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Project Finance 2021

Indonesia: Law & Practice
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INDONESIA

Law and Practice

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1. PROJECT FINANCE PANORAMA

1.1 Sponsors and Lenders

Commercial offshore financing (with characteristics of non-recourse, limited-recourse, trustee borrowings, etc) for projects involving State-Owned Enterprises (as sponsors and/or off-takers) no longer requires approval from the government (through the Offshore Commercial Loan Team). The offshore project finance is now only subject to periodic reports to Bank Indonesia and the Minister of Finance.

With respect to mortgage rights, the government has now implemented the e-mortgage system, in which all mortgage registration, transfer of mortgages, change of creditors, de-registration of mortgages and data correction are conducted through the system. With the e-mortgage system, all creditors or lenders need to register so that the notary can list the relevant creditor as the mortgage holder/mortgagee.

Another development in the legislation/regulation is not directly related to project finance but may influence the project finance market in Indonesia. The government recently issued new regulation in the investment business sector, which generally regulates lines of business that are prioritised by the government (and that are open for 100% foreign investment), allocated for small- and medium-sized enterprises (SMEs) or co-operation with SMEs and subject to certain limitations (closed for foreign investment or open with a specified maximum foreign ownership). Most lines of business, especially in the infrastructure and industry sectors, are open for 100% foreign investment and thus this may influence the project structure and generally provides flexibility for the lenders in terms of enforcement of a shares pledge by the offshore lenders.

The sponsors involved are typically Indonesian limited-liability companies for local sponsors (including State-Owned Enterprises (SOE)) and foreign legal entities or companies for the foreign sponsor. With respect to lenders, project finance in Indonesia is normally provided by export credit agencies, multi-lateral agencies, commercial banks, and non-bank financial institutions (both from onshore and offshore).

1.2 Public-Private Partnership Transactions

Implementation of a Public-Private Partnership (PPP)

A PPP project in Indonesia is implemented through a co-operation agreement between the implementing business entity (IBE) and the government contracting agency (GCA), which can be a Minister/Head of an Institution/Head of a Region, or State-Owned Enterprises/Regionally Owned Enterprises as the provider or administrator of the infrastructure, based on the laws and regulations. The IBE is appointed or selected by way of tender in accordance with procurement regulation for PPP projects.

Allocation of Risks and PPP Project Guarantees

The co-operation agreement between the IBE and the GCA contains a division of risks between the contracting parties in accordance with the risk-allocation principle. The guarantee provided by the government for the PPP project is based on the allocation of risks as set out in the co-operation agreement.

The guarantee provided for a PPP project (infrastructure guarantee) is granted and administered through a special State-Owned Enterprise established by the government, ie, the PT Penjaminan Infrastruktur Indonesia (or referred to as the Indonesia Infrastructure Guarantee Fund or IIGF in English). The infrastructure guarantee can be granted solely by the IIGF or as a co-guaran-

tee with the Minister of Finance. Generally, the infrastructure risks that can be covered by the guarantee are:

- those that are better controlled, managed, prevented or can be absorbed by the GCA instead of the IBE;
- risks that are caused by the GCA (the GCA's event of default) and/or;
- risks that are coming from the Government of Indonesia (GOI) (other than the GCA) such as political *force majeure* (a change in law or government action and inaction).

Cap and Claim on the Guarantee

An IIGF guarantee is limited to its equity sufficiency. If the IIGF's equity is not sufficient to provide the guarantee, the Minister of Finance (MOF) can provide a co-guarantee. There is also a limit to the amount of infrastructure guarantee provided for each PPP project by the IIGF and/or the MOF, based on the guarantee proposal submitted by the GCA, and the amount will be set out in the guarantee agreement entered into between the IIGF/MOF and the IBE.

The IIGF will only accept and process the claim from the IBE to disburse the guarantee further:

- if the GCA agrees to the occurrence of the default declared by the IBE;
- if the IBE has exhausted all the available remedies to demand payment to the GCA, based on the co-operation agreement;
- and if there is no dispute with the GCA on the outstanding invoice claimed by the IBE.

1.3 Structuring the Deal

Offshore borrowings must be received by the borrower through a "Domestic Foreign Exchange Bank". A Domestic Foreign Exchange Bank is a bank specifically appointed by Bank Indonesia, by way of a letter of appointment, to conduct banking activities using foreign currencies, including an Indonesian subsidiary or branch of a foreign bank, but not an overseas branch office of a bank headquartered in Indonesia. This means that any foreign currency money transaction in relation to the project finance, eg, a utilisation under a loan facility, must only be conducted through an account established in such an appointed bank.

With respect to the project revenue, the payment to the project company is subject to mandatory use of rupiah, which is applicable for any transaction conducted within the Indonesian territory unless the transaction falls under an automatic exemption (such as transactions that implement the State Budget, the acceptance or disbursement of grants from or to overseas, an international trade transaction, international financing, a transaction entered into under the law) or the project meets the criteria to obtain exemption from Bank Indonesia.

The type of project that can be granted an exemption from the mandatory use of rupiah is a strategic project endorsed as such by the central or regional government, as evidenced by a statement letter issued by the relevant government body; this exemption may include the sale of products and services produced by the project concerned. In considering the application, Bank Indonesia will review the source of financing for the project and the project's impact on Indonesia's macro-economic stability. The categories of project listed are transportation, roads, water, drinking water, sanitation, telecommunications and informatics, power, oil and gas.

1.4 Active Industries and Sectors

It is expected that the infrastructure, energy and industry sectors (such as smelting, electric cars and batteries) will continue to be more active in Indonesia in the coming year.

2. GUARANTEES AND SECURITY

2.1 Assets Available as Collateral to Lenders

The assets typically available as collateral to lenders and the form that the security typically takes are as follows:

- land with land titles/certificate, plant and other fixtures attached to the land are secured under a mortgage;
- movable and immovable tangible assets, such as machinery and equipment that cannot be secured under the mortgage, are secured under fiducia security;
- receivables and insurance proceeds are secured under fiducia security;
- intellectual property rights are secured under fiducia security and commonly accompanied with a contractual security in the form of power of attorney to exercise intellectual property;
- bank accounts are secured under a pledge of bank account and commonly accompanied with a contractual security in the form of a power of attorney to manage the bank account;
- shares are secured under a pledge of shares or fiducia security, although the latter is uncommon; pledge or fiducia security over shares is normally accompanied with a contractual security in the form of a power of attorney to vote on shares and a power of attorney to sell shares;
- project contracts cannot be subject to an in rem security right under Indonesian law; in practice, the project contracts will be subject to contractual security in the form of conditional novation or conditional assignment and a power of attorney to exercise contractual rights;
- licences of the borrower/project company cannot be subject to an in rem security right; in practice, the rights under the licences are subject to contractual security in the form of a power of attorney to manage the business.

Formalities and Perfection Requirements of In Rem Security

Mortgage

A mortgage is created by way of entering into a mortgage deed before a land-deed official (PPAT). The perfection of the mortgage is conducted by way of registering the mortgage deed and obtaining the mortgage certificate and annotation of the mortgage. The process of mortgage deed registration is now conducted online via the E-Mortgage Deed Registration System and the certificate will be issued electronically. Before the registration of the mortgage deed in the E-Mortgage Deed Registration System, each lender must first register itself in the E-Mortgage Party Registration System in order for the lender to be registered as the mortgagee in the System.

Fiducia

A fiducia security is created by way of entering into a fiducia security agreement in the form of notarial deed. The perfection of the fiducia security must be conducted within 30 days, since the date of the deed of the fiduciary security agreement by way of registration in the Fiducia Registration Book is kept by the Fiducia Registration Office and the issuance of the Fiducia Certificate via online system. Failing to complete the registration within the foregoing time-line will require the fiducia grantor and grantee to re-execute the (deed) fiducia security agreement.

In addition to the registration with the Fiducia Registration Office, the fiducia security needs to be properly notified to and acknowledged by the relevant counterparties of the fiducia security (debtors, insurance companies, contractors, the bank-guarantee issuer, etc) so that they can pay the fiducia security assignee directly during an event of default.

Pledge of shares

A pledge of shares is created by way of entering into a pledge of shares agreement. In practice, the pledge of shares is entered into in the form of a notarial deed. The perfection of a pledge of shares is conducted through the registration and annotation of the pledge in the shareholders' register of the company/borrower. For a pledge over shares of a listed company, the perfection of the pledge is conducted by way of notification to the company and the Stock Administration Bureau, and the pledge must be recorded in the register of shareholders with the Stock Administration Bureau.

Pledge of bank account

Similarly to a pledge of shares, a pledge of a bank account agreement is normally entered into in the form of a notarial deed, although it is not mandatory and generally can be privately executed. The perfection of a pledge of bank account is conducted through a notification to the relevant bank and must obtain an acknowledgment from the bank as evidence that the bank agrees to the pledge and other provisions, or the arrangement of the pledge set out in the notice.

2.2 Charges or Interest over All Present and Future Assets of a Company

There is no concept of a floating charge under Indonesian security law. However, a security interest over all present and future assets of a company is permitted under Indonesian law.

2.3 Registering Collateral Security Interests

The cost of the notary, stamp duty (with a nominal amount of IDR10,000 that is affixed to the notarial deed or privately executed agreements) and registration fees or charges, as well as Non-Tax State Revenue (PNBP), are the costs that must be paid to the government.

2.4 Granting a Valid Security Interest

Each item of collateral needs to be individually identified in the security document with as detailed a description as possible of each security object.

2.5 Restrictions on the Grant of Security or Guarantees

There is no other restriction other than those which have already been set out or mentioned previously.

2.6 Absence of Other Liens

Lenders can only rely on a contractual security arrangement and a power of attorney. However, unlike in rem security (mortgage, pledge, fiducia), there is no preferential right for contractual security.

There is no centralised record of liens. Although it is possible to carry out a check for a mortgage or fiducia security, there is no guarantee that the information or detail of the security (including the secured object) is accurate, complete and up to date, nor that it can be fully relied upon.

2.7 Releasing Forms of Security

The release of a mortgage and fiducia security is conducted by means of the lenders issuing the release letter or statement letter to confirm that the loan has been fully repaid. The release letter will be used as the basis to submit an application to release and delete the annotation of the mortgage at the relevant land office (via the online system) and the release of the fiducia security to the Fiducia Registration Office, via the online system.

With respect to a pledge, the parties normally sign a termination of the pledge agreement. For a pledge of shares, it is followed by the deletion of the record of the pledge in the shareholder's register of the borrowers or the register of share-

holders with the Stock Administration Bureau for that listed company.

3. ENFORCEMENT

3.1 Enforcement of Collateral by Secured Lender

Generally, lenders can enforce their collateral upon an event of default, pursuant to the loan agreement. The general rule of enforcement of an Indonesian in rem security interest is that the holder of the security right cannot take possession of the secured objects. Enforcement of an in rem security right/interest can be conducted by way of a public auction or private sale.

Enforcement through public auction is conducted based on either (i) direct execution or (ii) executory title.

Direct execution is a right conferred by operation of law in which the security interest-holder is entitled to sell the security objects based directly on its own authority through a public auction without the consent of the borrower, guarantor, or the security objects' owner. In practice, however, a direct execution can only be conducted if the debtor is co-operative and, in practice, it has rarely been used due, among other reasons, to the fact that the Indonesian State Auction Office will not allow an auction without an Indonesian court order. As for enforcement based on executorial title, it has the same status as a final judgment of an Indonesian court and confers on the mortgagee the right to sell the mortgaged property through an auction after obtaining a writ of execution (fiat executie) from the court.

Execution by way of private sales can only be done if the debtor or assets owner is co-operative and if a higher sale price can be achieved for the benefit of the parties.

For a mortgage, a private sale may only be conducted if there is no objection from third parties; the law, however, is unclear as to who these third parties may be, although it is safe to assume that these at least include the other creditors of the debtor. The mortgagee and/or mortgagor must serve at least one month's prior written notice to the concerned parties in respect of the mortgaged properties, such as the holder of a second mortgage and subsequent holders (if any), and other creditors, informing them that the mortgaged land and buildings will be sold by private sale. Within this period, the mortgagor and/or mortgagee must announce the intended private sale in at least two newspapers circulating in the area where the mortgage land and building/s is/are located and/or in the local mass media, such as radio and television.

Foreclosure by private sale for a fiducia security over goods (machinery, equipment, supplies) can only be conducted after the expiry of one month from the date of a written notification of the intended sale to interested parties and publication thereof in at least two daily newspapers that are circulated at the place concerned, as long as no third party has voiced an objection against the private sale.

For fiducia security over receivables or insurance proceeds, upon default or a foreseeable default, the fiducia transferee will need to notify immediately the underlying obligors of the receivables and insurances of the fiducia security. This notification should be officially served on the obligors by a court bailiff, unless the obligors are willing to acknowledge the assignment in writing (Article 613 of the Indonesian Civil Code), which is the reason why in practice it is necessary to provide notice and obtain an acknowledgment of fiducia security from the obligor once the fiducia security is in place. The legal effect of this notification and acknowledgment is that the obligors can thereafter no longer validly settle with the

fiduciary transferor. They are required to make all payments thereafter directly to the fiduciary transferee, who may in principle enforce those payments against those obligors even if the obligors, after the notification or acknowledgment, had already made the underlying payment to the fiduciary transferor.

The enforcement of a pledge of shares may also be subject to restriction under the articles of association of the company whose shares have been pledged that must be complied with, such as a right of first refusal and a requirement to be approved by the general meeting of shareholders. In certain cases, licences or agreements (such as a power purchase agreement or a co-operation agreement in a PPP project) of the company may also have restrictions on changes of control in the company and would require prior approval from the issuer or counterparty.

3.2 Foreign Law

Generally, a choice of a foreign law as the governing law of the contract is upheld in Indonesia, except for a contract that is mandatory to be governed by Indonesian law under specific regulations, such as a construction contract. With respect to a submission to a foreign jurisdiction, it is generally legally binding and enforceable.

3.3 Judgments of Foreign Courts

A foreign-court decision is not enforceable in Indonesia. The merit and substance of the dispute must be re-litigated in an Indonesian court and the foreign-court judgment can be used as evidence in the retrial.

3.4 A Foreign Lender's Ability to Enforce

There is no restriction applicable to a foreign lender specifically to enforce its security right.

4. FOREIGN INVESTMENT

4.1 Restrictions on Foreign Lenders Granting Loans

Foreign lenders are not restricted in any way from granting loans in Indonesia.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

There is no impediment to or restriction on the granting of security or guarantees to foreign lenders unless the debtor is an SOE, which cannot grant any security or guarantee to lenders (both domestic and foreign) due to restrictions under the World Bank Negative Pledge and Indonesian regulations. For private companies, the granting of security or guarantees need to obtain approval from the general meeting of shareholders.

4.3 Foreign Investment Regime

Foreign direct investment in Indonesia is subject to the requirements and, in certain cases, the restrictions imposed under the regulations. With the issuance of Presidential Regulation No 10 of 2021 on Investment Business Activities, the government has opened most lines of business for 100%-foreign investors and there is only a minority of lines of business that is still subject to restrictions on foreign investment.

For a foreign investment company, there is a minimum amount of issued and paid-up capital that must be met upon the establishment of the company, ie, IDR2.5 billion and a minimum total investment of more than IDR10 billion (excluding land and buildings) for each line of business.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

There are no restrictions on payments abroad or repatriation of capital by foreign investors.

4.5 Offshore Foreign Currency Accounts

It is permissible for a project company to maintain offshore foreign currency accounts.

5. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

5.1 Registering or Filing Financing of Project Agreements

Other than the registration of certain Indonesian security documents, there is no need for any registration or filing of financing or project agreements with any government authorities in order for them to be valid or enforceable.

5.2 Licence Requirements

Generally, the ownership of land or natural resources and the undertaking of business operation of the assets requires a licence. In certain sectors, such licences can be held by a foreign entity, for instance, in the oil and gas and construction sectors.

5.3 Agent and Trust Concepts

The concept of trust is not recognised in Indonesia. The concept of an agent is recognised and commonly used in project finance in Indonesia.

5.4 Competing Security Interests

An in rem security-holder or secured creditor takes precedence over other unsecured creditors with respect to the foreclosure of a mortgaged, pledged or fiduciarily secured asset and receiving the proceeds of that foreclosure and over other creditors seeking recourse from the secured assets, except for those whose claims are preferred by law (such as claims for the costs of foreclosure, costs incurred to protect the mortgaged, pledged or fiduciarily secured asset from loss, and preferential claims of tax authorities).

The priority of security interest cannot be contractually varied.

There are uncertainties as to whether contractual subordination provisions will survive the insolvency or bankruptcy proceedings of a borrower, since:

- there is no specific provision in the Indonesian Civil Code (ICC) which regulates the subordination of debts, nor is there a provision in the Indonesian Bankruptcy Law (IBL) dealing with this issue; and
- the IBL merely classifies creditors into:
  (a) secured creditors;
  (b) preferred creditors; and
  (c) unsecured creditors.

It is likely that the claims that are subject to the contractual subordination provisions would be classified as unsecured creditors/claims under the bankruptcy proceedings.

It should be noted that the definition of insolvency under Indonesian law is different from other jurisdictions (for a detailed explanation of insolvency under Indonesian law, see **6. Bankruptcy and Insolvency**).

5.5 Local Law Requirements

Generally, local law requires that the project company be organised under the laws of Indonesia. Only certain sectors, such as the oil and gas and construction sectors, allow a foreign legal entity to conduct its business activities, subject to certain requirements. The typical legal form of a project company is a limited-liability company or a permanent establishment for the foreign legal entity that conducts its business in Indonesia.

6. BANKRUPTCY AND INSOLVENCY

6.1 Company Reorganisation Procedures

The court-sanctioned restructuring and insolvency proceedings, ie, suspension of payment (*Penundaan Kewajiban Pembayaran Utang* or PKPU) and bankruptcy, are often used to reorganise a company in Indonesia. Insolvency under Indonesian law has a different meaning from insolvency in other jurisdictions. Insolvency under Bankruptcy Law refers to "the state of being insolvent at law", which occurs when:

- no composition plan is submitted in the creditors' meeting for the verification of the claim;
- the composition plan is rejected in the voting process by the creditors;
- the composition plan is approved by the creditors but not ratified by the Commercial Court;
- no composition plan is ratified by the Commercial Court during the suspension of payments' period (causing the borrower, security-provider or guarantor (collectively, the Debtor) to be declared bankrupt and insolvent at the same time); or
- the final and binding ratified composition plan is nullified by the Commercial Court on the basis that the debtor is negligent in performing its obligations under the ratified composition plan.

The bankruptcy and PKPU processes are intertwined because (i) restructuring can emerge from a bankruptcy proceeding which aims at liquidation, as the IBL provides the opportunity for a bankrupt debtor to offer a composition plan, while (ii) liquidation can result from a PKPU proceeding which aims at continuation, especially if the PKPU proceeding fails to produce a composition plan that is acceptable to the creditors.

6.2 Impact of Insolvency Process

The secured lender may not be able to enforce its security right after the commencement of the insolvency process, as it will be subject to a stay period of a maximum of 90 days as of the rendering of a bankruptcy declaration, or a stay period of a maximum of 270 days during the duration of the PKPU as of the granting of the PKPU decision. Further, the Debtor in either bankruptcy or PKPU cannot be forced to pay its debts.

With respect to a contractual guarantee, the lender should still have the right to enforce the guarantee against the guarantor, to the extent that the guarantor is not under a PKPU or bankruptcy.

6.3 Priority of Creditors

The priority of creditors will only be applicable upon the liquidation process of the Debtor during the bankruptcy proceedings.

Creditors' claims are classified into several types, as follows.

Bankruptcy Estate Claims

Bankruptcy estate claims, also known as the post-bankruptcy claims, are claims against the bankruptcy estate which arise during the bankruptcy proceedings after the bankruptcy declaration is rendered and would normally rank higher than any other type of claims, for example:

- fees of the receiver/administrator;
- costs in the liquidation of the bankruptcy estate or costs incurred in the PKPU process (if commenced prior to the bankruptcy);
- fees of experts engaged during the proceedings;
- a post-bankruptcy financing;
- a lease of the bankrupt's house or offices during the bankruptcy proceedings; and

- wages of employees of the bankrupt debtor for their continued employment during the bankruptcy proceedings.

Preferred Claims

There are several types of preferred claims.

Preferred claims that rank higher than the secured claims

Preferred claims that rank higher than secured claims will need to be paid from the entire bankruptcy estate, including but not limited to the assets of the Debtor that have been encumbered by in rem security rights being held by the secured claims, ahead of the unsecured claims, for example:

- outstanding wages (excluding severance payments and other rights) of the employees of the bankrupt Debtor;
- specific expenses stipulated by the Tax Law:
  (a) legal expenses arising solely from a court order to auction movable and or immovable goods;
  (b) expenses incurred for securing the goods;
  (c) legal expenses, arising solely from the auction and settlement of inheritance;
  (d) a tax claim, court charges that specifically result from the disposal of a movable or immovable asset, and the legal charges, exclusively caused by the sale and saving of the estate.

Preferred claims that rank lower than those of the secured creditors

For specific statutorily preferred creditors whose preference relates only to the debtor's specific assets, as stipulated by Article 1139 of the ICC, if the specific relevant assets are subject to in rem security rights of the secured claim, the secured claim will rank higher.

General preferred claims

General preferred claims will need to be paid from the assets under the bankruptcy estate that have not been encumbered by in rem security rights being held by the secured claims, ahead of the unsecured claims.

General statutorily preferred creditors relate to the Debtor's assets in general, as stipulated by Article 1149 of the ICC (for example, revenue authorities, outstanding rights of the employees of the bankrupt debtor other than outstanding wages, eg, severance payments).

Secured Claims

Secured claims are the claims that are secured with in rem security rights over the Debtor's particular assets, regardless of whether or not the debt being secured is the Debtor's direct debt.

Note that the IBL provides that secured creditors are:

- able to prove that part of their secured claims would not be possible to be settled from the sale proceeds of the security, with a right to request the unsecured claims' right to be granted to that part of their secured claims, without jeopardising their privilege rights over the security;
- intending to cast votes in the voting of the composition plan under the bankruptcy proceedings, with the right to release their privilege rights under their secured claims to become unsecured claims;
- those whose secured claims cannot be entirely fulfilled from the sale proceeds of the security are to have the unpaid secured claims converted as unsecured claims.

Unsecured Claims

Unsecured claims are not secured with any in rem security rights and do not have any privilege granted by the prevailing laws and regulations.

They will be paid from the assets under the bankruptcy estate that have not been encumbered by in rem security rights held by the secured claims, after the general preferred claims have been fully paid.

The subordination of the creditor's claim of any class during the bankruptcy proceedings or the PKPU proceedings is not recognised under the IBL.

6.4 Risk Areas for Lenders

A transaction that is entered into by the Debtor within a specific period before the declaration of the bankruptcy of the Debtor may be nullified by the Commercial Court upon a claim submitted by the receiver in accordance with the provisions of the Bankruptcy Law.

The nullification of a legal action or transaction made by the borrower, security-provider or guarantor may be granted by the Commercial Court upon the petition of the receiver, if the receiver can prove the following requirements:

- the legal action being challenged was performed by the Debtor before the bankruptcy declaration was rendered;
- the Debtor was not obliged by contract or law to perform the legal action being challenged;
- the legal action being challenged prejudices all creditors' interests; and
- the Debtor and the counterparty with whom the debtor conducted the legal action being challenged, knew or should have known that the legal action would cause damages for the creditors.

With respect to the last requirement, the Indonesian Bankruptcy Law provides that if the transaction was conducted within one year before the bankruptcy (while the transaction was not mandatory for the Debtor, unless it could be proven otherwise), both the Debtor and the third party with whom the transaction was performed would be deemed to know that the transaction was detrimental to the creditors if it falls into one of the following three categories:

- a transaction in which the consideration that the debtor received was substantially less than the estimated value of the consideration given;
- a payment or granting of security for debts which are not yet due; or
- a transaction entered into by the Debtor with certain related parties (eg, a member of the board of directors/commissioners, majority shareholders).

The nullification of the payment of a debt that has become payable can only be granted if it can be proven that:

- the recipient of the payment (ie, the creditor) knows that the petition of bankruptcy against the debtor had been registered; or
- in the event that the payment was made due to a conspiracy between the Debtor and the creditor(s), in order to provide the creditor(s) in question with greater privileges than the other creditors.

The effect of a successful challenge is the nullification of the legal action or transaction in question (some court decisions have also declared that such actions to be unlawful acts based on the receiver's petition) and thereby the restoration of the conditions pertaining prior to the execution of those actions or transactions.

The IBL specifically provides for the following consequences of a successful challenge:

- any persons receiving properties or goods that constitute part of those assets of the debtor which are covered by the legal action being nullified must return them to the

receiver and this should be reported to the supervisory judge; if that person is not able to return the relevant goods or property before the legal action is taken, they must pay compensation to the bankruptcy estate; and
- the right of any third parties over the properties or goods, which are obtained in good faith and not free of charge (including the holder of the security rights being imposed on them), should be protected.

For goods being received by the Debtor under the legal actions being nullified, the receiver should return them or their value to the other party with whom the Debtor conducts the legal action, to the extent that the bankruptcy estate is not jeopardised. If there is an outstanding difference that needs to be returned to the other party with whom the Debtor conducts the legal action, that party may verify that difference as an unsecured claim.

6.5 Entities Excluded from Bankruptcy Proceedings

Generally, no entity is excluded from bankruptcy proceedings.

According to the Bankruptcy Law, the initiation of either bankruptcy or PKPU proceedings against:

- banks, insurance companies, securities companies, pension funds, and public-interest state-owned companies can only be undertaken by the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan*) (OJK);
- an SOE operating for the public interest whose capital is owned by the State and not divided into shares can only be undertaken by the Minister of Finance of the Republic of Indonesia.

Although not explicitly regulated by the Bankruptcy Law, the Supreme Court Decree No 109/MA/SK/IV/2020 on Guide Book for Resolving Bankruptcy and PKPU Cases, dated 29 April 2020 requires the OJK to initiate the voluntary bankruptcy proceedings against a "Finance Institution" or involuntary bankruptcy proceedings against "Other Financial Services Institutions" (for example: pawnshops, deposit insurance institutions, the Indonesian Eximbank (export financing), secondary mortgage facilities, the health and social security agency (*Badan Penyelenggara Jaminan Sosial*) and others that are under OJK supervision). Nevertheless, no similar provisions for PKPU proceedings exist.

In practice, no bank in Indonesia has ever been either liquidated under the bankruptcy proceedings or restructured under the PKPU proceedings under the Bankruptcy Law, although it is technically possible. Instead, all bank dissolutions and liquidations cases that have occurred in Indonesia in practice used the Dissolution & Liquidation Proceedings under Indonesian Company Law and the applicable bank liquidation rules.

7. INSURANCES

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

There have been no restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by insurance companies in Indonesia. However, payment of the insurance premium received by foreign insurance companies is subject to income tax.

7.2 Foreign Creditors

Insurance policies over project assets are payable to foreign creditors.

8. TAX

8.1 Withholding Tax

The payment of interest, certain fees and proceeds from guarantees or the enforcement of security is subject to withholding tax. The withholding tax is to be collected by the borrower.

8.2 Other Taxes, Duties, Charges

Withholding tax, as previously mentioned, may not be applicable or charged at a lower rate than the normal rate under the regulation (generally set at 20%) if there is a tax treaty with the country where the lender is incorporated.

From the borrower's perspective, it is subject to income tax (the rate is generally set at 25%) and value-added tax (the current rate is 10%). Capital gains tax is applicable to proceeds from enforcement of security or guarantee. Certain charges payable to the government through the relevant security registration office will also apply to the registration of security (namely, mortgages and fiducia).

8.3 Limits to the Amount of Interest Charged

A usury law (known as *woekerordonantie*) is still in force, which generally allows the court, at the request of the disadvantaged party, to declare an agreement null and void if the agreement indicates a disproportionate interest value. However, usury law under Indonesian law is generally considered not to affect commercial loan agreements.

9. APPLICABLE LAW

9.1 Project Agreements

Project agreements in Indonesia are typically governed by Indonesian law. Normally, it is only offshore supply agreements that are governed by foreign law.

9.2 Financing Agreements

Other than Indonesian security documents (which must be governed by Indonesian law), financing agreements are typically governed by foreign law.

9.3 Domestic Laws

Matters which are typically governed by domestic law are those for which the performance and objectives are in Indonesia and which by regulation are obliged to be governed by domestic law, such as onshore construction activities or power purchase agreements with PT Perusahaan Listrik Negara (Persero) (PLN).

ABNR Counsellors at Law is Indonesia's longest-established law firm (founded 1967), and pioneered the development of international commercial law in the country, following the reopening of its economy to foreign investment after a period of isolationism in the early 1960s. With over 100 partners and lawyers (including two foreign counsel), ABNR is the largest independent, full-service law firm in Indonesia and one of the country's top-three law firms by number of fee earners, giving the firm the scale needed to handle large and complex transnational deals across a range of practice areas simultaneously. ABNR also has global reach as the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries. ABNR's position as LM member firm for Indonesia was reconfirmed for a further six-year period in 2018.

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Serafina Muryanti joined ABNR in 2007 and was made a partner in January 2019. She focuses her practice on project finance and development, mergers and acquisitions (M&A) and foreign direct investment (FDI). In project finance and development, she has extensive experience advising lenders and sponsors on power-project financings, including related-risk analyses and all aspects of the Indonesian regulatory regime. Over the years, she has been involved in many of Indonesia's largest power projects, including the Paiton Expansion Project, the Tanjung Jati B Expansion Project, the Sarulla Project, the Wampu Hydroelectric Project, the Semangka Hydroelectric Project, the Central Java PPP Project, the Cirebon Expansion Project, the Tanjung Jati B 5 & 6 project, and the Muara Laboh and Rantau Dedap Geothermal projects. In other infrastructure projects, she is a member of the ABNR team advising on the procurement, financing and development of waste to energy, waste treatment and water-supply projects.

Emir Nurmansyah is a senior partner at ABNR and a member of the firm's management board, and is one of the most respected and versatile lawyers in Indonesia today. After some 30 years in legal practice, he is a market-leading lawyer for project finance and development, banking and finance, corporate/mergers and acquisitions (M&A), and foreign direct investment (FDI). He also offers extensive experience and expertise in restructuring and insolvency, shipping, aviation, and technology, media and telecommunications (TMT). As head of ABNR's project finance and development practice, Emir has been involved in most of the major power projects developed in Indonesia in recent years, including the USD1.74 billion, 1000 MW Cirebon Expansion Project, the USD3 billion, 2000 MW Java 9&10 project, and the USD2.7 billion, 2 x 660 MW Tanjung Jati A project.

Kevin Omar Sidharta is a key member of ABNR's restructuring and insolvency, technology, media and telecommunications (TMT), and aviation practices, and also has busy M&A/FDI, real estate and project finance and development practices. In project finance and development, he has led a number of notable projects, including PT Patra SK's USD127.5 million Lube Base Oil Plant Project, and PT Krakatau Posco Energy's USD193.9 million, 200-MW Captive Power Plant Project. He is currently involved in the USD5.9 billion Jakarta-Bandung High Speed Rail Project being developed by PT Kereta Cepat Indonesia China.

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