

# ACTIO

ISSUE NO.1 / MAY 2016

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## Hypothec over Vessels

FOR EASY PROCUREMENT OF  
COMMERCIAL VESSELS

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## Non-performing Loans

THINGS TO DO FOR SMOOTH  
LOAN APPLICATION

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## Security for a Debt





We, Akasa Cipta Tama (ACT), was established in April 2015 as a response to the demand of highly qualified translators for business, legal, technical, and general documents; as well as interpreters and note takers for meetings, seminars, and conference. Our translators, interpreters and note takers have extensive experiences in their respective fields.

With a comprehensive database of qualified human resources, ACT works to ensure the best results in every project we run. Some of our top personnel have worked for various international events and some of our clients include the Office of the President of the Republic of Indonesia, People's Consultative Assembly, The United Nations, The World Bank, AusAID, USAID, and some prominent law firms in Indonesia.

We hereby would like to present our proposal for providing translation service.



Please do not hesitate to contact us if you have any question at [marketing.akasa@gmail.com](mailto:marketing.akasa@gmail.com).  
Looking forward to hearing from you.

# Knowledge is power



Aristotle once said that knowledge is power. By obtaining knowledge, people do better today than yesterday. Anggraeni & Partners believe that law, as a knowledge, is beneficial for each individuals in living their life as part of the society. This includes relations among individuals in their economic activities.

In this first edition, Actio, an Indonesian legal magazine published by Anggraeni and Partners picked "Encumbrance Law" as its main theme. In each economic activities, capital is the main factor to ensure the smooth sailing of business operations. Often times, businessperson found various obstacles in collecting fund to increase capital and expand their businesses; this is the point where the financiers such as bank will play an important and central role. To guarantee the payment of the loans, banks or other financial institutions will need security. In this May 2016 edition, Actio will feature articles on encumbrance law. We hope that these information will help enrich the knowledge of the readers on encumbrance law.

We would like also to inform you that, although the information contained in Action is a personal contribution of associates at Anggraeni and Partners, these analyses neither represent the view of Anggraeni and Partners nor provide a legal opinion on a particular legal issue.

Lastly, we hope that Actio could be useful to all of us.

Enjoy.

With regards,

**Anggraeni & Partners**

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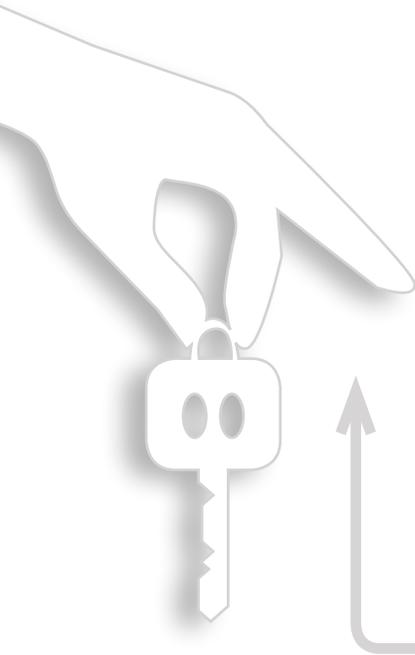
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## CRIMINAL PENALTY ON FIDUCIA SECURITY

If you or your family member purchases a movable asset while such asset is secured by way of fiducia security, you may need to be careful because you may be subject to imprisonment if you sell or transfer the secured asset. The provision on the imprisonment has been clearly regulated under Article 36 of Law No. 42 of 1999 regarding Fiducia Security (Fiducia Law). Pursuant to the Fiducia Law, a person which is subject to fiducia security is prohibited from transferring, encumbering or renting the fiducia object without prior written consent from the fiducia grantee. A breach to such provision is subject to imprisonment at a

maximum of 2 (two) years and penalty at a maximum of Rp. 50,000,000 (fifty million Rupiah).

The imprisonment is a serious penalty since there have been cases decided by courts in Indonesia which punish the relevant parties to prison due to violation of Article 36 of Fiducia Law. You may do your own research by following the link: <http://putusan.mahkamahagung.go.id> and entering the key word: "criminal act of transferring fiducia security" and clicking "submit query". **(MRT)**



## Ratification Of Law On Guarantee

Bill on Guarantee is officially adopted by the General Assembly of the Indonesian's House of Representative (DPR RI) on 17 December 2015. As published in the website of DPR RI, [www.dpr.go.id](http://www.dpr.go.id), the law on guarantee has been anticipated by the business community, particularly by micro and middle-scale business players and cooperative to face the ASEAN Economic Community (AEC), which is effective as of 1 January 2016.

The existence of Guarantee Law is the umbrella of guarantee activities. It gives hope to create a level playing field which balances the other financial services, and to increase the trust of banking institution, financing institution and the people against security institution. **(MRT)**



Source: <http://www.dpr.go.id/berita/detail/id/11866>

# HYPOTHEC OVER VESSELS A SOLUTION FOR FINANCING NATIONAL COMMERCIAL VESSELS PROCUREMENT

Law No. 17 of 2008 regarding Shipping (Shipping Law) has initiated the use of cabotage principle which is the activities of domestic shipping conducted by national shipping company using Indonesian flag vessel and Indonesian crew members. Since the implementation of cabotage principle, the use of national commercial vessels has increased from 6,041 units in 2005 to become 14,064 units in 2013 or marked a 132,8% increase. The success of cabotage principle coupled with the Nawa Cita (nine priority agenda of the current administration) initiated by Jokowi JK which focuses on strengthening the identity as a maritime country obviously lead to the increase of procurement of national commercial vessels.

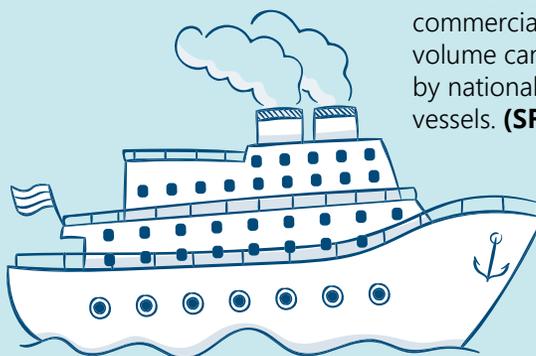
The massive procurement of commercial vessels require huge amount of financing from banking sector. On the other hand, the banking sector

requires security assets to ensure the repayment of loan and interest. Hypothec over vessels has been regulated under Commercial Code (Kitab Undang-Undang Hukum Dagang – KUHD). Hypothec is defined as a repayment of a credit agreement which derives from immovable assets by way of substitution mechanism. Hypothec over vessels is also regulated in Shipping Law which sets out

that a vessels registered at Indonesian Vessel Register can be secured for loan repayment. The encumbrance of security is conducted by way of hypothec over vessels through deed of hypothec over vessel and the issuance of hypothec deed (Grosse Akta Hipotek). For easy procurement of commercial vessel, Shipping Law allows a vessel to be secured by more than one hypothec.

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The existence of hypothec as mentioned above is the easy way that can be used by commercial vessel business players to meet the demand of national commercial vessels. This is necessary to be conducted considering the growth of national cargo volume which is at 15% to 25% annually. Therefore, if there is no obstacle in procuring commercial vessels, such volume can be accommodated by national commercial vessels. **(SFA)**



1. Ario Fajar, 'Pemberlakuan Asas Cabotage Dorong Bisnis Pengapalan Lokal', Swa 13 Januari 2015 <<http://swa.co.id/business-strategy/management/pemberlakuan-asas-cabotage-dorong-bisnis-pengapalan-lokal>> diakses pada 10 Februari 2016; 2. "Nawacita", 9 Agenda Prioritas Jokowi-JK. Kompas 21 Mei 2014 <<http://nasional.kompas.com/read/2014/05/21/0754454/.nawa.cita.9.agenda.prioritas.jokowi-jk>> diakses 10 Februari 2016; 3. Kitab Undang-undang Perdata; dan 4. Undang-Undang Pelayaran Nomor 17 Tahun 2008.

# ENFORCEMENT OF FIDUCIA SECURITY:

## Judicial Basis, Practice and Common Issues

The background of the enactment of Law No. 42 of 1999 regarding Fiducia Security is the interest to develop the economy, particularly to support financing activities. In particular, it is also intended to be a facility to create an integral fiducia security law. Fiducia Security Law regulates the principles of law on security that is absolute principle, droit de suite, preference, priority and publicity. The existence of such principles show that the fiducia security, as a type of security which has a position in law on security in Indonesia, has given sufficient legal certainty for the parties, particularly the ones engage in economic activities.



One of the principles which gives protection to the fiducia grantee is the principle of parate executie, as provided under Article 15(2) and Article 29(1) of Fiducia Security Law. The mechanism/enforcement procedures of parate executie are as follows:

- a** enforcement of the executory power inherent to the Fiducia Certificate by the fiducia grantee (in the fiducia certificate which is made in notarial form, it includes the passage "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa" which has executorial power with the same legal effect as a final and binding court decision), and therefore a creditor is not required to demand a court to issue a writ of execution permitting the enforcement of fiducia security in the event of a breach of the debtor.
- b** The sale of fiducia object based on the fiducia grantee (bank)'s power through public auction and apply the sale proceeds for the repayment.
- c** The private sale based on the consensus between the fiducia grantor (debtor) and the fiducia grantee (bank) if the highest possible price for the interest of both parties can be obtained.

The enforcement of parate executie give certain facilities to the creditor such as: easy procedures, faster, cheaper and simpler way to get repayment; certainty in selling the fiducia object; and is an exception to enforcement procedures based on the proceedings under the Civil Law (Hukum Acara Perdata). Therefore, such benefit of parate executie in order to get repayment when the debtor is in default is beneficial for entrepreneurs in financing sectors. Hence, it can be concluded that parate executie, in a normative way, is a main pillar in law on security, particularly in fiducia security.



In practice, nevertheless Fiducia Security Law is effective, several related minister regulations and the Regulation of the Head of Indonesian Police Force Number 8 of 2011 regarding the Safety in the Enforcement of Fiducia Security still have issues, particularly in enforcing fiducia security. The issues are as follows:

- Fiducia Security Law has not accommodated the enforcement of executory power completely and comprehensively;
- The value of the fiducia object is not sufficient, is not maintained by the debtor and result in debtor's losses;
- For fiducia objects in the form of stock/ inventory, equipment, machinery, it is often that such objects have been transferred by the debtor without the acknowledgment from the creditor;
- Executory attachment which can directly be conducted in enforcing fiducia security, in practice the official of the public auction house requires a writ of execution from the court;
- The possession of fiducia object by the fiducia grantor, which does not have good faith, is misused by granting another fiducia object over the same object. In this case, the fiducia object is delivered to another party, which will be the second ranking of fiducia grantee;
- The fiducia object is sold to another third party;
- Challenge from the fiducia grantor during the enforcement, which may raise a conflict between the officer enforcing the fiducia security and the debtor;
- There is an unlawful criminal act by the officer enforcing the fiducia security, such as intimidating or conducting anarchy by damaging the fiducia object and conduct violent action against the debtor which lead to debtor's losses;
- The enforcement is suspended because the fiducia object is attached by an investigator as an evidence in a criminal case which does not have relation with the fiducia grantee;
- The law enforcement officer does not understand/acknowledge the privilege rights of the financing institution as the fiducia grantee to directly enforce (*parate executie*) when the debtor is in default, therefore such officer deems that the direct enforcement by the fiducia grantee is a one-way action and unlawful;
- The safety in enforcing fiducia security provided by police force is hard to be obtained and therefore the enforcement of fiducia security is often conducted by external collector without the safety from the police force.

The above mentioned are some of the issues arising from the enforcement of *parate executie* of fiducia security which requires attention from the relevant stakeholders, so that the law protection for creditors as mandated by the Fiducia Security Law, can be implemented. **(AP)**

# DILEMMA ON THE OBLIGATION TO REGISTER FIDUCIA SECURITY

**What is the legal consequence if a financing institution registers a fiducia certificate after the lapse of 30-day period, as set out in the Minister of Finance Regulation No. 130/PMK.010/2012 regarding Registration of Fiducia Security for Financing Company which Conducts Consumer Financing for Vehicle with Fiducia Security ?**

**Answer:**

We understand that the Minister of Finance Regulation No. 130/PMK.010/2012 requires a financing company to register a fiducia security by no later than 30 days as of the consumer financing agreement. In practice, however, this requirement is difficult to be conducted by the entrepreneurs as the registration process may take more than 30 days. Therefore, within 30 days, the financing company may not have obtained the fiducia certificate. As the legal consequence, the financing company will get a warning from the Minister of Finance in the form of a written sanction for 3 (three) times. In addition, the financing company will not be able to take the vehicles from the debtor so long as the fiducia certificate has not been issued.

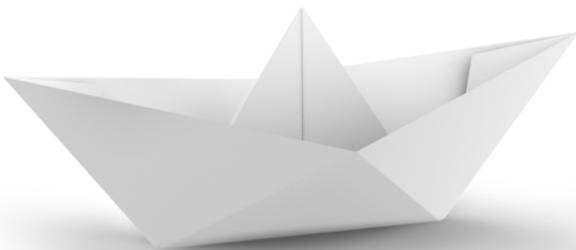
**(ADP)**



**What is the difference in an auction between fiducia object which is voluntarily delivered and fiducia object which is obtained from enforcement proceeding?**

**Answer:**

Generally, fiducia object must be auctioned by a financing company to fulfil the outstanding payment of the debtor, except there is an agreement between the fiducia grantor and the fiducia grantee to privately sell the fiducia object. This is intended to obtain the higher enforcement proceeds. Auction procedure, either for fiducia object which is voluntarily delivered or which is enforced, shall refer to the Minister of Finance Regulation Number 27/PMK.06/2016 regarding the Guidance on Auction Procedure (PMK Auction). The financing company as an auction applicant must note that if the fiducia object is obtained from enforcement proceeding, the auction must be conducted by Class I Auction Officer whereas if the fiducia object is voluntarily delivered, the auction may be auctioned by Class I or Class II Auction Officer. **(ADP)**



\* the questions are submitted by an employee of a financing company in Jakarta.

# LAW NO. 1 OF 2016 REGARDING ENCUMBRANCE OF SECURITY



Guarantee Law No. 1 of 2016 regulates guarantee institutions in granting guarantee to the party which has received credit facility. It is created by financial institution or non-financial institution.

Prior to the enactment of Guarantee Law, the provision regarding Guarantee Institution is stipulated under the Minister of Finance Decision Number 486/KMK.017/1996 regarding Guarantee Institution, Presidential Regulation Number 2 of 2008 regarding Guarantee Institution and Presidential Regulation Number 9 of 2009 regarding Financing Institution. After the issuance of Law Number 21 of 2011 regarding Financial Services Authority, the supervision of guarantee institution is transferred from the Minister of Finance to the Financial Services Authority (Otoritas Jasa Keuangan – OJK). Now, guarantee institution refers to (i) Regulation of OJK No. 4/POJK.05/2013 of 2013 regarding the Fit and Proper Test for Main Party in Insurance Company, Pension Fund, Financing Company and Guarantee Institution, (ii) Regulation of OJK Number 5/POJK.05/2014 of 2014 regarding Business License and the Corporate Structure of Guarantee Institution, and

(iii) Regulation of OJK Number 6/POJK.05/2014 of 2014 regarding Business Operation of Guarantee Institution (OJK Regulations).

The Guarantee Law stipulates the Guarantee Business which covers (i) Credit Security, Financing or Sharia Financing granted by financial institution, (ii) Guarantee for a Loan distributed through loan cooperative (koperasi simpan pinjam) or cooperative which has loan division to its members and (iii) Guarantee Credit and/or loan for partnership program distributed by state owned enterprise within the program of partnership and environment building.

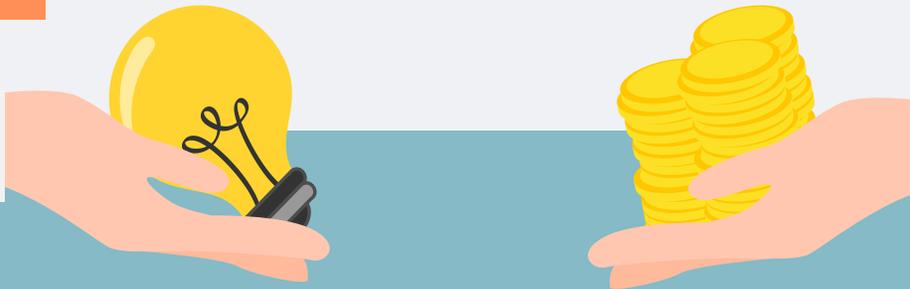
In addition, the Guarantee Law adds the businesses that can be conducted by guarantee institution, other than the ones mentioned in the OJK Regulations being (i) guarantee for purchase of goods in instalment, (ii) guarantee for trade transaction, (iii) guarantee for duty, and (iv) other business activities after obtaining an approval from the OJK.

The Guarantee Law also stipulates foreign ownership

in a Guarantee Institution in the form of a limited liability company to become 30% (thirty per cent). Previously, based on OJK Regulation foreign party can own 49% (forty nine per cent) of the subscribed capital.

In more details, the Guarantee Law stipulates the subscribed capital or subscribed principal and capital certificate of Guarantee Institution and Sharia Guarantee Institution at the minimum of (i) Rp. 100,000,000,000 (one hundred billion Rupiah) for national coverage or (ii) Rp. 25,000,000,000 (twenty five billion Rupiah) for provincial coverage and (iii) Rp. 200,000,000,000 (two hundred billion Rupiah) for Re-Guarantee Institution and Sharia Re-Guarantee Institution.

Sanction for the Guarantee Institution which does not fulfil the provisions under the Guarantee Law is only administrative sanction which provided under the Guarantee Law. In addition to administrative sanction, there is an administrative penalty, which was not provided under the OJK Regulation. **(TWK)**



# COPYRIGHT AS SECURITY FOR A DEBTOR

Copyright falls under the category of intangible movable assets, as set out in the general elucidation of Law No. 28 of 2014 regarding Copyright (New Copyright Law). In this regard, the New Copyright Law limits the definition of rights over goods (hak kebendaan) against copyright, while the previous Law No. 19 of 2002 regarding Copyright and Law No. 6 of 1982 regarding Copyright only categorize copyright as movable asset.

Pursuant to Article 193) of Law No. 42 of 1999 regarding Fiducia Security (Fiducia Security Law) goods are defined as any thing that can be owned and transferred, either tangible or intangible, registered or unregistered, movable or immovable, movable but cannot be encumbered with mortgage or hypothec. Therefore, any goods that fulfil the provision under Fiducia Security Law can be encumbered with fiducia security.

In relation to the above, it is clear that Copyright can be secured as fiducia object whose implementation will be in accordance with the prevailing laws and regulations. This is also governed under the New Copyright Law.

However, the question is whether the regulation which says that copyright can be encumbered with fiducia security is acceptable to the banks in their position as the creditor? Does copyright have economic value for the creditors?

In general, the creditors is willing to grant the loans if the debtors are able to provide security over their assets to secure the repayment of the loans.

According to Munir Fuady as mentioned in his book "Law on Security For A Debt" (Erlangga, 2013) the credible security must fulfil few requirements being (i) the

process to bind the assets is easy and fast, (ii) the security will not put the creditors in a dispute, (iii) the value of the secured assets is easily calculated, (iv) the value of the security can increase or at least stable, (v) the security will not give obligations for the creditors, (vi) if the loan is non-performed, the security is easy to enforce with easy, cheap enforcement method without the assistance of the debtors.

The enforcement of fiducia security over copyright can be conducted through several ways being (i) enforcement after obtaining a writ of execution, (ii) enforcement by way of public auction, and (iii) private sale by the creditors. However, the enforcement over copyright is difficult to be performed due to inexistence of precedent on enforcement of intellectual property rights in the form of copyright.

**(ADP)**

# AVOIDING NON-PERFORMING LOAN

Make sure you do the following things while applying for a credit to avoid non-performing loans

## Find reputable financing company

This is beneficial to ensure that the company will continue its business until we repay the loan. In addition, make sure that the financing company is registered at the Financial Service Authority (Otoritas Jasa Keuangan – OJK) so that its financing activities is supervised.



01

## Choose the repayment method which is in line with the repayment capability

In financing, there are methods that can be offered such as pay higher down payment in advance to get less instalment amount or otherwise pay less down payment but higher instalment amount later. Know you own financial condition. Ask for credit simulation from financing company to predict the repayment amount that must be paid and the term of the repayment.



02

## Note the penalty

Penalty will be charged if you are late in making the repayment. Therefore, understand the penalty mechanism to anticipate the situation where you in any event cannot make the repayment to the creditor in timely manner.



03

## Decide slowly

Do not let the marketing officer affect you since what you want may not be the same as what they offer. Find more information on the credit simulation, interest, down payment, security, repayment method, cost, penalty and insurance or other facility or obligation during the term of the loan.



04

## Check the credit agreement

This is useful to avoid you from anything that could happen to you as the customer/debtor which cannot repay the loan in timely manner. While drafting the agreement, note the provisions such as the instalment amount, the term of the loan, security required by the financing institution as creditor, penalty, and the enforcement of security. Ask sufficient time to review the credit agreement prior to agreeing and signing it. **(HPT)**



05

# "We are worthy of your trust"



## CONTACT

Please do not hesitate to contact us If there is any further question or discussion.

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- ACTING AS AN ATTORNEY for an Indonesian company in an International Arbitration proceeding at the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in relation to a dispute on a Shareholders Agreement of a joint venture company;
- PROVIDING LEGAL ADVICE to a foreign insurance company in relation to the purchase

of bonds issued under Indonesia laws and regulations governing the purchase of bonds by a company;

### 2014

- DRAFTING AND ANALYZING shipping contracts for a palm oil plantation company;

### 2013

- REPRESENTING a Japanese private company as a foreign shareholder in a joint venture in the transfer of shares to a domestic shareholder, in a manpower outsourcing joint venture.