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The International Comparative Legal Guide to:

Securitisation 2018

11th Edition

A practical cross-border insight into securitisation work

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EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Five general chapters. These chapters are designed to provide readers with an overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 27 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Sanjev Warna-kula-suriya of Latham & Watkins LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?

Generally, agreements in Indonesia can be made either in writing or verbally. However, for a debt that arises from a loan agreement, Article 1756 of the Indonesian Civil Code ("**ICC**") stipulates that the payment of a debt shall only be limited to the amount stated in the agreement. Thus, receivables shall be made in an agreement in order to provide clarity. Further, pursuant to Article 1457 of the ICC, a sale and purchase is an agreement where one party binds itself to provide goods and the other party pays the agreed price. Article 1513 of the Indonesian Civil Code further stipulates that the main obligation of the buyer is to pay the purchase price in the place, and at the time, agreed in the agreement. If there is no agreement on the place and time of payment, Article 1514 of the Indonesian Civil Code further regulates that the buyer has to pay at the time of the handover of the goods (levering). Based on this, it can be concluded that for the sale and purchase, the payment for the good/services has to be made at the agreed time or at the time of the levering. Such payment cannot be made in instalments, since it has to be paid at the levering.

Invoices alone are sufficient to be deemed as a binding agreement, as long as the recipient of the invoices has made the payment to the issuer of the invoice. Hence, the recipient of the invoices is deemed to provide his consent to the invoices. Indonesian law also recognises the concept of consent by conduct under Article 1347 of the ICC which stipulates that customary stipulation shall be deemed to be implied in the agreement, notwithstanding that these have not been expressed.

As previously explained, a receivables contract, the nature of which can be deemed as a debt or loan agreement, shall be made based on a binding agreement. Hence, it cannot be deemed to exist as a result of the behaviour of the parties. However, as for other agreements which entitle the seller to receive payment aside from the loan agreement, we believe that a contract might be deemed to exist as a result of the behaviour of the parties (please also refer to our explanation above in relation to Article 1347 of the ICC).

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Generally, there are no restrictions on interest on consumer credit, loans or other kinds of receivables. Parties may determine the interest rate mutually. However, it should be noted that in Indonesia a usury law (the "*Woekerordonantie*") is still in force. In addition, save for a credit card, Bank Indonesia limits the interest to a maximum of 2.95% per month. Aside from the limitation of interest, Bank Indonesia (the Indonesian central bank) has imposed significant restrictions on new offshore financing arrangements entered into by non-banking institutions in Indonesia, as stipulated under BI Regulation No. 16/21/PBI/2014 on Prudential Principles in the Management of Offshore Borrowing for Non-Bank Institutions as amended by BI Regulation No. 18/4/PBI/2016 dated 21 April 2016 ("**BI Regulation 18/2016**"), which require Indonesian non-bank borrowers to satisfy certain minimum hedging and liquidity ratios in relation to their external indebtedness.

There is no statutory interest rate on late payments.

There are no noteworthy rights of consumers under the Consumer Protection Law with respect to the receivables that they owe.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

Yes, additional requirements may apply to the sale or collection of government assets. Article 46 of Law No. 1 of 2004 on State Treasury stipulates that any transfer of a government asset shall obtain approval from the House of Representatives, the president, or the minister of finance. Such approval is determined based on the value of the asset. As for government assets other than land and buildings valued at: (i) more than Rp100 billion shall obtain approval from the House of Representatives; (ii) Rp10 billion up to Rp100 billion shall obtain approval from the president; and (iii) below Rp10 billion shall obtain approval from the minister of finance.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

Indonesia acknowledges the concept of the "most characteristic connection" in order to determine the governing law of a contract that does not stipulate a choice of law provision.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

No, there should be no reason.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Generally, Indonesian courts will recognise the parties' choice of law in an agreement as long as it is not contrary to public policy or existing laws and regulations. However, to the extent there is an Indonesian party, an Indonesian court has the right to invalidate the agreement if it is deemed to violate Indonesian law.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

No, it does not.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Yes, it should recognise the sale. Generally, an agreement must fulfil the requirements under Article 1320 of the ICC to be deemed valid, which are as follows:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject; and
4. there must be an admissible cause.

However, in relation to the transfer of receivables, the following requirements must be made in order to give effect to such transfer: (i) there is an underlying agreement to the sale and purchase; (ii) there is a delivery of the object, in the form of deed of transfer/assignment from the seller to the purchaser; and (iii) there is notice and acknowledgment of the obligor to such transfer of receivables.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

Please see the answer to question 3.2. An Indonesian court should uphold the choice of Indonesian law by the parties.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

Yes. Indonesian law recognises the concept of freedom of contract, which the Indonesian party may freely enter into, to the extent it does not violate the public order. Therefore, if the nexus of the agreement is valid, the court might acknowledge the perfection of the sale and purchase, as regulated by the requirement under the prevailing laws of the chosen governing law.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

Yes. Please see the answer to question 3.4 above.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

Yes. Please see the answer to question 3.4 above.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

The seller and the purchaser will enter into a sale and purchase agreement. The customary terminology for a sale of receivables is "a true sale".

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

Please refer to our explanation to question 3.2 above.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

Promissory notes

The sales of a promissory note can only be perfected by way of endorsement.

Mortgage loans

A loan secured by a mortgage may be sold in the form of a sale and purchase agreement or an assignment agreement.

Consumer loans

A transfer of a consumer loan can be made in the form of a sale and purchase agreement.

Marketable debt securities

Marketable debt securities ("**MDS**") (which are issued in scripless form), must be transferred from the securities account of the seller to the securities account of the purchaser to be perfected. On the other hand, as for MDS issued in physical form, the perfection shall be made by way of endorsement upon physical delivery.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Yes. The seller or the purchaser must notify obligors of the sale of receivables in order for the sale to be effective against the obligors.

Article 613 of the ICC stipulates that the assignment or transfer of receivables should be notified to the debtor, or agreed and acknowledged in writing by the debtor.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

There is no specific requirement of notice regarding the time or how it must be delivered. However, in order to perfect the sale of receivables and make the transfer binding, the obligor shall be informed promptly that a sale of receivables has taken place.

As for an insolvency proceeding and execution of security, notice to the obligors is provided by the bailiff.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Yes, the above provisions can be interpreted that any transfer or assignment of rights or obligations shall obtain consent from the non-transferring party.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

Since Indonesia honours the freedom of contract, such restrictions will be acknowledged and enforceable in Indonesia (since it has been agreed by the parties to the contract).

If the seller sells the receivables to the purchaser without any consent from the obligor (not in compliance with the provisions of the contract), the seller shall be liable to the obligor for breach of contract.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

Article 1320 paragraph 3 of the ICC stipulates that an agreement must set out a specific object. Nonetheless, there is no provision or guidance regarding the details of receivables.

However, we believe that the details should include: (i) the name of the obligor; (ii) the amount of receivables; (iii) the underlying agreement of the receivables mentioning the parties, the date of agreement and the number of the agreement (if any); (iv) the payment date; and (v) other specific information, in order to distinguish each of the receivables. This will also apply if the seller sells all of his receivables. The seller should break down which receivables to be sold.

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

As previously explained, Indonesian law recognises the concept of "freedom of contract". Hence, if the agreement has been duly signed and there are no outstanding conditions that need to be fulfilled, and such agreement has complied with Article 1320 of the ICC, the agreement is binding on the parties to such agreement.

However, for a more sophisticated transaction (i.e. REPO), in the event of a dispute, a court may categorise a REPO transaction as a loan transaction. Therefore, the seller may retain a credit risk and a right of repurchase/redemption.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

Yes. However, the notice and acknowledgment by the debtor still remains.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to *versus* after the seller's insolvency?

Yes, the seller can commit; however, once the receivable exists, the sale and purchase agreement should be executed and have the details of the receivable.

As for the distinction in relation to the insolvency event, please refer to question 6.5 below.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Practically, security in Indonesia is made in three forms, depending on the type of assets involved.

Mortgage

A mortgage is created over an immovable asset. If the receivable is secured by a mortgage and it is transferred, the transferee should register it at the land office and the mortgage certificate should be amended to state the name of the transferee.

Pledge

A pledge is a security interest over tangible or intangible property. If the receivable is secured by a pledge and it is transferred, a notification to the pledgor is necessary to be made in favour of the transferee.

Fiduciary security

A fiduciary security is a security right over movable (tangible or intangible) and immovable property which cannot be secured by a mortgage. If a receivable is secured by a fiduciary security and it is transferred, the transferee should register it at the fiduciary registration office.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

In the event a set-off right is not waived in an agreement, such right still remains valid upon the receipt of notice of a sale. As such, a borrower may implement its right to set-off against any amount it owes to the purchaser.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

The proceeds of collection less all costs (purchase price + cost of capital + other relevant costs).

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

It is not common in Indonesia to take a "back-up" security interest, to the extent the sale of receivables and the related security have been perfected.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

It is not common to take a "back-up" security interest as stipulated in question 5.1.

A security interest in receivables in Indonesia is secured under a fiduciary security. Execution of a deed of fiduciary security and registration to the fiduciary registration office are needed in order to perfect the security.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

Commonly, receivables are secured under a fiduciary. A fiduciary over receivables should be registered to the fiduciary registration office in order to be perfected.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

To the extent the purchaser is located in Indonesia, the receivable can be encumbered with fiduciary security then registered and perfected under Indonesian law. Otherwise, the receivable cannot be used as a security under Indonesian laws.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

Insurance policies

Acknowledgment by the insurer is needed in order to perfect a security interest on insurance policies. In addition, a banker's clause can also be an option for a security interest connected to insurance policies.

Promissory notes

Please see the answer to question 4.3 above.

Mortgage loans

Please see the answer to question 4.3 above.

Consumer loans

Please see the answer to question 4.3 above.

Marketable debt securities

Please see the answer to question 4.3 above.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

The concept of a trust is not recognised under Indonesian law since Indonesian law does not recognise the concept of splitting up ownership (i.e. between ownership of record and beneficial ownership).

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in your jurisdiction?

Yes, escrow accounts are recognised in Indonesia and are usually structured under an escrow agreement.

Yes, security can be taken over a bank account. The typical method of a security over a bank account is a pledge. However, the Fiduciary Registration Office has expressed the view that a bank account cannot be subject to an Indonesian security interest, and the enforceability of a pledge over a bank account is yet to be tested in court. Although its enforceability is doubtful, it is common in practice to secure a bank account with a pledge over a bank account.

Yes, an Indonesian court should recognise a foreign law grant of security taken over a bank account.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

Please see the answer to question 5.7.

In practice, a pledge of a bank account is supplemented with a power of attorney to manage a bank account which grants authorisation to the attorney to manage and control all cash flowing into the bank account. The secured party may control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full. However, it should be noted that perfection and enforcement of a pledge of a bank account shall be acknowledged by the bank in advance.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

In practice, to access or take action with regard to the pledged account, prior consent from the pledgee shall be obtained.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

In relation to the sale of receivables under Indonesian law, the sale of receivables will be deemed as valid if it has fulfilled certain aspects. Please refer to our answer to question 3.2 above.

Normally, there is no stay of action if the seller becomes subject to an insolvency proceeding after the sale of receivable has been perfected. The sale of the receivable may be annulled if the seller commits fraudulent conveyances when it sold the receivable. The cancellation can be done if the seller is aware that the sale of the receivable would damage the interest of the creditor of the seller. In the event the sale happens within the last 12 months before the bankruptcy status of the seller is issued by the commercial court, the seller would be deemed aware of the consequences in question.

If the purchaser is deemed to only be a secured party rather than the owner of the receivables, then the answer will be different. Article 56 of IBL regulates that the right of the secured party to execute its right pursuant to a security agreement is stayed for a period of 90 days as of the announcement of the bankruptcy decision.

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

Please refer to our responses to questions 6.1 and 6.3. These relate to fraudulent conveyances.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

As briefly mentioned earlier, fraudulent conveyances are regulated under the IBL and the ICC.

The IBL states 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 and met the following requirements:

- 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.

However, in addition to the above, the ICC provides the right of any creditor to request the nullification of preferential transfer. The ICC stipulates that the right exists within a period of five years starting

from the date when the creditor knew, or should have known, the preferential transfer prejudiced the creditor's interests. Meanwhile, the IBL stipulates that a legal act taken by the debtor up to one year prior to the issuance of a bankruptcy decision which prejudices the rights of the creditors (while such legal act is not compulsory to be carried out by the debtor) could be deemed detrimental to the creditors. However, the IBL does not clearly define any time difference on the length for a "suspect" or "preference" period for a transaction entered into by related or unrelated parties to the bankrupt debtor.

Notwithstanding the above, please be advised that the ICC and the IBL 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 seizure in relation to a preferential transfer claim made by a receiver or creditor.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

There is no consolidation concept in Indonesian bankruptcy law.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

For the purposes of answering this question, we assume that the commencement of proceedings here means the date when the seller is declared bankrupt.

Sales of receivables that would occur after the commencement of the proceeding

After the debtor has been declared bankrupt, all assets of the debtor will be managed by the receiver and the debtor will not have any access to its assets again. Therefore, we believe that it is unlikely that the sale of receivables will be made after the debtor is declared to be bankrupt. However, this will be up to the discretion of the receiver. If the receiver believes that continuing the sale will benefit the other creditors of the bankrupt debtor, then the receiver may continue with the sale.

Sales of receivables that only come into existence after the commencement of the proceeding

Under this scenario, there is a commitment to sell future receivables which has not existed, however, the seller is subsequently declared bankrupt before the receivable exists. Pursuant to Article 36 of IBL, if the declaration of bankruptcy is announced and there is a reciprocal agreement which has not been executed, the counterparty of the debtor may request a certainty on the continuation of the agreement after the declaration of bankruptcy of the debtor. If the receiver has not provided a certainty after a certain period which has been: (a) agreed by the receiver and the counterparty; or (b) assigned by the supervisory judge, then the agreement will be deemed as terminated and the counterparty may claim damages as an unsecured creditor of the bankrupt debtor. Once the receiver believes that continuing the agreement will be beneficial to the other creditors of the bankrupt debtor, then he/she may decide to continue the agreement.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

The IBL regulates that the requirements for a debtor to be declared bankrupt are: (i) having two creditors or more; and (ii) failing to pay at least one debt which has matured and become payable. The IBL further regulates that the petition for bankruptcy shall be granted if the facts or circumstances summarily prove the fulfilment of the requirement as mentioned above. As such, if the requirements have been fulfilled, we believe that the limited recourse provision should not have any effect on the bankruptcy proceeding. However, this will be subject to the discretion of the panel of judges in the proceeding, who might have their own view as to the nature of the case.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction?

Yes. There are several regulations in Indonesia in relation to securitisation transactions. Below are the regulations in relation to securitisation transactions in capital markets and banking.

Capital market

In a capital market, the regulations in relation to securitisation transactions are as below:

- OJK Regulation No. 65/Pojk.04/2017 dated 21 December 2017 on Guidelines of Issuance and reporting of Monthly Report of Asset-backed Securities ("**EBA**") Collective Investment Contracts;
- OJK Regulation No. 23/POJK.04/2014 dated 19 November 2014 on Guidelines of Issuance and Reporting of EBA in the Form of Participation Letter in the Context of Secondary House Financing; and
- OJK Regulation No. 20/POJK.04/2015 dated 3 November 2015 on Issuance and Requirement of Sharia EBA.

In Indonesia, EBA is issued under an EBA Collective Investment Contract ("**KIK-EBA**"). A KIK-EBA is entered by, and between, an investment manager and a custodian bank of which the investment manager will manage the portfolio and the custodian bank will provide custodian services to the investment manager.

Aside from the investment manager and custodian bank, there are other parties involved, for example, a servicer (usually this role is conducted by the initial creditor (originator)) and a credit enhancer.

Banking

In banking, regulations relating to securitisation are governed by Bank Indonesia Regulation No. 7/4/PBI/2005 on Prudential Principles in Asset Securitisation for Commercial Banks.

This regulation generally governs criteria and requirements of financial assets that can be transferred in relation to the securitisation asset and the function of a bank in securitisation transactions.

ICC

Article 584 of the ICC stipulates the following:

"*Ownership of assets cannot be acquired in any manner other than by appropriation, attachment, prescription, legal or testamentary succession, and by delivery pursuant to a transfer of legal title, originating from the individual who was entitled to dispose of the property.*"

Article 613 of the ICC stipulates the following:

"*The transfer of registered debts and other intangible assets, shall be effected by using an authentic or private deed, in which the rights to such objects shall be transferred to another individual. Such transfer shall have no consequences with respect to the debtor, until he has been notified thereof, or if he has accepted the transfer in writing or has acknowledged it.*"

Securitisation transactions are regulated and supervised by the Financial Services Authority and Indonesian Central Bank.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

There is no specific regulation for the establishment of a special purpose entity for securitisation; such establishment will generally comply with the Indonesian Company Law.

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

Typically the special purpose entity is established in our jurisdiction. Please note that under the Indonesian law, securitisation is structured under the collective investment contract ("**CIC**") that shall be made before the notary. Based on this structure, the investment manager will purchase the underlying assets from the originator (the one who has the underlying assets). Further, based on the CIC, the investment manager as the one that purchases the assets will issue and offer the EBA to the investor. There are no specific advantages to locating the special purpose entity in our jurisdiction, other than the rules on EBA only regulate the establishment of EBA in our jurisdiction.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Normally yes, to the extent there is an Indonesian party or other legal nexus which relates to Indonesia.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Please see the answer to question 7.4 above.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Please see the answer to question 7.4 above.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

Please see the answer to question 7.4 above.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

The purchaser is typically established in our jurisdiction for a securitisation transaction. The main benefit to having the purchaser in Indonesia is that it results in an easier process for collecting the receivable as well as lowering withholding tax upon interest paid by the obligor *vis-à-vis* withholding tax upon interest paid to an offshore purchaser.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

No licences are required to the extent that the purchaser is (i) solely purchasing and holding the receivables, and (ii) not established as a permanent legal entity in Indonesia.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third-party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

Please see the answer to question 8.1 above. A third-party replacement servicer is not required to hold any licences in order to enforce and collect sold receivables to the extent it is solely purchasing and holding the receivables and does not intend to establish a permanent legal entity in Indonesia.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Indonesia does not have specific regulations regarding data protection. However, Law No. 7 of 1992 on Banking as amended by Law No. 10 of 1998 provides that a bank has bank secrecy obligations which require it to keep the confidentiality of any information regarding the depositor and his deposit. Meanwhile, information concerning debt is not deemed as confidential information and may be released.

Further, if the utilisation of information relating to personal data is made through electronic media, Law No. 11 of 2008 on Information and Electronic Transaction will apply where it requires such utilisation to be based on approval by the respective person.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

To the extent the agreement has been duly signed and has complied with the prevailing regulations and no continuing obligations need to be fulfilled, we believe that consumer protection law should not have any impact on the agreement.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

There are no restrictions or requirements which limit the availability or transfer of foreign currency except that, pursuant to Regulation of Bank Indonesia number 18/18/PBI/2016 dated 5 September 2016 on Foreign Exchange Transactions Against Rupiah between Banks and Domestic Parties, the conversion of Indonesian Rupiah to foreign currencies or the purchase of foreign currency in the amount of more than US$100,000 per month (or its equivalent) per customer (including the purchase of foreign currencies for derivative transactions) must be based on an underlying transaction, with a maximum amount required under the underlying transaction. In addition, the party purchasing the above-stated foreign currencies is required to submit the following documents to the bank making the conversion:

(i) a copy of the underlying agreement that can be accounted for, both the final and estimated form;

(ii) supporting documents in the form of a copy of customer's ID and Tax Registration Number for Indonesian parties (known as NPWP); and

(iii) a written statement from the party purchasing the foreign currencies which contains information on: (i) the authenticity and validity of the underlying transaction and the utilisation of underlying transaction documents, for the purpose of foreign currencies against Rupiah, shall not exceed the nominal value of the underlying transaction in the banking system in Indonesia; and (ii) the total needs, purpose of utilisation, and date of foreign currencies utilisation, in case the underlying transaction documents is in estimated form.

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

There is no specific law that regulates "risk retention". Please see our answer to question 7.3 above on the structure of securitisation in Indonesia.

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

No, there have been no such regulatory developments.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

(a) If the obligors are Indonesian tax residents, the interest portion of the receivables would be subject to withholding tax.

(b) It does not depend on the nature of the receivables or the location of the seller or the purchaser.

(c) Yes, there is.

(d) Yes, there is.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

Yes, it does.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other transfer or documentary taxes on sales of receivables?

Yes, it does.

9.4 Value Added Taxes. Does your jurisdiction impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Yes, it does.

9.5 Purchaser Liability. If the seller is required to pay value-added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

No, it will not.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

No, unless the withholding tax is imposed by the seller upon the sale.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.3 above), is that debt relief liable to tax in your jurisdiction?

Yes, it is.

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Mr. Freddy Karyadi joined ABNR as Senior Associate in July 2007 and became a Partner on 1 January 2012. He read law at the University of Indonesia (1998) and Leiden University, majoring in International Tax Law (2002). He also graduated *cum laude* in 1997 from the Faculty of Economics of Trisakti University in Jakarta. He has participated in various training and seminars in Indonesia and abroad. Prior to joining ABNR, he worked for a number of years in other prominent law firms in Jakarta. In 2010, he was seconded to Loyens & Loeffs, Amsterdam Office, a prominent Dutch law firm. His special practice areas are capital market, M&A, taxation, banking and corporate finance matters. He has represented numerous financial institutions, banks, private equity and funds, and multinational companies.

He is a member of the editorial board of Derivatives and Financial Instrument Journal, International Bureau of Fiscal Documentation, the Netherlands and is the regional correspondent for the Indonesia jurisdiction for Tax Notes International of Virginia, United States. He also contributes articles to the *International Financial Law Review* and a number of national tax magazines, teaches in several universities and is a regular speaker at seminars and training. In addition to being an advocate and tax attorney, he is also a registered accountant (Ak) and a licensed tax consultant (brevet C).

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