Private Equity

Contributing editor
Bill Curbow

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Private Equity 2017

Contributing editor
Bill Curbow
Simpson Thacher & Bartlett LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2005
Thirteenth edition
ISSN 1746-5524

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Indonesia

Freddy Karyadi and Mahatma Hadhi

Ali Budiardjo, Nugroho, Reksodiputro

Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

Currently private equity funds are not specifically regulated; private equity funds are set up outside Indonesia and then subsequently invested in the Indonesian portfolio or target company (which may be an operating company, holding company or listed company). Offshore private equity funds sometimes set up a limited liability company (PT) in Indonesia or a representative office to ease and support their efforts to find lucrative deals, or to act as a liaison office or for monitoring their portfolio.

A PT as a portfolio or target company can be in the form of a privately owned or publicly listed company. Law No. 40 of 2007 regarding Limited Liability Company (the Company Law) defines PTs as any legal entity that forms a partnership of capital, established by an agreement, performs business activities with all of its authorised capital divided into shares and fulfils the requirements as provided for in the Law and its ancillary regulations. It means PT has a legal entity and recognises the separation assets of the shareholders. As a consequence, shareholders and management boards (ie, the board of directors) of PTs shall not be personally liable for a binding agreement entered into in the name of the PT and, specifically for shareholders, they shall not be liable for PTs' losses extending beyond the value of shares he or she owns. However, to a certain extent, the shareholders or board of directors may be assumed liable for any loss within the PT if they have conducted activities in bad faith or have violated their fiduciary duty.

For certain investments, private equity may invest via discretionary funds in the form of mutual funds or venture capital in order to manage the restrictions on foreign ownership under the negative list regulation.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

As it is not specifically regulated, a private equity fund is normally formed outside Indonesia. The fund subsequently may form a PT in Indonesia to support its investments in the country.

In brief, the process for establishing a PT pursuant to the Company Law involves the following steps:

- reserve the name of the company;
- filing to the Indonesian Investment Coordinating Board (BKPM) if the PT is a foreign investment company;
- signing of the deed of establishment;
- filing for certificate of company domicile;
- filing for taxpayer registration number and taxable entrepreneur confirmation number;
- opening bank account and capital injection;
- filing for Ministry of Law and Human Rights (MOLHR) approval of the deed of establishment;
- registering the company office;
- announcement of the deed of establishment by MOLHR; and
- filing for a business licence (ie, BKPM business licence if the PT is a foreign investment company or a trade business licence if the PT is a local company).

It takes approximately two months for companies to obtain a legal entity and four months to be ready to commence commercial business activities.

It is actually free of charge to establish a new company, except for the costs involved in reserving the name of the PT and in notarising documents.

Note that if the PT is established with the status of foreign investment company because of foreign equity participation, any investment made by such PT will be considered as foreign investment and foreign ownership restrictions may be applicable for certain lines of business.

For non-conventional structures, a fund can also be established in the form of a limited participation collective investment contract (KIK-UPT). KIK-UPTs are regulated under the Financial Services Authority (OJK) Regulation No. 37/POJK.04/2014 on Mutual Fund in the Form of Limited Participation Collective Investment Contract (OJK Regulation 37). The formulation of a KIK-UPT is subject to OJK Regulation 37 and relevant regulations on the mutual fund and it must be registered with the OJK. The fund must be managed by a qualified investment manager, having net asset value of at least 1,000 rupiah as a start and based on a collective investment contract that meets requirements stipulated under OJK Regulation 37. Distinguished features of a KIK-UPT compared with a conventional mutual fund are that this fund can only invest in debt securities not offered by an IPO and equity securities that are not issued by a publicly held company.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

Generally a private equity fund vehicle does not need a custodian, administrator or a corporate secretary unless the form of it is KIK-UPT or a mutual fund, in which case it must have a bank custodian and fund manager who are licensed under the OJK. It should also maintain books and records and have a registered office.

If the private equity fund vehicle is in the form of a PT, it must have a registered office and its board of directors must maintain the shareholders register, books and records under the Company Law. The failure to maintain and keep those records could constitute negligence on the part of the board of directors for which they are personally and jointly liable for any losses that may be suffered.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

The MOLHR provides a database consisting of general information of companies, which can be requested by the public. This database is

automatically updated every time the PT deals with the MOLHR for any corporate actions (eg, transfer of shares, change of capitalisation) involving the notary that has access to the database.

The information provided by the MOLHR is limited to general information related to the company such as the shareholders, amount of shares and line of business of the company. The information may not include the portfolios of the private equity. To access the information, people need to make an online request to the MOLHR and pay a fee.

As for mutual fund KIK-UPTs, the investment manager must comply with mandatory disclosures stipulated under capital market regulations including disclosure of information on the product structure and risk assessment to its potential investor.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Any investors, including third-party investors, shall be respected as a matter of Indonesian laws as long as they have invested and have interest in Indonesian companies. However, under the Company Law, the investor or shareholder shall not be liable for the company's losses extending beyond the value of shares he or she owns.

The Company Law recognises the concept of piercing of the corporate veil. Under this concept a shareholder of a PT shall not be personally liable for the consequences of binding agreements entered into in the name of the PT and shall not be personally liable for the PT's losses extending beyond the value of shares he or she owns. However, there are some exceptions to this general rule in the following cases (the piercing of the corporate veil concept):

(i) the PT does not have the status of a PT as a legal entity;
(ii) the relevant shareholder, either directly or indirectly, appropriates the PT in bad faith for his or her personal benefit;
(iii) the relevant shareholder is complicit in an unlawful act committed by the PT; or
(iv) the relevant shareholder, either directly or indirectly, unlawfully utilises the PT's assets, causing such assets to be rendered insufficient to pay off the debts of the PT.

In the case of (ii), (iii) and (iv), the Company Law provides that the burden of proof is with the third party intending to raise a claim against the shareholders of the company concerned. Nevertheless, as court decisions are not a matter of public record in Indonesia it is not clear how frequently the corporate veil has been pierced in the courts.

A shareholder's liability may exceed the capital paid on all of the shares he or she owns if it is substantiated that, inter alia, the shareholder's personal assets are commingled with the company's assets, or the company is established solely as a vehicle for manipulation by the shareholder in pursuit of his or her own benefit, as intended by (ii) and (iv).

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

In the case of mutual funds and KIK-UPTs, pursuant to OJK Regulation No. 43/POJK.04/2015 regarding Code of Conduct of Fund Managers (POJK No. 43), fund managers shall carry out their work based on the following principles:

- integrity;
- professionalism;
- prioritising customers' interests;
- monitoring and supervising;
- ensuring sufficient resources;
- protecting customers' assets;
- disclosure;
- avoiding any conflict of interest; and
- compliance.

These are fundamental principles so they may not be waived or exempted by agreement entered by and between the fund manager and investor. On the other hand, for privately held companies, there is no strict principle relating to fiduciary duty. Fiduciary duty can be modified as long as it does not result in the piercing of the corporate veil as discussed in question 5.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Indonesian laws do not explicitly recognise gross negligence or ordinary negligence. However, it is adopted from relevant doctrine in the field of civil law and up to the sole discretion of the judges to determine certain circumstances in which the limitation of liability may be acceptable.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The restriction factors stated in the negative list of investment (which was last revised on 12 May 2016 pursuant to the Presidential Regulation No. 44 of 2016 Regarding Lists of Business Fields That Are Closed to Investment and Business Fields That are Conditionally Open for Investment) should be considered when doing business in Indonesia.

Conditionally open business fields are specified business fields that investors may engage in with specified conditions. The aforementioned conditionally open lines of business are as follows:

- those that are reserved for micro, small and medium-sized enterprises and cooperatives;
- those for which a partnership is required;
- those for which certain shareholding arrangements are required;
- those that may be conducted only in certain locations; and
- those for which a special licence is required.

The negative list restrictions feature prominently in the structuring of acquisitions, as well as considerations such as exit method, dividend repatriation and tax.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Pursuant to Indonesian bankruptcy law, from the point of a bankruptcy declaration, the debtors (in this case the institutional sponsors) are no longer entitled to all of their assets. Afterwards, the assets and the business of the institutional sponsors will be managed by receivers or curators.

In the event of change of control or restructuring, the company has to make sure there is no negative covenant regarding such transactions. After completing the transactions, the company must submit a report to the MOLHR regarding the change of control or the restructuring. Furthermore, the transaction that may result in the change of control is also subject to certain requirements (eg, newspaper announcement) under the Company Law.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The OJK is an independent institution whose functions are to establish an integrated regulatory and supervisory system for all activities in the financial services sector, including banking, capital market, insurance, pension funds, financing institutions and other financial services institutions. Therefore, if a private equity fund conducts business activities in such sectors or has become a publicly held company and subject to capital market regulation, then it will also be supervised by the OJK.

With respect to inspection rights, the OJK as a regulatory body may conduct supervision, inspection, investigation, consumer protection and other actions towards financial services institutions, subjects, or supporting activities to a private equity fund.

For investors, in the forum of a general meeting of shareholders, shareholders are entitled to have access to any information relevant to the company from the board of directors or the board of commissioners to the extent relevant to the agenda of the meeting and not in contravention of the interest of the company.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

Investment in certain sectors (including banking, insurance, mining and finance) requires advance approval from the competent government authority and if it involves foreign capital an approval from BKPM may be required. A foreign sponsor may also consider forming a venture capital company (VCC) if it wishes to have significant portfolios in micro, small or medium-sized businesses that are closed or conditionally open for foreign investment.

A VCC is known as a business entity that conducts financing activities or capital participation in a micro, small or medium-sized business that needs financial support to grow. A VCC can be established in the form of a PT, a cooperative or a limited partnership company and it must secure a business licence from the OJK prior to engaging in venture capital business. A VCC in the form of a PT has a minimum paid-up capital requirement of 50 billion rupiah. In general a VCC may conduct the following business activities:

- a venture capital business, which refers to provisions regarding investment capital or financing facilities to individuals, cooperatives, micro, small or medium-sized business;
- venture fund management;
- fee-based services, including consultation services on the management, accounting, administration and marketing of financial products such as insurance or mutual funds; and
- other activities approved by the OJK.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Under Indonesian law, there is no requirement for a private equity fund's manager, or any of its officers, directors or control persons to register as an investment adviser.

Investment managers that manage securities in capital market or KIK-UPTs are subject to compliance with capital market regulation. Among other things, they must be registered with the OJK and be a member of the investment managers association. Furthermore, the investment manager representative or individual who is in charge of the investment management business must also hold certification recognised by the OJK and be experienced in the capital market industry.

For VCCs, at least one of the members of the board, director or party who manages the investment must have a minimum of two years' operational experience either in a VCC, bank or other financial institution.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

In terms of a publicly held company, the fund manager shall be a member of the investment managers association, which has a code of conduct and is recognised by the OJK under POJK No. 43. Furthermore, investment manager representatives must comply with OJK Regulation No. 25/POJK.04/2014 regarding Licensing of Investment Manager Representative (POJK No. 25). POJK No. 25 provides that investment manager representatives must meet integrity requirements, competency requirements, have experience of working in financial institutions in Indonesia for foreigners and must not hold a position in another financial services institution.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

Under the Law on Corruption Eradication, companies are not permitted to give or promise something to a civil servant or state apparatus with the aim of persuading them to carry out, or not carry out, an action because of their position. In such circumstances, the related parties will be punished with imprisonment or fine sanctions, or both.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

Such activities have not yet been regulated.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

Bank Indonesia has monetary policy to restrict certain transactions involving banks. These policies include the restriction on banks on owning productive assets in the form of shares and maintaining foreign exchange deposits at certain levels. Indonesian banks are also prohibited from extending credit for acquiring marketable securities (stocks, bonds and commercial paper). These policies are expected to mitigate the risk of spread of the global financial crisis in Indonesia .

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Yes, private equity fund vehicles, as well as the fund distributed to investors in the form of dividends, will generally be subject to taxation.

If it is formed as mutual funds, the benefit distributed by the mutual funds to the unit holder may be exempt from income tax.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

An individual investor is regarded as a tax resident if he or she fulfils any of the following conditions:

- he or she resides in Indonesia;
- he or she is present in Indonesia for more than 183 days in any 12-month period; or
- he or she is present in Indonesia during a fiscal year and intends to reside in Indonesia.

Indonesia imposes withholding tax of 20 per cent on interest or dividends payable to non-residents, unless the non-resident has a permanent establishment in Indonesia (in which case, the tax rate for residents would apply). If the non-resident is a resident of a country with a double taxation treaty with Indonesia, the withholding tax could be lower (subject to completion of Form DGT-1). See question 21.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

There are no special tax rules for private equity in Indonesia. A private equity fund vehicle set up in Indonesia or with effective management in Indonesia must obtain a taxpayer identification number and will generally be subject to the normal 25 per cent income tax rate. As for resident taxpayer investors, they are subject to normal withholding tax of 15 per cent on interest or dividend.

If private equity funds are incorporated abroad, they would generally be subject to 20 per cent withholding tax for income in the form of dividends, interest or royalties but this rate can be reduced via an applicable tax treaty. With regard to the capital gain, there would be 5 per cent withholding tax upon the gross sale proceeds of shares unless a relevant and applicable tax treaty waives it.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

Organisational tax is not recognised in Indonesia.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

With respect to the private equity fund's sponsor, there is a tax issue to consider in the event of the transfer of shares. The transfer of shares may result in the payment of income tax as a result of capital gain, which shall be borne by the seller, under the following conditions:

- if the seller is an Indonesian tax subject, the obligation to pay tax on the capital gains is the seller's. The rate would generally be 25 per cent for corporate taxpayers and up to 30 per cent for individual taxpayers. There is no obligation on the part of the buyer to withhold any amount from the sale price; and
- if the seller is not an Indonesian tax subject, the resident buyer must withhold 20 per cent of the estimated net income (ie, the capital gain amounting to 25 per cent of the transaction value) to the seller from the sale of the shares, except where the taxation of capital gains is reserved for the treaty partner by an applicable tax treaty. To obtain the benefit of the applicable tax treaty, the seller must comply with the certification, eligibility, information and reporting requirements in force in Indonesia. Currently, the seller would need to provide to the purchaser and the company a certificate of tax domicile issued by a competent tax authority (the Internal Revenue Services).

Update and trends

Currently, the fast-growing business sectors in Indonesia are IT and internet-based fintech, oil and gas, mining and healthcare. We believe that these business sectors make promising targets for private equity funds and will play a significant role in the development of Indonesia's economy as well as on a global economic basis as e-commerce and such markets can be conducted online, are relatively easy to establish and potentially low budget. Furthermore, the rising price of coal and other minerals is also stimulating transactions in these sectors.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Currently Indonesia has approximately 60 tax treaties with other counties such as Japan, Korea, the US, Germany, Australia, Singapore, Hong Kong, China and the Netherlands. The purpose of these treaties is generally to avoid double taxation and to prevent fiscal evasion with respect to taxes on income and capital. Principally these treaties regulate which income or capital should be taxed by a country to avoid double taxation.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Tax consideration may shape the exit option. Typically, private equity exits are done via IPO. This exit route is attractive, tax-wise. The sale of shares listed in an Indonesian exchange is subject to a favourable tax rate of 0.1 per cent (with an additional 0.5 per cent founder tax). Another common exit strategy would be the sale of investment instruments (eg, shares, warrants, convertible bonds, etc) in the offshore holding company (which normally resides in a low tax jurisdiction).

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

The negative list restriction factors, as mentioned in question 8, should be considered in the offer and sale of interests. In addition, funds sold or transferred to any investors must be registered or notified to the MOLHR.

However, the restriction on the negative list may be anticipated by gaining capital from other sources such as venture capital whose business activities are to conduct financing activities and capital participation in other companies.

Alternatively, the company can also make an investment through a stock exchange (capital market) since the capital participation publicly held company is deemed as a national investment, which is not subject to the negative list. In the event the offer of investment is made to more than 100 parties or sold to more than 50 parties or via mass media, the public offering procedures must be observed and it would be subject to mandatory disclosure, which covers all information regarding the issuer itself and the securities to be offered. The issuer must also submit a registration statement in the Indonesian language to the OJK.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

Pursuant to the Investment Law, domestic investors and foreign investors who make investments in the form of a PT are prohibited from

entering into an agreement or making a statement asserting that share ownership in a PT is for and in the name of another person (nominee arrangement). If nominee arrangements must be made, they should be very carefully structured to avoid possible arguments of violation of Indonesian laws and regulations on foreign investment.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

Every change in the ownership, board of directors or board of commissioners of a PT (including a PT that engages in private equity funds) must be reported or notified to the MOLHR. This is an administrative requirement that does not affect the validity of such changes.

As for mutual funds, there is no specific requirement to notify government agencies on the identity of investors. However any changes to composition portfolios and management control are subject to disclosure requirement and approval from the OJK.

Specifically for VCCs, changes regarding companies' organisational structure, business activities or address must be submitted to the OJK within the following period:

- 15 days after any changes to a company's organisational structure have been approved or administered by the MOLHR;
- 10 days after any changes made to a company's address (headquarters or branch offices); and
- each time a company intends to engage in a new type of business activity.

The company is also required to submit a self-assessment report that covers the implementation of good corporate governance principles and this report must be finished by the end of the fiscal year and submitted no later than 30 April of each year to the OJK.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Generally in direct investment, there is no need for the person offering interests in a private equity fund to have a licence or registration. However, when a transaction is conducted in the capital market area, the person must have a licence and be recognised by the OJK.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

Pursuant to the Anti-Money Laundering Law, any entity (including a private equity fund) is obliged to report to the relevant authority (in this case the Centre for Financial Transaction Reporting and Analysis (PPATK)) if there are any suspicious or unusual transactions. The report may be in the form of records, disclosure of identities, etc. After reporting, the PPATK will take further action and may request additional information.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Private equity funds in the form a PT or mutual funds may be listed on a stock exchange and become a publicly held company or exchange traded funds. The advantage of being a publicly held company is that the liquidity of capital can be increased as it attracts retails investment.

However, the disadvantage of being a publicly held company is the relative expense of maintaining it as it becomes subject to various capital market compliance requirements (eg, disclosure requirements) before entering into particular transactions.

The principal initial and ongoing requirement for listing is by submitting a registration statement to the OJK along with supporting documents. Afterwards, the company must conduct an IPO to sell its shares to the public in a stock exchange.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

Generally, there is no prohibition on any party making certain restrictions; however, if the listed fund is an exchange traded fund, interest in such funds can be freely transferred to any investor.

Ali Budiardjo, Nugroho, Reksodiputro

Freddy Karyadi **fkaryadi@abnrlaw.com**
Mahatma Hadhi **mhadhi@abnrlaw.com**

Graha CIMB Niaga, 24th floor
Jl Jend Sudirman Kav 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125 / 5136
Fax: +62 21 250 5001 / 5121
www.abnrlaw.com

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Some of the regulatory restrictions are as follows:

- any agreement with an Indonesian party would need to be translated pursuant to article 31 of Law No. 24 of 2009 (the Law on Flag, Language, Emblem, and National Anthem);
- Law No. 13 of 2003 (the Labour Law) contains provisions that give the right of employees to terminate their employment and ask for severance payment in the case of change of control;
- article 28 of Law No. 5 of 1999 (the Anti-Monopoly Law) provides that some joint ventures may be subject to mandatory merger control requirements; and
- Bank Indonesia Regulation No. 17/3/PBI/2015 provides that the rupiah must be used in certain cash and non-cash transactions occurring in the territory of Indonesia.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

If the private equity fund is set up in Indonesia, the sponsor's ability to take profit from the fund may be in the form of management or transaction fees or a bonus that may be subject to transfer pricing regulations and a debt-to-equity ratio. The interest payment to the sponsor having control over the fund may also be constructed as dividend payment. The dividend payment from a PT should observe the 20 per cent mandatory reserve as required by the Company Law.

Indonesia

Freddy Karyadi and Mahatma Hadhi

Ali Budiardjo, Nugroho, Reksodiputro

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Indonesia's private equity market is relatively small compared to the more developed markets of China and India. The private equity capital is also relatively low relative to the country's overall economy and the size of the stock market.

Private equity transactions in Indonesia commonly utilise mezzanine debt instruments, convertible instruments and equity purchase, as well as financing based on profit or revenue sharing.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Indonesian law does not recognise specific corporate governance rules for private equity business activities. Company law has guidelines relating to corporate governance in general. Corporate governance rules are only mandatorily adopted in certain sectors, particularly commercial banking, financial services, publicly listed companies and also for state-owned entities. Therefore, since it is not generally applicable for all sectors, a private equity company may adopt its own corporate governance rules and it may be attractive to investors and can increase the accountability of the fund management once the company becomes a public company.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

There is a high bar to clear to complete a 'going-private' process (ie, where the intention is to no longer be a public company and no longer be subject to various capital market regulations) and the capital market authority is generally reluctant to allow delisting.

In many cases of voluntary delisting, the delisting is carried out with a going-private plan. The decision of the Jakarta Stock Exchange (currently known as the Indonesian Stock Exchange) on Regulation No. 1-1 on the Delisting and Relisting of Shares in the Stock Exchange, provides that to delist its shares to the stock exchange, a company must obtain an approval from its general meeting of shareholders (GMS). In cases where companies delisted and went private (eg, PT Bank Ekonomi Raharja, PT Merck Sharp Dohme Pharma and PT Unitex), they were required by Indonesia's capital market regulator, the Financial Service Authority (OJK), to achieve an approval from a quorum of at least 75 per cent attendance of total independent shareholders and approval of 50 per cent +1 of the independent shareholders.

Regulation No. 1-1 also requires the company or other party to purchase all shares of shareholders who reject the approval for delisting at the minimum price as stipulated in the regulation.

In addition, an extensive disclosure requirement, tender offer of the remaining shares and stock exchange rules with respect to delisting would need to be followed. In practice, public-to-private transactions are not common in Indonesia.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

A public company that intends to go private must first submit a letter to the OJK, with a copy going to the stock exchange, regarding its intention and its reason for doing so.

The going-private process can potentially be deemed as a conflict of interest transaction, and in which case requires the relevant parties to follow procedures regulated under Regulation No. IX.E.1 on Affiliated Transaction and Conflict of Interest of Certain Transaction attached to the Decision of the Chairman of Bapepam (now the OJK) No. KEP-412/BL/2009 (Regulation IX.E.1). Such procedures are, among other things, to obtain the approval of independent shareholders and an independent party rendering an independent opinion. After all of the procedures are complied with, the going-private process must follow Regulation No. IX.F.1 on Voluntary Tender Offers attached to the Decision of the Chairman of Bapepam No. KEP-263/BL/2011 (Regulation IX.F.1).

Based on Law No. 8 of 1995 on Capital Market, and its implementing regulations on disclosure of information (Regulation No. X.K.1 on the Disclosure of Information that must be Made Public Immediately attached to the Decision of the Chairman of Bapepam No. KEP-86/PM/1996), the public company must report to the OJK and publicly announce its decision to go private within two business days as of the material fact that the decision has been made.

Once the company has changed its status from public to private, article 62 of Law No. 40 of 2007 on Limited Liability Company (Company Law) will apply to the public shareholders who do not want to sell their shares through a tender offer. The company must buy their shares at par value. This requires dissenting shareholders to be bought out after a resolution of a general meeting of shareholders.

Conflict of interest

In order to go private, a public company must comply with Regulation IX.E.1, which defines a conflict of interest as 'the difference between the company's economic interests and the economic interests of its directors, commissioners, main shareholders or affiliates'.

The public company must obtain independent shareholder approval in a general shareholders' meeting and must provide the following, among other items:

- a description of the transaction including the following:
  - the transaction to be undertaken (ie, to go private);
  - the value of the transaction;

  - the names of the parties conducting the transaction and their relationship with the company; and
  - the nature of the conflict of interest of the parties involved in the transaction;
- a summary of the appraiser's report including the following:
  - the identity of the parties;
  - the valuation object;
  - the purpose of the valuation;
  - the assumption;
  - the approach and valuation method;
  - the concluded value; and
  - the opinion on the fairness of the transaction;
- a description of the general meeting of shareholders planned to be held if the required quorum of attendance by independent shareholders is not achieved at the first meeting, a statement on eligibility to vote on the proposed transactions and the required favourable votes at each meeting;
- explanations, considerations and reasons for the transaction to be conducted compared to a similar transaction that does not have a conflict of interest;
- a plan and data of the public company;
- a statement from the board of commissioners and the board of directors stating that all material information has been disclosed and the information is not misleading; and
- a summary or expert and independent consultation, if required by the OJK.

Generally, the GMS must be attended by more than 50 per cent of independent shareholders, and approved by more than 50 per cent of all shares held by the independent shareholders.

Tender offer

As part of the going-private process, the OJK requires the controlling shareholders to undertake a tender offer to buy out the public shareholders as stipulated under Regulation IX.F.1, which defines the term as 'an offer through mass media to acquire equity-linked securities (eg, shares) by purchasing or exchanging with other securities'.

Announcements

A party conducting a tender offer must announce its intention in at least two Indonesian-language newspapers, one with national circulation. The tender offer statement must comprise the following:

- the name and address of the target company;
- a detailed description of the shares that will be the object of the tender offer, comprising the following:
  - the price of the tender offer;
  - the time and date the tender offer will be conducted; and
  - the procedure of tender offer;
- requirements and conditions of the tender offer;
- the name of the stock exchange where the shares are traded;
- the calculation result of the price of the shares;
- the name, address and nationality of the offeror and its affiliation in relation to the tender offer and notification on whether any of the following relate to the offeror:
  - if he or she has ever been declared bankrupt;
  - if she or she has ever been a director or a commissioner guilty of causing a company to go bankrupt;
  - if he or she has been convicted of a financial crime; or
  - if he or she has been ordered by the court or any other authorised agency to stop activities in relation to the shares;
- the description on the relationship, contract and material transaction between the public company and its affiliations during the previous three years, for example, the following:
  - sale and purchase contracts;
  - agency relationship; and
  - management relationship;
- a statement from the offeror on the availability of sufficient funds to complete the tender offer supported by the opinion of the accountant, bank and securities company;
- a statement on the purpose of the tender offer and the plan for the company after the tender offer is conducted, including the plan to change the capitalisation structure, dividend policy and change of management;
- a description on the amount and percentage of shares owned directly or indirectly by the offeror including the option to buy or the right over dividends and other benefits and the power of attorney to vote in the GMS;
- a list of names and addresses of parties that receives a reward from the offeror in relation to the offer; and
- other material information.

Purchase price

Regulation IX.F.1 explicitly provides that the purchase price offered in the tender offer must be higher than the following:

- the highest tender offer price submitted by the same offeror during the 180 days prior to the date of announcement;
- if the tender offer is addressed to shares listed and traded on the stock exchange, the average highest daily market price in the stock exchange during the 90 days before the date of announcement;
- if the shares are not traded in the stock exchange during the 90 days before the date of announcement, the average highest daily market price in the stock exchange during the 12 months leading up to the shares' last day of trading; and
- if the tender offer is addressed to shares that are not listed in the stock exchange, a reasonable price decided by the appraiser.

If the board of directors or board of commissioners of the company undergoing the going-private process know, or have sufficient reason to believe, that the information stated in the tender offer is incorrect or misleading, then the company is obliged to make an announcement relating to its objection on the tender offer statement. The announcement must be made in at least two newspapers, one with a national circulation, at least 15 days prior to the end of tender offer period.

The offeror (ie, the controlling shareholder) is prohibited to buy or sell the offered equity-linked securities within 15 calendar days before the announcement of the tender offer plan, up to the end of the tender offer period.

From the date of the announcement of the tender offer plan up to the end of the tender offer period, the target company must not conduct any transactions aiming to prevent the change of the controlling party of the target company (as a result of the execution of the tender offer).

See also question 3.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

Taking into account shareholders' meetings, tender offer processes, appraisal reports, conflict of interest disclosure and compliance and crossing via the stock exchange, a going-private transaction takes around eight to nine months.

For private equity transactions, the timing would be around four to five months for equity and around three to four months for debt.

6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

See question 4.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

In order to keep up with the international standard, the following are the features that are frequently included in the governance agreement of private equity investments in Indonesia:

- conditions precedent for closing to ensure delivery of various original documents and corporate approvals are complete;
- representation, warranties and indemnities from the target company and seller in connection with the following:
  - due incorporation;
  - title warranties of shares; and

- constitutional documents, registers, books and records. If the investor requests more, these may be expanded to include the following:
  - financial warranties;
  - financial indebtedness;
  - real property and leases (if applicable);
  - assets;
  - material contracts;
  - employees;
  - dispute proceedings;
  - tax warranties; and
  - anti-bribery or anti-corruption;
- covenants (positive) relating to various outstanding documents, actions, performances from the seller. Sometimes these may also be mentioned in the conditions subsequent;
- covenants (negative) relating to restriction to the seller such as non-solicitation, non-competition, non-disclosure, etc; and
- indemnity for non-compliance before closing.

In relation to tax, the seller provides certain representations and warranties to the purchase in relation to the condition of the stock or business asset, such as the following:

- the seller or the target company has paid all of its tax obligation to the government as of the execution date of the agreement and will provide the purchaser with a list of outstanding tax obligations that may incur in the future;
- in the event that, after the closing date, the result of the tax correction made by the authorised agency appears to be beyond the reasonable tax propriety, the seller agrees and binds itself to bear all of the payments in connection to such tax correction provided that such tax correction is resulted from the transaction completed by the target company prior to the closing date;
- the seller or the target company has made all returns, given all notices and submitted all computations, accounts or other information required to be made, given or submitted to any tax authority in accordance with the law and all such returns and other documentation were and are true, complete and accurate; and
- the seller or the target company has not carried out, been party to or otherwise been involved in any transaction where the sole purpose was the unlawful avoidance of tax or unlawfully obtaining a tax advantage.

In addition to this, the purchaser could also add a tax covenant from the seller to the purchaser as a schedule to the agreement. Aside from the representations and warranties clause itself, indemnity or the payment for misrepresentation or incorrect warranties is usually also regulated under the agreement. The parties to the agreement can state a certain amount of money as a remedy for such representations or incorrect warranties.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity buyer should discuss management participation following the completion of a going-private transaction?

Normally, the management of a target company is rather passive in a going-private transaction as the transaction is initiated by the controlling shareholder (or new controlling shareholder). In Indonesia, the principal executive compensation during the going-private transaction is generally not a major issue as unlike management of public companies in certain jurisdictions, the outstanding stock option for management would be minimal. The timing consideration is also an immaterial issue.

9 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

Normally the target is an Indonesian corporate tax resident that is subject to 25 per cent corporate income tax. The income tax is generally imposed upon the net profit (the revenue less allowable deductible expenses relating to generating taxable income including interest).

Interest tax relief for acquisitions can be obtained if the acquisition would result in the acquirer owning under 25 per cent in shares of the target company. However, the withholding of taxes on interest payment cannot be easily avoided. The debt to equity ratio (generally at 4:1) should also be observed in order to enable the interest relief to be obtained.

With regard to tax issues related to executive compensation, basically the compensation is treated as normal taxable income (the individual income tax rate is progressive from 5 per cent up to 30 per cent) when all conditions to receiving the compensation are met.

Share acquisition could not be classified as asset acquisitions for tax purposes.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Utilisation of debt is normally in the form of convertible bonds or loan plus warrants, which have a feature that may offer an alternative to an investor wishing to invest in a sector where certain equity limitations are imposed upon foreign ownership or to erode some of the investor's profits. The main issues would relate to the debt to equity ratio, security sharing, cross default and payment waterfall.

Any financial assistance offered by the company would be analysed from the prism of the ultra vires and corporate benefit limitations (ie, whether such financial assistance goes beyond the scope of the object and purpose of the company and whether such assistance benefits the company). Indonesian commercial banks are generally prohibited from providing loans to purchase shares for speculative purposes.

With regard to foreign offshore loans, the recent policy of Bank Indonesia is the obligation to apply the prudential principle for non-banking corporations. This prudential principle requires non-banking corporations to comply with the mandatory hedging ratio, liquidity ratio and credit rating. Although there are certain exemptions, in general, this recent policy creates a hurdle for using debt to finance going-private or private equity transactions.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements? What other documents typically set out the financing arrangements?

Normally, the Asia Pacific Loan Market Association standard for facility agreement would be used as a reference for financing documentation. Standard provisions in the financing documentation would include definition interpretation, purpose of the loan, conditions precedent to drawdown, events of default, collateral, representations and warranties, covenants, boiler plate provisions (notices, dispute resolutions, governing law, severability, language, etc) and countersign mechanism.

See also question 7.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

The fraudulent conveyance would normally appear where the debt of the new controlling shareholder (which is used to finance the acquisition) is pushed down to the target company, which most of the existing creditors of the target company would object to. In the majority of such cases, the target and new controlling shareholder will re-negotiate with the existing lenders of the target and offer some sweetener to them (such as additional collateral, guarantee, etc). Furthermore, if the transfer of debt occurs within one year before the company's bankruptcy, such transfer of debt can be nullified if it is considered detrimental to the existing creditors on the basis of Indonesian fraudulent conveyance laws as stipulated under articles 41 and 42 of the Indonesian Bankruptcy Law and articles 1341 and 1454 of the Indonesian Civil Code.

Private equity firms may also invest in a special situation target (ie, a target facing financial difficulties, which may cause insolvency or substantial debt restructuring).

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

The shareholders' agreements cover the agreed features between the shareholders (although sometimes the company signs and acknowledges this). The negotiable points commonly include the following:

- the shareholders' rights to nominate the members of the board of directors and board of commissioners;
- quorum and voting requirements for the GMS;
- details of reserved matters;
- pre-emptive rights and shareholders' loans;
- certain restrictions on the transfer of shares of the company (eg, rights of first refusal, rights to match, tag-along, drag-along, change of control, etc); and
- dispute resolutions (Mexican stand-off, Russian roulette, etc).

Indonesian company law provides certain protection to minority shareholders (depending on the shareholding percentage). The protection may include the following:

- rights to access the company's books;
- rights to request his or her shares to be bought back;
- rights to veto on certain corporate actions such as merger, liquidation, change of constitutional documents and disposal of material assets;
- rights to file court claims for damages against directors or commissioners; and
- pre-emptive rights, etc.

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

There are several procedures under the Company Law that must be observed in the event of acquisition. The takeover or acquisition of a controlling interest in any Indonesian company must be approved by its shareholders, be published in an Indonesian newspaper and requires settlement of objections that creditors may have. An abridged acquisition plan must be published in a newspaper and submitted to all employees. A complicated objection procedure applies: any creditor (which may include employees) may file objections to the board of directors, but if these are not settled they must be submitted to the shareholders' meeting that must approve the acquisition.

Further to the above, according to government Regulation No. 57 of 2010 on Merger, Consolidation of Business Entity and Acquisition of Shares which may cause Monopoly Practice and Unfair Business Competition, there are certain reporting requirements for an acquisition (and subscription of shares) that results in a change of control of an Indonesian company (if certain thresholds are met).

In addition, as mentioned in question 5, investment in certain sectors (such as banking, insurance and finance) require prior approval from the relevant government authorities.

An approval from the Investment Coordinating Board would also be required in the case of direct investment by a foreign investor. This approval is commonly granted by taking into account the negative list, which is a list issued by the Indonesian government classifying business activities that are entirely closed or open for investment with certain conditions (for example, the following:

- limitations on foreign ownership;
- requirements for local partnership;
- limited permitted locations; and
- requirements of special licences).

The position of listed companies and foreign ownership rules has been in a state of change for the last few years. It is not clear in Indonesian practice whether a publicly listed company is also subject to the shareholding limitation set under the negative list. In practice, there are a number of precedents where publicly listed companies with foreign shareholding (either directly or indirectly and non-portfolio) exceed the limitations set out under the negative list. A foreign direct investment is required to have the following:

- a minimum total investment (excluding land and buildings) to be 10 billion rupiah;
- a minimum issued and paid-up capital to be 2.5 billion rupiah; and
- a minimum share participation of a shareholder to be 10 million rupiah.

The source of funds to finance the investment can be from equity or a combination of equity and loan.

Additional rules apply to public companies. Pursuant to Rule No. IX.H.1 on Public Company Acquisition, as attached to the Decree of Chairman of Bapepam-LK No. KEP-264/BL/2011 dated 31 May 2011, the transfer of shares of a public company leading to an acquisition results in the new controller having the following obligations:

- make an announcement to the public in at least one Indonesian daily newspaper with national circulation and notify the OJK at least one business day after the takeover (the takeover announcement), which, according to item 3.a.1 of Rule IX.H.1 includes the following information:
  - the total number of shares that have been acquired and total number of the new controller's shares;
  - the new controller's identity including name, address, contact details, line of business (if any) and the objective of the control; and
  - a statement declaring that the new controller is an organised group (only relevant if the new controller falls under the organised group definition);
- submit evidence of the daily newspaper announcement to the OJK within two business days of the date of the announcement;
- conduct a mandatory tender offer (MTO), according to item 3.a.2 of Rule IX.H.1. This MTO must extend to the shares owned by all shareholders other than those owned by the following:
  - any shareholder that has taken part in the takeover transaction with the new controller;
  - any other person that has already received an offer from the new controller with the same terms and conditions;

Update and trends

In 2016 we noted that many private equity companies were interested in investing in IT and internet-based industries, fintech, oil and gas, mining and healthcare sectors in Indonesia. Many new regulations in these sectors were issued to catch this trend.

The e-commerce sector shows significant potential in Indonesia because of the country's high population and rising internet usage. We foresee an increase in the flow of funds in this sector in the coming years. The rising price of coal and other minerals is also stimulating transactions in the energy and natural resources sectors.

- any other person who, at the same time, is making either an MTO or voluntary tender offer for the target company shares;
- the 'primary shareholder'; and
- another controller of the target company; and

- submit a report to the OJK and a public announcement on the acquisition, as required under OJK Regulation No. 31/POJK/04/2015 on Disclosure of Information or Material Facts By Public Listed Companies.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer?

Indonesia's capital market regulator has mandated minimum free float requirements (ie, the total number of shares owned by 'non-controlling shareholders' and 'non-substantial shareholders') at IPO of between 10 and 20 per cent.

If the investor contemplates an exit by way of the sale of shares in a stock exchange in Indonesia (for example, via the Indonesia Stock Exchange (IDX)), this sale would be taxed at a favourable rate (0.1 per cent of the sales proceeds amount (plus 0.5 per cent 'founder' tax)).

The other limitation is a lock-up for the founder meeting certain conditions (see question 16).

In relation to the sale of a portfolio company, private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer via a put option, management seat control and certain conditions for qualifying IPO situations.

The exit also can be structured by IPO at offshore level depending on the commercial consideration and tax treatment.

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

Generally, other than rights of first refusal, most governance rights and other shareholders' rights and restrictions typically survive an IPO. The public company would be subject to various additional good corporate governance obligations such as ensuring the presence of an independent commissioner and director, audit committee and other committee, corporate secretary, etc.

Post-IPO, OJK regulations require an adjustment towards the newly listed company's articles of association to conform to the requirements under the regulations. The shareholders' agreements may state that its terms will survive post-IPO, however, in the event of conflicting provisions between the articles of association and the shareholders' agreement, Indonesia's courts would generally give credence to the articles rather than the terms of the shareholders' agreement. Thus, in the case of a dispute, the investors' rights under the shareholders' agreement would be enforced under contract law, rather than under the Company Law, and depending upon its governing law, often at a venue outside of Indonesia's court system. These foreign court judgments, however, cannot be enforced directly in Indonesia.

For this reason, the preferred dispute resolution mechanism in a contract involving a foreign investor is to utilise arbitration in an internationally recognised arbitration venue. Singapore is the most prominent venue, and arbitration conducted there would adopt the rules of the Singapore International Arbitration Centre. Another alternative dispute resolution mechanism is the Indonesian National Arbitration Board.

If a foreign investor successfully obtains an arbitral award offshore, enforcement against the Indonesian party requires registration and enforcement of the award through the Indonesian courts. In practice, it is rarely possible to obtain an injunction or other forms of specific performance against an Indonesian party in Indonesia. In general, awards of damages against an Indonesian party is the best outcome one can expect for a breach of contracts action.

Furthermore, a party that acquires shares or other equity securities from issuers with a price, conversion value or executing price below the IPO price during the six months prior to submission of a registration statement to the OJK, is prohibited from transferring some or all ownership of the shares and the other equity securities until eight months after the effectiveness of the registration statement.

An exit is typically done by way of public offering of stock in the local stock market (eg, IDX).

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

There is no particular industry that has been the target of going-private transactions. However, several sectors in Indonesia remain attractive for private equity investment, including IT and internet-based industry, consumer, healthcare, banking and financial services, oil and gas and mining.

Investment in certain industries may require prior approval, licensing or notification.

Ali Budiardjo, Nugroho, Reksodiputro

Freddy Karyadi **fkaryadi@abnrlaw.com**
Mahatma Hadhi **mhadhi@abnrlaw.com**

Graha CIMB Niaga, 24th floor
Jl Jend Sudirman Kav 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125 / 5136
Fax: +62 21 250 5001 / 5121
www.abnrlaw.com

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

The investment structures adopted in cross-border private equity transactions in Indonesia are mostly shaped by the relevant business fields of the target, because of restrictions imposed by the negative list. This causes various structures to be explored, such as synthetic equity or quasi equity before the target goes public, venture capital structure, backdoor listings, mutual funds, back-to-back loans, etc.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

When more than one private equity firm participates in a club or group deal, the value that each private equity firm can bring to the table and whether such values complement one another must be a consideration of the deal.

A club arrangement is often contemplated in a master investment or consortium agreement, which provides sharing of costs and returns, exclusivity and decision-making between investors.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

The key issues that arise between a seller and a private equity buyer related to certainty of closing are normally related to valuation, fulfilment of conditions precedent, compromised control sharing and exit strategy. The discussions between the parties throughout all stages of negotiation are essential in agreeing the key terms and in avoiding any of the parties losing face.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Private Equity
ISSN 1746-5524

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law