Acquisition Finance

Contributing editors
Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas

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GETTING THE DEAL THROUGH

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1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Generally, the parties' choice of law (including foreign law) in an agreement will be recognised by the Indonesian courts as a valid choice of law provided that there is a sufficient connection between the chosen law and the subject matter of or parties to the agreement. Financing agreements tend to be governed by English law, whereas security agreements (ie, fiduciary agreements, pledge agreements), several agreements (ie, deed of land sale and purchase) and engineering, procurement and construction contracts must be governed by Indonesian law.

We understand that, in accordance with article 436 of the Indonesian Code of Civil Procedure, foreign judgments cannot be enforced in Indonesia on the basis of territorial sovereignty. Note, however, that generally a judgment rendered by any court in foreign jurisdictions in respect of a certain transaction could be offered, accepted and given such evidentiary weight as the Indonesian court may deem appropriate under the circumstances. However, in the absence of an applicable convention between the foreign jurisdictions with Indonesia, a judgment rendered by a foreign court will not be enforced by the courts of Indonesia. At present, Indonesia has no bilateral convention in place with any other countries other than those countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (ie, the New York Convention).

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

Under Presidential Regulation No. 44 of 2016 on the List of Business Fields which are Closed and Conditionally Opened in the Investment (the Negative List), there are certain restrictions imposed upon foreign nationals to invest in a company running certain lines of business. Such restrictions depend on the business field classification of the acquired company.

Law No. 24 of 1999 regarding the Flow of the Foreign Exchange System and the Exchange Rate System provides that a person may freely hold and use foreign currency. The transfer of foreign exchange to and from abroad is, however, subject to the reporting obligation to Bank Indonesia as regulated under the Regulation of Bank Indonesia No. 16/22/PBI/2014 on the Reporting of Foreign Exchange and Reporting of Prudent Principles in Managing Foreign Debt of a Non-banking Corporation, dated 31 December 2014 (PBI No. 16/2014). According to PBI No. 16/2014, both financial and non-financial institutions that are state-owned, region-owned, company-owned or privately owned enterprises are required to deliver monthly foreign exchange reports to Bank Indonesia by no later than the 15th day of the next month. In addition to this, Bank Indonesia also issues a prudent principle in managing foreign debt of a non-banking corporation pursuant to Regulation of Bank Indonesia No. 16/21/PBI/2014 dated 29 December 2014 as amended by Regulation of Bank Indonesia No. 18/4/PBI/2016 dated 21 April 2016. Pursuant to this regulation, a non-bank corporation that has foreign debt in foreign currency must apply a prudent principle, which consists of the fulfilment of a hedging ratio, a liquidity ratio and a credit rating. The hedging ration requirement will start to prevail on 1 January 2017 while the credit rating requirement will be applied to foreign debt that is obtained after 1 January 2016.

Bank Indonesia Regulation No. 16/17/PBI/2014 and Circular Letter No. 16/15/DPM, concerning Foreign Exchange Transactions against Rupiah Between Bank and Foreign Parties states that certain transactions of foreign exchange against rupiah with foreign parties can be made based on an underlying document.

Further, Regulation of Bank Indonesia No. 16/10/PBI/2014 as amended by Regulation of Bank Indonesia No. 17/23/PBI/2015 regarding the Acceptance of Export Proceeds Foreign Exchange and the Withdrawal of Offshore Loan Foreign Exchange provides that the offshore loan shall be drawn down to a bank account that obtains approval from the relevant authority to conduct banking activities in foreign exchange, including a branch office of a foreign bank in Indonesia but not including representative office of a foreign bank that is located in Indonesia.

In addition to the above, the Bank of Indonesia issued Bank Indonesia Regulation No. 17/3/PBI/2015 on the Obligation to Use Rupiah in the Territory of the Republic of Indonesia (PBI 17/2015) as supplemented by its implementing regulation, Circular Letter No. 17/11/DKSP. This states that every transaction conducted in Indonesia must use rupiah as the currency and it prohibits from setting the price in any other currency (dual quotation) except for certain transactions for the implementation of the state budget, acceptance or granting a grant from or to offshore, international trading, bank savings in foreign currency or an international financing transaction, provided that it fulfils certain criteria as regulated under PBI 17/2015.

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Various categories of debt may be used to finance a large acquisition. Therefore, the debt component of acquisition financing may include subordinated debt and senior debt. In addition, subordinated debt is a loan that ranks below other loans with regard to claims on assets or earnings, whereas senior debt shall be paid before the subordinated debt.

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

The regulations are silent on the requirement of certainty of financing for acquisitions of public companies. In general, any new controller of public companies is required by Bapepam-LK Rule No. IX.H.1 on Public Companies Takeover (Bapepam-LK Rule IX.H.1) to comply with the disclosure and mandatory tender offer requirements.

The new controller will be exempted from the disclosure and mandatory tender offer requirements if the takeover takes place as a result of the following:

(i) marriage or inheritance;
(ii) a purchase or acquisition of the target company shares, by a party who has not owned any shares of the target company before, within a period for each of 12 months, in the maximum amount of 10 per cent of the total issued shares having valid voting rights;

(iii) an exercise of the duty and authority given by the state or governmental body or institution subject to the prevailing laws;
(iv) a direct purchase of shares owned or held by the state or governmental body or institution as a result of (iii);
(v) pursuant to a final and binding court order or decision;
(vi) a merger, division, consolidation or implementation of liquidation of the shareholder;
(vii) a grant of shares without an agreement to obtain any consideration whatsoever;
(viii) the exercise of security for a debt that has been stated in the loan agreement, and also of any security in connection with the target company restructuring, stipulated by the state or governmental body or institution in accordance with the prevailing laws;
(ix) acquisition of shares as an implementation of Bapepam-LK Rule No. IX.D.1 on Pre-Emptive Rights and No. IX.D.4 on Capital Increase Without Pre-Emptive Rights;
(x) an acquisition of shares as a result of exercising the policies of state or governmental bodies or institutions;
(xi) the exercise of the mandatory tender offer, if implemented, would be contrary to laws and regulations; or
(xii) acquisition of shares from the exercise of a voluntary tender offer based on Financial Services Authority Regulation No. 54/POJK.04/2015 on a Voluntary Tender Offer.

Regardless of the above exemptions, the new controller must still:
- make an announcement in at least one Indonesian daily newspaper having national circulation; and
- notify Bapepam-LK (ie, the Financial Services Authority), the target company and the stock exchange regarding the following minimum information, within two business days after the takeover:
  - the identity of the new controller;
  - the name of the target company and percentage of shares owned before and after the takeover; and
  - any valid supporting evidence.

The above disclosure requirements do not apply to a takeover that takes place owing to events stated in points (i), (ii), (v) and (vi).

As regards the takeover that takes place due to events stated in points (iv) and (viii), the new controller must ensure that the content of disclosure also includes the following:
- the affiliation relationship (if any);
- any specific reason for takeover; and
- the plans of the new controller towards the target company.

5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

The parties usually stipulate the provisions on the use of proceeds from loans or debt securities in their agreement. Generally, the use of proceeds shall be in accordance with its agreed allocation and the corporate benefit of the borrower.

Proceeds must not be used for money laundering purposes, as this is subject to criminal sanctions as stipulated under Law No. 8 of 2010 regarding the Prevention and Eradication of Money Laundering.

6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

If the financial institutions are located abroad and have no presence in Indonesia, there should be no licensing requirements.

7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

The payment of the principal should not be subject to withholding tax while the interest would generally be subject to 20 per cent withholding tax. If the recipient of interest benefits from the provisions of a tax treaty, the withholding tax rate may be reduced or eliminated. The borrower is normally requested to calculate the gross and indemnify any tax obligation that may be imposed upon the lender.

8 Are there usury laws or other rules limiting the amount of interest that can be charged?

We can only find one law related to usury, namely, the Woeker Ordonantie of 1938 Staatsblad 38-524, which was promulgated on 9 September 1938 (Woeker Ordonantie). As stated in the Woeker Ordonantie, this law is an amendment to article 2 of the Decision of the Kingdom of the Netherlands, which prohibited usury in Staatsblad 16-643 of 1916 (due to the unavailability of documents, we have not seen and reviewed Staatsblad 16-643 of 1916 and all are written in Dutch).

The Woeker Ordonantie states as follows:

In the event that in an agreement there has been, as of the start, such a difference in the value of the mutual obligations, that, in connection with the circumstances, the non-proportionality of those obligations is exorbitant, the court is entitled, at the request of the party affected or also on its own initiative, to diminish the obligation of that party or void the agreement altogether, unless it is plausible that the affected party has fully appreciated the consequences of the obligation entered into and has not acted in frivolity, inexperience or duress.

Testimony by witnesses is allowed.

Before taking a decision as meant in the first sub-section, the court shall allow the parties to express themselves concerning the circumstances that could justify the exorbitance of the non-proportionality of the mutual obligations.

If the court renders a decision as meant in the first sub-section, it will also provide in its decision reasonably and fairly for the consequences for both parties, it being understood that in the event of voidance of the agreement, the parties must as much as possible be brought back in the situation that existed before they assumed their obligations.

The Woeker Ordonantie has not been revoked. Further, this law is stated as an annotation after article 1,456 of the Indonesian Civil Code. Therefore, this law forms part of the reason of claims for cancellation or annulment of an agreement, unless the interest has been stated explicitly in the agreement.

Further, we found the following provisions under articles 1,767 and 1,768 of the Indonesian Civil Code that stipulate interest shall arise either by law or by agreement. The legal interest shall be stipulated by law. The interest stipulated in an agreement may exceed the legal interest in all circumstances that are not prohibited by law. The amount of interest payable negotiated in the agreement shall be stipulated in writing. If the lender has agreed to interest, without determining the amount, the individual who has received the loan is obligated to pay the interest in accordance with the legal interest.

As a final remark, we can conclude that the Woeker Ordonantie is still applicable as it has never been revoked. Using the parameters provided by article 1,767 of the Indonesian Civil Code, the application of an interest that is either not agreed or stipulated by law can be considered as usury.

The most effective way to prevent a usury claim is to provide in the contract for a full explanation of the workings of the contract and the acceptance by the contract party of the consequences of the mechanisms, including the grave financial consequences that these may have. Therefore, the parties to a credit or loan agreement must explicitly state the agreed interest applicable to the respective credit or loan agreement. However, ultimately, as the above provisions show, the court is free to determine the usurious character of a contract. It is uncertain whether or not the ordinance may be waived, although we hold the opinion that that is not the case.

9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

The borrower customarily provides an indemnity to the lenders with regard to the actual damages suffered that result from, among other things, a breach of a representation, warranty or covenant set forth in the agreement, and any cost, loss or liability arising as a result of conversion of the rate of exchange.

10 Can interests in debt be freely assigned among lenders?

Yes.

11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

With regard to the trustee in the form of bank, the Financial Services Authority has issued Regulation No. 27/POJK.03/2015 as amended by Regulation No. 25/POJK.03/2016 regarding Business Activity of the Bank in the form of a trust, which applies to all banks established under the law of Indonesia and representatives of offshore banks. We are not aware of any specific regulation particularly addressing the role of agents set forth above.

12 May a borrower or financial sponsor conduct a debt buy-back?

If the agreement allows it, the buy-back of a debt can be done pursuant to the relevant provisions applicable to the buy-back.

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

It would depend on whether the relevant agreement provides such matter. Normally, a debt bought back would be automatically deemed as withdrawn debt, thus, it would have no voting rights.

Guarantees and collateral

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

There are costs or taxes that only apply to certain types of security requiring registration to relevant authority to perfect the security, such as a mortgage, fiduciary agreement or hypothec, which will depend on the nature and the type of the security.

As for the mortgage and hypothec, we believe that a foreign entity is not permitted to own land or vessels in Indonesia. As such, we believe it will not be possible for a foreign entity to provide security in the form of a hypothec or mortgage. As for a fiduciary agreement, the registration of assets that are subject to the fiduciary assignment will need to be conducted with the relevant fiduciary registration office having jurisdiction over the domicile of the fiduciary assignment grantor. Although there are no clear prohibitions under the prevailing laws and regulations, in practice the fiduciary registration office will refuse to accept the registration of any fiduciary assignment that is granted by a foreign legal entity having no presence in Indonesia because there will be no authorised fiduciary registration office having jurisdiction over the domicile of such foreign legal entity.

On the other hand, as for the pledge and personal guarantee, we believe that there is no restriction on the provision of a pledge and personal guarantee from a foreign entity. However, the enforcement for the personal guarantee of a foreign entity will be limited to its assets in the Indonesian jurisdiction only.

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

Although there is no explicit restriction on the target's provision of guarantees or collateral or financial assistance in acquisition of its shares, the transaction may be subject to the following:

- fraudulent conveyance: the creditors of the target may think the transaction would damage their interest, thus, they may ask the court to nullify the transaction;
- corporate benefit: the target would lack benefit by entering the transaction unless there are sufficient fees in return to the target. This would also create the basis for the target to the courts for nullification;
- ultra vires: the objective of the target should not normally include the provision of a guarantee. As such, the transaction is outside the objective of the company, thus, the shareholders of the target may ask the court to free the target from the obligations of the transaction; and
- fiduciary duties: the tasks and obligations of the directors of the target would include the efforts to boost the value of the company. By giving the guarantee, the target would put itself at risk of losing its assets or having additional obligations, thus, the directors would breach their tasks and obligations.

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Security interests in Indonesia are limited to those prescribed by Indonesian law. The security interests available under Indonesian law are the mortgage (used to secure land with certain land titles and all fixtures attached to it), the fiduciary security interest (to secure moveable assets, either tangible or intangible and certain immoveable assets including buildings that cannot be the subject of a mortgage under the mortgage law), hypothec (to secure a vessel), the pledge for in rem security interests (to secure tangible moveable property such as machinery, vehicles, equipment, physical coins and notes, stock and inventory; and intangible moveable property such as shares, bonds, Indonesian government bonds, receivables, debentures, patents, the credit balance of a bank account and other personal rights) and the guarantee for personal security interests.

Floating charges are not permitted while fixed charges are permitted. The security or collateral cannot be granted on all assets (including future acquired assets). The security or collateral has to be particular and specific. As for security in the form of shares, it can be regulated that the future shares will be subject to the pledge. However, the security of such shares cannot be automatically added as a security. The parties have to execute another set of security documents called an additional pledge of shares. Without the execution of such documents, the future shares cannot be automatically added as a security to the previous agreement.

Even if a personal or corporate guarantee is granted to cover an all-assets grant, in practice, such personal or corporate guarantee might not be enforceable if:

- the asset has been registered as a fiduciary security or has been pledged;
- there is a privileged right that is still attached to such assets, as regulated under the Indonesian Civil Code (Privileged Creditors) including, among others:
  - court charges that specifically result from the disposal of a moveable or immoveable asset;
  - legal charges, exclusively caused by the sale and saving of the estate; and
  - unpaid tax attached to the assets that could cause the assets to not be enforced (pursuant to article 1,137 of the Indonesian Civil Code and Staadblad 1871-150, the right of the state beneficiary, auction office, and institution organised by the authority is prioritised), therefore, if there is unpaid tax attached to the assets, the assets will be prioritised for the payment of the unpaid tax; and
- the assets are leased to a third party. Based on the Indonesian Civil Code, sale, purchase or the death of a lessor cannot terminate a lease. As such, by analogy the enforcement of assets also cannot cause termination of a lease.

This exclusion is also provided under article 1,133 of the Indonesian Civil Code, which states that there is a privileged right to certain creditors.

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Yes. Specific to collateral in the type of fiduciary, there is a fiduciary office, which was established to register the fiduciary security. A mortgage must be registered to the National Land Agency. Other than that, there are no specific bodies that have been established for the perfection of other types of collateral.

For the notification to perfect a security, this would depend on the type of security itself. As for security in the form of mortgages, hypothecs and fiduciary agreements, registration with the relevant authority (the land office for mortgages and to the fiduciary office for fiduciary agreements) is required to perfect the security. For security in the form of pledge, registration is generally not required. However, as for the pledge of certain goods (such as pledge of shares), a notification

of the pledge of shares to the company in which the shares are held and the recording of the pledge in the company's register of shareholders is required.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Generally no. We believe that there is no obligation to renew the security interest to keep the lien valid and recorded, except where there is an amendment related to the collateral or to the parties concerned, such as:

- an amendment to the detail of the object of a mortgage (ie, expiry of the right to build (HGB) certificate or right to cultivate (HGU) certificate, which will cause the removal of the mortgage (as such, if the HGB or HGU certificate has expired, the mortgage has to be re-registered under the new HGB or HGU certificate);
- an amendment to the principle agreement, which is covered under fiduciary;
- an amendment to the value of the guarantee;
- an amendment to the value of the fiduciary object (ie, an amendment to the value of the inventory as the object of the fiduciary);
- an amendment to the identity of the fiduciary grantor and fiduciary receiver;
- an amendment to the date, number of the fiduciary deed, or name and domicile of the notary who prepared the fiduciary deed; or
- an amendment to the value of the guarantee.

19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

This is related to the articles of association of the company. However, we believe that the term 'works council' is not common in the articles of association of an Indonesian company. Pursuant to the common articles of association to approve the provision of guarantees or security, the directors shall obtain approval from either the shareholders, board of directors or board of commissioners (depending on the regulation in the articles of association).

In addition to the above, certain loan agreements prohibit the borrower from providing any guarantee or security to another party. In this regard, the consent of such creditors or lenders shall also be obtained by the company to provide a guarantee or security to another third party.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

It depends on the type of the security and arrangement between all lenders. Normally it can. However, as for the mortgage, we believe that the names of all the secured parties should be mentioned in the mortgage deed and the land title certificate in order to obtain the benefit of the mortgage. Accordingly, the list of secured parties in the mortgage certificates and in the relevant land certificates should always be amended to reflect the current composition of the secured parties.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

There are several protections afforded to the creditors before collateral can be released, as follows:

- under Law No. 37 of 2004 regarding Bankruptcy and Suspension of Payment (the Bankruptcy Law), there is a stay period that has to be observed by the secured creditors before they can enforce the collateral (see question 30); and
- the status of the guarantee will still be attached to the collateral even though the collateral has been sold (the status of the guarantee will only be released upon the release of collateral).

Pursuant to the prevailing laws and regulations regarding collateral and security in Indonesia, the guarantee will be released upon, among others:

- the release of the loan granting the collateral;
- the release of the right over the collateral by the receiver; or
- the removal of the collateral.

22 Describe the fraudulent transfer laws in your jurisdiction.

Under Indonesian law, a fraudulent transfer is also known as a preferential transfer. There are two routes for a preferential transfer claim: under articles 41 and 42 of the Bankruptcy Law and under articles 1,341 and 1,454 of the Indonesian Civil Code.

Articles 41 and 42 of the Bankruptcy Law state that only the receiver could request for the nullification of a preferential transfer transaction conducted by the debtor before its bankruptcy if such transaction was considered detrimental to the creditors. To be nullified, the following requirements must be proven by the receiver:

- the preferential transfer was performed by the debtor before it was declared bankrupt;
- the debtor was not obligated by contract (existing obligation) or by law to perform the preferential transfer;
- the preferential transfer prejudiced the creditors' interests; and
- the debtor and such third party had or should have had knowledge that the preferential transfer would prejudice the creditors' interests.

Pursuant to articles 1,341 and 1,454 of the Indonesian Civil Code, any creditor could request for the nullification of a preferential transfer transaction conducted by the debtor if such transaction was considered detrimental to the creditors. To nullify a preferential transfer under the Indonesian Civil Code, the following requirements must be proven:

- the debtor was not obligated by contract (existing obligation) or by law to perform the preferential transfer;
- the preferential transfer prejudiced the creditors' interests; and
- the debtor and such third party had knowledge that the preferential transfer prejudiced the creditors' interests.

The Indonesian Civil Code stipulates that a nullification of a preferential transfer transaction should be made within a period of five years starting from the date that the creditor knew or should have known the preferential transfer prejudiced the creditor's interests. Although in theory proving the debtor's and the third party's awareness of the detrimental action is possible, a successful preferential transfer claim by creditors under article 1,341 of the Indonesian Civil Code is extremely rare in Indonesian practice.

Notwithstanding the above, the Indonesian Civil Code and Bankruptcy Law protect a good faith purchaser from a preferential claim. As such, even if the preferential transfer claim on an asset was accepted and the transaction was nullified, purchasing the asset in good faith should be a valid defence for the purchaser to protect the asset from any seizure in relation to a preferential transfer claim made by a receiver or creditor.

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

Basically, acquisition financing requires the same documentation as common financing occurring in Indonesia, therefore, debt commitment letters may also be used in this transaction. Whether full documentation is required would depend on the provisions of the facility agreement made by the parties.

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

The level of commitments may be in the form of underwritten, best efforts or any other kinds of commitments to the extent that they have been approved by the parties.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

In Indonesia, conditions precedent typically provided in the commitment letter, among others, include:

- the delivery of the relevant corporate approvals;
- the delivery of the complete constitutional documents;

- the delivery of the relevant documents evidencing ownership over assets, which will be secured to all lenders;
- the execution of all security interests documents;
- consents from other lenders;
- legal opinions from qualified counsel;
- corporate certificates confirming various facts;
- various letters and fees for settlement evidence; and
- certain financial models and financial statements.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

The flex provision usually used in commitment letters relates to the perfect security, which regulates as follows.

The borrower must ensure that it takes all actions necessary or reasonably advisable in the opinion of the majority lenders (including the making or delivery of filings, the payment of fees and charges and the issuance of supplemental documentation) to:

- maintain and preserve the security interests created or evidenced by the security documents in full force and effect at all times (including the priority of such security interests);
- ensure that the security interests created or evidenced by the security documents will constitute valid, enforceable and first-ranking security;
- protect and enforce the borrower's rights and title to the assets secured under the security and the rights of the secured creditors to such security interests; and
- grant or create additional security in accordance with the terms and conditions of the security documents.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Securities demands are one of various features available in acquisition financing. The provision of securities demands may:

- include limits on the time period in which the arranger can make the demand;
- provide a grace period before the demand can be made (typically up to the first six months);
- cap securities on the debt (so that the borrower does not have to issue debt securities at a higher interest rate); and
- provide for various types of debt instruments and structures that can be required by the arranger.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

In the acquisition financing transaction, the key elements would be the business valuation of the target company as the pledge of shares of the target would be the main collateral. Other than the pledge of shares of the target company, the revenue and assets of the target and call option or warrant against the shares of the target would also normally be part of the protection given to the lender.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Commitment letters are not publicly filed. Pursuant to the relevant regulations of the central bank, a company that wishes to obtain a foreign commercial loan must file a report on its plan; further, the offshore commercial loan shall be reported periodically to Bank Indonesia as required under Bank Indonesia Regulation No. 16/22/PBI/2014 on reporting of foreign exchange transactions and the application of prudence principle in the management of offshore debt by a non-bank debtors and Bank Indonesia circular letter No. 17/3/DSta/2015 dated 6 March 2015 as amended by Bank Indonesia circular letter No. 17/24/DSta/2015 dated 12 October 2015.

Respecting the acquisition agreements, Law No. 40 of 2007 on Limited Liability Companies provides that the acquisition agreement shall be notarised and filed in the Ministry of Law and Human Rights. This ministry will then issue its approval, thus, evidencing that the acquisition has been effective.

Update and trends

Since September 2015 the government of the Republic of Indonesia has issued several economic packages in order to stimulate economic investment and growth. One of the products of the economic packages is revision of the Indonesian negative list, which has led to more foreign investors being attracted to invest in Indonesia. Further, the government has reformed its bureaucracy to expedite and facilitate such investment.

In addition, the government has made a tax amnesty as a tool for domestic investors to repatriate their offshore assets into Indonesia. Further, according to the news, in the next few months the government will focus on logistic issues in Indonesia, especially eastern Indonesia. This policy will be set forth in economic package 15. Economic package 15 is also aimed at encouraging investors to invest and develop the east area of Indonesia.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

The main restriction during the enforcement is that the lender may not step in and own the collateral during the enforcement. The enforcement event (before any bankruptcy) would normally need approval from the court subject to an auction event.

In addition to the above, see question 16 regarding the existence of privileged creditors and leases, which may restrict the lenders' ability to enforce against collateral.

Under the Bankruptcy Law, the secured creditors holding a mortgage, pledge or any other security right in rem are unable to enforce their rights against the collateral within 90 days of the granting of a bankruptcy decision (for bankruptcy proceedings) or within the process of the suspension of payment (for suspension of payment proceedings).

Other than the above-mentioned restrictions, another restriction that might apply is if a court ruling prevents the enforcement of the collateral. In this regard, a court ruling (Judicial Decision No. 451/Pdt.G/2012/PN.Jkt.Bar, which was affirmed by the decision of the Jakarta High Court on 7 May 2014 and upheld by the Supreme Court on 31 August 2015) held that an agreement made between an Indonesian party and a foreign party is null and void since the agreement was made in English without an Indonesian version and was deemed as a violation to article 31 of Law No. 24 of 2009 regarding Language, which provides that the 'Indonesian language must (*wajib*) be used in memorandums of understanding or agreements involving state institutions, government institutions, Indonesian private institutions or Indonesian citizens'. Paragraph 2 of the article further provides that 'Memorandums of understanding or agreements referred to in paragraph 1 that involve foreign parties shall also be written in the national language of those foreign parties or the English language, or both'. Prior to the issuance of the decision, the implementation of article 31 had been unclear since the implementing regulation has not yet been issued. However, the decision, which is not final and binding and may be subject to an appeal, has become a precedent that an agreement with an Indonesian party not executed in Indonesian might be deemed as null and void. In this regard, if the principal agreement (ie, loan agreement) between the lender and an Indonesian borrower is not executed in Indonesian and deemed null and void by a court, the collateral granted as a derivative of the principal agreement will also be considered as null and void. Thus the lender will not be able to enforce against a collateral.

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

The regulation in Indonesia is silent about DIP financing. However, in practice, there is a precedent where the scheme of DIP financing is put in the composition plan of the debtor under suspension of a payment proceeding.

In addition to the above, see question 16 regarding privileged creditors. The status of privileged creditors as referred to in question 16 cannot be superseded by the scheme of DIP financing.

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Yes. As for the stay period for the secured creditors in bankruptcy or suspension of payment proceedings, see question 30.

Regarding adequate protection for existing lien holders who become subject to superior claims, we believe that there is no such protection. However, the Bankruptcy Law provides that during the stay period in the bankruptcy status, the receiver may utilise or sell the assets within the bankruptcy estate that are under the receiver's possession. The assets concerned may be moveable assets (for usage and sale) or immoveable assets (for usage only, sale is not permitted) or in the form of inventory or other current assets, irrespective of whether these assets are being encumbered by any security rights or not. In doing so, the Bankruptcy Law sets forth that the receiver must provide adequate protection for the interest of creditors or other third parties. The 'adequate protection' means the protection required to be given to protect the interests of the creditors or third parties whose rights are stayed. Upon the transfer of the assets concerned, the said in rem rights shall be deemed to expire by operation of law.

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

A court may claw back previous payments or transactions to lenders if it determines that such payments could prejudice the rights of creditors in bankruptcy proceedings. To annul the previous payment made by the debtor prior to insolvency, the receiver of the debtor must prove the following requirements:

- the payment was made by the debtor before it was declared bankrupt;
- the debtor was not obligated by contract (existing obligation) or by law to perform the payment;
- the payment was prejudicial to the creditors' interests; and
- the debtor and such third party had or should have had knowledge that the payment would prejudice the creditors' interests.

Article 42 of the Bankruptcy Law stipulates that a legal act taken by the debtor within one year prior to the issuance of a bankruptcy decision that prejudices the rights of the creditors while such legal act is not obligated to be conducted by the debtor (ie, execution of an agreement where the obligations of the debtor exceeds the obligations of the other party to such agreement, payment of a loan that has not been due and is payable or has matured or a transaction entered into by the debtor with a certain relative of the related parties) could be deemed detrimental to the creditors.

Further, article 45 of the Bankruptcy Law provides that, as for the loan that has matured, the annulment can only be conducted if it can be proved that the creditors receiving such payment know that a bankruptcy petition has been filed or if such payment consists of a conspiracy between the debtor and the creditor for the purpose of giving more benefit to such creditor than to the other creditors. See question 22.

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Yes. The creditors are ranked as secured and unsecured creditors. Secured creditors are the creditors who held collateral against the debtor while unsecured creditors are the creditors without any collateral.

Pursuant to the Bankruptcy Law, in order to be valid, the voting result to approve a composition plan must meet the following quorum:

- more than half of the unsecured creditors, who are present or represented at the meeting, whose rights are acknowledged or provisionally acknowledged and who represent at least two-thirds of the total amount of the unsecured claims of the unsecured creditors present or represented at the meeting, whose rights are acknowledged or provisionally acknowledged; and
- more than half of the secured creditors, who are present or represented at the meeting and who represent at least two-thirds of the total amount of the secured claims of the secured creditors present or represented at the meeting.

In addition, see question 16 regarding the existence of privileged creditors.

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

There is no clear regulation under Bankruptcy Law regarding lien subordination. Based on the current practice, we note that the prohibitions of subordination of a debt by one creditor in favour of another creditor are very rare, and there is no direct authority such as court decisions that uphold the validity of a subordination clause in a bankruptcy situation.

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

The regulations regarding the treatment of the claim as stipulated in the Bankruptcy Law are as follows:

- with respect to interest on debts that accrue after the decision declaring bankruptcy is rendered, a verification of such debt shall not be permitted unless, and only to the extent, such debt is secured by a pledge, a fiduciary transfer, a mortgage, a hypothec or other in rem security right (article 134, paragraph 1);
- a claim with an uncertain due date or which entitles the claimant to periodical payments must be verified for its value at the date the bankruptcy declaration is rendered (article 137, paragraph 1);
- claims that become payable within one year after the date the bankruptcy declaration is rendered are considered payable on that date (article 137, paragraph 2); and

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- claims that become payable after one year after the date the bankruptcy declaration is rendered must be verified for their value one year after the date the bankruptcy declaration is rendered (article 137, paragraph 3).

The following must also be taken into account in order to determine the value of these claims: the period and method or terms of repayment, any possible profit opportunity, and the interest rate, if the claim bears interest (article 137, paragraph 4).

With regard to bond payments, we believe that, if the bond issuer is declared bankrupt before the maturity date of the bonds, the value of the claim must be verified for its value at the date of the rendering of bankruptcy declaration. As for the discount, such as an OID, there is no clear regulation stipulating the calculation of such discount in the amount of the claim. Regarding this, we believe that it shall also be considered in the calculation of the claim. However, the discretion as to whether the amount of a claim will be acknowledged or not will be in the hands of the receivers and the supervisory judge of the respective bankruptcy case.

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

Such liabilities will not be attached to the creditors but to the object or collateral. Such liabilities attached to the collateral may cause the secured creditors to be unable to enforce the full amount against collateral because there are other liabilities attached to the collateral that have to be settled first. The following are potential liabilities that may be faced by the secured creditors that enforce against collateral:

- if there is an unpaid loan for the privileged creditors as stated in articles 1,139 and 1,149 of the Indonesian Civil Code that has a preferential right and rank above the secured creditors (ie, unpaid tax attached to the collateral that could cause the collateral to not be enforced; pursuant to article 1,137 of the Indonesian Civil Code and Staadblad 1871-150, the right of a state beneficiary, auction office and institution organised by the authority is prioritised); therefore, if there is unpaid tax attached to the collateral, the collateral will be prioritised for the payment of the unpaid tax; or
- if the collateral is being leased to a third party, the enforcement of such collateral may be hindered if the collateral is being leased to another third party; based on the Indonesian Civil Code, sale and purchase and the death of a lessor cannot terminate a lease. As such, based on such a regulation in the Indonesian Civil Code, it can be analogous that the enforcement of collateral cannot also cause the termination of a lease.

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