

LEGAL AUDIT & LEGAL OPINION

by

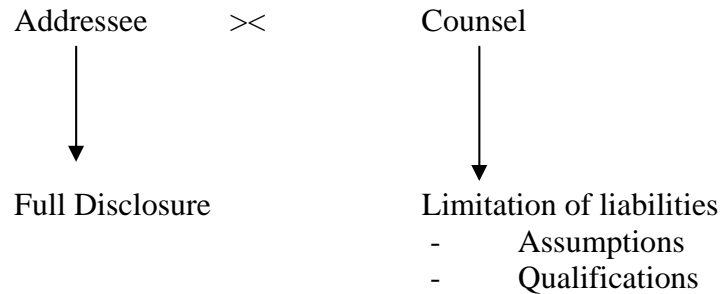
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LEGAL AUDIT & LEGAL OPINION

Legal Audit → Long Form; Legal Opinion → Short Form

Purposes: extension and restructuring of loans, issuing instruments in stock exchanges, merger and acquisition:



Full Disclosure:

- ◆ Articles of Association and any amendments thereof.
- ◆ History of equity and shareholders.
- ◆ Management and Supervisor.
- ◆ Permits.
- ◆ Assets and encumbrance : movable (Art. 1977 Civil Code), immovable, IPR.
- ◆ Contracts.
- ◆ Litigation.
- ◆ Special Conditions: M&A.
- ◆ Corporate Guarantor, Holding Company, Subsidiaries, Affiliates (full or limited audit).

Assumptions:

- General: Good Faith Concept (Art. 533 Civil Code).
- Genuine of signatures.
- Conformity of copies to originals.
- Accuracy of translations.
- Due authority and execution by all parties other than the party being opined upon.
- Absence of conflict with other contracts of the party being opined upon.

Qualifications:

- ❖ Express no opinion in respect of matters governed by foreign laws.
- ❖ Rely public records.

GUIDELINES TO REVIEW LOAN AND SECURITY DOCUMENTATION

GENERAL

Notarial/Non Notarial Deed

- Loan Agreement may be in the form of notarial deed or not.
- Akte Pemberian Hak Tanggungan/Akte Hipotik shall be made by PPAT.
- Sertifikat Hipotik shall be issued by the appropriate Land Office.
- Akte Kuasa Memasang Hak Tanggungan/Akte Hipotik shall be made by notary public or PPAT.

Consent

- If the loan given to a PT or other legal entities, check the Articles of Association on how the procedure should be followed (who is entitled to sign, who should give approval, etc). Check also whether the amendments of the loan agreement follow the procedure.
- If the security is given by a PT or other legal entities, check who is entitled to sign the security document and whether the consent of commissioners is needed. Check with the Articles of Association of the PT/other legal entities and their amendments.
- If the security constitutes more than 50% of the assets of the security giver, article 88 UUPT shall be complied with (the consent from RUPSLB and announcement in 2 newspapers). Ask the client about the "50% of the assets". Please note that article 88 UUPT shall only be considered if the security is given after March 7, 1996.
- If the security is given by a married giver, check whether the security document was co-signed by his/her spouse as consent or whether the spouse consent was given in a separate document (the consent letter is usually attached to the security document, except for Akte Pemberian Hak Tanggungan/Akte Kuasa Memasang Hak Tanggungan/Hipotik the consent letter is kept by the PPAT/notary public. It is not necessary for us to check with the PPAT/notary public of the consent letter as the Akta will mention about the consent. However, please check the wording in the Akta whether consent letter is in the notarial or in the underhand form).
- However, if there is an agreement of segregation of marital assets, the spouse's consent is not needed.
- If the document is made in notarial Deed, you may not check the Articles of Association of the borrower/security giver as you can rely on the information in the notarial deed that the consent has been given. Please note that you NEED to check the Articles of Association if the notarial deed does not give such information.
- Check if there are two witnesses signed any non-notarial deed.

Enforcement Forum

- Check the forum of Loan Agreement and every security documents. Different forum among them may make the enforcement difficult.
- In the case of the assignment of the borrower's deposit with the client, we can neglect the enforcement forum since the client may simply enforce the assignment by set off.

Unsecured Loan

- "Negative Pledge" clause is required to protect the client creditor's interest against newer creditor. Look for it in "Covenants" or "Negative Covenants" clause.
- "Pari Passu" clause is required to protect the client creditor's interest against other unsecured creditor. Look for it in "Representation and Warranties" clause.

Power of Attorney

- Power of Attorney by a borrower to the creditor shall be given with a waiver of articles 1813, 1814 and 1816 of the Indonesian Civil Code.

MORTGAGE

- See Sertifikat Hak Tanggungan/Sertifikat Hipotik.
- See Sertifikat Tanah being mortgaged. If "Hak Milik", look for spouse consent, if "HGB", look for the expiry date of the Land Certificate.
- Offer the client to check with the appropriate Land Office the originality of Sertifikat Hak Tanggungan/Sertifikat Hipotik/Sertifikat Tanah. Do not forget to advise the client that there will be some disbursement for this.
- If the client does not feel it necessary to have that checking we have to make our assumption in our legal opinion that Sertifikat Hak Tanggungan/Sertifikat Hipotik and Sertifikat Tanah the client made available to us are the same as those knitted in Buku Tanah in the appropriate Land Office.
- No Akte Kuasa Memasang Hak Tanggungan/Hipotik is valid after one month of its date.
- If there is Akte Kuasa Memasang Hak Tanggungan/Hipotik ask for Sertifikat Hak Tanggungan/Sertifikat Hipotik.

PLEDGE OF SHARES

- See the share certificates being pledged. Note that no pledge is valid, unless the pledgee (the bank) retains the share certificates.

FIDUCIARY TRANSFER OF OWNERSHIP

for stocks/inventories

- Look for the waiver of articles 1750 to 1753 (inclusive) and 1759 to 1762 (inclusive).
- Look for the specific go-down to store the stocks/inventories.
- Look for the provision which says that at any time the stocks/inventories (i) shall have a certain value, or (ii) shall have the value which at least the same as the aggregate amount of the loan if the FTO is the only security given to that loan.

- Please ask client whether they know other creditor(s) of the borrower receiving the FTO of stock or inventories. If there is such other creditor(s), ask client who first receive the FTO.

for machinaries

- Look for the list of the machinaries being pledged.

GUARANTY (PERSONAL OR CORPORATE)

- Look for the waiver of articles 1430, 1831, 1833, 1837, 1838, 1843, 1847, 1848, 1849, 1850 of the Indonesian Civil Code.
- Please check whether there is spouse consent appears in the guarantee or in separate letter for the guarantee given by married persons without asset separation.
- An indemnity clause shall appear (usually at the end of the guaranty document). The clause says that if for whatever reason the guaranty cannot be enforced or invalid, then the guarantor commits itself to pay the loan as a primary borrower (or something like that).
- Value of the Guarantee. Some guarantees address or limit the value of the guarantee, some only say that all debts of the borrower are guaranteed.

BANK GUARANTY

- All items required by SKDir BI No. 23/72/KEP/Dir and SEBI No. 23/5/UKU both dated February 28, 1991 shall be satisfied.
- Value of Bank Guarantee.
- Expiration Date and Period of Claim. Please note that any claims against a bank guarantee submitted to the guarantor bank after the end of the period of claim may likely be rejected by the bank. The end of the period of claim is usually either 14 or 30 days after the expiration date of the bank guarantee.

ASSIGNMENT OF RECEIVABLES FOR SECURITY PURPOSES

- Look for the list of Receivables assigned.
- Ask the client whether the debtors of the borrower have been notified about such assignment.
- It is better if there is provision in the Assignment document which obliges the borrower to deposit any payment it receives in an escrow account with the client.

ASSIGNMENT OF DEPOSIT FOR SECURITY PURPOSES

Deposit with the client

- There should be a provision in the Assignment Document which says that as long as there is any money owed by the borrower, the deposit and its interest cannot be remitted which result that the amount of the outstanding loan is bigger than the amount of the deposit and its interest.
- Check whether there is authorization in the Assignment Document to the bank to cash the deposit or whether there is separate power of attorney to do so if the debtor is default.

Deposit with another bank

- There should be a provision in the Assignment Document which says that as long as there is any money owed by the borrower the deposit and its interest cannot be remitted.
- The client shall retain the certificate/the book of deposit.
- The depositor bank shall give the client an undertaking not to let the borrower to call for the deposit and its interest.
- Check about authorization clause or separate power of attorney as above mentioned.
- The Borrower shall give a power of attorney to the client to call for the deposit and its interest from the depositor bank.

ASSIGNMENT OF INSURANCES

- Pursuant to the Indonesian law, only claims or proceeds of the claims that can be assigned not the object insured.
- Check the list of all policies assigned to the bank.
- Ask the client whether it holds/retains the policies described in the list.
- Check whether the policies are still valid (see the period of the insurance).
- Check whether the policies contain a "Banker's Clause" ie. the name of the bank/creditor is addressed as the co-insured. It is very important since with the Banker's Clause, the bank can directly receive payment from the insurer, while with the absence of this clause, the insurer may not feel obliged to pay directly to the bank.
- Check whether the insurer has been notified/or at least if there is a notice clause in the Assignment Agreement.

*Iswahjudi A. Karim
KarimSyah Law Firm, Jakarta
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