



Happy Place by Andrea Edwards

TAKING SECURITY IN INDONESIA

WHAT TYPES OF SECURITY INTEREST CAN BE TAKEN IN INDONESIA?

In Indonesia, security interests can only be used to secure proprietary (in rem) rights and only security interests expressly recognized by Indonesian law are enforceable. The following describes the common types of security interest taken in financing transactions:

- **Mortgage** (*hak tanggungan*) secures plots of land with registered land title, and buildings and other fixtures attached to plots of land.
- **Fiduciary security** (*jaminan fidusia*) secures immovable assets (that cannot be encumbered with a mortgage) and moveable assets, including buildings and fixtures

(which are not subject to mortgage), equipment, inventories, intellectual property rights, receivables, insurance proceeds and other monetary rights, and shares. A fiduciary security is a quasi-transfer (on a fiduciary basis) of legal title, but with no surrender of possession; this means the beneficiary merely holds the title for security purposes while possession of the assets remains with the security grantor. The Fiducia Registration Office (in charge of registration for fiduciary security) takes the view that bank accounts cannot be subject to fiduciary security.

- **Pledge** (*gadai*) secures similar objects as fiduciary security. Similarly to fiduciary security, a pledge also does not result in the

transfer of legal title of the assets to the beneficiary. However, a pledge requires the possession of the assets to be surrendered by the owner of the assets (the security grantor) to the beneficiary or a third party. Unlike fiduciary security, a pledge does not provide flexibility for securing assets that in nature constantly fluctuate, in a way that a change of secured assets requires amendment to the pledge document. To address this issue, when a pledge is taken on an asset which is fluctuating such as a bank account, the security provider will be required to submit periodical updates on the secured asset. These updates will be deemed to be amendments to the secured documents so as to satisfy applicable Indonesian law requirements.

Other than the above, a hypothec can be created to secure ships registered in Indonesia. In working capital and other financings for farmers and small and medium-scale enterprises, it is common to create security over warehouse receipts (*resi gudang*) issued by warehouse managers.

ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Most assets can be secured, except non-monetary contractual rights under agreements and licenses that cannot be subject to prescribed Indonesian law security interests. Indonesian practice has developed “other security documents” in an attempt to cover all contingencies, including non-monetary contractual rights, although they do not create security interests under Indonesian law. The common form of “other security documents” are conditional assignment or novation of agreements; additional powers of attorney are normally created to enhance the enforcement of these “other security documents”. Despite their use in practice, Indonesian law may deem these documents a circumvention of the prescribed Indonesian law on security interest, and therefore they are potentially challengeable and voidable.

DO SECURITY INTERESTS NEED TO BE REGISTERED?

The following registration requirements apply:

- fiduciary security must be registered (online) with the Fiducia Registration Office (Kantor Pendaftaran Fidusia);
- fiduciary security and pledge over shares must be recorded in the register of shareholders of the company in which the shares are secured; for listed companies, registration is conducted through a commercial share registration company

and/or the Indonesian Central Securities Depository;

- a hypothec must be registered (offline) with the port of registry of the corresponding vessels;
- a mortgage must be registered (online) with the relevant land office (kantor pertanahan);
- a security interest over a warehouse receipt must be registered (online) with the Central Registry (Pusat Registrasi).

DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

Security interests do not need to be notarised and can be created by way of privately executed agreements, except for the following:

- fiduciary security agreements must be notarial deeds, in Bahasa Indonesia;
- hypothec deeds are drawn up by the Vessel Registration Officer (Pejabat Pendaftar dan Pencatat Baliknama Kapal) in Bahasa Indonesia;
- mortgage deeds are drawn up by a Land Conveyancer (Pejabat Pembuat Akta Tanah, “PPAT”) in Bahasa Indonesia.

While not required by law, it is common (and advisable) to execute a pledge, security interest over warehouse receipt, or “other security documents” as deeds before a notary in Indonesia for the purpose of authenticating the documentation, which has more evidentiary weight than privately executed agreements in Indonesian courts.

Power of attorney executed outside Indonesia, to be relied upon for the signing of Indonesian security documents in Indonesia, must be notarised and legalised by the Indonesian embassy concerned.

DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY?

Generally, registration takes up to one week to complete after complete submission. However, additional procedures may apply to certain security interests, such as:

- notice and acknowledgement requirements apply to security interests involving receivables, insurance proceeds, bank accounts, and shares as objects. While it is common to serve the notice immediately after execution of the relevant security



documents, in practice, obtaining an acknowledgement may take longer. Parties to some Indonesian financing transactions have accepted the obtaining of such acknowledgement as a condition subsequent rather than a condition precedent;

- the issuance of the mortgage certificate as evidence of registration of a mortgage can take up to 2-4 weeks to complete; this is often included as a condition subsequent.

IS STAMP DUTY PAYABLE?

IDR 10,000 (less than USD 1) stamp duty is payable on any documents (including security documents) for their admissibility as evidence in Indonesian courts. Stamp duty is payable upon the signing of notarial deeds, mortgage deeds, or hypothec deeds. For privately executed documents, duty can be paid upon signing or post-signing but prior to admission to Indonesian courts as evidence.

ARE “PARALLEL DEBT” PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

“Parallel debt” (where an agent is the beneficiary of the security and an independent obligation of the Borrower to repay the debt is created in favour of the Agent) is not recognized under Indonesian law. Under Indonesian law, the Agent holds security interests merely as an agent, on behalf of the beneficiary of the security; the Agent will also hold any enforcement proceeds on behalf of the beneficiary. The agent is bound to redistribute the proceeds of enforcement between the lenders under the financing arrangement in its capacity as the attorney of the lenders. However, it is common in offshore syndicated financings for Indonesian borrowers to incorporate “parallel debt” provisions in the financing agreements. There is no guarantee that Indonesian courts would enforce the provisions, noting it is unprecedented and untested in Indonesian court cases.

CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN INDONESIA?

Yes, a foreign lender can take and enforce security in Indonesia, subject to normal enforcement procedures under Indonesian law.

CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

Although a waiver of sovereign immunity is should in principle be valid under Indonesian law, sovereign immunity itself has not been expressly legislated upon in Indonesia. There is therefore no clear legal certainty on this point.



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