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Project Finance

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Contributing editor**Aled Davies**

Milbank LLP

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

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 on India and Taiwan.

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.lexology.com/gtdt.

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 editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



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Indonesia

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ABNR

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Security interests in Indonesia are generally limited to those prescribed by law, and cover in rem and in personam security.

There are three basic forms of in rem security available under the Indonesian law, depending on the type of collateral: mortgage (*Hak Tanggungan*) for land, buildings, fixtures above and attached to land; pledge over shares and bank accounts; and fiduciary transfer for movable and immovable tangible assets (including buildings and other fixtures that cannot be secured by a mortgage), receivables, insurance proceeds and intellectual property.

The in personam security interest is a guarantee.

Under strict legal interpretation, Indonesia does not allow parties to freely determine or create a security interest contractually. However, in practice, 'contractual security' is being done notwithstanding questions of validity and the possibility of being deemed invalid by Indonesian courts, as it may be considered circumvention of Indonesian security laws. The common forms of contractual security are, for example, a conditional assignment or novation of contractual rights and obligations for security purposes or powers of attorney.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Mortgage

A mortgage is established through the signing of a mortgage deed before a land deed official in Indonesia and registration with the E-Mortgage Deed Registration System.

The mortgage will be established and finalised once the electronic mortgage certificate (E-Certificate) and annotation note are issued. This will be sent to the mortgagee via email. The annotation note must be printed and attached to the original land certificate(s).

Under the E-Mortgage regime, each lender or creditor must initially register itself in the E-Mortgage Party Registration System prior to the registration of the mortgage deed in the E-Mortgage Deed Registration System. The online mortgage registration system is relatively new and unfortunately still in Bahasa Indonesia only. Registration of lenders or creditors with the system may be burdensome for offshore creditors or lenders and may take a significant amount of time to complete.

Generally, no regulatory approval or consent is required to establish a mortgage. However, in the event that the land title held by the project company is granted upon land with management rights held by the government, the establishment of a mortgage may require approval from the relevant government institution, depending on the underlying arrangement for the land cooperation or utilisation agreement entered into between the project company and the relevant government institution as the basis to apply for the land title.

A mortgage is subject to registration fees or charges and Non-Tax State Revenue (PNBP) paid to the government, with a maximum PNBP of 50 million rupiah per mortgage deed.

Fiduciary transfer

A fiduciary transfer security is established by entering into a written agreement and signed before a notary to be made into a notarial deed form. Based on the fiduciary transfer agreement, the transferor transfers to the transferee its rights of ownership in respect of the assets for the time during which the debt under the agreement remains outstanding. 'Possession' of the tangible assets remains with the transferor, who is normally entitled to use the assets in the ordinary course of business.

The fiduciary transfer agreement must be registered (online) at the Fiducia Registration Office within 30 days of the date of the fiduciary transfer agreement. The fiduciary transfer security becomes effective on the date of registration, and upon acceptance of the registration application the fiduciary transferee will receive a Fiduciary Certificate issued by the Fiduciary Registration Office.

If within 30 days the fiduciary transfer agreement is not registered, the parties must re-execute the fiduciary transfer agreement.

Until the enforcement of the fiduciary security or assignment has been properly notified to, or acknowledged by, the debtors, the debtors may still pay their receivables to the fiduciary assignor in discharge of their debts and obligations to the fiduciary assignor (though the absence of notification and acknowledgement does not affect the validity of the fiduciary transfer). The legal effect of the notification or acknowledgement is that debtors can thereafter no longer validly settle with the fiduciary assignor and are required to make payments directly to the fiduciary assignee.

Fiduciary transfer security is subject to registration fees or charges and PNBP paid to the government.

Pledge

A pledge is established by a deed of pledge setting forth the particulars of the pledge, which can be executed in a notarial deed form or privately.

In respect of tangible assets, the requirement for the establishment of a pledge is that the pledged asset is physically transferred out of the possession of the pledgor. The right of pledge will be discharged when the pledged asset is no longer kept under the control of the creditor. In respect of intangible movable assets, a notification must be made to whomever the assets or receivables would have to be paid.

With respect to a pledge of shares, the pledge must be registered in the shareholders register of the company. To create a pledge on listed shares, both the company and the Stock Administration Bureau must be notified of the pledge. This will be recorded in the shareholders register held by the Stock Administration Bureau. For blocked shares kept in the custody of the Indonesian Central Securities Depository, a confirmation letter will be issued by them certifying that the shares are pledged.

With respect to a pledge of bank account, the relevant bank must be notified and acknowledged of the pledge. The acknowledgement also serves to evidence the bank's agreement to the provisions set out in the notice. In practice, a pledge of a bank account is normally supported by the power of attorney to manage bank accounts. This power of attorney, however, does not create an in rem security interest.

A pledge is subject to registration fees or charges and PNPB paid to the government.

General

In addition to the above, the following are the items to be observed in regard to the establishment of a security (mortgage, fiduciary transfer or pledge) under Indonesian law.

From a corporate law perspective, the board of directors needs to obtain approval from a general meeting of shareholders to provide any guarantees that may result in more than 50 per cent of the company's assets to be transferred to a third party in the event that the guarantee (security) is enforced. Nevertheless, in practice (especially for project finance), it is common for the lenders to require corporate approval from all the company's organs (ie, a general meeting of shareholders, the board of commissioners and the board of directors).

It should be noted that if the borrower is a state-owned company, it cannot grant security over its assets or provide a guarantee due to the restriction applicable under Indonesian regulation and the World Bank Negative Pledge.

The concept of a security trust is not recognised in Indonesia. The common arrangement used in Indonesia is the concept of a security agent. The security agent can act on behalf of the individual lenders to sign the security documents and enforce the security. There is no requirement for the security agent to hold any licence for this purpose.

In addition to the fees relevant to the type of security, there is a notarisation fee for security types that must be made in a notarial deed form. The notarisation fees vary, as a notary is given the freedom to determine them. The stamp duty applicable in Indonesia is 10,000 rupiah, affixed to the notarial deed or privately executed agreements.

A mortgagee, pledgee or fiduciary grantee is not only entitled to foreclose on the mortgaged, pledged or fiduciarily secured asset, but may also enforce his or her claim out of the proceeds ahead of most other creditors seeking recourse on the mortgaged, pledged or fiduciarily secured asset, except for those whose claims are preferred by law (such as claims for costs of foreclosure, costs incurred to protect the mortgaged, pledged or fiduciarily secured asset from loss, and preferential claims of tax authorities).

Bankruptcy of the mortgagor, the pledgor and the fiduciary grantor does not, in principle, affect the security right of the mortgagee, pledgee and fiduciary grantee in that the assets in question are not regarded as being part of the bankruptcy estate.

Contractual security will be treated like any other contractual arrangement in the event of the bankruptcy of a borrower where the receiver has the right to determine the continuation of the contract, and thus it may not survive the event of the bankruptcy. The Indonesian Civil Code also provides that a power of attorney, even if irrevocable, automatically terminates by operation of law upon bankruptcy of the grantor of the power of attorney. This rule is mandatory and a contractual provision to the contrary is invalid and ineffective.

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

It is not typical for creditors in project finance in Indonesia to provide a loan in the absence of lien or security interest. Project finance in Indonesian is typically non-recourse financing and therefore the creditors would be secured creditors.

The financing sources for project finance in Indonesia are typically bank financing, multilateral or bilateral financial institutions and export credit agencies. Project bonds are also a source of project finance, although not used as often as bank or export credit agency financing. Recently, Islamic financing has also been used in project financing in Indonesia.

The project sponsors will incorporate a special purpose vehicle in the form of a limited liability company to develop and run the project (the project company). As in typical project financing, the project company will become the borrower and all of its assets will be secured for the benefit of the lenders. The sponsors are required to provide sponsor support in the form of a contractual undertaking (set out in a sponsor support agreement) to provide equity to the project company when necessary.

In the absence of a lien, the creditors will be unsecured creditors and will rank at least *pari passu* with all its other present or future unsecured obligations.

Enforcing collateral rights

4 | Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Security interest in Indonesia can be enforced by way of public auction or private sale. In the event of default, theoretically, secured lenders may sell the secured assets without any court decision. However, in practice, the state auction body sometimes still requires a court decision or order to be provided before it will proceed with a public auction. The state auction body may even refuse the application of a public auction sale if the party that wishes to execute the security could not provide a court decision or order for the said auction.

For a pledge of shares, the enforcement may be subject to the following restrictions. The sale of pledged shares through enforcement of the pledge will be subject to restriction of the articles of association of the company whose shares have been pledged. The articles of association may stipulate that the sale of shares is subject to other shareholders' right of first refusal, or a general meeting of shareholders prior approval. In some cases, licences of the company may include restrictions on changes of control of the licence holders and thus these provisions must also be observed.

Subject to obtaining specific permission from an Indonesian court, each of the persons secured by a security interest will be permitted to bid on any collateral auctioned in any judicial foreclosure proceeding; and specifically for a bank conducting the bid, the bank must submit a statement that the purchase is being made for another party that will be appointed within one year of the auction.

Sales of the secured assets carried out in Indonesia will be subject to the mandatory use of rupiah and therefore must be made in rupiah. However, the mandatory use of rupiah is not applicable to a transfer in foreign currency by a resident party to a non-resident party that is not in payment or other settlement of a transaction effected in Indonesia. Therefore, the payment of the sales proceeds to an offshore lender can be made in foreign currency.

Enforcing collateral rights following bankruptcy

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

A bankruptcy proceeding may affect the ability to enforce security during the 'stay period'. The stay period is 90 days from the rendering of a bankruptcy declaration, and a maximum of 270 days from the rendering of a suspension of payments decision.

Preferential creditors would have a higher ranking with respect to proceeds arising out of the bankruptcy asset's liquidation, even though the assets might be part of a secured claim of a creditor. Claims for costs of foreclosure, costs incurred to protect the bankruptcy assets, claims from the government (including tax) and employees' claims all have a higher ranking than a secured claim.

No entity is excluded from bankruptcy proceedings. However, certain financial institutions can only be the subject of a bankruptcy petition made by a relevant government institution. For example, insurance companies can only be petitioned by the Indonesian Financial Services Authority. The legislation applicable to them is Law No. 40 Year 2014 on Insurance.

Based on Law No. 37 of 2004 on Bankruptcy and Suspension of Payments (Bankruptcy Law), there are two types of court-sanctioned insolvency proceedings applicable to the Indonesian limited liability companies: bankruptcy proceedings and suspension of payment proceedings.

Bankruptcy proceedings

Bankruptcy proceedings are initiated by the filing of a bankruptcy petition by either the creditor (either unsecured or secured) or the debtor itself, which contains the receiver nomination. If the bankruptcy petition is granted, the Commercial Court will declare the debtor bankrupt and appoint a receiver and a supervisory judge.

The court-appointed receiver will handle the affairs of a bankrupt debtor during the bankruptcy process. A bankrupt debtor can still reorganise if the composition plan that the debtor offers is approved by the affirmative votes of more than half of the unsecured creditors, who are present or represented at the voting meeting and whose rights are acknowledged or provisionally acknowledged; and who represent at least two-thirds of the total amount of the unsecured claims of the unsecured creditors present or represented at the meeting and whose rights are acknowledged or provisionally acknowledged.

Otherwise, the bankrupt debtor will be declared insolvent and the receiver will liquidate the bankrupt debtor.

Suspension of payment proceedings

The suspension of payment proceedings (PKPU) are initiated by the filing of the PKPU petition by either the creditor or the debtor itself, which contains the administrator nomination. If the PKPU petition is granted, the Commercial Court will grant the debtor a provisional PKPU and appoint an administrator and a supervisory judge. The court-appointed administrator will, jointly with the debtor's directors, handle the affairs of a corporate debtor. A debtor in a PKPU can reorganise if the composition plan that the debtor offers is approved by the affirmative cumulative votes of:

- more than half of the unsecured creditors, who are present or represented at the meeting and whose rights are acknowledged or

- provisionally acknowledged; and who represent at least two-thirds of the total amount of the unsecured claims of the unsecured creditors present or represented at the meeting and whose rights are acknowledged or provisionally acknowledged; and
- more than half of the secured creditors, who are present or represented at the meeting; and who represent at least two-thirds of the total amount of the secured claims of the secured creditors present or represented at the meeting.

Otherwise, the bankrupt debtor will be declared bankrupt and insolvent. The receiver thereafter will be appointed to liquidate the bankrupt debtor.

The two types of proceedings are not principally opposed and can be used as needed by the situation at hand. Generally, the claims of foreign creditors are treated the same as the claims of local creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Foreign exchange controls in Indonesia are limited. Generally, the rupiah can be freely converted into other foreign currencies within Indonesia, although the conversion of rupiah to foreign currencies or the purchase of foreign currency in the amount of more than US\$25,000 (or equivalent) per month per customer for purchase of foreign currency for a spot transaction or US\$100,000 (or equivalent) for derivative transactions, US\$5,000,000 (or equivalent) for forward transactions and US\$1,000,000 (or equivalent) for option transactions must be based on an underlying transaction, with a maximum amount specified under the underlying transaction, and the party purchasing the foreign currency is required to submit supporting and underlying documents to the exchange bank.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Other than bank fees, there are no restrictions applicable.

With respect to the applicable taxes, dividend income earned or received from domestic listed and non-listed companies, that is declared in a shareholders meeting, is exempted from tax if the recipient is:

- a domestic individual recipient, with certain restrictions; or
- a domestic corporate recipient, without any restriction.

Generally, an Indonesian individual is subject to 10 per cent final income tax for receiving dividend income from a domestic source. However, there is an exemption for the 10 per cent final income tax, in which the 10 per cent final income tax is exempted for the portion of the dividend that is reinvested into Indonesia within a certain period, as regulated by the Minister of Finance regulations. The difference between the amount of dividend received and the amount reinvestment is still subject to 10 per cent final income tax.

The following withholding tax rates are applied to dividends or interest paid by an Indonesian company:

- 15 per cent of the gross amount if paid to a resident taxpayer other than an individual resident taxpayer;
- 10 per cent of the gross amount if paid to an individual resident taxpayer; and
- 20 per cent of the gross amount if paid to a non-resident taxpayer, unless any applicable double tax treaty requires a lower rate.

Foreign earnings

- 8 | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

No, project companies are not obliged to repatriate foreign earnings.

- 9 | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes, project companies may establish and maintain foreign currency accounts in other jurisdictions and locally.

FOREIGN INVESTMENT ISSUES

Investment restrictions

- 10 | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Foreign direct investment is subject to restrictions or requirements that vary based on the line of business of the company, for example: limited foreign shareholding; minimum capital contribution; or certain cooperation with micro-, small and medium-sized enterprises.

For foreign shareholders, the dividend received is subject to income tax at a general rate of 20 per cent or 10 per cent for a specified line of business that is subject to tax facilities, or can be lower if there is a tax treaty that has established a lower tax percentage between Indonesia and the home country of the shareholder.

Insurance restrictions

- 11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

There are no restrictions on insurance policies over project assets provided or guaranteed by foreign insurance companies. However, payment of the insurance premium received by foreign insurance companies is subject to income tax in Indonesia (at 20 per cent).

Insurance policies over project assets are payable to foreign secured creditors if the insurance policies are subject to fiduciary security and the relevant insurance company has provided its acknowledgement of the fiduciary security or assignment.

Worker restrictions

- 12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Employment of foreign workers, technicians, engineers or executives by a project company requires the project company to initially obtain the necessary permits (ie, Approval of Foreign Personnel Utilisation Plan). In certain sectors, for example geothermal energy, there is a requirement that the head of geothermal engineering and deputy head of geothermal engineering cannot be a foreign worker and must be an Indonesian national.

Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

Importation of project equipment is subject to obtaining approval of the master list and the project company or contractors obtaining the necessary import licence. Import of equipment or any capital goods is subject to import duties, value-added tax (VAT) and income tax for imports.

For foreign investment companies, there are tax facilities provided by the government that can be applied for exemption from import duties and VAT for capital goods.

Nationalisation laws

- 14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Indonesian investment law generally protects foreign investment companies from nationalisation or expropriation by the government. The government does not take measures to nationalise or expropriate the proprietary rights of investors; if the government were to do so, it would have to be based on law and involve payment of compensation determined by market value established in accordance with internationally accepted methods adopted by an independent appraiser appointed by the parties.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

- 15 | What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

If there is a tax treaty with the country where the recipient of the interest or the bank or the investors is incorporated, withholding tax may not be applicable or may be charged at a lower rate in accordance with the provisions under the tax treaty.

Tax incentives (eg, lower income tax for dividends, automatic exemption from income tax for importing of equipment required for the operation of the renewable project, and income tax relief through a reduction of net income of the total investment (up to 30 per cent applied within a six-year period with a reduction of 5 per cent per year)) are also applicable to foreign investors in renewables and pioneer industry.

Non-tax government fees are payable for the registration of security documents with the relevant government institution, the rate of which is subject to where the relevant security coverage value amount falls. There is a requirement for a duty stamp to be affixed to loan and security documents to be signed in Indonesia; however, the absence of a duty stamp will not affect the validity of the documents but is required if such documents are to be used as evidence before the courts in Indonesia.

GOVERNMENT AUTHORITIES

Relevant authorities

- 16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The relevant authorities are:

- energy sector: Ministry of Energy and Mineral Resources; specifically for power with a BOOT scheme, PT Perusahaan Listrik Negara (Persero), a state-owned company that will become the sole off-taker;
- transportation (ports, airports, railways): Ministry of Transportation;
- water, waste management and toll roads: Ministry of Public Works and Housing; and
- telecommunications (eg, satellites, underground cables): Ministry of Communications and Information.

REGULATION OF NATURAL RESOURCES

Titles

- 17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

All energy and mineral natural resources found within the Indonesian jurisdiction are national assets of the Indonesian people and shall be controlled and utilised by the state for the maximum welfare of the people. Accordingly, the selling of energy and mineral natural resources is generally regulated and, to a certain extent, subject to government approval. For instance, in the sector of mineral mining, a mining company is obliged to process and purify their minerals domestically before they can export the minerals. Selling minerals below certain purification levels is permitted provided that the mining company obtains approval from the Director General of Foreign Trade at the Ministry of Trade, which is issued based on a recommendation from the Director General of Mineral and Coal at the Ministry of Energy and Mineral Resources. As a result of this policy, in recent years, there have been a number of project financings in Indonesia for the development of processing and purifying facilities.

Royalties and taxes

- 18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction and export of natural resources is generally subject to a variety of regulations and to some extent requires government approval. In the mining sector, a mining company must process and purify the minerals in Indonesia before they can be exported. The export proceeds from natural resources exploitation, management and processing activities must be paid into an onshore bank account.

Export restrictions

- 19 | What restrictions, fees or taxes exist on the export of natural resources?

Pursuant to Government Regulation No. 1 of 2019 on Export Proceeds from Natural Resources Exploitation, Management, and/or Processing Activities, export proceeds from natural resources must be paid to an onshore bank account.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

- 20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

The transaction documents do not need to be registered with any governmental body. However, upon the signing of the transaction documents, the borrower must report to Bank Indonesia and the Minister of Finance and must provide a copy of the main finance documents (eg, common terms agreement). There is no fee or other charges that apply for the report.

There is no requirement under Indonesian law to have the finance documents governed by Indonesian law. Therefore, it is common in Indonesia to have the finance documents governed by foreign laws (usually English law or New York Law).

Registration of financing

- 21 | Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

There is no specific registration required with government authority or legal formalities other than those that have been mentioned above (reporting to Bank Indonesia and the Minister of Finance, documents to be made in notarial deed form, etc).

There is a language requirement applicable in Indonesia. Law No. 24 concerning Flag, Language, National Emblem, and National Anthem and its implementing regulation, Presidential Regulation 63/2019 on the Use of Indonesian Language (Language Regulations) provides, among other things, that a memorandum of understanding or an agreement between Indonesian individuals or Indonesian legal entities must be set out in the Indonesian language and, if it involves a foreign entity, such memorandum of understanding or agreement may also be set out in the national language of such foreign party or the English language.

Based on the Language Regulations, the parties are free to choose the version that will prevail should differences or inconsistencies be found between the Indonesian language version and the foreign language version of an agreement entered into between foreign parties and Indonesian parties.

There has been a court case that invalidated agreements on the basis that the agreement was only executed in the English language and that the parties did not prepare and execute an Indonesian language version of the agreement. Indonesian law does not adopt the concept of precedence, and there is in principle no obligation for other courts in Indonesia to follow previous court decisions. However, these court decisions serve to demonstrate how other courts may interpret the regulations and may be taken into account by the courts in Indonesia when making decisions in similar cases.

Arbitration awards

- 22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Indonesia is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (ie, the New York Convention). Therefore, international arbitral awards (including English or New York arbitral awards) are enforceable under Indonesian law. The award becomes enforceable after an Indonesian court validates the award by issuing a writ of *eksekutorial* (a court order).

Labour disputes and disputes related to licences, permits or governmental approvals are not arbitrable under Indonesian law.

In the oil and gas sector, the regulation requires that for certain contracts or agreements (such as an engineering, procurement, and construction contract), if arbitration is chosen as the dispute resolution forum, it must be referred to domestic arbitration via Badan Arbitrase Nasional Indonesia.

Law governing agreements

23 | Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Typically, project agreements are governed by Indonesian law. Certain project agreements whose performance does not have to be conducted in Indonesia, such as offshore supply contracts or technical services agreements, are typically governed by foreign law.

Except for Indonesian security documents, the financing agreements are typically governed by foreign law.

Matters that involve performance by the parties or are related to the financing and security upon assets that are located in Indonesia are all conducted in Indonesia. Certain contracts, such as for construction, are required by law to be governed by Indonesian law.

Submission to foreign jurisdiction

24 | Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

In general, a party's submission to a foreign jurisdiction and waiver of immunity is generally legally binding and enforceable. However, a foreign court decision is not enforceable within Indonesia. The judgment can be used as evidence in a retrial of the merits of the case, but subject to the prevailing laws and regulations. Indonesia is not a party to any treaty, convention or bilateral agreement that recognises the enforcement of a foreign court judgment.

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

25 | What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Environmental matters in Indonesia are generally governed by Law No. 32 of 2009 on Environmental Protection and Management (Environmental Law). The Environmental Law was enacted for the purpose of protecting Indonesian territory from environmental pollution and damage. In light of this, the Environmental Law requires any business activity conducted within Indonesia to comply with the requirement to prepare environmental impact analysis documents that must be approved by the Minister of Environment and Forestry, Governor, Mayor or Regent (depending on the activities and coverage area of the project). The project company must also obtain an Environmental Permit issued by the Minister of Environment and Forestry, Governor, Mayor or Regent (as applicable).

Normally the oil and gas, power and mining sectors are also subject to Government Regulation No. 101 of 2014 on Management of the Waste of Hazardous and Toxic Materials, which requires that every company conducting business activities using or producing hazardous and toxic materials (locally known as B3) perform B3 waste reduction, B3 waste processing or B3 waste land-filling and obtain a B3 Waste Management Permit.

In respect of health and safety, the project company must prepare occupational health and safety guidelines pursuant to Law No. 1 of 1970 on Work Safety. Further, each industry sector also has its own safety

regulations. However, the general requirement is that every installation, as well as all equipment and machinery used by a company, must have certificates of worthiness.

In the context of infrastructure projects, the relevant government bodies that oversee environmental health and safety in Indonesia are the relevant local government, the Ministry of Environment and Forestry, the Ministry of Energy and Mineral Resources and the Ministry of Human Resources.

PROJECT COMPANIES

Principal business structures

26 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

The project sponsors will usually incorporate a special purpose vehicle in the form of a limited liability company to develop and run the project (the project company). As in typical project financing, the project company will become the borrower and all of its assets will be secured for the benefit of the lenders. The sponsors are required to provide sponsor support in the form of a contractual undertaking (set out in a sponsor support agreement) to provide equity to the project company when necessary.

The financing sources for project finance in Indonesia are typically bank financing, multilateral or bilateral financial institutions and export credit agencies. Project bonds are also a source of project finance, although not used as often as bank or export credit agency financing. Recently, Islamic financing has also been used in project financing in Indonesia.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

27 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The mechanisms for establishing public-private partnerships between the government and the business sector for the development of infrastructure are generally set out in Presidential Regulation No. 38 of 2015 on Government Co-operation with Business Entities in the Procurement of Infrastructure (PR 38/2015).

This type of cooperation was introduced as an alternative to the conventional bureaucratic 'business licensing' to entice investors by providing a sense of greater equality between the parties, as the private investor is deemed the government's counterparty. Under Indonesian law, contracts are considered as law and bind those who enter into them. This means that the government is legally bound to honour the contract, thus giving greater certainty compared to business licensing.

The procurement of an infrastructure project that will be developed with a PPP scheme is prepared by the minister, head of the institution or the head of the region. However, private business entities can initiate a PPP project and bring it to the government if the proposed infrastructure project and the procurement fulfil the following criteria:

- being technically integrated to the master plan for the relevant sector;
- being economically or financially feasible; and
- the private business entity is capable of financing, or procuring financing for, the implementation of the project.

The appointment of the business entity that will execute the PPP project (business entity executor) can be by way of public tender or direct appointment. Under PR 38/2015 direct appointment is expressly permitted in the event of the following situations:

- development of infrastructure that has been built or operated previously by the same developer;
- the work can only be carried with new technologies and only one developer can provide that technology; or
- the developer controls most or all the land required to implement the PPP.

If the PPP project was initiated by a private business entity, that private business as the initiator may receive compensation or certain advantages in the form of an extra 10 per cent added to its points score in the competitive tender, the right to match, or the right to sell the project's idea or plan (including any intellectual property rights) to the government or the tender winner.

The implementation of the PPP project will be based on the cooperation agreement signed between the government contracting agency (CA) and the business entity executor.

Under PR 38/2015, the business entity executor is required to obtain the financing for the PPP project within 12 months of the signing of the cooperation agreement. However, the CA can grant an extension from time to time (with each extension being for a maximum of six months) if the failure to obtain financing is not caused by negligence of the business entity executor.

PPP - LIMITATIONS

Legal limitations

28 | What, if any, are the practical and legal limitations on PPP transactions?

Although not specific to PPP transactions, in the power sector, in particular for non-geothermal independent power projects (IPPs), the transfer of shares prior to the commercial operation date (COD) is subject to restriction under Minister of Energy and Mineral Resources Regulation No. 48 of 2017 on the Supervision of Business Activities in the Energy and Mineral Resources Sector (Regulation 48).

Regulation 48 provides that, prior to COD, non-geothermal IPPs may only transfer shares to affiliated parties whose shares are more than 90 per cent-owned by an equity financier or sponsor. Further, the affiliate must be a party one level below the sponsor (a direct subsidiary of the sponsor). While Regulation 48 does not define the term 'sponsor', the current view from the Ministry of Energy and Mineral Resources is that the term is intended to refer only to direct shareholders of the IPP. The effect of this, given the way in which the term 'sponsor' is used in Regulation 48, appears to be that the share transfer restrictions described above only apply to transfers of shares in the IPP itself, and not to transfers of shares in (including share pledge enforcements over) its direct or indirect shareholders. While, so far, the restrictions seem intended only to apply to shares in the IPP itself, we cannot exclude the possibility that the ministry may change its view in the future, as a literal reading of Regulation 48 is not free from doubt on this point.

PPP - TRANSACTIONS

Significant transactions

29 | What have been the most significant PPP transactions completed to date in your jurisdiction?

In public infrastructure, the main transactions have been in project financing for power plants, toll roads, water treatment and supply.



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UPDATE & TRENDS

Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

There have not been any emerging trends in project finance in Indonesia recently.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There are no relief programmes or other initiatives specific to project finance implemented to address the pandemic.

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