COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Indonesia

LENDING & SECURED FINANCE

Contributor

Mochtar Karuwin Komar

Craig M. Heggie

Senior foreign legal advisor | cmheggie@mkklaw.net

Lucyana Dela Rosa

Senior associate | lucyana@mkklaw.net

Gusti Oka Anantajaya

Senior associate | oka.anantajaya@mkklaw.net

This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Indonesia.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

INDONESIA
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

It is not necessary under Indonesian law that foreign lenders should be licenced, qualified or otherwise entitled to do business in order to execute and/or enforce their rights under financing documents or Indonesian law security documents.

With regard to Indonesian borrowers and their proposed offshore loan borrowings, the approval of the Indonesian Minister of Finance will only be required if the Indonesian company borrowing an offshore loan is a State owned entity (*Badan Usaha Milik Negara* or "BUMN") and the Indonesian borrower will not be a BUMN if the Government / State of Indonesia does not own more than 50% of the shares of the Indonesian borrower. Indonesian borrowers should, however, report the execution of offshore loan agreements to, and file copies of offshore loan agreements with, Bank Indonesia and the Ministry of Finance. The reporting to Bank Indonesia should be carried out online through Bank Indonesia's website and the reporting should be carried out at the latest on the fifteenth day of the following month after execution of the offshore loan agreement. The reporting to the Ministry of Finance is carried out manually by submitting hardcopy documents together with a cover letter reporting the offshore loan.

Indonesian borrowers should also comply with a Bank Indonesia regulation on the implementation of prudential principles in managing offshore loans. This concerns minimum hedging ratio, minimum liquidity ratio and minimum credit rating requirements as set out in Bank Indonesia Regulation No. 16/21/PBI/2014 dated December 29, 2014 as amended from time to time. This Regulation requires Indonesian non-bank companies having offshore loans denominated in foreign currency to implement prudential principles covering the maintaining of hedging ratios, liquidity ratios and credit ratings and the requirements can be summarised as follows :-

a. minimum hedging ratio of 25% of the negative difference between foreign currency assets and foreign currency liabilities which will be due either within 3 months or 3 months to 6 months as of the end of a quarter;
b. minimum liquidity ratio of 70%; and
c. credit rating of at least "BB-" issued by a ratings agency recognised by the Indonesian financial sector authorities.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

A pre-independence usury law (the "*Geldschieters Ordonantie*") is still in force in the Republic of Indonesia but the provisions of the usury law are, generally, considered not to affect offshore loan agreements on normal commercial terms.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Pursuant to the prevailing Bank Indonesia regulations on the receipt of foreign exchange from offshore loans, Indonesian borrowers are required to have the proceeds of drawdowns under offshore loans remitted to an account with an Indonesian foreign exchange bank. There is, however, no requirement that the loan proceeds should be held in the account for a specific period. In addition, Indonesian borrowers are required to file with Bank Indonesia reports on drawdowns under offshore loan agreements at the latest on the fifteenth day of the following month after a drawdown.

There are, currently, no exchange controls in effect in the Republic of Indonesia which will prevent or restrict

the repayment of principal and the payment of interest under offshore loan agreements. There will, however, be withholding tax on payments of interest and fees in the nature of interest and fees for services performed either in or outside the Republic of Indonesia at the rate of 20% of the gross amount, except where the recipient qualifies for the benefits under a bilateral tax treaty.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

Foreign lenders can directly hold security over Indonesian assets and can, in the case of mortgages and fiduciary security (see our comments below), be registered as secured parties. Foreign lenders can, generally, require Indonesian borrowers to execute the following types of Indonesian law security documents :-

a. mortgages over land and other immovable assets – mortgage deeds will be signed in the Indonesian language before an Indonesian Land Deed Official (or PPAT) and, thereafter, registered with the relevant Land Office;
b. fiduciary security (fiduciary transfer agreements relating to plant, machinery and equipment and inventories and fiduciary assignments relating to, for example, receivables and insurance proceeds) – fiduciary security deeds will be signed in the Indonesian language before an Indonesian Notary and, thereafter, registered with the relevant Fiduciary Registry Office; and
c. pledges (over, for example, shares or movable assets) – we recommend that pledges should be signed in the Indonesian language but pledges may, at the discretion of the foreign lenders, be signed in private form or in notarial deed form (i.e. signed before an Indonesian Notary) and there is no requirement to register pledges with any registry in Indonesia (with regard to pledges over shares in Indonesian public companies, the relevant securities account maintained with the Indonesian Central Securities Custodian Agency (or KSEI) should be blocked to prevent any future transactions involving the pledged shares).

The Indonesian law on things is a closed system and, where the assets are located in Indonesia, Indonesian law must govern and the security documents must be in such form as may be mandated by the applicable specific law.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Indonesian borrowers may grant security for future obligations provided that such future obligations have been described in the relevant Indonesian law security documents with sufficient specificity. While it is common to include provisions in fiduciary security deeds and pledges purporting to encumber future assets (future acquired property clauses), we generally recommend that, following the acquisition of such assets, the relevant fiduciary security deeds and pledges are amended and/or restated (and, in the case of fiduciary security deeds, the amended and/or restated fiduciary security deeds should be registered with the relevant Fiduciary Registry Office). For mortgage deeds there must be an existing registered land title although mortgage deeds can also cover future acquired appurtenances and improvements.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

It is not possible for Indonesian borrowers to grant security over all of their assets under a single security agreement. As stated in our response to question 4 above :-

a. land and other immovable assets should be encumbered by mortgage deeds;
b. plant, machinery and equipment and inventories should be encumbered by fiduciary transfer agreements and receivables and insurance proceeds should be encumbered by fiduciary assignments; and
c. shares and movable assets should be encumbered by pledges.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

As stated in our response to question 4 above, mortgage

deeds will be signed before an Indonesian Land Deed Official and fiduciary transfer agreements and fiduciary assignments will be signed before an Indonesian Notary (and we recommend that pledges should also be signed before an Indonesian Notary).

8. Are there any security registration requirements in your jurisdiction?

As stated in our response to question 4 above, mortgage deeds should be registered with the relevant Land Office and fiduciary transfer agreements and fiduciary assignments should be registered with the relevant Fiduciary Registry Office.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Offshore lenders should be aware of the following costs :-

a. each transaction document signed by Indonesian borrowers will be subject to nominal stamp tax in the amount of Rp. 10,000;
b. mortgage deeds will be subject to the fees of the PPAT (calculated at the rate of 0.1% to 0.25% of the security value) and registration fees payable to the relevant Land Office;
c. fiduciary transfer agreements and fiduciary assignments will be subject to the fees of the Indonesian Notary and registration fees payable to the relevant Fiduciary Registry Office; and
d. pledges will be subject to the fees of the Indonesian Notary (if the same are signed in notarial deed form).

Offshore lenders should also be aware that Presidential Regulation No. 63 of 2019 on the Use of the Indonesian Language ("PR 63/2019") was issued to further implement the provisions of Law No. 24 of 2009 on National Flag, Language, Emblem and Anthem ("Law 24/2009") regarding the use of the Indonesian language. Article 31 of Law 24/2009 imposes the requirement that memoranda of understanding or agreements entered into by Indonesian parties should be set out in the Indonesian language and, if the relevant memoranda of understanding or agreements involve foreign parties, the relevant memoranda of understanding or agreements may also be set out in the language of the relevant foreign parties and / or in English. PR 63/2019 confirms the requirement that agreements entered into by Indonesian parties should be set out in the Indonesian language and that, if the relevant agreements involve foreign parties, the relevant agreements may also be set out in the language of the relevant foreign parties and / or in English. However, Article 26(4) of PR 63/2019 provides that the parties to an agreement are free to choose which version of the agreement will prevail in the event that there are inconsistencies between the Indonesian language version of the agreement and the non-Indonesian language version of the agreement.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

An Indonesian company can guarantee or secure the obligations of another group company. However, if no tangible economic benefit accrues as a result of the Indonesian company guaranteeing or securing the obligations of another group company, then the transaction may be challenged by the shareholders of the Indonesian company or by third party creditors. While the risk of a challenge by the shareholders can be mitigated by obtaining the prior approval of the shareholders, it can be difficult to mitigate the risk of a challenge by third party creditors.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

While Indonesian law does not have a specific provision prohibiting a company from providing financial assistance in connection with the purchase of its own shares, the requirements to preserve corporate equity and protect third party creditors are fundamental principles of Indonesian company law. Accordingly, an Indonesian company should not provide financial assistance in connection with the purchase of its own shares.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Indonesian law does not recognise the concept of trust and, accordingly, Indonesian law security documents (mortgage deeds, fiduciary transfer agreements, fiduciary assignments and pledges) should be prepared on the basis that the security interests created by the Indonesian law security documents are vested in all syndicate lenders. However, the syndicate lenders may, on the basis of agency law, appoint a security agent to act on behalf of the syndicate lenders pursuant to security agency provisions contained in the relevant financing agreements and the role of the security agent can include (a) enforcing the rights of the syndicate lenders under the relevant financing agreements and (b) applying the proceeds of any foreclosure proceedings in accordance with the provisions of the relevant financing agreements.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

As stated in our response to question 12 above, on the basis of agency law, the syndicate lenders may appoint a security agent to act on behalf of the syndicate lenders pursuant to security agency provisions contained in the relevant financing agreements.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

The choice of non-Indonesian law, including English law, to govern the terms of any agreement entered into by an Indonesian company should be enforceable in the Indonesian courts save to the extent that the applicable laws are contrary to fundamental Indonesian concepts of public order.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Final judgements rendered against Indonesian companies by courts in England or the United States of America will not be recognised by the Indonesian courts because there are no bilateral treaties on the execution of foreign judgements between the Republic of Indonesia and the United Kingdom or the United States of America.

However, pursuant to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, the Republic of Indonesia has adopted procedures for the enforcement of foreign arbitral awards. Accordingly, arbitral awards rendered against Indonesian companies should be enforceable in Indonesia provided that (a) the award is rendered in a country with which the Republic of Indonesia is bound by a treaty, either bilateral or multilateral, concerning the recognition and enforcement of international arbitral awards (in this regard we note that, pursuant to Presidential Decree No. 34 of 1981, the Republic of Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (b) such award arises out of a dispute which is "commercial" in nature under Indonesian law (c) such award is not contrary to public order of the Republic of Indonesia and (d) such award, having been registered with the Clerk of the District Court of Central Jakarta, obtains an exequatur (writ of execution) from the Chairman of the District Court of Central Jakarta.

16. What (briefly) is the insolvency process in your jurisdiction?

The Indonesian Bankruptcy Law, Law No.37 of 2004, has two substantive chapters, namely Chapter II on Bankruptcy and Chapter III on Suspension of Debt Payment Obligations.

Chapter II of the Bankruptcy Law addresses bankruptcy, the general seizure of all of a debtor's assets which is established by a declaration of bankruptcy by the court pursuant to which such assets are placed under the management of a curator (broadly equivalent to a receiver in common law jurisdictions), as supervised by a supervisory judge, for the benefit of the debtor's creditors. The requirements for a declaration of

bankruptcy are the existence of at least two creditors and *prima facie* evidence that the debtor has failed to pay at least one debt that has become due and payable. In the absence of a composition plan which has been approved by creditors and ratified by the court during a preceding phase in the bankruptcy process, then the "state of insolvency" will commence. This is the liquidation phase where the curator will sell the bankrupt debtor's assets and the sale proceeds will be distributed to creditors based upon their respective priorities (which can take place in multiple rounds).

Chapter III of the Bankruptcy Law addresses suspension of payments (moratorium). A debtor who is unable to pay its debts as they fall due may apply to the court for suspension of its payment obligations for the purpose of submitting a composition plan to its creditors. This application may be made before or after a petition for bankruptcy is filed by creditors. Based on our experience, a debtor will immediately file for suspension of payments protection following filing of a petition for bankruptcy which it considers cannot be resisted. This procedure is intended to grant the debtor temporary relief from the obligation to pay its debts in order to give the debtor a period of time to put together a plan of composition to restructure its debts with its creditors.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The declaration of bankruptcy triggers an automatic stay on the enforcement of security until the earlier of (a) 90 days from the date of declaration of bankruptcy (b) termination of the bankruptcy or (c) commencement of the state of insolvency. This stay also applies to the rights of third parties to recover assets which are owned by them but are in the possession of the bankrupt debtor or the curator, such as lessors. During the stay period, secured creditors holding in rem security interests may not foreclose on the encumbered assets and any ongoing foreclosure sale proceedings will be stayed for the duration of the stay period.

18. Please comment on transactions voidable upon insolvency.

We set out below the voidable preference rules under the Indonesian Bankruptcy Law :-

a. Article 41. The curator can seek cancellation of any act or transaction carried out by the debtor which is detrimental to the creditors where the act or transaction was carried out before the declaration of bankruptcy and where the execution was not obligated by any contract or by law. The curator has the burden of proving that the debtor and the contract counterparty knew or should reasonably have known that the act or transaction would be detrimental to the creditors.
b. Article 42. There is a presumption that the debtor and the contract counterparty knew of detriment to creditors if the act or transaction took place within one year prior to the declaration of bankruptcy and (i) the act or transaction is a commitment on the part of the debtor which exceeds the obligation of the contract counterparty (ii) the act or transaction is done to effect payment or to confer security for an obligation that is not yet due or (iii) the act or transaction is conducted by the debtor for the benefit of an affiliated party.
c. Article 45. The curator can also seek cancellation of payment of a matured debt if he can prove that the recipient knew at the time that a bankruptcy petition had been lodged or that the payment was the result of negotiations between the debtor and the recipient to give preference to the recipient over the other creditors.

19. Is set off recognised on insolvency?

After the declaration of bankruptcy a creditor may not set off any cash deposits of the debtor in accounts held with the creditor against outstanding debts owned by the creditor to the debtor.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

The claims which will take priority over the claims of secured creditors are:-

a. court costs of foreclosure of movable and immovable goods and fees of the receiver which are to be paid from the proceeds of such foreclosure enjoy priority over all secured claims and privileged claims pursuant to Articles 1139 and 1149 of the Indonesian Civil Code; and
b. tax liens.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

We are not aware of any impending reforms which will make lending into the Republic of Indonesia easier or harder for foreign lenders.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

While there is no current information available regarding the proportion of the lending provided to Indonesian companies by way of traditional bank debt versus alternative credit providers, based on our experience, the role of alternative credit providers has been steadily increasing over the years.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

Pursuant to the prevailing Bank Indonesia regulations, all foreign exchange proceeds arising as a result of the export of natural resources must be received through a special account with an Indonesian foreign exchange bank. As a result, foreign lenders may face difficulties in structuring transactions where offshore loans are provided to Indonesian companies which are exporters of natural resources (such as mining companies).

Contributors

Craig M. Heggie
Senior foreign legal advisor
cmheggie@mkklaw.net

Lucyana Dela Rosa
Senior associate
lucyana@mkklaw.net

Gusti Oka Anantajaya
Senior associate
oka.anantajaya@mkklaw.net