

International Comparative Legal Guides



Practical cross-border insights into lending and secured finance

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Contributing Editor:

Thomas Mellor
Morgan, Lewis & Bockius LLP

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Indonesia

ATD Law in association with Mori Hamada & Matsumoto



Alfa Dewi Setiawati

1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

On January 12, 2023, the House of Representative passed Law No. 4 of 2023 on the Development and Strengthening of the Financial Sector (the “**Financial Omnibus Law**”) that is intended to consolidate policies/provisions which existed in implementing regulations level to parliamentary level, widen the roles of the existing financial authorities, introduce new financial sector supervisory bodies, as well as accommodate financial innovation to develop and strengthen the financial sector in Indonesia. The Financial Omnibus Law is also issued in response to the global pandemic and to anticipate worldwide economic downturn.

Leading up to the enactment of the Financial Omnibus Law, Indonesia’s Financial Services Authority, OJK, has also been issuing policies that encourage the expansion of the digital lending environment, which are intended to increase financial inclusion in Indonesia.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Many significant lending transactions are now focused on funding infrastructure projects, renewable energy, and technology business, albeit through more stringent assessment. We have also seen the majority of financing goes into impact investing efforts to support growing businesses and/or to create a sustainable business model, be it directly or through a digital lending ecosystem.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

In general, actions where companies guarantee borrowings are recognised and protected under Indonesian law save for (i) the aspect of the Corporate Benefit Principle as required under the Company Law, and (ii) mandatory disclosure by a publicly listed company.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In principle, any corporate actions taken/decisions made by the Board of Directors for and on behalf of the company must be in line with (and not prohibited under) the company’s Articles of Association, and approval must be obtained from shareholders or the Board of Commissioners (as applicable) (“**Corporate Benefit Principle**”). Providing collateral directly relates to the BODs and/or BOCs’ liabilities under their fiduciary duties in proving corporate benefits. However, failure to prove corporate benefit does not directly affect enforceability of the collaterals provided.

2.3 Is lack of corporate power an issue?

Yes. Since providing a guarantee means that a company is guaranteeing all of its assets. Hence, entering into a guarantee agreement would mean the company is putting more than 50% of its assets as security for loan repayment. Therefore, the lack of corporate power will undermine the due execution and authorisation of the guarantee.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental approvals or consents are generally required. A Shareholders’ approval will be required since the company will be using its assets as security to its lender.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

In general, no specific regulation limits the amount. However, contractually, the guarantor will need to ensure there is no negative pledge/covenant under any other existing agreements that may impose certain contractual restrictions for additional security or guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

A corporate guarantee serves as a general security under the Indonesian Law. Therefore, guarantee holders do not enjoy

preferential rights as compared to asset collateral (i.e. mortgage, fiduciary security, or pledge) during bankruptcy proceeding, and will be considered an unsecured creditor.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Collaterals to secure lending obligations may be encumbered over the following assets:

- land and buildings using a mortgage (*bak tanggungan*);
- movable objects or immovable objects not eligible for security through a mortgage (i.e., machinery, inventory, vehicles) using fiduciary security;
- movable assets (i.e., shares, bank account) using a pledge;
- vessels with a gross weight of 20 cubic metres or more and aircraft using hypothec; and
- warehouse inventories receipt through warehouse receipt.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A general security agreement may be entered into by a guarantor and a lender through a guarantee agreement. This guarantee agreement will create general security over the guarantor's total assets to secure the lending obligation. However, if there is an intention to encumber a specific type of asset as a collateral, it is necessary to create a specific agreement for each type of assets in the categories as mentioned in question 3.1 above.

Typically, collateral agreements to secure a specific type of assets would require execution of the security agreement and perfection of the security. Perfection procedures will differ depending on the type of assets being encumbered.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, please refer to questions 3.1 and 3.2.

Real property (land)

For real property, a mortgage is the most appropriate form of security. Lenders will act as a mortgagee, while a borrower or other obligor can act as a mortgagor. The mortgagor and mortgagee will need to execute a mortgage deed before the Land Deed Official ("PPAT") having jurisdiction over the land to be mortgaged. The PPAT must then register the signed mortgage deed to the relevant land office where the land is located, at the latest seven days after the signing date. Perfection of the mortgage occurs when the relevant land office issues a mortgage certificate as evidence of registration.

If there is no separation of certificate between land and building, a mortgage over land or real estate may also include the buildings on top of such land.

Plant, machinery, and equipment

For a plant or factory building which is secured separately from the land, the appropriate security type would be a mortgage over buildings, or fiduciary security over buildings. Fiduciary security is also used to secure machinery and equipment type of assets.

For fiduciary security, A fiduciary security deed must be executed before the notary in Indonesian language. The notary will then need to register the deed fiduciary security to the

Fiduciary Security Registration Office. The perfection of fiduciary security will occur when the fiduciary security has been registered with the Fiduciary Security Registrar. Further, as evidence that the fiduciary security has been lawfully perfected, a Fiduciary Security Certificate will be issued.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, the common form of security over receivables is a fiduciary security. Please refer to question 3.3 for the procedure to secure assets through a fiduciary security over receivables.

Since receivables move over time with operations of a company, the borrower or other obligor may be required to update its receivables status at each period of time.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, the common form of security over a cash deposit is a pledge over the bank account. Please refer to question 3.2.

A pledge over bank accounts is created by entering into a pledge agreement. The pledge agreement can be executed through a notarial deed or private deed. Perfection of a pledge over a bank account will occur on notification and acknowledgment over the pledge from the pledgor's bank on the establishment of the pledge.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

For shares, the most appropriate type of security would be a pledge. A pledge agreement can be executed in a notarial deed or private deed, in which the pledged object will be kept by the pledgee (lender).

For perfection, the pledgor will need to notify the company on the pledge and the pledged shares must be recorded in the shareholders' register of the company. A non-listed company will usually maintain or prepare a share certificate, including for the purpose of entering into a pledge. The shares certificate of the company will be kept by the pledgee as further evidence of a pledge over the shares.

Customarily, an irrevocable power of attorney will be entered into by the pledgor and the pledgee to authorise the pledgee in: (i) carrying out a private sale of the pledged shares in the case of default; as well as to (ii) attend and vote in the general meeting of shareholders.

For a public listed company, since the shares are not in physical certificate form, the company must (through its custodian) notify the Indonesian Central Securities Depository ("KSEI") in order to block the pledged share from trading. Registration of the pledged shares with the Securities Administration Bureau ("BAE") is also necessary.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, the common form of security over inventory is a fiduciary security. Please refer to question 3.3 for the procedure to secure assets through a fiduciary security over inventory.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. A company can grant a security interest as a borrower or a third party guarantor to secure a lending obligation.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Land mortgage

Fees are payable to PPAT (for drawing up the mortgage deed and its registration) and to land office (registration and issuance of land mortgage certificate), normally based on the value of the secured amount under the mortgage (the lender may choose to use between the actual value of the assets or the principal amount of the loan).

Fiduciary

Fees are payable to notaries (for drawing up the deed and its registration) and to the Fiduciary Security Registration Office, which is also based on the value of the secured amount of the fiduciary security.

Pledge

Fees are payable to a notary (if using a notarial deed), and to the KSEI for the registration of a pledge of shares of a listed company (as applicable).

Hypothec

Fees are payable to the relevant Vessel Registrar.

Stamp duty

Stamp duty of IDR 10,000 (less than US\$1) is payable on any agreement signed by the parties.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

It depends on the type of security (please refer to question 3.9). In practice, save for a pledge, the estimated time for filing and registering other types of security would approximately take one month.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In addition to questions 2.2 and 2.4, and as mentioned in question 2.5, creditor consent may be required (as applicable).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Given the accessory nature of a security interest, in principle collaterals continue to exist until the full repayment of the

loan. Therefore, the security interest will be valid until the full payment of the disbursed amount from the revolving credit facility. In practice, it may be viewed and implemented differently to accommodate that the security is valid until the expiration/termination of the revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, please refer to questions 3.2 to 3.9.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company that directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

No, save for corporate benefit and fiduciary duty as elaborated in questions 2.1 and 2.2.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, these roles are commonly assumed by a security agent. However, in such cases where the role of a security agent is required to enforce the loan and collateral security, the security agent will assume an administrative role, and will not take discretion to declare default against a borrower.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

No, this is not applicable.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, Lender A may use: (i) an assignment of receivables (*cessie*) by way of a *cessie* deed – and the guarantee will automatically follow the assignment; or (ii) a transfer of rights and obligations (novation) by way of a tripartite novation agreement (Lender A, Lender B and the debtor) – and the guarantee must be re-executed as it will automatically cease because of the termination of a previous loan agreement due to novation.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There will be tax applicable for interest payable on loans, especially to domestic lenders. There are certain registration and notarial fees for the creation of security interests, but they are relatively nominal, except in the case of land mortgage, the costs of which would depend on the secured amount. As for other specific withholding tax-related matters, this will need to be assessed and confirmed by a qualified tax consultant.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

It depends on and is subject to a tax treaty with Indonesia. Foreign lenders originating from countries that have a double tax treaty with Indonesia may enjoy certain income tax incentives for providing loans in Indonesia. However, advice on this should be sought from a qualified tax consultant.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

In general, yes, any interest or fee paid by the borrower to the lender is deemed taxable income. However, advice on this should be sought from a qualified tax consultant.

6.4 Will there be any other significant costs that would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Generally, registration of collaterals will be one of the largest costs of granting loans in Indonesia, in addition to notarial fees as mentioned in question 3.9.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for the purposes of this question.

None. However, thin capitalisation principles may be assessed for tax purposes for a company acting as a borrower, having lenders within or outside Indonesia.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Generally, Indonesian law recognises foreign law as the governing

law chosen by the parties under a loan agreement save for and to the extent that: (i) terms and conditions of the loan is not contrary to Indonesian public policy; and (ii) the chosen jurisdiction as a close connection to the parties of the loan agreement.

Nonetheless, a foreign choice of law may cause certain security interests to not be enforceable in Indonesia.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

No, Indonesian courts do not recognise judgments of foreign courts, unless re-litigated in the Indonesian courts. However, such judgment can be used as *prima facie* evidence in the court proceedings upon being legalised (now apostilled) by the Indonesian embassy/consulate general in the country where it was ruled and translated into Indonesian language by a certified Indonesian translator.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

- (a) Considering the litigation process that may be unpredictable at times, it may take approximately six months to one year to obtain a judgment in the district court (first instance court). However, if the counter party (defendant) appeals to the higher courts, it may take several years to complete the high/appellate court and the supreme court level.
- (b) No, it is not enforceable. Please refer to question 7.2.

7.4 With respect to enforcing collateral security, are there any significant restrictions that may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

In principle, it can be enforced through a public auction or private sale that depends on the type of security.

Public sale or auction (*Parate Executie*)

In theory, a public auction (or through stock exchange for pledged shares of public listed company) can be conducted without the involvement or interference of a court procedure or the borrower/obligor. However, in practice, a court order is usually required, unless there is no resistance from the borrower/obligor side.

Private sale

In general, a private sale is permitted as long as and to the extent that a higher sale price can be achieved for and as agreed by the parties. A court order is required for this enforcement (*fiat executie*) to be obtained by the pledgee from the chosen competent/relevant court as the dispute resolution forum.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No, there is none.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

This moratorium is known as a Suspension of Debt Payments (*Penundaan Kewajiban Pembayaran Utang*/"PKPU"). It can be commenced by the debtor itself or its creditor by filing a PKPU petition to the Commercial Court, and if granted, the debtor is then suspended from the payment obligation (and thus, no creditor is permitted to enforce any security rights against the secured object) and must propose a composition plan to restructure the payment of the loan.

In the event of bankruptcy, once it is declared the secured creditors may enforce its right against the secured assets upon the lapse of a "stay period" of 90 days since the bankruptcy declaration. By law, the stay period will expire on an earlier date in case of an early termination of the bankruptcy or upon the commencement of the state of insolvency.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

A foreign or international arbitral award is recognised and can be enforced in Indonesia. For foreign arbitral awards to be enforced in Indonesia, the dispute: must fall within the scope of commercial law; must be rendered in a state party to a bilateral/multilateral treaty on the recognition and enforcement of foreign award; must not contradict public policy; and must be registered at and have obtained an enforcement order (exequatur) from the Chairman of the District Court of Central Jakarta.

Further, if Indonesia, as a state, is a disputing party in the award (for example, in a dispute between international investors and the Indonesian state), the foreign arbitral award must obtain leave for enforcement from the Supreme Court.

A decision approving the enforcement of the foreign arbitral award cannot be appealed.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Please refer to questions 2.6 and 7.6 on the restriction of the ability of the secured creditors to enforce its rights. Please also refer to question 8.2 for preferential creditors' rights.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In bankruptcy, the receiver has the authority to exercise clawback rights and request the Commercial Court to nullify transactions

conducted by a debtor prior to the bankruptcy only and to the extent that the party to the transaction has the knowledge that it is detrimental to the creditors at the time of the transaction.

For preferential creditor's rights, in bankruptcy proceedings, the creditors are classified/ranked into: (i) a preferred creditor with special rights based on laws and regulations e.g., tax authority, receiver, employee; (ii) a secured creditor with collateral security; and (iii) a concurrent/unsecured creditor.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No, there is none.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

No, there is none.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Yes, as long as and to the extent that it does not contradict with Indonesian public order/policy.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Sovereign immunity has not been explicitly legislated in Indonesia. However, the Republic of Indonesia has subscribed to the doctrine of restrictive sovereign immunity by its entry into the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e., a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

In general, it is not mandatory for foreign lenders to have a specific licence in Indonesia to provide financing to Indonesian borrowers.

11 LIBOR Replacement

11.1 Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

The Indonesian Government has yet to issue any regulatory rules with respect to the transition of loans from LIBOR pricing. However, domestically, since 2018 Indonesia has implemented IndONIA as an alternative reference rate to JIBOR. In anticipation of that, the Bank of Indonesia, together with the Ministry of Finance, Ministry of Finance, OJK and Indonesian Foreign Exchange Market Committee, have established the National Working Group on Benchmark Reform (NWGBR) and published a White Paper on LIBOR transition in December 2021.

12 Other Matters

12.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2022 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2021/2022 due to COVID-19 to continue into 2023 and beyond?

During the COVID-19 period, whenever signing of notarial deeds need to be conducted before a public notary, there were

some adjustments to signing mechanics which are more lenient compared to the pre-pandemic period. These adjustments include leniency to provide notarised and consularised power of attorneys or shareholders' resolutions for the signing of corporate approvals and other finance documents. This is because embassies may close from time to time due to lockdown. This in turn causes a backlog in processing consularised documents. The notaries will require these documents to be provided once available. This leniency also includes signing mechanics where in-person meetings may be waived to give way for a video conference or separate signing timing.

While activity and travel restriction have been slowly lifted over time, we are still seeing similar measures being taken in practice. However, when conditions are considered normal to conduct procedures similar to pre-pandemic situations, previously strict requirements for signing may be reinforced with some adjustments.

12.2 Are there any other material considerations that should be taken into account by lenders when participating in financings in your jurisdiction?

There are specific requirements for offshore loans to be granted to Indonesian borrowers, such as the requirement to obtain a credit rating, hedging, and liquidity ratio for the Indonesian borrowers, to use a foreign exchange bank by Indonesian borrowers in receiving the loans, as well as offshore loan reporting by Indonesian borrowers.



Alfa Dewi Setiawati is ATD Law's core practitioner in banking and finance. Aside from financial service works, she also advises clients on group restructuring, M&A transactions, liquidation, credit restructuring, as well as project works. Alfa has represented major banks within and outside Indonesia in various financing transactions, both offshore and onshore.

In M&A and corporate restructuring work, Alfa represented multinational companies in acquiring stakes as well as assisting corporate restructuring in various leading financial technology platforms.

Alfa was nominated as Young Lawyer of the Year in 2021 and was listed as a NexGen Lawyer by *Hukumonline* in 2021. She graduated from Universitas Indonesia for her Sarjana Hukum degree.

Alfa is registered as a member of the board of the Capital Market Legal Consultant Association (HKHPM).

ATD Law in association with Mori Hamada & Matsumoto

Revenue Tower, Level 25

Jl. Jend. Sudirman Kav. 52–53

DKI Jakarta 12190

Indonesia

Tel: +62 813 811 665 29

Email: alfa.s@mhm-global.com

URL: www.atdlaw.id

ATD Law is an Indonesian law firm with a focus on corporate commercial work serving local and international clients and is spearheaded by Abi Tisnadisastra, an experienced M&A and corporate lawyer, with expertise in the financial service, telecommunications, and technology sectors. As a firm, ATD Law offers a full range of corporate commercial practices, mergers & acquisitions, TMT, and banking & finances. Since 1 January 2023, ATD Law has formalised its strategic alliance and affiliation with a top-tier Japanese firm, Mori Hamada & Matsumoto (MHM).

MHM is one of the top-tier firms in Japan, having offices in Japan, Singapore, Thailand, Vietnam, Myanmar, and China. MHM's extensive regional network also means the firm is well-placed to advise on cross-border work for regional as well as international clients.

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