the basis that they have not agreed that there is a default and/or the lender is taking enforcement action unilaterally); all of which are time consuming and are not in line with the expectations of the lenders to swiftly remedy any default which is occurring.

Key Takeaways

In light of the above, some of the immediate key takeaways which can be taken for consideration include:

- review existing loan and security documents as well as procedures for enforcement of security, particularly those lenders who have received Indonesian fiduciary security and/or are primarily dealing with retail borrowers (e.g. leasing companies) and seek for improvements which can be made; and

- consideration on approaches in calculating loan-to-value ratio in respect of Indonesian fiduciary security assets (owing to the perceived enforcement

formalities/difficulties, as discussed above), especially for lenders which provide financing for acquisition of certain moveable assets which are normally secured by Indonesian fiduciary security – and determine whether there is a need to make adjustments and/or require the borrowers to provide additional security package.

Given the recent nature of Decision 18/2019, it is interesting to learn how affected industries and businesses would react on the matter and we would suspect that relevant Indonesian government authority (e.g. the Financial Services Authority/*Otoritas Jasa Keuangan* (OJK) and the Ministry of Law and Human Rights) might issue new regulations, policies and/or directives on the matter. We are monitoring this matter and will update this alert as required.

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