

# International Comparative Legal Guides



## Lending & Secured Finance 2021

A practical cross-border insight into lending and secured finance

### Ninth Edition

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## Editorial Chapters

- 1** **Loan Syndications and Trading: An Overview of the Syndicated Loan Market**  
Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association
- 7** **Loan Market Association – An Overview**  
Hannah Vanstone, Loan Market Association
- 13** **Asia Pacific Loan Market Association – An Overview**  
Andrew Ferguson & Rosamund Barker, Asia Pacific Loan Market Association

## Expert Analysis Chapters

- 16** **An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions**  
Thomas Mellor, Marcus Marsh & Michael Byrnes, Morgan, Lewis & Bockius LLP
- 21** **Global Trends in Leveraged Lending**  
Joshua Thompson, James Crooks & Bryan Robson, Sidley Austin LLP
- 31** **The Rise of the SPAC**  
Michael Steinberg & Alain Dermarkar, Shearman & Sterling LLP
- 36** **Intellectual Property and Personal Data in Drop-Down Financings**  
Frank J. Azzopardi, Scott M. Herrig, Eli J. Vonnegut & Daniel F. Forester, Davis Polk & Wardwell LLP
- 41** **The Pandemic: A Regulatory Perspective**  
Bill Satchell & Elizabeth Leckie, Allen & Overy LLP
- 52** **Acquisition Financing in the United States: A Year of Panic and Rebound**  
Geoffrey Peck & Mark S. Wojciechowski, Morrison & Foerster LLP
- 58** **A Comparative Overview of Transatlantic Intercreditor Agreements**  
Miko Bradford & Benjamin Sayagh, Milbank LLP
- 66** **A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements**  
Sarah M. Ward & Clive J. Wells, Skadden, Arps, Slate, Meagher & Flom LLP
- 84** **Fund Finance: 2020 Year in Review**  
Michael C. Mascia, Cadwalader, Wickersham & Taft LLP
- 87** **Recent Developments in U.S. Term Loan B**  
Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP
- 96** **The Continued Prevalence of European Covenant Lite**  
Jane Summers, Daniel Seale & Karan Chopra, Latham & Watkins LLP
- 100** **Restructuring Across the Pond and Back: A Comparison of Chapter 11 and the New UK Act**  
Judah Frogel, Dan Guyder, Jennifer Marshall & Shaheen Karolia, Allen & Overy LLP
- 107** **Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions**  
Sandra Lee Montgomery & Michelle L. Iodice, Proskauer Rose LLP
- 117** **Trade Finance on the Blockchain: 2021 Update**  
Josias Dewey, Holland & Knight
- 124** **Financing Your Private Debt Platform**  
Global Finance Group, Dechert LLP
- 134** **An Overview of Debtor in Possession Financing**  
Gary L. Kaplan & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP
- 139** **Developments in Midstream Oil and Gas Finance in the United States**  
Elena Maria Millerman, Charlie Ofner, Taylor Pullins & Ariel Oseasohn, White & Case LLP
- 147** **LIBOR – The End is Near(er)?**  
Kalyan (“Kal”) Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP
- 151** **2021 Private Credit and Middle Market Update: Pandemic Priming Shifts Debt to Defence**  
Jeff Norton, Jennifer Taylor, Sung Pak & Adam Longenbach, O’Melveny & Myers LLP
- 155** **Bankruptcy Asset Sales & Acquisition Financing Process: Key Considerations from a Buyer’s Perspective**  
Margaret (Meme) S. Peponis, Lisa M. Schweitzer, Katherine (Katie) R. Reaves & John H. Veraja, Cleary Gottlieb Steen & Hamilton LLP

## Q&A Chapters

- 161** **Argentina**  
Marval O'Farrell Mairal: Juan M. Diehl Moreno & Diego A. Chighizola
- 171** **Austria**  
Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter
- 182** **Belgium**  
Astrea: Dieter Veestraeten
- 189** **Bermuda**  
Wakefield Quin Limited: Erik L. Gotfredsen & Jemima Fearnside
- 197** **Bolivia**  
Crales & Urcullo: Andrea Mariah Urcullo Pereira & Luis Valda Yanguas
- 205** **Brazil**  
Veirano Advogados: Lior Pinsky, Ana Carolina Barretto & Amanda Leal
- 213** **British Virgin Islands**  
Maples Group: Michael Gagie & Matthew Gilbert
- 221** **Canada**  
McMillan LLP: Jeff Rogers & Don Waters
- 232** **Cayman Islands**  
Maples Group: Tina Meigh & Bianca Leacock
- 240** **Chile**  
Carey: Diego Peralta, Fernando Noriega & Diego Lasagna
- 248** **Croatia**  
Macesic and Partners: Ivana Manovelo
- 257** **Cyprus**  
S. Koukounis & Partners LLC: Stella C. Koukounis, Chara Paraskeva & Andreas Zevlaris
- 266** **England**  
Allen & Overy LLP: Oleg Khomenko & Jane Glancy
- 277** **France**  
Orrick Herrington & Sutcliffe LLP: Carine Mou Si Yan
- 287** **Germany**  
SZA Schilling, Zutt & Anschutz Rechtsanwaltsgesellschaft mbH: Dr. Dietrich F. R. Stiller, Dr. Andreas Herr & Dr. Michael Maxim Cohen
- 297** **Greece**  
Sardelas Petsa Law Firm: Panagiotis (Notis) Sardelas & Aggeliki Chatzistavrou
- 306** **Indonesia**  
Walalangi & Partners (in association with Nishimura & Asahi): Miriam Andreta, R. Wisnu Renansyah Jenie & Raditya Pratamandika Putra
- 314** **Ireland**  
Dillon Eustace: Conor Keaveny, Jamie Ensor & Richard Lacken
- 325** **Italy**  
Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo
- 335** **Japan**  
Mori Hamada & Matsumoto: Yusuke Suehiro
- 343** **Jersey**  
Carey Olsen Jersey LLP: Robin Smith, Laura Healy, Kate Andrews & Peter German
- 353** **Luxembourg**  
Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier Grethen & Tina Fettes
- 362** **Mexico**  
Gonzalez Calvillo: José Ignacio Rivero Andere & Jacinto Avalos Capin
- 370** **Netherlands**  
Freshfields Bruckhaus Deringer LLP: Mandeep Lotay & Tim Elkerbout
- 378** **Russia**  
Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov
- 387** **Singapore**  
Drew & Napier LLC: Pauline Chong, Renu Menon, Blossom Hing & Ong Ken Loon
- 398** **South Africa**  
Allen & Overy (South Africa) LLP: Lionel Shawe
- 409** **Spain**  
Cuatrecasas: Héctor Bros & Manuel Follía
- 420** **Sweden**  
White & Case LLP: Carl Hugo Parment & Magnus Wennerhorn
- 427** **Switzerland**  
Bär & Karrer Ltd.: Frédéric Bétrisey, Lukas Roesler, Micha Schilling & Tatiana Ayranova
- 437** **Taiwan**  
Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu
- 446** **United Arab Emirates**  
Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Tomisin Mosuro
- 462** **USA**  
Morgan, Lewis & Bockius LLP: Thomas Mellor, Katherine Weinstein & Matthew Edward Scherneck
- 475** **Venezuela**  
Rodner, Martínez & Asociados: Jaime Martínez Estévez

# Indonesia

**Walalangi & Partners**  
(in association with Nishimura & Asahi)



Miriam Andreta



R. Wisnu Renansyah Jenie



Raditya Pratamandika Putra

## 1 Overview

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

Throughout 2020, understandably, the market has shown more restructuring of existing financings due to the COVID-19 pandemic.

At the same time, the Indonesian Government has seemed to focus on equity crowdfunding lending markets through the issuance of several new regulations in 2020 by the Financial Services Authority (Otoritas Jasa Keuangan or “**OJK**”). On 11 December 2020, OJK issued OJK Regulation No. 57/POJK.04/2020 concerning Securities Offering through Information Technology-Based Equity Crowdfunding (“**OJKR 57**”), revoking and repealing its predecessor, OJK Regulation No. 37/POJK.04/2018 on Equity Crowdfunding. OJKR 57 introduces a new type of securities that can be offered through equity crowdfunding, to include bonds, commercial papers, and collective investment contract participation units.

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

Due to the COVID-19 pandemic, only a few mega financing deals closed in 2020, including a major power project and the biggest (and first of its kind) advance smart and sustainable Transit-Oriented Development (“**TODs**”) by Mitbana Pte. Ltd. (“**Mitbana**”). The deal involved a joint venture company of Mitsubishi Corporation and Surbana Jurong (a wholly owned company of Temasek Holding) in BSD City, Jakarta, where Mitbana formed a significant partnership with an Indonesian leading property developer, namely PT Sinar Mas Land, which will transform hundreds of hectares of greenfield land into TODs, including residential areas, green-park offices, digital hubs, a convention centre, railways and public transport nodes to enlarge BSD City’s footprint of 200,000 residents to a total land area of 6,000 hectares.

## 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)?

Subject to certain qualifications on corporate benefit issues, generally it is common in Indonesian practice for an Indonesian company to provide guarantees to its subsidiaries.

### 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?

Indonesian law recognises the corporate benefit concept where every corporate action of a company must be in line with its constitutional documents and it must give a justification of its benefits. Therefore, when a company enters into a guarantee or a security arrangement, lenders must carefully observe: (i) the company’s articles of association; and (ii) a justification stating the company’s commercial benefit from the transaction for which the guarantee and/or the third-party security is issued.

In practice, to minimise the risk of challenge, written consent from each of the company’s organs (i.e. the general meeting of shareholders, board of directors, and board of commissioners) must be obtained.

### 2.3 Is lack of corporate power an issue?

While the guarantee may still be binding if the parties are acting in good faith, the board of directors may be considered negligent and may be personally liable for any losses suffered by the company with respect to the relevant guarantee.

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

This very much depends on the company’s line of business and its constitutional documents. As a general rule under Indonesian

company law, if a company's guarantee obligation constitutes more than 50% of the company's net assets, the company is required to obtain approval from its general meeting of shareholders. In addition, if the guarantee is provided in favour of foreign creditors, the guarantor must submit a periodical report to the Central Bank of Indonesia of its contingent liability.

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

No, but under the Indonesian Civil Code, a guarantor is not liable for anything more than the amount owed by the borrower, and it may guarantee only a part of the amount owed. The guarantor may also need to check any negative pledge/covenant under its existing agreements that may contractually impose certain limitations relating to providing a guarantee for any other party's payment obligation.

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

There are no exchange control obstacles under Indonesian law, but obstacles may occur in the enforcement timeframe. The enforcement of a guarantee is basically similar to the enforcement of a valid contract. A claim/suit must be filed with the court having jurisdiction over the guarantor's domicile or another court agreed by the parties in the guarantee agreement. There are three levels of court (i.e. District Court, Court of Appeal (High Court), and Supreme Court) in Indonesia, each level of which could take quite some time to complete.

## 3 Collateral Security

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

There are a number and various classifications of security, depending on the type of asset, but the most common *in rem* security rights in Indonesian financing include:

- (1) Immovable assets: mortgage (*Hak Tanggungan*); hypothec (for vessels).
- (2) Movable assets: fiduciary security; pledge (*Gadai*).
- (3) Intangible movable assets: pledge (*Gadai*).

Personal security is in the form of a guarantee (either a personal or corporate guarantee).

### 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?

Different types of assets require different types of security agreements.

#### Mortgage for land (with or without any building upon the land)

The signing of the mortgage deed must be in the form of a notarial deed in Bahasa Indonesia, made before the Land Conveyancer Officer ("PPAT") with jurisdiction over the land to be mortgaged. The executed mortgage deed must then be submitted to the Land Office ("BPN") by PPAT at the latest seven days after the execution date.

The mortgage is established once registered in the BPN's land book (the seventh day after the BPN receives the complete

mortgage application). The BPN would then issue the mortgage certificate as evidence of registration. In total, from a practical point of view (before issuance of Regulation 5/2020 discussed below), the issuance process of a mortgage certificate may take up to eight weeks depending on the process with the relevant land office. On 8 April 2020, the Ministry of Agrarian and Spatial Plan/National Land Agency introduced Regulation No. 5 of 2020 on Electronically Integrated Mortgage Service ("E-mortgage") ("Regulation 5/2020"), revoking the Ministry of Agrarian and Spatial Plan/National Land Agency Regulation No. 9 of 2019 on the same subject matter. The E-mortgage is intended to accelerate the service process of registration, assignment, rectification, amendment and deregistration of mortgage through an electronic system. One of the features of the E-mortgage system is that a qualified secured creditor can directly access the E-mortgage certificate and attach it to the relevant land certificate. Based on the Technical Guideline of Regulation 5/2020 issued by the Ministry of Agrarian and Spatial Plan/National Land Agency, as of 8 July 2020, land offices throughout Indonesia must implement E-mortgages.

#### Hypothec for vessels

Hypothec over vessels should be made by signing a hypothec deed prepared by a Vessel Registration Official at the relevant Director General of Sea Transportation office where the vessel is registered and listed in the Master List of Vessel Registration. The hypothec is effective once registered in the List of Indonesian Vessels (*Buku Daftar Kapal Indonesia*). The registration process takes from three days to two weeks.

#### Pledge (*Gadai*)

There is no prescribed form; in practice, a pledge is created by a deed of pledge (notarised or executed privately), followed by registration of the pledge in the company's shareholders' register (for pledge of shares) or notification and/or acknowledgment (for pledge of bank accounts). Pledge over tangible assets requires the secured objects to be kept in the pledgee's possession. Once the possession is re-transferred to the pledgor, the pledge will cease.

#### Fiduciary security

Unlike a pledge, fiduciary security over tangible assets allows for the security provider to keep the secured objects under its possession and utilise them for its day-to-day operations. A fiduciary transfer takes the form of a notarial deed in Bahasa Indonesia, under which the transferor (borrower) transfers to the transferee (lender) its legal title for security purposes for the period during which the debt remains outstanding. The fiduciary is effective once registered in the Fiduciary Registration Book kept by the Fiduciary Registration Office. On acceptance of the registration application, the applicant will obtain a Fiduciary Security Certificate. It can take from one to five business days for issuance of the certificate. The certificate will be dated the same as the application for registration.

#### Guarantee

A guarantee is mutually agreed by the parties, and there is no specific prescribed form for such. In practice, a guarantee is created by a written agreement (notarised or privately) between the guarantor and grantee.

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

Yes; in the same way and procedures as described in question 3.2 above. Mortgages apply to land (either with or without buildings

upon the land), and fiduciary security applies for buildings/plant (secured separately from the land), machinery, and equipment.

**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 most common form of security over receivables is a fiduciary transfer. Please refer to our answer in question 3.2, under the heading “Fiduciary Security”.

In the case of a transfer of receivables, notification from the fiduciary grantee and/or acknowledgment from the debtor on the creation of the fiduciary security plays a significant part for enforcement purposes. However, the absence of notice and/or acknowledgment will not invalidate the fiduciary security, yet without a notice and/or acknowledgment, the lender will not have a direct claim against the debtor under the receivables.

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

The most common form of security over cash deposits is a pledge over a bank account using the formalities referred to in our answer to question 3.2 under the heading “Pledge”. Although theoretically a bank account can also be secured by way of fiduciary security, nonetheless, the Fiduciary Registration Office does not consider a bank account as an object of a fiduciary security; therefore, the validity of creation of a pledge over a bank account is doubtful.

**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?**

Yes – the most common form of security over shares is a pledge as per question 3.2 under the heading “Pledge”.

Not all shares have certificated forms, depending on the company’s articles of association, but all shares must be registered in the shareholders’ register maintained by the director of the company. The pledge takes effect upon notification of the pledge to the company in which the shares are held, which is normally done by annotation of such pledge in the company’s register of shareholders. For enforcement purposes, all Indonesian security agreements must be governed by Indonesian law.

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

Yes, inventory is commonly subject to fiduciary transfer using the formalities referred to in our answer to question 3.2 under the heading “Fiduciary Security”.

**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, subject to the security interest meeting the corporate benefit requirement.

**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?**

**Mortgage**

The cost of granting a mortgage consists mainly of the fees payable to the PPAT and BPN which includes the fees for preparation, execution, and registration of the mortgage deed. The fees are generally calculated on a percentage basis of the amount secured by the mortgage (which is commonly chosen by the lender based on the actual value of the assets or the principal amount of the loan).

**Hypothec**

The main fees are for the creation of the hypothec deed and the registration fees, generally calculated based on the size of the vessel, payable to the relevant Vessel Registration and Listing of Transfer of Ownership Official (*Pejabat Pendaftaran dan Pencatat Balik Nama Kapal*).

**Fiduciary**

The costs are nominal – mainly notary and registration fees.

**Pledge**

Costs are very nominal – commonly only the notary fees when the parties opt to sign the pledge in a notarial deed.

**Stamp Duty**

Stamp duty is at a very nominal amount of IDR10,000 (less than US\$1).

**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?**

This depends on the type of security; the most significant would be a mortgage over land.

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

Yes; please refer to our answers to questions 2.2 and 2.4.

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

A security interest is of an accessory nature and is conditional upon the existence of the underlying secured obligation(s). Due to its accessory nature, an Indonesian security cannot secure a future obligation not yet in existence at the time the security is created, and the security will be valid as long as the revolving credit facility is valid. Therefore, if the loan is a revolving facility, the lenders need to carefully ensure that the loan is not fully repaid, and the secured object(s) remain in existence until the period of the loan lapses.

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

Yes; please refer to our answers to questions 3.2–3.9.

## 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 which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

There is no strict regulatory prohibition, but in the case of the above, theoretically, there is uncertainty as to whether the issuance of the guarantee can be regarded as in line with the objective and purpose of that company (*Ultra Vires Doctrine*).

## 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, the role of an agent in relation to loans/financing (especially syndicated loans) is common in Indonesian financing, and as far as Indonesian law is concerned, the agent would be deemed to act for and on behalf of the lenders.

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?

As per our answer to question 5.1 above, the security agent role is common in Indonesian financing.

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?

Loan transfers can be divided into: (i) assignment of receivables (only) or *cessie*; or (ii) transfer of obligations and rights (*novation*). If the former, the assignment is effectuated by an assignment instrument called a *cessie*. The assignment takes place when the assignment agreement is signed by Lender A and Lender B, but in order to bind the borrower to pay the debt directly to Lender B, the assignment must be notified to the borrower (in practice, lenders usually require acknowledgment from the borrower). In this case, the guarantee will automatically follow the assignment, securing Lender B. In contrast, in the event of a novation, the borrower's consent is required by law (by way of a tripartite novation agreement), and the existing guarantee will automatically cease when the novation takes place and therefore a new guarantee agreement must be signed by the guarantor in favour of Lender B.

## 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 are certain registration fees and notarial fees for 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 withholding tax-related matters, this needs to be assessed and confirmed by a qualified tax consultant.

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

The most significant cost would be in the case of a registration of mortgage over land, as it would depend on the secured amount, which, in practice, is calculated on a percentage of either the actual market value of the land or the total loan amount. In practice, the registration cost is normally borne by the borrower.

6.3 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 purposes of this question.

Strictly from a non-tax regulatory perspective, the answer is negative.

## 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?

Yes, a choice of foreign law for finance documents (other than Indonesian security interests documents, which should be governed by Indonesian law) would be honoured and recognised as binding under the laws of the Republic of Indonesia except (i) to the extent that any term of those documents is manifestly incompatible with the public policy of the Republic of Indonesia, and (ii) if the Indonesian court gives effect to mandatory rules of the laws of another jurisdiction with which the situation has a close connection, if and so far as, under the laws of that other jurisdiction, those rules must be applied, whatever the chosen law.

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?

A judgment of a non-Indonesian court will not be enforceable in the Republic of Indonesia, although such judgment could be admissible as non-conclusive evidence in proceedings on the underlying claim in an Indonesian court. Re-examination of

the merits of the case would be required before an Indonesian court in order to enforce the claim underlying the foreign judgment in the Republic of Indonesia.

**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?**

Theoretically, the litigation process in a District Court may take up to five months, and if there is further appeal, it would take the maximum three months in the court of appeal and 250 days in the Supreme Court. Nevertheless, in practice this may take more than the above timeframe given the uncertainty of the Indonesian litigation process.

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

Yes, enforcement of security interests in Indonesia should involve public auctions and, in practice, some auction companies require a court order to proceed. Depending on the type of security interest, private enforcement is generally possible, subject to the consent of the borrower or the relevant security provider and certain public announcements; as an example, for fiduciary security, a private sale is allowed provided that the fiduciary grantor has consented to such private sale and it can be done after one month following the announcement of such proposed sale in two daily newspapers and provided that there is no objection from any interested party.

**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 no legal restriction for foreign lenders to file a suit in Indonesia.

**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?**

There is a moratorium procedure called the Suspension of Debt Payments under Law No. 37 of 2004 on Bankruptcy and Suspended Debt Repayments, but this does not apply to the enforcement of security interests. The suspension can be filed by a debtor or a lender to the commercial court if the debtor: (i) has at least two creditors; and (ii) cannot continue to repay one of its debts that have become due and payable, during which period the debtor cannot be forced to repay the debts.

Additionally, bankruptcy does not apply to collateral security unless it is during the “stay period” of 90 days that commences when a verdict pertaining to a declaration of bankruptcy is read out (the lender can execute its right over the relevant collateral security on the 91<sup>st</sup> day, and must exercise this right no more

than two months after the insolvency condition (“**Lender’s Enforcement Period**”). Following the lapse of the Lender’s Enforcement Period, the enforcement process by law will be managed by the appointed curator.

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

Indonesia is a signatory to the 1958 New York Convention and has adopted such convention into Indonesian law by way of Presidential Decree No. 34 of 1981. Therefore, any final international arbitration award would be recognised without re-examination of the merits pursuant to Law No. 30 of 1999 and the 1958 New York Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (the “**1958 New York Convention**”). However, enforcement of an arbitral award may be denied if:

- (a) the award is issued by an arbitrator or arbitration tribunal in a foreign country which is not a signatory to an international convention on the recognition of foreign arbitral awards to which Indonesia is a signatory, or does not have a bilateral arrangement with the Republic of Indonesia on the recognition of arbitral awards on a reciprocal basis;
- (b) the award is not on commercial law matters; or
- (c) the award is against the public policy of the Republic of Indonesia.

To enforce the award, it is necessary to register the award with the Clerk of Central Jakarta District Court, obtain a writ of execution (known as an Exequatur) from the Chairman of the Central Jakarta District Court or, in case the award involves the Government of the Republic of Indonesia as one of the parties in the dispute, from the Supreme Court of the Republic of Indonesia (through the Central Jakarta District Court).

## 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 our answer to question 7.6.

**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?**

Bankruptcy creditors are ranked in three categories, in the following order: (i) those with special rights based on laws and regulations (e.g. tax claims and collections); (ii) preferred creditors (i.e. secured creditors); and (iii) concurrent creditors (i.e. non-secured creditors).

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

There are no entities excluded from bankruptcy proceedings.

**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?**

There are no other proceedings available to a creditor.



## 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 it does not contradict Indonesian public policy. Under Indonesian law, parties to an agreement are free to choose the laws which govern their agreements, provided that the law chosen has a relationship with the agreement or to the parties to that agreement and provided that the choice of law is not contrary to Indonesian public order.

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

Yes; however, sovereign immunity has not been explicitly regulated in Indonesia, although 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?**

It is not necessary for a foreign lender to establish a place of business (or be licensed) for merely extending a loan to an Indonesian borrower, unless it has an actual business operation in the Republic of Indonesia.

## 11 Other Matters

**11.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2020 (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 2020 due to COVID-19 to continue into 2021 and beyond?**

There has been no specific relaxation on the method for executing notarial deed documents, but there has been a significant change in relation to registration of land mortgages, whereby, as of 8 July 2020, the registration of land mortgages is processed through E-mortgages (an online system), which aim to replace the lengthy process of manual registration. Please refer to our answer to question 3.2 under the heading "Mortgage for Land" for further details on E-mortgages.

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

The regulation requires that each DULN in the form of a fund originates from (i) an offshore loan based on a non-revolving agreement which is not used for re-financing, or (ii) an offshore loan based on debt securities, and the difference between the new value of the offshore loan and refinancing over the previous value of the offshore loan is to be withdrawn through a Foreign Exchange Bank in Indonesia (a bank licensed by Bank Indonesia to carry out foreign exchange banking activities).

### Currency conversion for repayment

There are some requirements for conversion of IDR into a foreign currency. The regulations allow a party to purchase foreign currency up to maximum amount of or equal to:

- (i) USD 25,000 per month for each customer for spot transactions; and
- (ii) USD 100,000 per month for each customer for derivative transactions.

A party may purchase foreign currency exceeding the above threshold, but in doing so, supporting documents as listed below must be presented to Bank Indonesia, and with a maximum amount required under the underlying transaction:

- (i) a copy of the underlying agreement, i.e., the loan agreement;
- (ii) a copy of the tax registration number (*Nomor Pokok Wajib Pajak*); and
- (iii) a duly stamped and signed statement from the party:
  - (1) confirming that the underlying agreement is an authentic and valid document and the utilisation of the underlying transaction for the purchase of foreign currencies against IDR shall not exceed the nominal value of the underlying transaction;
  - (2) setting out the required amount, purpose of utilisation and date of foreign currencies utilisation, in case the underlying transaction is an estimation; and
  - (3) setting out the source of funds, sales amount and time in obtaining the foreign currencies, in case the underlying transaction is an estimation.

### Offshore loan report

A borrower obtaining an offshore loan is subject to certain reporting requirements, which must be submitted to Bank Indonesia on a monthly basis at the latest on the 15<sup>th</sup> day of the following month.

### Prudence Principles requirement and report

In addition to the above report, a borrower receiving an offshore loan in foreign currency must implement certain principal requirements:

(i) **Minimum hedging ratio**

The borrower must meet a minimum hedging ratio of 25% of the negative difference between its foreign exchange assets and its foreign exchange liability exceeding USD 100,000 (or its equivalent), which is due (i) within three months ahead the end of the relevant quarter, and (ii) in the next three to six months ahead of the end of the relevant quarter.

In doing so, the borrower is required to enter into a hedging transaction (in the form of foreign exchange derivative transaction against Rupiah, i.e., forward, swap and/or option) with Indonesian banks. Exemptions to the above regulation apply if the borrower: (i) maintains

financial records in USD; (ii) has previous year export income 50% greater than its other business revenues; and (iii) obtains an approval from the Ministry of Finance to maintain USD financial records (the borrower must submit this approval to Bank Indonesia for the exemption).

(ii) **Minimum liquidity ratio**

The borrower must maintain at least a 70% liquidity ratio of foreign exchange assets to foreign exchange liability, which is due within three months as of the end of the relevant quarter.

(iii) **Minimum credit rating**

The borrower must have a credit rating of at least “BB-” issued by a credit rating company acknowledged by Bank Indonesia.

In relation to the above, the borrower is required to submit:

- (i) quarterly and annual reports on the implementation of the Prudence Principles (for the annual report: it must be assessed through an attestation procedure by an independent public accountant);
- (ii) reports of the credit rating, including information on the credit rating, time of rating, and name of the rating agency, by the end of the following month after the execution of the loan agreement or disbursement; and
- (iii) a quarterly unaudited financial report and an annual audited financial report. The quarterly report must be submitted at the latest in the third month following the relevant quarter and the annual report is to be submitted at the latest by the end of June after the end of the relevant year.

### **Enforcement of fiduciary security**

Enforcement of security interest has always been challenging in Indonesia due to many factors, including a non-transparent enforcement system and case precedence where borrowers raise legal suits against their lenders during an enforcement event.

Many practitioners consider the situation to have been worsened by the Indonesian Constitutional Court, when in 2019 it rendered a controversial binding decision stating that the executory title contemplated in the fiduciary certificate is enforceable and valid *only to the extent that*: (i) it is mutually agreed by the fiduciary security grantor and the fiduciary security grantee on the occurrence of default; and (ii) the fiduciary security grantor willingly surrenders the fiduciary secured objects to the fiduciary security grantee, which contradicts the self-execution right of a lender provided by law (*recht van parate executie*).



**Miriam Andreta** is an Indonesian qualified lawyer with extensive knowledge and experience in M&A, banking and finance, oil and gas, and antitrust matters. She graduated from the University of Gadjah Mada and attended a one-year undergraduate exchange programme at the University of Tokyo. Ms. Miriam Andreta has just been shortlisted in the Women in Business Law Awards Asia 2020 for the Rising Star Award in two categories: Corporate and Finance. She was one of the finalists in the Woman Lawyer of the Year category for the *Asian Legal Business* Indonesia Law Awards 2020, was regarded by *Asia Business Law Journal* 2020 and 2019 as one of Indonesia's A-List Top-100 Lawyers, has been listed as an *Asian Legal Business* Rising Star Indonesia 2019, and was one of the top five finalists for the Young Lawyer of the Year category, as well as a contender in the Woman Lawyer of the Year at the *Asian Legal Business* Indonesia Law Awards 2018. She was also listed in the "40 Under 40" list of outstanding legal professionals in Asia by *Asian Legal Business* in 2018.

**Walalangi & Partners**  
(in association with Nishimura & Asahi)  
Pacific Century Place, 19<sup>th</sup> Floor, SCBD Lot 10  
Jl. Jenderal Sudirman Kav. 52–53, Jakarta 12190  
Indonesia

Tel: +62 21 5080 8600  
Email: [Mandreta@wplaws.com](mailto:Mandreta@wplaws.com)  
URL: [www.wplaws.com](http://www.wplaws.com)



**R. Wisnu Renansyah Jenie** is a bright and agile lawyer with five years of experience in Indonesian legal practice, mostly focusing on cross-border market and capital market transactions.

Mr. Renansyah Jenie has assisted clients on various transactions of banking and finance, capital market, M&As, including assisting foreign companies in their complicated financing structures and capital market transactions and investment plans. He has successfully assisted and advised clients in many prestigious deals.

**Walalangi & Partners**  
(in association with Nishimura & Asahi)  
Pacific Century Place, 19<sup>th</sup> Floor, SCBD Lot 10  
Jl. Jenderal Sudirman Kav. 52–53, Jakarta 12190  
Indonesia

Tel: +62 21 5080 8600  
Email: [Rjenie@wplaws.com](mailto:Rjenie@wplaws.com)  
URL: [www.wplaws.com](http://www.wplaws.com)



**Raditya Pratamandika Putra** is a young and very talented Indonesian lawyer with more than five years of experience. Prior to joining W&P, Mr. Raditya Pratamandika Putra worked at a first tier UK-affiliated law firm, where he assisted various foreign and domestic clients in banking and energy and natural resources matters, for which he has immense knowledge and experience.

Mr. Pratamandika Putra holds a Bachelor of Law degree from the University of Padjadjaran and was active in the Asian Law Students' Association and several moot court competitions.

**Walalangi & Partners**  
(in association with Nishimura & Asahi)  
Pacific Century Place, 19<sup>th</sup> Floor, SCBD Lot 10  
Jl. Jenderal Sudirman Kav. 52–53, Jakarta 12190  
Indonesia

Tel: +62 21 5080 8600  
Email: [Rpratamandika@wplaws.com](mailto:Rpratamandika@wplaws.com)  
URL: [www.wplaws.com](http://www.wplaws.com)

Walalangi & Partners (in association with Nishimura & Asahi) ("W&P") was founded in 2017 by Mr. Luky I. Walalangi, a highly regarded lawyer with two decades of experience. W&P is a corporate firm focusing on M&A, Banking & Finance, Real Property, Project Development, Foreign Direct Investment, Antitrust, Debt & Corporate Restructuring, Capital Market (Debt and Equity), Employment, General Corporate, TMT, Energy & Natural Resources and Constructions.

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W&P is: ranked by *Chambers Asia-Pacific* 2020 and *Chambers Global* 2020 in Corporate/M&A; regarded by *IFLR1000* 2021 as a Recommended Firm; regarded by *Asialaw Profiles* 2021 as a Recommended Law Firm; a winner of Equity Market Deal of the Year at the *Asian Legal Business* Indonesia Law Awards 2020; regarded by *Asia Business Law Journal* as Competition & Antitrust Law Firm 2020/2021 and Real Estate Law Firm 2020/2021 at

the Indonesia Law Firm Awards; ranked by *Asian Legal Business* in M&A Rankings 2020; and a finalist for the Rising Law Firm at the *Asian Legal Business* South East Asia Law Awards 2020.

W&P expanded and doubled its office space in 2019, from 689 sq. m. in 2018 to almost 1,400 sq. m. now, and has 25 lawyers and counsels, with a total of almost 50 employees.

W&P's team comprises prominent and qualified lawyers, led by Mr. Luky I. Walalangi, a leading lawyer in Corporate, M&A and Banking & Finance, with two decades of experience in law practice.

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