Lending and taking security in Indonesia: overview

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A Q&A guide to finance in Indonesia. The Q&A gives a high level overview of the lending market, forms of security over assets, special purpose vehicles in secured lending, quasi-security, guarantees, and loan agreements. It covers creation and registration requirements for security interests; problem assets over which security is difficult to grant; risk areas for lenders; structuring the priority of debt; debt trading and transfer mechanisms; agent and trust concepts; enforcement of security interests and borrower insolvency; cross-border issues on loans; taxes; and proposals for reform.

To compare answers across multiple jurisdictions, visit the Lending and taking security in *Country Q&A tool*.

This article is part of the global guide to finance. For a full list of contents visit *global.practicallaw.com/finance-guide*.

Overview of the lending market

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

In the last 12 months, most of the markets in Indonesia have been affected by the 2019 novel coronavirus disease (COVID-19) pandemic, including the lending market. As a result, most of the important developments in the lending markets are focusing on optimising and helping the lending market to counter the effects of the pandemic on the economy.

Because of this, the Government of Indonesia issued several extraordinary financial measures and policies to mitigate the ongoing impact of the pandemic in the interests of the Indonesian economy. The government issued a regulation (which has subsequently been passed into law by the House of Representative) on the financial system and the stability of financial policies in the context of COVID-19 which also deals threats of potential harm to the national economy and/or to the stability of the financial system.

One of the extraordinary financial measures is the national economy recovery (*pemulihan ekonomi nasional*) (PEN) programme. PEN set outs mechanisms for minimising the ongoing impact of the COVID-19 pandemic, including:

- State-equity participation.
- Placement of funds to provide liquidity support for banks.
- Government investment and guarantees.
- Provision for granting interest subsidies to micro, small and medium sized enterprises acting as debtors of banks and financing companies.

Overall, the PEN programme's goal is to maintain the liquidity of banks and financial institutions, and to assist debtors who are struggling with the impact of the pandemic.

Separately, the Financial Services Authority (*Otoritas Jasa Keuangan*) (OJK) issued several regulations (most of which focus on the conventional lending market, that is, banks), including those on:

- Relaxing bank ownership rules under OJK's single presence policy but simultaneously increasing minimum capital requirement.
- Compulsory consolidation in the banking sector, requiring distressed and a healthy banks to engage in a restructuring process by way of merger, consolidation, acquisition, integration and/or conversion.
- Compulsory consolidation between distressed and healthy non-bank financial institutions (including insurance companies, leasing and finance companies and pension providers), requiring them to conduct a merger, consolidation, acquisition and/or integration process.
- National economic stimulus in relation to the impact of the pandemic, governing the policies for restructuring of credit / financing facilities and determination of asset quality. The regulations allow credit and/or financing facilities restructuring to be provided to the entire credit or financing facilities given to the impacted debtors. This restructuring can be made against credit or financing facilities given before or after the debtor is affected by the pandemic and focus on micro, small and medium sized business debtors.

Besides the above measures, there has been a development in the debt private placement sector in Indonesia which was previously not specifically regulated. In this sector, the OJK has issued a regulation on the issuance of debt securities and/or sharia bonds without public offerings, which sets out a new legal framework and guidelines for parties who intend to issue debt securities and/or sharia bonds without the need to implement any process of public offering.

Before the enactment of this regulation (on November 2019, in force 1 June 2020), the issuance process for debt securities and/or sharia bonds without public offering was relatively straightforward. However, under this new regulation:

- There are:
    - certain restrictions on the circumstances in which capital can be raised by a debt private placement;
    - requirements on a range of documents to be submitted to the OJK before a debt private placement can be conducted.
- The outcome of a debt private placement must be reported to the OJK.

However, a debt private placement can be immediately carried out on submission of the required documents to OJK and does not require approval from the OJK.

Forms of security over assets

Real estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

Real estate

Real estate includes:

- Land.
- Buildings and all fixtures attached to it.
- Vessels with gross volume of 20 cubic metres or more.
- Aircraft.

Common forms of security

The most common form of security granted over real estate is a mortgage (*Hak Tanggungan*). A mortgage is used to secure land with certain land titles and all fixtures attached to it.

Formalities

Mortgages are established through a two-step procedure. The mortgage deed must be signed before the Land Officer (PPAT) with jurisdiction over the land to be mortgaged. The mortgage deed must then be registered at the relevant Land Registration Office (BPN). This deed must be in Bahasa Indonesia and in the prescribed PPAT form, which must include the following information:

- Identity of the parties.
- Domicile of the parties.
- A clear reference to the secured obligations.
- Amount secured.
- Description of the mortgaged property.

The mortgage is established when it is entered in the land book at the BPN. Registration of the mortgage deed, and issuance of the mortgage certificate as evidence of registration, can take between two weeks to six months (most commonly two to four weeks).

The PPAT must submit the executed mortgage deed to the BPN at the latest seven days after the execution date of the mortgage deed. The actual date of the registration is deemed as the seventh day after the receipt of the complete

mortgage application by BPN. If the seventh day falls on a day that is not a business day, then the actual date of the registration is the next business day.

In relation to the registration of mortgages, the Minister of Agrarian Affairs and Spatial Planning issued a new regulation on Integrated Electronic Mortgage Services effective as of 21 June 2019. This new regulation provides the establishment of an online system for the administration of the mortgage. By the enactment of this regulation, the mortgage deed can now be submitted by the PPAT in electronic document format, while previously the originals had to be submitted. Further, under the new online land mortgage registration system, a creditor who wishes to be registered as a mortgage holder must first be registered through the system.

From early this year, the online land mortgage registration system has been launched and manual registration is no longer permitted by the National Land Agencies in regions that had been using or had started the transition to the online system.

Tangible movable property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible movable property

Tangible movable property includes:

- Machinery and equipment.
- Vehicles, including vessels with gross volume of less than 20 cubic metres.
- Stock and inventory, including raw materials.

Common forms of security

The most common form of security granted over tangible movable property is a fiduciary transfer. Under a fiduciary transfer, there is no requirement to remove the asset from the debtor's possession. A fiduciary transfer only secures debts up to the amount specified in the fiduciary deed.

Formalities

A fiduciary transfer is a written agreement by which the transferor transfers to the transferee its rights of ownership in the transferred assets. Under Law No. 42 of 1999 concerning fiduciary, the agreement must be in Bahasa Indonesia and in notarial deed form. The transferor transfers to the transferee its rights of ownership in the assets for the period during which the debt under the agreement remains outstanding. Possession of the tangible assets remains

with the transferor who can normally use or dispose of the assets in the ordinary course of business. The fiduciary transfer deed must include the following information:

- Identity of the fiduciary transferor and transferee.
- Date of the underlying agreements secured by the fiduciary transfer.
- Description of the assets.
- Amount secured.
- Value of the assets.

Fiduciary transfers must be registered by the fiduciary transferee at the Fiduciary Registration Office. There is no specific time period for registration.

If a fiduciary transferor fraudulently executes a fiduciary transfer over the same assets in favour of more than one fiduciary transferee, the first fiduciary transferee registering its security interest has priority regardless of the date of any other transfer. However, all fiduciary transfers remain valid as a contractual matter against the transferor and can be enforced though court proceedings.

Fiduciary transfers come into effect on the date of registration in the Fiduciary Registration Book at the Fiduciary Registration Office. Applicants obtain a Fiduciary Security Certificate when the registration application is accepted. The date of the Fiduciary Security Certificate should be the same as the date of the application.

Applications for registration can be made online, which results in a faster process for issuing certificates as opposed to paper applications (one to three days compared to from one week to one month). The date of the Fiduciary Security Certificate is the date of the application for registration.

Financial instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial instruments

Shares are the most common type of financial instrument over which security is granted. The Indonesian law only recognises registered, certificated form of shares.

Common forms of security

Pledges are the most common form of security granted over shares.

Formalities

There is no formal legal requirement to have a pledge agreement in writing (pledge of shares agreement). However, it is standard practice deeds (notarised or executed privately) are used, which set out the details of the pledge (deed of pledge). The deed of pledge need not be executed in Bahasa Indonesia.

A power of attorney to vote shares and a power of attorney to sell shares are also usually entered into. A pledge of shares does not include voting rights. The power of attorney to vote shares attempts to authorise the pledge to exercise the voting rights over the pledgor without assigning them voting rights. However, there is no certainty as to whether Indonesian courts will uphold such power of attorney as it may be in violation of the principle that the voting rights in a pledge must remain with the pledgor or shareholder, notwithstanding the grant of any security interests.

Different formalities apply for different types of shares:

- Registered shares: a pledge is effectuated on 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 shareholders' register.
- Shares listed in the Indonesian Stock Exchange: a pledge is effectuated on notification of the pledge of shares to the company as well as the Stock Administration Bureau (appointed by the company), which keeps the company shareholders' register. The Stock Administration Bureau subsequently records the pledge in the shareholders' register.
- Dematerialised shares kept in custody of the Indonesian Central Securities Depository (KSEI): a pledge is effectuated on notification of the pledge of shares to the KSEI, which will issue a confirmation letter certifying that the shares are blocked and pledged.

Claims and receivables

5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?

Claims and receivables

Debts are the most common type of claims and receivables over which security is granted.

Common forms of security

Fiduciary assignment is the most common form of security granted over claims and receivables (*see Question 3, Common forms of security*).

Formalities

See *Question 3, Formalities*.

Fiduciary assignment is validly created only on the registration of the fiduciary deed of assignment with the Fiduciary Registration Office. However, the debtor can still pay the receivables to the fiduciary assignor to discharge his debts or obligations until the fiduciary assignment has been either:

- Notified to the obligor: a court bailiff must officially serve the notification on the debtor.
- Acknowledged by the obligor: this can be done in writing on the deed of transfer.

Once notified or acknowledged, the obligor can no longer validly settle with the fiduciary assignor and must make payments directly to the fiduciary assignee. For an assignment of trade receivables, notification or acknowledgment of the obligor only takes place when an event of default is anticipated. However, in other cases, such as an assignment of insurance proceeds, the insurance company is usually notified of the transfer when the assignment is created, or soon after.

Cash deposits

6. What are the most common forms of security over cash deposits? How are they created and perfected?

Common forms of security

Pledges over bank accounts are the most common form of security over cash deposits.

Formalities

See *Question 4, Formalities*.

The relevant bank holding the relevant account must be notified of the pledge. Acceptance of the notification is deemed as the transfer of control over the pledged accounts from the pledgor to the pledgee.

Intellectual property

7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?

Intellectual property

Trade marks are the most common type of intellectual property rights over which security is granted.

Common forms of security

Fiduciary assignment is the most common form of security granted over intellectual property rights (*see Question 3, Common forms of security*).

It is not possible to create security over unregistered intellectual property rights. However, it is possible to provide an undertaking to grant security over such rights when they are registered.

Formalities

See *Question 3, Formalities*.

Problem assets

8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

Future assets

See *Question 2, Real estate*.

The registration authorities require a clear description of assets to register security (*see below, Fungible assets*). Therefore, for future tangible assets, receivables, insurance proceeds and bank accounts that do not exist at the time of the original fiduciary transfer or assignment, new fiduciary transfers or assignments must be effected each time they come into existence. This is usually done by way of periodical submission to the creditor (fiduciary transferee or assignee) of lists of recently created receivables, insurances and bank accounts. The fiduciary transferor or assignor must sign these lists, and they must contain a reference to the original fiduciary transfer or assignment deed. The updated lists must be registered with the Fiduciary Registration Office.

It is doubtful whether future shares will be automatically pledged by the original pledge of shares agreement. Therefore, it is advisable to execute an additional pledge of shares each time the pledgor acquires or subscribes to new shares.

Fungible assets

Granting security over fungible assets is not expressly forbidden. However, it may not be feasible in practice as the relevant registration authority requires a clear description of the fiduciary assets. The relevant company or bank where the specific shares or bank accounts are held must be notified of the pledge.

Other assets

There are no other assets over which security cannot be granted or is difficult to grant.

Release of security over assets

9. How are common forms of security released? Are any formalities required?

Security interest under Indonesian law is accessory in nature, that is, it is tied to the claim in respect of which it is vested (normally a loan). It ceases to exist when the underlying claim is paid, expired, or is deemed null and void. Some security interests must be registered at the relevant authority to be created (*see Question 2 and Question 5*). There are also administrative procedures for deregistration (for example, mortgages (BPN), fiduciary assignments or transfers (Fiduciary Registration Office), pledges over listed shares (Stock Administration Bureau), pledges over dematerialised shares (Indonesian Central Securities Depository).

Special purpose vehicles (SPVs) in secured lending

10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

It is not common to take security over shares of an SPV set up to hold certain of the debtor's assets; it is more common to take direct security over the borrower's assets.

Quasi-security

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

Sale and leaseback

Although available, quasi-security structures are not common. Lenders normally prefer to use the available forms of security (*see Questions 2 to 6*).

Sale and leaseback is usually used in leasing (commercial) transactions; however, it is not commonly used as a security. However, some borrowers use sale and leaseback instead of fiduciary security to secure payment of its debts. For example, a borrower sells its asset to a lender and leases back the same asset from the lender. There is typically a condition that when the debts are paid, the lender will re-sell the asset to the borrower.

Factoring

Factoring is recognised; however, it is not commonly used as a security.

Hire purchase

Hire purchase is recognised; however, it is not commonly used as a security.

Retention of title

The Indonesian Civil Code grants rights to certain creditors to retain title to goods; however, retention is not commonly used as a security.

Purchase money

Acquisition financing transactions where the borrower acquires a certain asset (land, shares) using the funds derived from the financing before creating an encumbrance over the asset as a security are common in Indonesia. The borrower and the lender will enter into an ordinary loan agreement with corresponding security documents (mortgage deed for land, or pledge agreement for shares).

Other structures

Repurchase agreement (Repo) transactions are often entered into. These are sale and purchase contracts for securities with undertakings to purchase or resell at a predetermined time and price. In the event of a dispute, a court may consider a Repo transaction as a secured loan transaction. Repo transactions are not commonly used as security.

Guarantees

12. Are guarantees commonly used in your jurisdiction? How are they created?

Personal and corporate guarantees are commonly used. They are created by written agreement (in notarial form or privately executed form) by the guarantor and the beneficiary. There is no formal requirement to register guarantees to give them effect.

Risk areas for lenders

13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

Financial assistance

There is no explicit prohibition on a company providing financial assistance for purchase of shares. Generally, Indonesian law applies the principle of fiduciary duty where the management of a company must administer the company for the benefit of the company, according to the objectives and purposes of the company. In certain cases, financial assistance can be considered as ultra vires (*see below, Corporate benefit*).

Corporate benefit

The validity of a legal act performed by an Indonesian company can be contested for want of corporate benefit and compliance with the company's objectives and purposes of its articles of association. It is not clear whether the issuance of a guarantee, or a third-party security, for the benefit of third parties by a company to secure the fulfilment of obligations of a third party can be regarded as furthering the objectives of that company (ultra vires doctrine). Therefore, it is unclear whether such guarantee or third-party security can be voidable or unenforceable.

As a parameter to determine whether any such actions are in furtherance of the objectives of a company, it is important to consider the following:

- The provisions of the articles of association of that company.
- Whether that company obtains certain commercial benefit from the transaction in respect of which the guarantee or third-party security is issued.

Based on the ultra vires doctrine, the validity or enforceability of a guarantee can in principle be challenged by any or all of that company's:

- Shareholders.
- Board of directors.
- Board of commissioners.
- Receivers or trustees in the event of bankruptcy.

To minimise the risks that a guarantee will be challenged based on the ultra vires doctrine, all corporate approvals (from shareholders, board of commissioners and board of directors) must be obtained.

Loans to directors

There is no general prohibition on an Indonesian company granting a loan to its directors or directors of a related company. However, corporate benefit must be considered (*see above, Corporate benefit*).

Usury

There is one law dating back to the pre-independence era related to usury (*Woeker Ordonantie of 1938 Staatsblad 38-524*) which, to date, has not been revoked. This law prohibits usury (illegal rate of interest).

However, for legal interest rates, the Indonesian Civil Code (ICC) stipulates that there are two types, that is:

- Interest approved on agreement or contract.
- Interest stipulated by law.

The interest approved on agreement or contract can exceed the interest stipulated by law, to the extent permitted or not prohibited by law. Therefore, although *Woeker Ordonantie* has never been revoked, if the parties explicitly stated in their agreement an agreed interest rate, then that agreed rate cannot be deemed as usury.

Others

Other risk areas for lenders include:

- General provisions on loans, securities and guarantees under the ICC. For example, under Article 1153 of the ICC, a pledge over intangible movable assets must be notified to the individual against whom the pledge is exercised.
- Mandatory use of the Indonesian language (*Bahasa Indonesia*). A law on the use of Bahasa Indonesian was issued in 2009, which stipulates that memoranda of agreement or agreements involving, among others, Indonesian individuals and private institutions, must also be in Bahasa Indonesia (Language Law 2009).

  Further, a presidential regulation was enacted in 2019, Presidential Regulation No. 63 of 2019 concerning the Use of Indonesian Language (PR 63/2019), which implemented Language Law 2009. With the enactment of PR 63/2019, a bilingual version of a contract (which contains an Indonesian version) in a cross-border transaction involving an Indonesian party must be used, or separate Indonesian and English

versions should be prepared and executed simultaneously. This must also be done even if the contract is governed by foreign law or contains an international arbitration clause.

- Mandatory use of rupiah. In March 2015, Bank Indonesia issued a regulation that states that any transaction carried out in Indonesia, both by residents or non-residents, must be in rupiah. Parties are also prohibited from refusing to accept the rupiah as payment if the rupiah must be used for such a transaction. It also prohibits the use of dual price denomination using rupiah and another currency for transactions within the territory of the Republic of Indonesia.
- Reporting on offshore loans. Offshore commercial loan borrowers must submit reports on foreign exchange flows and implementation of prudential principles to Bank Indonesia. Previously, they had to also report to the Offshore Commercial Loan Co-ordination Team (*Tim Koordinasi Pinjaman Komersial Luar Negeri*). However, as of July 2020, this reporting obligation has been shifted to the Ministry of Finance as the Offshore Commercial Loan Co-ordination Team has been dissolved.
- Limitation on ownership of land. Several types of land titles in Indonesia are restricted for foreign individuals and foreign entities (right of ownership or *hak milik*, right to build or *hak guna bangunan*, right to cultivate or *hak guna usaha*). Therefore, lenders who have granted loans to Indonesian borrowers with security in the type of mortgage over plots of land under these land titles will not be able to sell the plots of land to foreign individuals and/or foreign entities during execution of the mortgage (public auction).
- Industry regulations. Financial services regulation prohibits the subscription and the purchase of shares of a financial services company using funds sourced from loan / financing from third parties.

14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

Lenders are not held liable for actions of a borrower that have an environmental impact. Only owners of assets can be held responsible for pollution under environmental law. Lenders cannot become owners by holding security over assets.

Structuring the priority of debts

15. What methods of subordination are there?

Contractual subordination

Contractual subordination is possible and common. It can be achieved by an inter-creditor arrangement between the lenders or an individual subordination deed (commonly used in a shareholders' loan).

Structural subordination

Structural subordination is not common.

Inter-creditor arrangements

Inter-creditor arrangements are common. The parties to an inter-creditor agreement usually include lenders, borrowers and obligors. The agreement is used to set out various lien positions, the rights and obligations of each lender, and their impact on other lenders.

Debt trading and transfer mechanisms

16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

The Indonesian Civil Code allows debt to be traded by way of an assignment instrument (*cessie*). Under *cessie*, the debtor must first be notified and acknowledge the assignment. Without acknowledgment by the debtor, it can continue paying the debt to the original lender (assignor), although the debt has been assigned to the new lender (assignee).

Debt secured by a security interest can also be traded. However, the assignment would normally include an assignment of the security interest; this is due to the accessory (*accessoir*) nature of security interest, that is, it is tied to the debt it secures. The assignee becomes the new holder of the security interest. For security interests that must be registered in a public registry (*see Question 3 and Question 5*), amendments or notifications must also be made to ensure that the rights over the security interest are preserved.

Agent and trust concepts

17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

The agent concept is recognised.

Agency arrangements created under the law of another country are also recognised, to the extent that they do not violate public order. Facility agents can also enforce rights on behalf of other syndicate lenders.

18. Is the trust concept recognised in your jurisdiction?

The trust concept is recognised, specifically in the banking sector. The OJK issued OJK Regulation No. 27/POJK.03/2015 as amended by No. 25/POJK.03/2016 concerning Business Activity of Banks in the Form of Trusts. Under this regulation, banks can act as trustees, and receive and manage assets for beneficiaries. The bank acting as trustee can represent the party entrusting its assets under the trust agreement to act as:

- Paying agent.
- A conventional investment fund agent or funding agent based on sharia principles.
- A conventional borrowing agent or borrowing agent based on sharia principles.

These activities must be carried out on written instructions by the party entrusting its assets, as stipulated under the trust agreement.

Enforcement of security interests and borrower insolvency

19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

Circumstances in which lenders can enforce its loans, guarantees or security interests are typically specified in the agreements; most commonly, events of default due to failure to pay the principal amount or interest when due. There are no mandatory requirements that lenders must comply with to enable them to enforce loans, guarantees or securities.

Methods of enforcement

20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

Security interests can be enforced through public auctions or private sales.

Public auction

Public auctions can be conducted without a court judgment or order. However, in practice an Indonesian court judgment or order is required as the State Auction Office would most likely refuse to conduct a public auction without a court judgment or order.

Listed shares can be sold in the market with the involvement of two brokers. No court order is required so long as there is a power of attorney to dispose the shares, which is usually given when the pledge is created. However, there have been instances where the registrar of the listed shares was reluctant to transfer the shares to the purchaser on the grounds that they may be sued if the transfer was contested in an Indonesian court by the owner of the shares, causing a delay in the transfer process.

Private sale

Generally, a private sale is only possible if either:

- It is consented to by the debtor after the debt is due and it is in default.
- The debtor agrees to the sale by being a party to a sale and purchase agreement.

Especially for mortgages, the law allows for private sale if a higher sale price can be achieved for the benefit of the parties. Therefore, it is necessary on default that the mortgagor and the mortgagee agree to a private sale. The proceeds will be used to pay for the outstanding debt.

For mortgages and fiduciary transfers or assignments, a private sale can only be conducted:

- After the expiry of one month from written notification of the intended sale to interested parties and publication of this notice in at least two daily newspapers circulated in the area where the asset is located.
- Where no third party has voiced an objection against the private sale. The law is unclear as to who these third parties may be, although it is safe to assume that they at least include the borrower's other creditors.

Rescue, reorganisation and insolvency

21. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee or security?

Generally, in relation to debt restructuring, the parties can still conduct private negotiations on the outstanding debt, as long as the company has not been declared bankrupt by the court. However, the Indonesian Bankruptcy Law provides a formal company rescue process, that is, a suspension of payments. The suspension of payments process applies to all persons and companies that have their domicile or place of business in Indonesia.

Suspension of payments

The suspension of payments process is initiated by the debtor or his creditors by submitting a petition to the Commercial Court. The petition includes an offer to pay all or part of the debt to the secured and unsecured creditors. The objective is to give the debtor time to reorganise the company in the hope that it will survive as a going concern and ultimately satisfy the creditors' claims. After submitting a petition, the Commercial Court grants the petitioning debtor provisional suspension of payments and appoints both:

- A supervisory judge.
- An administrator, to assist the debtor in managing its estate.

The debtor can continue to manage and dispose of its assets, but only jointly with the administrator. During this suspension, the debtor does not have to make payments to its unsecured creditors. Secured creditors cannot enforce their security without the court's consent. The debtor can submit a composition plan to all its creditors.

First creditors' meeting

A creditors' meeting must be called within 45 days of the granting of provisional suspension of payments. At this meeting, the secured and unsecured creditors must either:

- Approve the composition plan, if a plan was submitted to the Commercial Court.
- Agree to convert the provisional suspension of payments into a permanent suspension of payments for a period of up to 270 days as of the granting of provisional suspension of payments.

If the creditors do not agree the debtor will be declared bankrupt.

Any creditors' meeting to consider the plan must be held before the permanent suspension of payments expires.

Decisions require affirmative votes of both:

- More than 50% in number representing at least 66.67% in value of the unsecured creditors present or represented at the meeting.
- More than 50% in number representing at least 66.67% in value of the secured creditors present or represented at the meeting.

Composition plan ratification

If the creditors approve the plan, the supervisory judge must submit a report in writing to the Commercial Court. The court considers the report and hears the administrator and dissenting creditors. The court must refuse to ratify the plan if:

- The value of the debtor's assets considerably exceeds the amount agreed in the plan.
- It is insufficiently certain that the plan will succeed.
- The plan was concluded as a result of fraudulent transactions or undue preferences of one or more creditors, or other unfair means, regardless of whether the debtor or any other party co-operated with this.
- The cost and expenses for the administrator or other professionals engaged have not been paid or the payments have not been adequately assured.

Once ratified, the composition plan becomes final and binding on all secured and unsecured creditors, except for the dissenting secured creditors. Dissenting secured creditors are entitled to compensation from the debtor at the lowest of either the:

- Value of their security. They can choose between the security value provided in the security documents or the security value designated by an appraiser appointed by the supervisory judge.
- Amount of their outstanding secured claims.

Post-ratification

Following ratification, the suspension of payments is completed and the administrator or receiver (as applicable) will be discharged. The business and assets of the debtor will be returned to the debtor's control, subject to any specific provisions contained in the plan.

22. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?

Insolvency in the Indonesian context means a state of being unable to pay, which may be triggered due to certain circumstances in a suspension of payments process (*see Question 21*). The insolvency proceeding is usually referred to as a bankruptcy proceeding. Generally, mortgages, pledges and fiduciary transfers or assignments are in rem rights that are absolute and exclusive. They create preferential rights to the holder, even in bankruptcy. Assets under mortgages, pledges and fiduciary transfers or assignments are not regarded as part of the bankruptcy assets.

The bankruptcy declaration triggers an automatic stay of the bankruptcy estate on the issuance of the Commercial Court decision granting the provisional suspension of payments (*see Question 21*) or declaring the bankruptcy of the debtor.

In the provisional suspension of payments procedure, the stay ranges between 45 days up to 270 days, in line with the suspension of payments period granted (*see Question 21*).

Under the bankruptcy proceedings, the automatic stay is a maximum 90 days, which may be less if the proceeding is terminated earlier or if the state of insolvency is commenced. Once the state of insolvency is declared, the secured creditors must start exercising their privileged rights over the collateral within two months of the insolvency. Otherwise, the appointed receiver must request the delivery of the collateral to be sold by the receiver. If the receiver enforces the collateral, mandatory preferred claims (which will also apply if the secured creditors enforce the collateral by themselves) and bankruptcy costs (including the receiver's fee) must first be deducted from the proceeds that will be distributed to the secured creditors.

23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

Under the Indonesian Bankruptcy Law, receivers can apply to the court to nullify a preferential transfer transaction (such as a transaction involving a loan, guarantee or security interest) on the basis that this transaction is detrimental to the creditors. The receiver must prove the following:

- The debtor entered into the transaction before it was declared bankrupt.
- The debtor was not required by an existing contractual obligation or by law to perform the transaction.
- The transaction prejudiced the creditors' interests.
- The debtor and the third party to the transaction had or should have had knowledge that the preferential transaction would prejudice the creditors' interests. The debtor and the third party are deemed to know this transaction was detrimental, unless they can prove that:
    - it was entered into within one year before the company's bankruptcy;
    - the transaction was not mandatory; and
    - it was a transaction in which the consideration that the debtor received was substantially less than the estimated value of the consideration given, it was a payment or granting of security for debts that are not yet due or it was a transaction entered into by the debtor with a relative or related party. A relative or related party has a wide meaning and applies to debtors who are individuals and debtors that are legal entities.

The Indonesian Bankruptcy Law does not set a time limit within which an application must be brought.

24. In what order are creditors paid on the borrower's insolvency?

The general rule on distributing the proceeds of a bankruptcy estate to unsecured creditors is one of equality, subject to the statutory priority rights of certain categories of creditors. Shareholders rank behind all creditors in the distribution of the proceeds of the bankrupt estate. The ranking order of creditors under the bankruptcy is as follows:

- Specific expenses stipulated by the Tax Law consisting of:
    - legal expenses arising solely from a court order to auction movable and or immovable goods;
    - expenses incurred for securing the goods; and
    - legal expenses, arising solely from the auction and settlement of inheritance.

- Preferred creditors with ranks above the secured creditors as provided by the Indonesian Civil Code, for example:
    - tax claims;
    - court charges that specifically result from the disposal of a movable or immovable asset (these must be paid from the proceeds of the sale of the assets before all other priority debts, even pledges or mortgages); and
    - legal charges, exclusively caused by sale and preservation of the estate (these have priority over pledges and mortgages).

- Post-bankruptcy creditors, that is, claims against the bankrupt estate, for example:
    - receivers' fees;
    - costs of liquidating the bankruptcy estate (for example, fees of appraisers and accountants);
    - new financing;
    - lease costs for the bankrupt's house or offices as of the date of the declaration of bankruptcy; and
    - wages of the bankrupt's employees as of the date of the declaration of bankruptcy.

- Secured creditors holding mortgages, pledges, fiduciary transfers or assignments, or hypothecs (a type of security interest granted over aircraft and vessels with gross volume of more than 20 cubic metres) (*see Question Question 2 to 6*).
- Specific statutorily preferred creditors whose preference relates only to specific assets.
- General statutorily preferred creditors (for example, revenue authorities).

- Other unsecured creditors who will receive their pro rata share of any of the remaining proceeds.

The cost of the bankruptcy is shared pro rata among the statutorily preferred creditors and the unsecured creditors.

Cross-border issues on loans

25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, or taking guarantees from foreign subsidiaries of the borrower?

There are no restrictions on the making of loans by foreign lenders. However, certain requirements such as reporting may apply (*see Question 13, Others*). There are no restrictions on granting security or guarantees to foreign lenders. There are no restrictions on taking guarantees from foreign subsidiaries of the borrower either.

However, for upstream or sister guarantees where subsidiaries provide guarantees to their parent company, this could raise an argument that such guarantee does not create a commercial benefit to such subsidiaries. Unlike a downstream guarantee where a parent company giving a guarantee to its subsidiaries is in relation to its interest in the subsidiary, a subsidiary or indirect subsidiary (or an unrelated third party) does not actually have any recognised interest in providing such a guarantee (*see Question 13, Corporate benefit*).

26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

There are no exchange controls that restrict payment to foreign lenders. However, purchase of foreign currency through either of the following transactions by an Indonesian entity must be based on an underlying transaction:

- Spot transactions amounting to more than USD25,000 (or its equivalent) per month per customer.
- Standard derivative transactions in the form of forward transactions and option transactions amounting to more than USD100,000 (or its equivalent) per month per customer.

Taxes and fees on loans, guarantees and security interests

27. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?

Documentary taxes

All agreements are subject to stamp duty. Currently, the nominal amount of Indonesian stamp duty is IDR6,000 for transactions of more than IDR1 million, and IDR3,000 for transactions of between IDR250,000 and IDR1 million. Generally, stamp duty is due at the time documents are executed. Withholding tax rates can also apply to interest and fees (not the principal of a loan), if the lender is subject to income tax in Indonesia.

Registration fees

Registration fees for mortgages are normally based on the value of the secured amount under the mortgage (the lender can use the actual value of the assets or the principal amount of the loan), and can be costly. Currently, registration fees are as follows (August 2019):

- Mortgages, with secured amount of:
    - up to IDR250 million is IDR50,000 per certificate;
    - more than IDR250 million and up to IDR1 billion is IDR200,000 per certificate;
    - more than IDR1 billion and up to IDR10 billion is IDR2,500,000 per certificate;
    - more than IDR10 billion and up to IDR1 trillion is IDR25,000,000 per certificate; and
    - more than IDR1 trillion is IDR50,000,000 per certificate.

- Fiduciary transfers or assignments, with secured amount of:
    - up to IDR50 million is IDR50,000 per certificate;
    - more than IDR50 million and up to IDR100 million is IDR100,000 per certificate;
    - more than IDR100 million and up to IDR250 million is IDR200,000 per certificate;
    - more than IDR250 million and up to IDR500 million is IDR450,000 per certificate;
    - more than IDR500 million and up to IDR1 billion is IDR850,000 per certificate;
    - more than IDR1 billion and up to IDR100 billion is IDR1,800,000 per certificate;
    - more than IDR100 billion and up to IDR500 billion is IDR3,500,000 per certificate;
    - more than IDR500 billion and up to IDR1 trillion is IDR6,800,000 per certificate; and

- more than IDR1 trillion is IDR13,300,000 per certificate.

Notaries' fees

Notaries' fees vary and are at the notary's discretion. However, for fiduciary transfers or assignments, the Indonesian Government issued a regulation stipulating that the creation of fiduciary transfers or assignment deeds is subject to fees based on the value of the secured amount, as follows:

- Up to IDR100 million, the fee is a maximum of 2.5%.
- More than IDR100 million and up to IDR1 billion, the fee is a maximum of 1.5%.
- More than IDR1 billion is based on agreement between the parties and the notary, but must not exceed 1% of the fiduciary object.

Enforcement

On enforcement, the interest component is subject to 20% withholding tax if it is paid to non-tax residents. The rate may be lowered under a relevant applicable tax treaty. If it is paid to resident taxpayers, the rate is 15%.

Brexit

28.If UK financial institutions no longer have "passporting" rights in the EU after Brexit, what regulatory requirements would a UK lender have to comply with to make a loan to, or purchase a loan made to, a borrower in your jurisdiction?

Not applicable.

29. Will a UK financial institution require a licence to lend after Brexit? Will a UK lender be able to take security from a borrower in your jurisdiction?

Not applicable.

30. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

For cross-border loans, the withholding tax rate can usually be reduced if the lender resides in a jurisdiction that has a tax treaty with Indonesia.

For mortgage registration fees, lenders normally use the actual value of the assets rather than the principal amount of the loan (*see Question 27, Registration fees*).

For fiduciary transfers or assignment deeds, parties can usually negotiate with the notary to reduce the fees.

Reform

31. Are there any proposals for reform?

"Omnibus" Law

The Government submitted the draft of the "Omnibus Law" (*Rancangan Undang-Undang tentang Cipta Kerja*) to the National Legislature (*Dewan Perwakilan Rakyat*/DPR) in February 2020.

The final draft of the Omnibus Law contains several provisions on various industry sectors and will amend a total of 76 sectoral laws, which cover all majority economic sectors and activities. The regulatory aspects addressed by the Omnibus Law are, among others, business licensing, manpower law, the foreign direct investment (FDI) regime, competition/antitrust law, government investment, product standardisation, special economic zones, intellectual property law and so on.

On 5 October 2020, the National Legislature approved the Omnibus Law. The Omnibus Law was signed and enacted as law in Indonesia as of 2 November 2020.

Contributor profiles

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Professional qualifications. DKI Jakarta, Indonesia, Advocate, 1998; DKI Jakarta, Indonesia, Licensed Tax Consultant, 1999; DKI Jakarta, Indonesia, Tax Attorney, 2003; DKI Jakarta, Indonesia, Chartered Accountant, 2015

Areas of practice. Project finance; power and energy; tax; capital markets.

Non-professional qualifications. Bachelor of Economics, Trisakti University, 1997; Bachelor of Law, University of Indonesia, 1998; Lex Legibus Magister, Leiden University, 2002; Master of Business Administration, Peking University, 2015

Recent transactions/activities

- Assisting a project owner in EPC agreement with Doosan Heavy Industries & Construction Co amounting to USD1.42 billion thermal power plant construction project in Indonesia (2019).
- Assisting a world leading manufacturer in the rack-and-pinion rail vehicle industry in its cooperation (initial investment around USD100 million) with the Indonesian state-owned integrated rolling stock manufacturer (2019).
- Assisting a multi-million USD partial divestment in a market leading printing company to a major Japanese printing company and the relevant cooperation (2019).
- Assisting PT Layar Persada in sale of shares in PT Graha Layar Prima Tbk (an Indonesia-based company primarily engaged in the operation and management of a cinema chain and food and beverages) to Coree Capital Limited amounting to approximately USD70 million (2018).
- Assisting a prominent conglomerate investor in the USD50 million funds raising by PT Sicepat Ekspres Indonesia, an e-commerce-focussed logistics company (2018).
- Assisting a major Japanese investor in its investment in CROWDE, an Indonesian agriculture-focused P2P lending (2018).

Languages. Indonesian, English.

Professional associations/memberships. PERADI (Indonesian Advocates Association); HKHPM (Indonesian Capital Market Legal Consultants); AAI (Association of Indonesian Advocates); IKPI (Indonesian Tax Consultant Association); IFA (International Fiscal Association); IFAC (International Federation of Accountants).

Publications

- *Omnibus Bill: Is It Time to Investment In Indonesia?: Asia Business Law Journal (2020).*

- *Practical law: Public Mergers and Acquisitions in Indonesia: Thomson Reuters (2020).*
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- *Lending and Taking Security in Indonesia: Overview, Thomson Reuters (2018).*

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Areas of practice. Corporate and commercial; investment law; mergers and acquisitions.

Non-professional qualifications. Bachelor of Laws, University of Indonesia, 2015.

Recent transactions/activities

- Assisting IDR200 billion value shares transaction between a Japanese client and several Indonesian distribution and import companies.
- Assisting in liquidation of PT Petronas Niaga Indonesia.
- Indonesian legal counsel for Geo Coal International Pte. Ltd. in the issuance of USD300 million 8% Senior Notes due in 2022.

Languages. Indonesian, English.

Publications

- *Foreign Investment Law Guide 2018-2019, LexisNexis.*
- *Lending and Taking Security in Indonesia: Overview, Thomson Reuters (2018).*

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Areas of practice. Project finance; corporate; mergers and acquisitions.

Non-professional qualifications. Bachelor of Laws, University of Indonesia, 2014; LL.M (Master of Laws) in International Financial Law, King's College London, 2017.

Recent transactions/activities

- Assisting USD81 million acquisition in Indonesia consumer finance company, PT Financia Multi Finance, by South Korean credit-card issuer KB Kookmin Card Corp's from private-equity firms Farallon Capital and Kendall Court.
- Indonesian legal counsel for PT Pertamina (Persero) for the issuance and sale of USD650 million and USD800 million Senior Notes pursuant to its Global Medium Term Note Program.
- Indonesian legal counsel in the issuance of USD400 million of Senior Notes of PT Bayan Resources Tbk.

Languages. Indonesian, English.

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Tax on corporate lending and bond issues in Indonesia: overview • Law stated as at 01-May-2020
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