Loans & Secured Financing 2020

Contributing editors
George E Zobitz and Christopher J Kelly

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2015
Fifth edition
ISBN 978-1-83862-143-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Loans & Secured Financing
2020

Contributing editors
George E Zobitz and Christopher J Kelly
Cravath, Swaine & Moore LLP

Lexology Getting the Deal Through is delighted to publish the fifth edition of *Loans & Secured Financing*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters Belgium and India.

Lexology Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, George E Zobitz and Christopher J Kelly, of Cravath, Swaine & Moore LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
July 2019

Contents

Indonesia

Mohamad Kadri, Alfa Dewi Setiawati, Richie Maureen, Adhitya Ramadhan and Michael Darari

AKSET Law

GENERAL FRAMEWORK

Jurisdictional pros and cons

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The primary advantages and disadvantages of bank loans versus debt securities are:

- interest on bank loans is commonly higher;
- issuance of debt securities may take longer and incur higher costs;
- debt securities are more easily assigned to third parties;
- issuance of debt securities involves more documentation (ie, agreements with trustees, stock exchanges and securities custodians, and distribution of prospectuses and registration statements);
- issuance of debt securities requires more compliance and disclosure to the public;
- conditions and enforcement of terms under bank loans can be more flexible, allowing more room for borrowers to negotiate or request waivers or amendments to the facility agreements;
- bank loans can be more private and confidential; and
- bank loans allow a broader range of borrowing portfolios, such as individuals and small to large enterprises.

Forms

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

Cash loan facilities

- Revolving loan facilities (for working capital);
- term loan facilities (for credit investment);
- overdraft facilities (for mitigating cost overruns); and
- commercial paper.

Non-cash loan facilities

- Various types of letters of credit (including trust receipts and standby letters of credit);
- various types of bank guarantees; and
- derivative and foreign exchange facilities.

Cash and non-cash loan facilities may be provided through bilateral financing arrangements, syndicated loans and club deals. In some cases, loan facilities may be combined with sharia financing.

Investors

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Participants in bank loan financings are banks (conventional, sharia, commercial, or rural banks) and other institutional investors. Hedge funds, pension funds and international monetary institutions may also be involved in the form of back-to-back or two-step financing through a conventional bank. Generally, loans from one business entity to another are allowed, unless sector-specific legal restrictions prohibit it, and as long as the investor is not engaging in lending as a day-to-day business activity.

Historically, participation by individual investors was restricted through participation in debt security financing, but with the rise of financial technology, the Financial Services Authority (OJK) has allowed individual investors to conduct lending activities through equity crowdfunding and peer-to-peer lending platforms, making it possible for individual investors to participate in a broader lending portfolio.

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

Standard templates for loan agreements

Foreign syndication and offshore banks providing bilateral loans will use Asia Pacific Loan Market Association (APLMA) templates as the base for agreement drafts. Bilateral loans from local banks will often be based on internal standard templates.

Choice of law

Offshore creditors generally opt for choice of law provisions that apply the law of the creditor's jurisdiction.

Choice of forum

Offshore banks usually provide for international arbitration, whereas local banks generally select the Indonesian National Arbitration Center (BANI) or local courts as forums for dispute resolution.

Pricing

For offshore creditors, interest rate is based on the regional cost of funds and commonly refers to an internationally recognised screen rate.

Language

Indonesian law requires every agreement entered into by an Indonesian party to use Bahasa Indonesia. Bilingual language documents that use English as their prevailing language are allowed.

Appointment of agents
Offshore syndicated creditors looking to secure assets of Indonesian borrowers in Indonesia commonly appoint a local bank or a foreign-affiliated local bank to act as a security agent, in order to ease communication and procedures for creating security interests.

Compliance and undertakings
In certain situations, foreign creditors may request extensive terms on anti-corruption, anti-money laundering, and environmental compliance, which reflect the legal requirements of the creditor's home jurisdiction.

Bridge facilities
5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Bridge financing is short-term (with or without collateral) and requires repayment from the proceeds of issuing debt security. Therefore, risk assessments from banks are commonly limited because they cover temporary lending periods.

Role of agents and trustees
6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

In a syndicated loan financing, a facility agent's role is will to ensure fulfilment of borrower's obligations (ie, drawdown preparation, conditions precedent to fulfilment, payment of interest and penalties, and in case of breaches). A facility agent will commonly participate in the credit agreement, and will hold a larger commitment of the total facilities extended.

A collateral agent will have the role in creating security interests, maintenance, enforcing the collateral in case of default, and coordinating with the facility agent to distribute the enforcement procedure.

All costs in relation to the agency arrangement will be borne by the borrower.

Role of lenders
7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

An arranger's main roles are bringing potential clients, preparing preliminary information memorandum that will be offered, and obtaining confirmation for financing from prospective creditors. These activities will include negotiating the facility agreement and security agreements, on behalf of the participating creditors, before handing them over to the facility agent for the performance of the agreement.

The fee arrangement will depend on the amount of facility and type of arrangers (typically lead arrangers will be entitled higher fees).

The typical fees may include an agency fee and an arranger fee that will depend on the agency's and arranger's contribution.

The specific fee arrangements will be documented in a separate fee letter.

Governing law
8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Typically, the choice of law for a facility agreement will be the creditor's jurisdiction. However, if collateral or guarantees are located in the jurisdiction of the borrower/guarantor, the choice of law will be where the borrower/guarantor's assets are located.

REGULATION

Capital and liquidity requirements
9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

The capital and liquidity status of banks affect capacity to provide loan facilities, with respect to the amount of loans and the types of services they can provide. For example, banks with smaller capital cannot conduct foreign currency transactions.

Further, affiliation status determines the lending limit which based on a percentage of the bank's capital, as follows:
- 10 per cent of its capital can be loaned to affiliated parties;
- 20 per cent to non-affiliated parties; and
- 25 per cent to non-affiliated groups.

Disclosure requirements
10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

There are no specific disclosure requirements for publicly listed companies receiving bank loan facilities beyond regular financial reporting obligations. However, disclosures may be required if there is a default or a debt restructuring in relation to bank loan facilities, as these may be considered material information affecting the interests of public shareholders.

In addition, certain disclosures or shareholders' prior approval may be required in cases where a corporate guarantee is given in relation to borrowing by a less-than-99 per cent-owned subsidiary of a publicly listed company.

Use of loan proceeds
11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Banks are required to state the use of proceeds under loan facility agreements and ensure the borrower's compliance throughout the loan period. Any deviation from an intended use of proceeds may cause a loan's productivity status to be downgraded, requiring the bank to allocate reserves as a defence to possible credit risks.

In Indonesia, banks may not allow certain uses of proceeds, such as:
- financing the acquisition of shares by individuals or companies (other than securities companies) which is speculative in nature;
- financing real estate developers where the loan proceeds will be utilised for land acquisition or land development; and
- financing derivative transactions.

Non-compliance may expose banks to administrative sanctions.

As for anti-corruption, anti-money laundering, and anti-terrorism, Indonesian banks are required to implement know-your-customer principles during credit assessments. Throughout the loan period, borrowers are subject to periodical reporting on the use of loan proceeds. Banks are also required to conduct monitoring to identify suspicious activities in borrowers' bank accounts.

Cross-border lending

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

In principle, Indonesian banks are prohibited from extending credit or loan facilities in Indonesian rupiah or foreign currency to debtors located outside Indonesia, including:

- foreign individuals;
- foreign legal entities or institutions;
- Indonesian citizens with permanent residence in another country who are not domiciled in Indonesia;
- foreign branch offices of banks having their head offices in Indonesia; and
- foreign branch offices of companies incorporated in Indonesia.

However, banks in Indonesia are still allowed to extend credit or loan facilities to foreigners for specific transactions, including:

- non-cash lending for investment activities in Indonesia with 100 per cent value of deposit guarantee;
- syndicated lending for projects in productive business within Indonesia; and
- lending for domestic consumption.

Debtor's leverage profile

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

There is no specific limitation on banks providing loans based on a debtor's leverage profile. However, in general, banks are required to implement prudential principles in extending credit by considering various aspects related to the debtor, such as business prospects, performance, repayment capabilities, and collateral provisioning capabilities.

Interest rates

14 Do regulations limit the rate of interest that can be charged on bank loans?

There are no specific regulations limiting the rate of interest chargeable on bank loans and, therefore, the parties are free to agree on the interest rate. Nevertheless, in determining interest rates for rupiah loan, banks shall refer to the prime lending rate stipulated by OJK.

This is calculated annually using cost of funds, overhead costs incurred by the bank, and the profit margin set by the bank.

As for foreign currency loans, see question 35 and 36.

Currency restrictions

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

In principle, all transactions conducted within the territory of the Republic of Indonesia must use rupiah. However, offshore entities may extend loans in foreign currency. Indonesian banks may extend loans to Indonesian borrowers in foreign currencies, provided that the loan proceeds are to be used within the territory of Indonesia.

Other regulations

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

Our explanations in previous questions cover most material regulatory and common practices in relation to bank loan facilities. However, banking operations are heavily regulated in Indonesia. Therefore, any specific issues in each bank loan facility transaction should be addressed on a case-by-case basis.

SECURITY INTERESTS AND GUARANTEES

Collateral and guarantee support

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

There are no specific restrictions for affiliated entities generally to provide collateral and guarantees for loan financings. However, for publicly listed companies, providing corporate guarantees may require disclosures or prior approval from shareholders. In determining a suitable collateral provider, banks are bound by general prudential requirements in conducting a credit assessment.

Banks normally prefer obtaining collateral or a guarantee from an affiliate that actively carries out the bank's business operations and is a source of assets, instead of non-active affiliates with assets but no active operations. For corporate guarantees, it is also important to check whether guarantees have also been given for other creditors. This is because upon receiving corporate guarantees, banks' position will remain as a concurrent creditors. Therefore, enforcement of a corporate guarantee needs to take into account other creditors' interest as well.

In addition, any collateral or guarantee provided by an affiliate must take into account corporate benefit principle. Refer to question 28.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

A hedging obligation is commonly shared with bank loan obligations. However, the collateral and guarantee provided to secure the bank loan obligations should state that they cover such additional hedging obligations.

Security sharing agreements or intercreditor agreements are commonly used to stipulate pari passu ranking of the collateral and guarantee so that they equally and rateably secure both the bank loan obligations and additional obligations. In these cases, cross-default provisions are stipulated in the underlying agreements, so that the proceeds of enforcement can be distributed contractually thereunder.

Due to ranking system in mortgage and hypothec, higher ranking securities receive priority.

Commonly pledged assets

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

Land, buildings and fixtures are encumbered by a mortgage, which provides prioritised position for the mortgagee against other creditors. After-acquired land cannot be encumbered by a mortgage.

Movable assets (tangible or intangible) such as accounts receivable, vehicles, inventory, insurance claims, bank account receivables and shares may be encumbered by a pledge or fiduciary security depending on the type of asset. In a pledge, the security interest is perfected by possession of the pledged collateral by the creditor, whereas, in a fiduciary security, the debtor may maintain possession of and utilise its assets. A pledge cannot cover future bearer securities.

Vessels with a gross volume of more than 20 cubic metres, usufruct rights on vessels, and shares in vessels are secured by way of hypothec. As with mortgages and pledges, a hypothec cannot be created over future-acquired vessels.

To date, Indonesian law does not provide any specific procedure for creating security interests in aircraft to secure bank loan financings. In practice, creditors commonly rely on non-Indonesian law security documents and register the same along with irrevocable de-registration and export request authorisations (IDERA) with aircraft registration authorities in order to authorise creditors to procure de-registration, export and physical transfer of the aircraft in case of default.

Banks also favour cash collaterals through pledge of bank accounts or back-to-back financing arrangement.

Creating a security interest

20 | Describe the method of creating or attaching a security interest on the main categories of assets.

Mortgage

The mortgagee generally requests an irrevocable power of attorney from the mortgagor authorising the mortgagee to carry out all necessary procedures to prepare and register the mortgage on behalf of the mortgagor. The parties then execute a Deed of Mortgage before a Land Deed Official (PPAT), who registers the Deed of Mortgage at the Land Office where the land is located. The Land Office will issue a certificate of mortgage, which serves as evidence that the mortgage has been lawfully registered as of the date of the certificate.

Fiduciary security

A fiduciary security is created by entering into a fiduciary deed before a notary with respect to the object that will be secured as collateral. Perfection is achieved through registration with the Fiduciary Registration Office. Following registration, the Fiduciary Security Registration Office will issue a fiduciary certificate, which serves as an evidence that the fiduciary security has been lawfully perfected on the date of issuance.

Pledge of shares

A pledge of shares in a limited liability company is created by entering into a pledge of shares agreement. It is customary that the pledgee requests irrevocable powers of attorney from the pledgor authorising the pledgee to carry out a private sale of the pledged shares if a default arises and attend and vote in the general meeting of shareholders. Following that, the pledgor delivers the original pledged share certificates to the pledgee. Separately, the pledgor needs to notify the company to record the pledged shares in its shareholder register book.

A pledge of registered securities is also created by entering into a pledge of shares agreement and preparing a consent to transfer the pledgor's shares to the pledgee or any appointed third party if a default arises and a power of attorney to attend and to vote in the general meeting of shareholders. Afterwards, the pledgor (through its custodian) needs to notify the Indonesian Central Securities Depository (KSEI) to block the pledged shares from trading. The pledge also needs to be registered in the securities administration bureau (BAE).

Pledge of bank account

Bank account deposits are secured by entering into a bank account pledge agreement, with the pledgor's bank providing an acknowledgment of the establishment of the pledge.

Pledge of tangible and movable assets

A pledge of tangible and movable assets is created and perfected way of the pledgor handing over the secured assets to the possession of the pledgee or an agreed third party during the pledge period. If the pledgee loses possession of the secured assets, the pledge will be deemed to have ceased to exist (except due to an act of theft).

Hypothec of a vessel

A hypothec of a vessel is created by entering into a hypothec agreement. For perfection, the hypothec needs to be registered with the Registrar of Shipping, which will issue a grosse deed as evidence of the hypothec. Similar to the mortgage process, the hypothec grantor may provide a power of attorney to the hypothec grantee to carry out the necessary procedures on behalf of the hypothec grantor.

Perfecting a security interest

21 | What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

See question 20 for the procedures to perfect security interests in Indonesia.

Under Indonesian law, perfection of security is crucial in establishing a security interest. If there is a failure to perfect a security interest, creditors are faced with the risk of not being able to enforce their security and recoup value from the secured assets.

In order to ensure perfection, creditors commonly request a power of attorney from the borrower allowing the creditor to prepare the necessary documentation and register the security interests, as required.

Future-acquired assets

22 | Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Possibility for collateral agreements to cover future-acquired assets depend on the type of security interest. Land mortgages, pledges, and hypothec cannot cover future-acquired assets because of the specific nature of the security interest.

For future-incurred obligations, if the secured amount under the collateral agreement is covered under the facility agreement, future-incurred obligations should also be covered under the collateral agreement. This is because collateral agreements are an accessory to the main facility agreement.

Also refer to our response in question 19.

Maintenance

23 | Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Under Indonesian law, security interests are accessories to underlying loan agreements. Therefore, so long as the rights and obligations under the underlying agreements still exist, there will be no automatic termination or expiration of the relevant security interests, absent of the full repayment of the loan and fulfilment of all outstanding obligations of the borrower.

It is also important to ensure information of secured assets are updated. See question 22.

Release

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

Generally, the sale of an asset that is secured by a certain security interest (ie, mortgage, hypothec or fiduciary security, but not pledge) neither releases the security interest nor precludes the creditor's right to enforce the security interest.

Under Indonesian law, a security interest follows the secured asset until it is properly released. However, unwarranted sale of a secured asset by a borrower to a third party may cause problems for a creditor enforcing the security, especially if the asset is sold to a bona fide purchaser. To minimise this risk, creditors may set out requirements such as keeping the original land certificate (for land mortgage) or affixing marks that secured assets are being secured (for fiduciary security and hypothec) to be conducted by the borrower.

Creditors would also require that the borrower obtain the creditor's consent prior to selling a secured asset to a third party.

For pledges, note that this type of security interest can only be perfected by physical possession and that when creditor has lost physical possession over the pledged objects (through a sale of the secured asset), the pledge will be considered as ceasing to exist.

Non-fulfilment of guarantee obligations

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

The Indonesian Civil Code provides the following possible defences special rights of guarantors on enforcement of a guarantee:

- the guarantor can deny request of guarantee enforcement on the basis that all possible actions against the borrower's assets (ie, seizure and sale of assets) need to be exhausted before requesting the guarantor to perform its guarantee obligations;
- if there is more than one guarantor, the claims are to be split between the guarantors; and
- guarantor is indemnified by the borrower through contractual arrangement among them, allowing guarantor to repudiate any claim by creditors.

Such defences above can be contractually waived as long as it is agreed between the relevant parties. If waived, the creditor can directly enforce the guarantee and claim against the guarantor without first pursuing all possible actions against the borrower's assets.

Parallel debt requirements

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

See question 6.

Enforcement

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

In principle, a security grantee is prohibited from owning secured assets sold through public auction.

Given the executorial nature of common security interests in Indonesia (see question 21), in the event of default by the debtor, the secured party has the right to sell the collateral without having to wait for a court decision. The secured party has a priority right over other creditors in terms of seeking repayment of its receivables based on the execution of the secured collateral. Such a right will not disappear due to bankruptcy or liquidation of the debtor.

In case of default, the debtor is obliged to hand over the collateral. However, the secured party may execute its security interest through the sale of the collateral at public auction or a private sale based on the agreement of the debtor and the secured party, if it results in the highest price beneficial for both parties. Stakeholders must be provided with one month's prior notice of a private sale.

In some cases, to limit the period of recouping collateral proceeds through public auction, banks may temporarily take over assets to compensate the outstanding loan. However, this must be conducted through private arrangement with the borrower.

To enforce a corporate or personal guarantee, the secured party may issue a demand letter to the guarantor requesting payment of the guaranteed amount within the agreed time period. If the guarantor fails to pay, the secured party may proceed with enforcement through ordinary civil claim proceedings.

Fraudulent conveyance and similar doctrines

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Clawback principles

During bankruptcy, the bankruptcy estate may not be transferred or disposed, and any transfer or disposal up to one year before the bankruptcy would be subject to clawback principles if it:

- causes loss to the creditor or creditors;
- was not a mandatory legal or contractual obligation of the debtor; or
- was not conducted through a bona fide transaction (having lesser value compared to sales in bankruptcy auction).

Any transfer or disposal within a one-year period before the bankruptcy that cause losses to the creditors may be deemed null and void and may be required to be unwound.

Thin capitalisation

Thin capitalisation in Indonesia is measured based on the borrower's debt to equity ratio (DER). In conducting a credit assessment through 5C (capital, capacity, condition, collateral and character) analysis, creditors would need to determine whether thin capitalisation is suitable for the specific business of the borrower, which may vary from one borrower to another. From tax perspective, in general, any borrowing costs in excess of liability exceeding a 4:1 ratio will be disallowed as a deductible interest expense from a tax perspective. If the interest expense exceeds the 4:1 DER, it will be deemed as a dividend payment and the applicable tax rate will be different.

Corporate benefit

Under the fiduciary duties concept, the directors are obliged to ensure all actions by their company are conducted in the company's best interest and provide corporate benefit to the company. If a bank loan is structured with a security provider that only grants security and does not receive direct loan proceeds, the directors of the security provider must be able to justify and ensure that such granting of security offers directly or indirectly creates a corporate benefit in order to comply with their fiduciary duties. Nevertheless, such actions requires certain corporate approvals.

INTERCREDITOR MATTERS

Payment and lien subordination arrangements

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

Payment subordination in Indonesia is conducted through contractual arrangements in the form of subordination or intercreditor agreements, in which senior and junior creditors are categorised as concurrent creditors. Senior and junior creditors will be paid an amount equal to their relevant loan portion. Nevertheless, priorities of repayment to senior and junior creditors are managed differently. In a bankruptcy proceeding, both concurrent creditors and secured creditor will be prohibited from receiving payment until privileged claim rights (tax and labour liabilities) are paid in full. In addition, secured creditors may take the collateral proceeds to ensure their loan are paid in full.

Creditors holding mortgages, fiduciary securities, pledges and warehouse receipts will be granted secured creditor status. Indonesian law recognises different treatment to creditors holding specific types of collateral (land mortgage and vessel hypothec), while other types of collateral (fiduciary and pledge) do not recognise the priority of rank. Where creditors hold similar claims to the same collateral, those with first priority rank higher than lower-ranked land mortgage securities. As opposed to land mortgages, creditors holding a fiduciary security are prohibited from re-securing collateral by encumbering the same property. For creditors holding other types of collateral, creditors may opt to sign a security sharing agreement that provides a pari passu arrangement among its parties (but not ranking). As with intercreditor arrangements, in the event of bankruptcy, security sharing agreements will only be enforceable among the relevant parties.

Creditor groups

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

Intercreditor agreement is normally entered into between existing creditors versus new creditors of the borrower under separate loan agreement as a result of new additional loans approved by existing majority lenders. Seniority in repayment may be determined based on commercial consideration among the creditors (ie, facility amount, type of loan portfolio, as well as relationship between the borrower and junior creditors). Normally, repayment to junior creditors uses the borrower's excess cashflow so it does not affect the senior creditor's portion of borrower's repayment.

In practice, voting rights for each group of creditors are regulated under an intercreditor agreement on a proportionate basis, in accordance with their exposure. Nevertheless, secured creditors will still have priority over payment from collateral proceeds.

Rights of junior creditors

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors are generally be only entitled to minimum to no security. In addition, junior creditors will be restricted to enforcing securities, request loan repayment, declare defaults or raise objections (ie, due to the merger or acquisition of the borrower, breach of covenants under junior loan, etc), as well as filing for bankruptcy without prior written consent from senior creditors.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

During bankruptcy proceeding, junior creditors will be entitled to a repayment after a portion of secured creditors (based on separate enforcement of preferred security interests) and senior creditors (based on intercreditor agreement) have been repaid. For junior creditors holding minimum preferred security, they will also be entitled to enforce their security portion separately from the sale of the bankruptcy estate.

Nevertheless, all claim rights from junior creditors will be subject to verification and calculation by the receiver. Any payment to junior creditors must be approved by the receiver.

Pari passu creditors

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

The pari passu concept is typically designed for senior creditors to enforce collateral and receive distribution on pro rata basis among them. An intercreditor agreement may be designated to govern specific provisions on pari passu basis among junior creditors holding minimum collaterals. Nevertheless, either the repayment to senior creditor or security enforcement can be taken after the senior creditors are paid in full.

LOAN DOCUMENT TERMS

Standard forms and documentation

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

There is not a fixed standard loan agreement in Indonesia. Typically, offshore creditors use the APLMA format as a basis for loan documentation or starting point of negotiation, especially in syndicated loans, high profiles, or financing transactions with relatively advanced scheme. However, certain loan mechanics and boilerplate provisions will need to be tailored to fit Indonesia's legal framework, such as the four basic requirements to form a legal and binding contract.

The majority of Indonesian banks have their own in-house model loan documentation, which vary from one bank to another. This is especially the case for bilateral and straightforward loan transactions. Loan agreements may be made in the form of notarial deeds or privately drawn-up agreements.

Pricing and interest rate structures

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

In general, banks determine pricing or interest rate structures on case-by-case bases. Components considered in determining interest rates may include, among others, the cost of funds, the borrower's risk profile, reference bank rates determined by Bank Indonesia, risks relating to the structure of the transaction, repayment scheme, term of loan, profit objectives of the loan, etc.

In some cases, interest rate may be determined by referring to an internationally recognised screen rate.

36 | Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

In 2018, Bank Indonesia introduced the Indonesia Overnight Index Average (IndoNIA) as a benchmark rate for non-collateral bank loans in rupiah. IndoNIA is based on non-collateral loan transaction interest rates with overnight periods as reported by banks to Bank Indonesia. In addition, Bank Indonesia has not published JIBOR with overnight tenors since 2 January 2019.

Notwithstanding the upcoming removal of LIBOR as a benchmark interest rate for loans, it is still common in practice for foreign banks providing loans in Indonesia (particularly for long-term bank loans) to implement various screen rates (eg, LIBOR, SIBOR or JIBOR) and other international interest rate by taking into account the stability and cost efficiencies of such interest rates.

Other loan yield determinants

37 | What other bank loan yield determinants are commonly used?

In addition to components used to determine interest rates as mentioned in question 35, competition in the loan market also determines calculation of interest rate used by banks, especially with the intention of maintaining existing clients and securing certain deal transactions.

Yield protection provisions

38 | Describe any yield protection provisions typically included in the bank loan documentation.

Market disruption clause

A market disruption clause, is commonly used by creditors to protect them against any losses incurred if a reference interest rate no longer reflects to the original calculation of the cost of the fund.

Prepayment fee or break cost clause

A prepayment fee or break cost clause is designed to compensate any losses that creditors may incur if a borrower makes a prepayment of principal amount on any day other than the last day of the interest period.

Tax gross-up clause

A tax gross-up clause is intended to require borrower to increase the sum payable in a loan agreement to exclude any applicable tax deduction which it may be subject to, so that this will prevent the creditor from receiving lesser amount of payment due to applicable taxes.

Increased cost clause

An increase cost clause commonly requires the borrower to cover an increased cost incurred by creditors due to change in laws or regulations.

Accordion provisions and side-car financings

39 | Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

Commonly, senior creditors restrict additional debt to be incurred by a borrower, except in cases where:

- there is excess value of the borrower's assets to be encumbered for a new debt while taking into account the existing loan;
- only a small amount of outstanding loan remains to be paid to the senior creditor; and
- there is no intention from the senior creditor to provide new loans to the borrower.

Typically, loan agreements do not govern rights for the borrower to request increases of loan commitments with a pre-approved amount under an existing loan agreement. An increase of a loan commitment will require the creditor's consent, which also requires the creditor to undertake internal credit assessment and approval to extend the new loan.

Financial maintenance covenants

40 | What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Types of financial maintenance covenant will depend on the commercial considerations in each transaction. Most financial covenant provisions comprise variations on one or more of five basic types of ratio:

- interest coverage;
- leverage (debt coverage);
- controls on cash flow or liquidity;
- limits on capital expenditure; and
- minimum net worth or net asset values requirements.

The types of covenant most often seen in corporate loans are interest coverage ratios and leverage ratios.

Interest coverage ratio (ICR) usually compares the group's operating profit (often a defined concept of EBITDA) to its interest obligations during the relevant period. A minimum ICR in a leveraged deal, for instance, might be set around 2:1 to the outstanding loan.

A leverage ratio compares the borrower group's financial debt to its operating profit.

In the project or property finance market, creditors may require a borrower to maintain or periodically reach certain project undertakings based on consolidated financial conditions of the project company's group.

Equity cures through top-up, capital contribution, or by taking over outstanding loan by shareholders are commonly used as remedies for technical default incurred from breach of financial covenants.

Other covenants

41 | Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Restrictions for borrowers would usually include non-day-to-day activities of the debtor's business, extraordinary actions (mergers and acquisitions, change of control, investing in new business, incurring additional indebtedness, or disposal of assets, etc). For certain day-to-day operation, borrowers are commonly restricted to make any capital expenditures exceeding certain thresholds determined by the investor.

Mandatory prepayment

42 | What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

Mandatory prepayment is required where there are certain triggers determined under the loan agreement, such as illegality for creditors to extend loan, market disruption, change of control or bankruptcy.

Debtor's indemnification and expense reimbursement

43 | Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

Borrowers are usually required to indemnify creditors for taxes incurred on sums payable to the creditors, cost and expenses, penalties, transaction costs, legal fees (including security enforcement fees), increased costs, currency risks and agency fees.

UPDATE & TRENDS

Key developments

44 | Are there any other current developments or emerging trends that should be noted?

Rapid growth of financial technology sector in Indonesia resulting in alternatives for financing to common bank loans (ie, the introduction of equity crowdfunding and peer-to-peer lending).

The OJK recently issued regulation stipulating the procedures for debt securities to support environmental sustainability (green bonds). This is a starting point for investors intending to provide financing in the form of green bonds in Indonesia.

akset

Mohamad Kadri
mkadri@aksetlaw.com

Alfa Dewi Setiawati
asetiawati@aksetlaw.com

Richie Maureen
rmaureen@aksetlaw.com

Adhitya Ramadhan
aramadhan@aksetlaw.com

Michael Darari
mdarari@aksetlaw.com

The Plaza Office Tower
29th Floor
Jl. M.H. Thamrin Kav. 28–30
Jakarta 10350
Indonesia
Tel: +62 21 2992 1515
www.aksetlaw.com

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-143-8