

ALLEN & OVERY

# Restructuring Across Borders

## Indonesia:

Creating and enforcing security over  
Indonesian Assets | September 2020





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# 1. Creating Security over Indonesian Assets

## 1.1 Movable property

### (a) Pledge

The Indonesian Civil Code (*Kitab Undang-undang Hukum Perdata*, **KUHPer**) defines a pledge as a right of a creditor (**Pledgee**) to movable property which is physically delivered into the possession of the Pledgee by a debtor, which gives the Pledgee a preferential right to the proceeds from the sale of the goods vis-à-vis other creditors. One important characteristic of a pledge is that the object should not be in the possession of the debtor (**Pledgor**). The right of the Pledgee will terminate if the object is no longer in the possession of the Pledgee, except if it is lost or stolen from the Pledgee.

As an intangible movable property, shares can also be pledged. In the case of bearer shares, the pledge is effective at the time the Pledgor delivers the share certificate to the Pledgee. For registered shares, the pledge will come into existence when the company is notified of, and accepts, the pledge of shares, which would normally be evidenced by annotation in the company's share register book.

### (b) Fiducia security

Fiducia security is regulated under the Fiducia Law, which was enacted on 30 September 1999. A fiducia security is a security right, securing repayment of a debt, over: (i) tangible or intangible movable goods; and (ii) immovable goods which cannot be the subject of hak tanggungan (as discussed in section 1.2 below) or hypothec, which goods remain in the possession of the

grantor of the fiducia security. This security right will grant the secured party a priority right over other creditors. The grantor of the fiducia security is usually known as fiducia grantor and the receiver of the fiducia security is known as a fiducia grantee.

Any goods which exist now or in the future which can be owned and transferred, whether tangible or intangible, registered or unregistered, movable or immovable, and which cannot be encumbered by a *hak tanggungan* or a hypothec, can be secured by a fiducia security. The Fiducia Law also allows for a fiducia security, unless otherwise agreed by the parties, to cover: (a) the products resulting from the goods secured by a fiducia agreement; and (b) insurance claims.

The Fiducia Law requires the fiducia agreement to be executed in Bahasa Indonesia, in a notarial deed form (which also states the hour when the deed is made), called a deed of fiducia security (*akta jaminan fiducia*, **Deed of Fiducia Security**). A Deed of Fiducia Security must at least contain:

- (i) the identities of the parties (the fiducia grantor and fiducia grantee of the fiducia security);
- (ii) the name of the principal agreement the obligations under which are secured by the fiducia security;
- (iii) the description of the objects of the fiducia security, which can be done by identifying and listing the goods,



including the ownership documents (if any). If the objects of the fiducia security are in the form of inventory or stock, the Deed of Fiducia Security will describe those goods by way of stating the type, brand, quality of the inventory;

(iv) the security value; and

(v) the value of the objects of the fiducia security.

The Fiducia Registration Office (**Fiducia Office**) interprets that only a legal entity established in Indonesia and having legal domicile in Indonesia can act as a fiducia grantor. However, we are aware that the Fiducia Office has accepted applications for fiducia security where the fiducia grantor is an offshore entity with an office in Indonesia. This limitation however does not apply for fiducia grantees. An offshore entity may enter into a fiducia security agreement and act as a fiducia grantee.

Under the Fiducia Law, all objects of the fiducia security must be registered. The procedure for registration is as follows:

- (i) Firstly, the fiducia security must be registered with the Fiducia Office having the jurisdiction where the fiducia grantor is located.
- (ii) Secondly, the registration is effected by the fiducia grantee or its attorney-in-fact or its representative. Registration is made by way of submitting a Registration Statement of Fiducia (**Registration Statement**), containing: (i) the identities of the parties to the Deed of Fiducia Security (ie the fiducia grantor and the fiducia grantee); (ii) the date, the number of the Deed of Fiducia Security, the name and domicile of the notary preparing the Deed of Fiducia Security; (iii) the name of the principal agreement the obligations under which are secured by the fiducia security; (iv) the objects of the fiducia security; (v) the security value; and (vi) the value of the objects of the fiducia security.

(iii) Thirdly, the Fiducia Office will record the fiducia security in the registration book of fiducia security (**Registration Book of Fiducia**) on the same day that the Registration Statement is submitted. The fiducia security is established on the date of its registration in the Registration Book of Fiducia.

(iv) Finally, after the above recording of registration, the Registration Office will issue a fiducia certificate (**Fiducia Certificate**) on the same day as the registration. The Fiducia Certificate, when properly executed, has a direct executory right, in the sense that the Fiducia Certificate has the same effect as a final and binding court decision.

Enforcement of a fiducia security is undertaken by an executory process based on the executorial title of the Fiducia Certificate.

(c) Hypothec

Separate laws apply in relation to the creation of security over Indonesian registered vessels (hypothecs) and aircrafts (that meet certain qualifications) which are not covered in this note.

## 1.2 Immovable property

### (a) Security over Land Title (similar to a mortgage)

The Mortgage Law defines a “*hak tanggungan*” as a security interest over a land right with or without other things that are inseparable from the land, securing the settlement of a debt and, granting a preferred position vis-à-vis certain other creditor(s).

The granting of a *hak tanggungan* must be preceded by a promise to grant a *hak tanggungan* as security for the settlement of a certain debt, incorporated in and forming an inseparable part of the loan agreement.

The *hak tanggungan* is documented in a deed of *hak tanggungan* drawn before a land deed official called the Pejabat Pembuat Akta Tanah (**PPAT**). The grantor of a *hak tanggungan* and the security holder are the parties to this deed. The deed contains, among other things, the identity of the parties (eg name, identity card/passport, address), details of the secured debt, the value of the *hak tanggungan* and a description of the land. The PPAT is obliged to register the *hak tanggungan* within 7 (seven) days from the signing of the deed of *hak tanggungan* at the relevant land register office (*Badan Pertanahan Nasional* or **BPN**). The original certificate of land title and the deed of *hak tanggungan* are required to be submitted to the BPN.

The following are the steps involved in order to register a *hak tanggungan*:

- (i) Firstly, to register the *hak tanggungan* in the land book of *hak tanggungan* maintained at the relevant BPN;
- (ii) Secondly, to issue a certificate of *hak tanggungan*, naming the security holder as the beneficiary;
- (iii) Thirdly, to annotate the *hak tanggungan* in the land book of land title maintained at the relevant BPN; and
- (iv) Lastly, to annotate the *hak tanggungan* on the certificate of land title.

The *hak tanggungan* is registered by the relevant BPN in the land book of *hak tanggungan* (7) seven days after the complete application is received by the BPN. The *hak tanggungan* comes into existence on the date the *hak tanggungan* is registered in the land book of *hak tanggungan*. As evidence of *hak tanggungan*, the BPN issues a certificate of *hak tanggungan*.

The holder of *hak tanggungan* has the right, if an event of default occurs, to sell the object of the *hak tanggungan* at its own discretion through a public auction and to take the settlement of its claim from the proceeds of the sale. However, by agreement in the deed of *hak tanggungan*, and when the foreclosure is to be carried out, the object of *hak tanggungan* may be sold privately, if the highest possible price can be obtained. The Mortgage Law stipulates that if the grantor of the *hak tanggungan* is declared bankrupt, the holder of the *hak tanggungan* remains authorized to exercise all the rights provided under the Mortgage Law.



### 1.3 Assignment of Rights

Based on Article 613 of the KUHPer, assignment of rights is made by way of a deed of assignment (either a notarial or a privately drawn deed of assignment) signed by the assignor and the assignee.

#### Effectiveness

The assignment is effective upon the signing of the deed of assignment by the assignee and the assignor.

#### Consequences of Assignment

The underlying agreement being assigned and all its related documents, including the security documents will remain effective after the assignment.

#### Additional Requirement

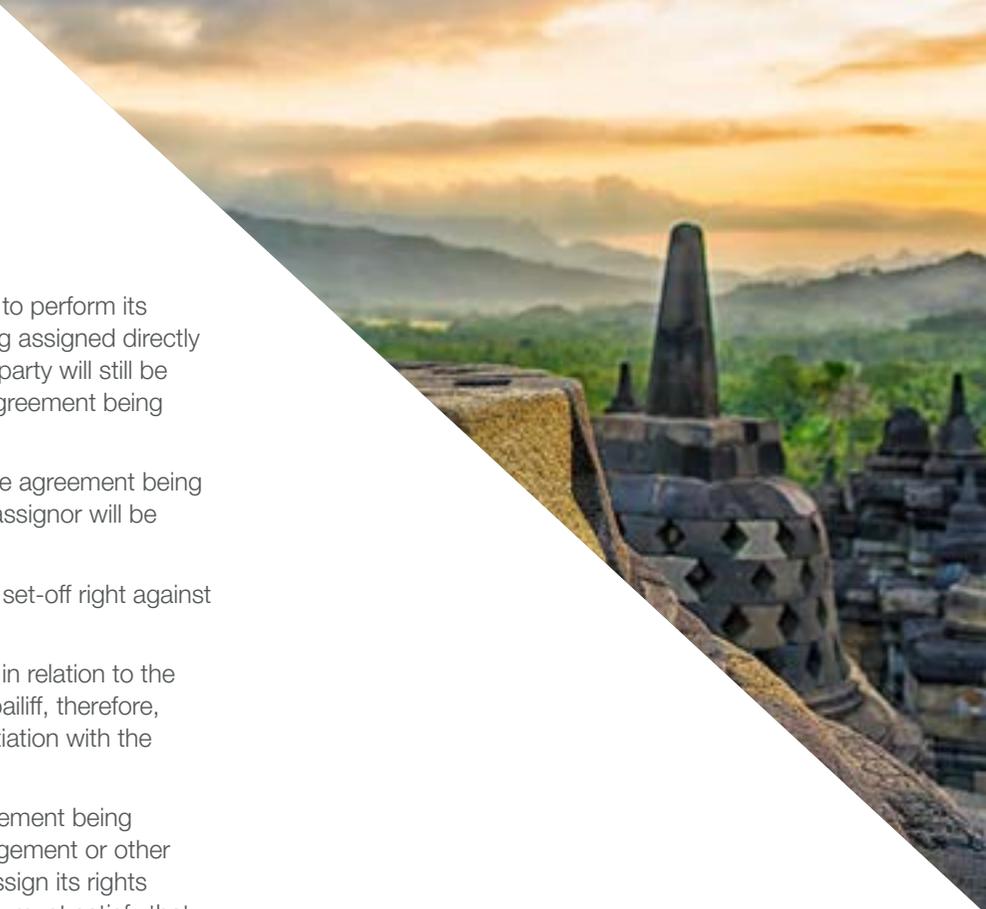
(a) Notification to the counterparty of the assignor in the agreement being assigned through a court bailiff or consent/acknowledgement of the counterparty if notification is not sent through a court bailiff, is required. The notification through a court bailiff and/or acknowledgement from the counterparty (as applicable) is required to bind the counterparty to the assignment. The consequences of failure to satisfy these requirements are:

- (i) the counterparty cannot be obligated to perform its obligations under the agreement being assigned directly to the assignee, although the counterparty will still be bound by the obligations under the agreement being assigned;
- (ii) any discharge of obligations under the agreement being assigned by the counterparty to the assignor will be considered as a valid discharge; and
- (iii) the counterparty can still exercise its set-off right against the assignor.

There is no statutory timeline and costs in relation to the sending of notification through a court bailiff, therefore, these requirements are subject to negotiation with the court bailiff.

Please note that if the terms of the agreement being assigned require consent or acknowledgement or other formalities in order for the assignor to assign its rights under the agreement, then, the assignor must satisfy that condition.

- (b) By operation of law all rights relating to the agreement being assigned, including the security rights under security documents will be transferred to the assignee. However, the laws require the assignment to be registered with the Fiducia Office if the assignment is of rights under a fiducia security, and with the Land Office if the assignment is of rights under a *hak tanggungan*.



## 2. Enforcement of Security

### 2.1 Fiducia Security

Pursuant to the Fiducia Law, a fiducia security provides the fiducia grantee a preferred position over the proceeds of the sale of the fiducia object (object of the fiducia security) for settlement of a debt *vis-à-vis* other creditors.

Article 29 Paragraph 1 of the Fiducia Law stipulates that in the case of default, the fiducia grantee may exercise its right over the fiducia object by way of: (a) the executory title in the fiducia object; (b) sale of the fiducia object through a public auction; or (c) a private sale if there is an agreement or promise to that effect contained in the Deed of Fiducia Security.

#### Executory Title

Proceedings are commenced by submitting an application for enforcement (*Permohonan Eksekusi*) of the fiducia security to the District Court having jurisdiction over the fiducia grantor or where the fiducia is registered.

Subsequently, the court will summons the fiducia grantor or debtor to appear before the court and then give an order (*aanmaning*) to the debtor to comply with its obligations under the fiducia security. Following the issuance of the writ of execution, the fiducia grantee may submit an application for executorial attachment (*Permohonan Sita Eksekusi*) upon which the court will issue a writ of executorial attachment (*Penetapan Sita Eksekusi*) to attach the fiducia object. Subsequently, the creditor may request the court to issue an auction order

(*Penetapan Lelang*) for the fiducia object to be sold in a public auction. The State Auction Agency's assistance is needed to sell the fiducia object.

This procedure may take three to six months, assuming that there is no delay or objection (*perlawanan*) from the fiducia grantor or debtor.

#### Public Auction

Current practice allows the State Auction Agency or a private auction house to enforce the fiducia security through a public auction without a court's prior writ of execution. The auction itself could be carried out within less than a month but subject to an announcement thereof within seven days prior to the auction date. The auction house however may opt to cease the enforcement process in the event of a fiducia grantor hindering the process by, among other things, requesting the court to cease the process. We are aware that in the past, the State Auction Agency has refused an application to sell by way of a public auction because the fiducia grantor submitted an objection to the State Auction Agency.

#### Private Sale

Further, Article 20 Paragraph 1 of the Fiducia Law allows the fiducia grantor and the fiducia grantee to agree on the sale of the fiducia object by way of a private sale (rather than through a public auction). If the highest price

could be achieved, this would be profitable to all parties concerned. The fiducia grantor's agreement to private sale should be expressed in the Deed of Fiducia Security. As best practice, our standard form fiducia security agreements are drafted such that the fiducia grantor authorizes the fiducia grantee to enforce its rights over the fiducia object, including authorization to sell by way of private sale and to determine the sale price for the object.

Notwithstanding their pre-agreement to a private sale, fiducia grantors may nonetheless try to stall the enforcement/sale process on the basis that the sale price is not the highest price achievable. The Indonesian court's interpretation of the highest price has varied from time to time. It is recognized that one way to prevent arguments on the sale price is to have the price agreed by the fiducia grantor and the fiducia grantee when the fiducia object is sold to a third party buyer however, in practice, the determination of a pre-agreed sale price in case of enforcement may be difficult.

A private sale may be undertaken only: (a) with the consent of the fiducia grantor (as normally contemplated in the Deed of Fiducia Security); (b) after one month has lapsed from the date of the notification served by the fiducia grantee/creditor to parties having an interest in the fiducia objects; and (c) after an announcement has been published in at least two newspapers or local mass media within the area where the fiducia grantor is domiciled.



## 2.2 Hak Tanggungan

Similar to the enforcement of fiducia security, the Mortgage Law provides that the enforcement of a *hak tanggungan* can be made by way of:

- (a) public auction; or
- (b) private sale upon the agreement of both parties.

The enforcement of a *hak tanggungan* can be reached by private sale if made at the highest possible price favorable for the parties. The private sale can only be made: (a) one month after: (i) written notice from the grantor and holder of *hak tanggungan* to any parties that hold an interest in the land title or are creditors of the grantor; and (ii) the making of an announcement in at least 2 (two) newspapers published in the place where the object of the *hak tanggungan* is located and/or local mass media (radio, television); and then only (b) if there is no objection from a third party. The purpose of this provision is to protect any holder of second, third or subsequent *hak tanggungan* or other rights over the relevant land title.

For the enforcement of a *hak tanggungan*, the executory power inherent in the certificate of *hak tanggungan* confers on the security holder the right to ask the court that has jurisdiction over the property to issue a writ of execution (*fiat executie*), permitting the security holder to have the secured property sold at public auction (or private sale) and to use the proceeds to pay his/her claims on the debtor.

## 2.3 Pledge of Shares

### Non-Listed Shares

Following an event of default and the enforcement process, the pledgee or the bank may enforce the pledge of shares agreement by way of:

- (c) Public auction: The pledgee needs to submit an application to the auction house for auction, noting the proposed auction date, and including a copy of the pledge of shares agreement, and all other pertinent documents (including collective share certificates and evidence of annotation of the pledge over the shares in the share register book). The pledgee is also required to announce the auction in newspapers six (6) days before the auction date. The floor price for the pledged shares shall be determined pursuant to an independent appraiser's valuation so as to get the highest sale price and also to avoid any challenge by the debtor or the pledgor. In practice we are aware that before submitting an application to the auction house, it is quite common for the pledgee to ask for court approval for the auction; or
- (d) Private sale: In this case, the pledgee shall act for and on behalf of the pledgor in entering into a sale and purchase agreement on the basis of authorization granted under the pledge agreement as well as the power of attorney to sell the pledged shares. Like a public auction, to avoid the pledgor's arguments that the sale price is below fair market value, or is unreasonable, etc, the sale price should be determined pursuant to an independent appraisal's evaluation. Again, in practice we are aware that before a private sale takes place, it is quite common for the pledgee to ask for court approval.

### Listed Shares

The general principle of the KUHPer allows the pledgee to sell the shares and to obtain the sale proceeds of the shares by way of public auction. This public auction is intended to obtain the best price for the shares. However, Article 1155 of the KUHPer allows the enforcement sale of pledged shares that are publicly traded to take place at the stock exchange where the shares are listed with the use of two brokers. This can be effected by way of: (i) releasing the shares from the blocking with the central custody (*PT Kustodian Sentral Efek Indonesia, KSEI*); (ii) instructing the custodian to sell the shares through a broker in the stock exchange with another broker acting for the buying party. Since the sale is done on the market, the sale proceeds of the price is deemed to constitute the fair market price and it can be applied against the outstanding amount under the facility agreement; and (iii) completing the sale by transfer of the shares from securities account of the pledgor maintained by a custodian (account holder) of the pledgor to the securities custodian (account holder) of the buyer.

The regulation does not require and in practice we are not aware of the enforcement of listed shares being done with court approval. As such the sale of the listed shares can be done without the court's involvement.

# Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.



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# Further information

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