

**Disclosure Requirements and  
Enforceability of Off-Shore Commercial  
Loans in Indonesia: From Bad to Good Decisions**

by

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## **Disclosure Requirements and Enforceability of Off-Shore Commercial Loans in Indonesia: From Bad to Good Decisions**

Over the past two decades in Indonesia, off-shore creditors granting commercial loans to borrowers in Indonesia have had to contend with a peril far greater in extent and uncertainty than the risk business of lending. In general, the borrower in Indonesia required to disclose certain particulars of the loan to the appropriate authorities. Whilst the laws of all countries impose disclosure requirements of some kind, few if any jurisdictions would negate a loan entirely on the basis that the disclosure requirements have not been fully satisfied. The Indonesian experience, however, starkly demonstrates that the disclosure requirements go much further than the procedural need for administrative convenience; the borrower's failure to report the loan to the relevant authorities have occasionally annulled the loan, and thus deprived the creditor from exercising his hallowed right of payment. These hostile decisions seem all the more perplexing when one discovers that the borrower's omission to report the loan might conceivably range from innocent inadvertence (mildest), to negligence (the median), and deliberate evasion with a view of annulling the loan later (the most extreme position). Yet the foregoing decision will amply show that the mental culpability of the borrower in failing to disclose the loan has little, if any, relevance to the issue of whether the loan is valid and enforceable. The creditor in one case was able to enforce the loan despite the borrower's negligence in failing to report the loan. Yet in another, the borrower's deliberate failure defeated the creditor's right to enforce the loan by rendering the loan null and void. This short article chronicles the series of conflicting cases spanning two decades that have justifiably stirred grave concern amongst creditors.

### **The genesis**

The progenitor case which created the controversy is *European Asian Bank/Midland Bank v. PT. Agfa Color Laboratories Indonesia*. The Creditor European Asian Bank/Midland Bank, granted a loan to PT. Agfa Color Laboratories Indonesia, the borrower. The director and the commissioner of the borrower brought the action. They argued that the loan agreement entered into between the creditor and borrower contravened certain reporting regulations, and consequently, were null and void. The District Court of Central Jakarta, as the first tier court, found for the plaintiffs and held that since the loan agreement had violated the regulations for disclosure of the loan, the court had rightly declared the loan null and void. The creditor appealed to the High Court of Indonesia, but failed when the court found for the plaintiffs. The case finally reached the cassation tier, the Supreme Court of the Republic of Indonesia. The Supreme Court upheld the decisions of the first and second tier courts, and again found in favour of the plaintiffs. The Supreme Court further mistakenly held that the disclosure regulations required a draft of the off-shore loan agreement to be scrutinised by Bank Indonesia prior to the conclusion of the loan agreement.

The decision in *European Asian Bank/Midland Bank* seems a curious one considering that the reporting requirements were never intended to jeopardise the rights of the banks providing off-shore loans to the Indonesian borrowers to recover the loan through the courts. The decision alarmed many foreign bankers and caused ripples of deep concern, both to existing and potential creditors. Its creditors had perceived the reporting requirements to be purely administrative procedures which had little, if any, legal effect on the validity and enforceability of their loans.

### **Lim Po Hock cs v Standard Chartered Bank**

Whilst the full impact and legal ramifications of *European Asian/Midland Bank* were being realised, the decision in *Lim Po Hock* firmly sealed the nail in the coffin of the creditors' rights of repayment, and entrenched the decision in *European Asian/Midland Bank*. The *Lim Po Hock* case is interesting because the borrowers *deliberately* flouted the reporting requirements of their off-shore loans to the authority. This was to enable the borrower later to rely on their own wrongdoing in failing to report the loan as justification to annul the loan agreements which they had concluded. In that case, the creditor, Standard Chartered Bank, Singapore, extended an off-shore loan facility to CV Sinar Surya. The plaintiff, Lim Po Hock, guaranteed the loan. The loan was never reported to Bank Indonesia nor the Department of Finance. The District Court of Central Jakarta held that, since the borrower had breached the reporting requirements, the loan facility was deemed in contravention of the requirements, and rendered null and void. Since the guarantee depended on the validity of the loan, the guarantee provided by the plaintiff was accordingly cancelled. The decision was affirmed on appeal to the cassation tier.

These two decisions have led foreign creditors to fear that off-shore facilities extended by their banks would vanish in the 'jungle' of Indonesian courts. If the *European Asian/Midland Bank* case had created the fear, the *Lim Po Hock* case certainly confirmed the creditors' fears. Lawyers were bewildered that the validity of the loan could be wiped out by the negligence of the borrower to report the loan. Even more bewildering was the effect the decision created in that a wrongdoer who flouted the laws, was able to hide under the umbrella of protection under this rule. The creditor was left with no means of resources, having lost all his money in the hands of the borrower who now stands unjustly enriched.

### **To right the wrongs-a new precedent?**

It was not long before the Indonesian judiciary had the opportunity to question the wisdom of its earlier decisions, and if necessary, to correct the iniquity perpetrated by those decisions. That opportunity was presented in *PT. Indokaya v Marubeni*, another action instigated by the borrower to invalidate the loan on account of their failure to report the loan to the proper authorities. The borrower, PT. Indokaya Nissan Motors, sued the creditors, Marubeni Corporation, and petitioned the court to annul the loan agreement made by the borrower on the ground that they, the borrower, had failed to report their loans to the proper authorities.

The Supreme Court of Indonesia not only departed from the earlier cases, but established a new jurisprudence. The Supreme Court held that the regulations of the Minister of Finance and Bank Indonesia were purely administrative sanctions which could not annul the loan agreement nor adversely prejudice the creditors.

Within a year of *Marubeni* the Supreme Court of Indonesia was blessed with the providence of considering another case, *PT. Starlight v Bank of America*. The facts of the case were broadly similar to *Marubeni* in that the borrower; PT. Starlight, sought to annul the loan on the grounds of their failure to report the loans to the proper authorities. The Supreme Court confirmed their earlier decision in *Marubeni*, and held that the loan was valid and enforceable, notwithstanding the non-observance of disclosure requirements. The court said that the borrower as obliged to report to the Monetary Authority the receipt and repayment particulars of the loan. The sanction for non reporting of the loan was the imposition of a penalty of Rp 10,000. More importantly, the Supreme Court held that the negligence of the borrower to report its off-shore loans did not make the loan agreement null and void.

These two landmark decisions of the Supreme Court of Indonesia have alleviated the problems that have haunted foreign bankers granting loan facilities in Indonesia in the last two decades. The decisions have also served the significant purpose of restoring creditor confidence in their rights of enforceability under the loan agreements. The courts have rein-stated equity and restored pragmatism.

### **A regrettable step backward- PT Young Indonesia Textile v Indian Overseas Bank**

Towards the end of 1992, the High Court of Jakarta, ignoring the proper jurisprudence of the Supreme Court in *Marubeni* and *Bank America*, decided in favour of the borrower, PT. Young Indonesia Textile, in its suit against the creditors, Indian Overseas Bank. The plaintiff in this case relied on its own negligence in failing to report the off-shore facility and succeeded.

Just when creditors believed that the misfortune of *European Asian/Midland Bank* and *Lim Po Hock* were behind them, the regrettable decision in *PT. Young Indonesia Textile v Indian Overseas Bank* changed all this and engendered deep doubt and uncertainty amongst foreign creditors. It is hoped that the Supreme Court of Indonesia would have the opportunity to rectify the decision in *Indian Overseas Bank*. By so doing, the judiciary would not only maintain but, more importantly, entrench the court's earlier pronouncements in *Marubeni* and *Bank of America*. Until then, foreign creditors might be tempted to take their loans elsewhere-perhaps to a less hostile jurisdiction where their rights would not easily be blown by capricious winds of change.

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