

# ICLG

The International Comparative Legal Guide to:

# **Project Finance 2017**

#### **6th Edition**

A practical cross-border insight into project finance

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#### Published by

Global Legal Group Ltd. 59 Tanner Street London SE1 3PL, UK Tel: +44 20 7367 0720 Fax: +44 20 7407 5255 Email: info@glgroup.co.uk URL: www.glgroup.co.uk

#### GLG Cover Design

F&F Studio Design

#### **GLG Cover Image Source** iStockphoto

#### Printed by

Ashford Colour Press Ltd April 2017

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ISBN 978-1-911367-43-7 ISSN 2048-688X

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# Indonesia



Emir Nurmansyah



Ali Budiardjo, Nugroho, Reksodiputro

Freddy Karyadi

#### 1 Overview

# 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Project finance is one of the main financing schemes used in Indonesia. This system has been used for several years in many transactions such as infrastructure development, power plant projects and others.

On 20 March 2015, the Indonesian Government issued Presidential Regulation No. 38 of 2015 regarding Public-Private Partnerships ("PPP"), which revokes and replaces Presidential Regulation No. 67 of 2005 regarding Public-Private Partnerships as amended several times. Presidential Regulation No. 38 of 2015 strengthens the role of the Government Infrastructure Guarantee Fund in increasing the creditworthiness of the PPP infrastructure, and develops sound procedures for granting security over project finance. Therefore, to date, project finance has made good progress and has often been used in Indonesia.

#### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Some of the most significant project financings in Indonesia in recent years have been financing projects on the development of mining/processing plants and power plants. Recently, offshore lenders arranged by JBIC entered into the financing of USD 4.3 billion to PT Bhimasena Power Indonesia for the construction of 2x1000MW Central Java IPP. It is regarded as the largest project financing to date in terms of the capacity of the power plant, and is the first IPP project developed under a PPP scheme to have reached financial close. This is the first project in which the obligations of PLN (the State electricity company) under the Power Purchase Agreement have been guaranteed by the Government of Indonesia and Government Infrastructure Guarantee Fund.

#### 2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

No, it is not possible to give asset security by means of a general security agreement, since there are several types of security which

have their own unique characteristics, therefore it is better if each type of asset has its own agreement. Such security agreements represent accessory rights upon the loan agreement. A corporate guarantee would be another type of security, but it does not give preference rights to the lender as it constitutes merely a contractual obligation of the guarantor against certain underlying liabilities. All of the assets of the guarantor would be the objects when the lenders enforce the corporate guarantee through a civil lawsuit.

In relation to general security agreements, there are several security documents (which will be explained below) that it is advisable to have executed in the form of a notarial deed. According to Law No. 30 of 2004 on Notaries as amended by Law No. 2 of 2014 ("Notary Law"), any deed made before a Notary must be made in an Indonesian language. If agreed by the parties, a notarial deed may be made in a foreign language, with a translation into the Indonesian language. If there is a difference of interpretation between the foreign language deed and its translation, then the Indonesian language must be used as the prevailing language.

#### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes, it can.

For security over the land, the security is in the form of:

#### a. Mortgage

Under Law No. 4 of 1996 on Mortgage (*Hak Tanggungan*) ("**Mortgage Law**"), a security interest known as a real property mortgage may be encumbered on land rights.

#### <u>Procedure</u>

Mortgages are established through a two-step procedure – namely:

- (i) The signing of the mortgage deed before the Land Officer ("PPAT") with jurisdiction over the land to be mortgaged. This deed must be in Indonesian and in the prescribed PPAT form.
- (ii) The registration of the mortgage deed at the relevant Land Registration Office ("BPN").

The mortgage is established at the moment it is entered in the land book located at the BPN. The PPAT must submit the executed mortgage deed to the BPN at the latest seven (7) days after the execution date of the mortgage deed, and the actual date of the registration is deemed as the seventh (7<sup>th</sup>) day after the complete application of the mortgage received by BPN.

For plant and machinery, the security may be in the form of a mortgage, as explained above, or:

#### b. Fiduciary transfer

Fiduciary transfers are governed by Law No. 42 Year 1999 concerning Fiduciary Security ("Fiduciary Law").

A fiduciary transfer can be effected with respect to movable assets (whether tangible or intangible) and certain immovable assets (including buildings which cannot be the subject of a mortgage under the Mortgage Law). The only specific exceptions are that a fiduciary transfer cannot be effected in respect of:

- land, buildings and all things appertaining thereto (including machinery affixed thereto) which are subject to the Mortgage Law;
- registered vessels with a gross weight of 20 cubic metres or more which are subject to the Mortgage Law and its regulations;
- aircraft which are subject to the Mortgage Law and its regulations; and
- d. assets which are subject to the pledge laws and regulations.

Therefore, machinery may be subject to mortgage or fiduciary. If the machinery is affixed to the land, it is considered as immovable property and can then fall as an object of mortgage. However, if the machinery is not affixed to the land but placed on the land instead, such machinery is categorised as movable property and accordingly falls under the fiduciary security.

#### **Procedure**

- Making the fiduciary transfer agreement in Bahasa Indonesia in a notarial form.
- The fiduciary transfer must be registered in the fiduciary transferee at the Fiduciary Registration Office by attaching a Statement of Fiduciary Transfer Registration.
- The fiduciary transfer comes into effect on the date of registration in the Fiduciary Registration Book kept by the Fiduciary Registration Office. Upon acceptance of the registration application, the applicant will obtain a Fiduciary Security Certificate. Based on Letter of Directorate General of General Law Administration No. AHU-06.OT.03.01 TAHUN 2013 dated 5 March 2013 regarding the Implementation of Online System of Registration Administration System of Fiduciary, the registration of a fiduciary conducted by the relevant Notary is done through an online system and the original supporting documents are submitted to the Fiduciary Registration Office in the hard-copy version.

#### c. Pledge

A pledge under Indonesian law can only be encumbered on tangible movable properties (such as machinery, vehicles and equipment) and intangible movable property (such as shares, bonds, Indonesian Government bonds, receivables, debentures and patents) which are regulated in Articles 1150 to 1160 of the Indonesian Civil Code ("ICC").

#### Procedure

There is no formal legal requirement to have a pledge agreement in writing. However, it is standard practice in Indonesia for pledges to be embodied in a deed of pledge (notarised or executed privately), setting forth the particulars of the pledge.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Yes, it can. Receivables are one type of intangible asset that may be secured by fiduciary transfer as regulated in Article 19 of the Fiduciary Law; the procedure to secure the receivables by fiduciary transfer is described in question 2.2 (b) above. The notification

itself should be officially served on the debtor by a court bailiff. The acknowledgment by the debtor can be in the form of a deed of transfer. The legal effect of the notification is that the debtor can no longer validly settle with the fiduciary transferor and is required to make payments directly to the fiduciary transferee.

#### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, a bank account is an intangible movable property, so that pledges over it are now being used instead. In general, the process to encumber cash deposited in bank accounts shall refer to the general procedure of creating a pledge for other tangible and intangible movable properties (please refer to question 2.2 c). However, the perfection of the pledge shall be subject to the service of each notice to and acknowledgment from the banks holding the relevant accounts. This notification acceptance shall be deemed as the transfer of control over the pledged accounts from the pledgor to the pledgee.

# 2.5 Can security be taken over shares in companies incorporated in Indonesia? Are the shares in certificated form? Briefly, what is the procedure?

Yes, pledge of shares is one of the mechanisms. The procedures that have to be followed are: making the Pledge of Shares Agreement, together with a Power of Attorney to Vote Shares ("POA to Vote") and a Power of Attorney to Sell Shares ("POA to Sell"). Under Indonesian law, a pledge of shares does not include voting rights, as the voting rights are not assigned through a pledge. This principle is explicitly stated in Article 60 of the Indonesian Company Law.

The POA to Vote attempts to authorise the pledgee to exercise the voting rights of the pledgor without assigning them voting rights and, therefore, without violating Article 60 of the Indonesian Company Law. It must be noted that although the granting of an (irrevocable) power of attorney to vote shares is customary in Indonesia, there is no certainty that an Indonesian court will uphold such a power of attorney since it may circumvent the general rule under Article 60 of the Indonesian Company Law that such voting rights must remain with the pledgor/shareholder, notwithstanding the grant of any security interests.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

There will be several fees in relation to such security which consist of the following (*inter alia*):

- Notary's fee in making a fiduciary transfer deed/pledge of shares agreement/power of attorney;
- Land Officer Deed/PPAT fee for making a mortgage deed;
- stamp duties; and
- registration fee in the Fiduciary Registration Office/BPN.

#### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Yes, each of asset security filing, notification and registration requires a certain period of time.

#### a. Mortgage

The registration of the mortgage deed and the issuance of the mortgage certificate as evidence of registration can take between two (2) weeks and six (6) months, although it most commonly takes two (2) to four (4) weeks.

#### b. Pledge

There is no requirement for registration or notification with the Pledge Registration Office.

#### c. Fiduciary transfer

The issuance of the Fiduciary Security Certificate may take one (1) week to one (1) month.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

If land and machinery are secured by mortgage, then they will have the requirements as stipulated in question 2.2 (a) above. However, if land is covered by mortgage, while plant, machinery and equipment are covered by fiduciary, then the stipulation under question 2.2 (c) above shall apply.

#### 3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Trust is regulated under the Financial Service Authority (*Otoritas Jasa Keuangan* – "**OJK**") Regulation Number 27/POJK.03/2015 as lastly amended by OJK Regulation Number 25/POJK.03/2016 concerning Business Activity of Bank in form of Trust. This regulation recognises the Trustee as the receiver and the manager of the assets to enforce the Trust in accordance to the prevailing law and regulation. The Trustee may represent the lenders under the Trust agreement to conduct the following:

- act as a paying agent;
- act as conventional investment fund agent and/or based on Shari'ah principles; and/or
- act as conventional borrowing agent and/or funding agent based on Shari'ah principles.

These actions may be carried out by the Trustee based on written instruction from the lenders under the Trust agreement.

3.2 If a security trust is not recognised in Indonesia, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please refer to question 3.1 above.

#### 4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Yes, there are requirements for a public auction or private sale as the enforcement of security, which must be complied with.

#### a. Mortgage

#### Public auction

In the event of the debtor's default, the mortgagee will have the right to enforce the mortgage based on:

- the mortgagee's right of instant or direct execution (parate eksekutie) (Article 6 of the Mortgage Law); or
- the executory title in the mortgage certificate (Article 14, paragraphs (2) and (3) of the Mortgage Law).

The right of instant or direct execution is a right conferred by operation of the law by which the mortgagee is entitled to sell the mortgaged property based directly on its own authority through a public auction without consent from the mortgagor.

#### Private sale

Based on the Mortgage Law, the procedures to effect a private sale of the mortgaged land and buildings are as follows:

- the mortgagee and the mortgagor agree to foreclose on the mortgaged land and buildings by means of a private sale;
- (ii) the mortgagee and/or mortgagor serve at least one month's prior written notice to the concerned parties of the mortgaged land and buildings. Within this period, the mortgagor and/or mortgagee must announce the intended private sale in at least two (2) newspapers and/or local radio stations circulating in the area where the mortgage land and building/s is/are located; and
- the private sale may only be conducted if there is no objection from third parties.

#### b. Pledge

#### Public auction

Pursuant to Article 1155 of the Indonesian Civil Code, pledged property is required to be sold by public auction in accordance with the rules of local custom.

#### Private sale

The sale of pledged property through a private sale is only possible if:

- it is consented to by the pledgor after the debt is due and the debtor is in default; or
- the pledgor agrees to the sale of such pledged property by being a party to any sale agreement and the proceeds of such sale are used to satisfy the creditor's claim.

#### c. Fiduciary transfer

#### Public auction

In the event of the debtor's default, the fiduciary transferee will have the right to enforce fiduciary transfer over the goods which are subject to this, by:

 exercising the executorial title as provided under the Fiduciary Certificate (Article 29, paragraph (a), and Article 15, paragraphs (1) and (2), of Law No. 42); or (ii) exercising the right of direct execution (Article 29, paragraph (b), and Article 15, paragraph 3, of Law No. 42).

#### Private sale

Foreclosure by private sale can only be conducted after the expiry of one (1) month as of the date of written notification of the intended sale to interested parties, and publication thereof in at least two (2) daily newspapers having circulation at the place concerned, so long as no third party has voiced an objection against the private sale.

In addition, with regard to the enforcement of fiduciary assignment of tangible goods, Regulation of Head of Police Department of Republic of Indonesia No. 8 of 2011 regarding Fiduciary Execution Protection ("Regulation No. 8/2011") provides that the holder of fiduciary rights may ask the police department to secure and protect the repossession and execution of its fiduciary objects by submitting the application. The fiduciary objects themselves should have been registered with the Fiduciary Registration Office. In the event the application is approved, the Operational Head of the Police Department will prepare, plan and perform the protection procedure whose purpose is to make the execution process of fiduciary objects run in a smooth and orderly way.

#### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No, there are no restrictions on foreign investors or creditors to foreclose the security. Such foreclosure is generally regulated under Article 227 HIR.

#### 5 Bankruptcy and Restructuring Proceedings

5.1 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 security?

The mortgage, the pledge and the fiduciary transfer are "in rem rights" which are "absolute" and "exclusive" and create preferential rights to the holder of the security, even in bankruptcy. Bankruptcy of the mortgagor, the pledgor and the fiduciary transferor does not, in principle, affect the security right of the mortgagee, pledgee and transferee, in that the assets in question are not regarded as being part of the bankruptcy assets.

The bankruptcy declaration, however, triggers an automatic stay of the bankruptcy estate upon the issuance of the Commercial Court decision declaring the bankruptcy of the debtor. The secured creditors' rights to enforce security are subject to automatic stay for a maximum of 90 days (Article 56 section (1) of the Law No. 37 of 2004 regarding Bankruptcy and Insolvency (Indonesian Bankruptcy Law "IBL")). Under the bankruptcy proceedings, the automatic stay period may be less than 90 days if the bankruptcy proceedings are terminated earlier or if the state of insolvency is commenced. Once the state of insolvency is declared, the secured creditors must start exercising their privileged right over the collateral within 2 (two) months as of the insolvency. Otherwise, the appointed receiver is required to request the delivery of the collateral to be sold by the receiver. If the receiver enforces the collateral, the proceeds that will be distributed to the secured creditors need first to be deducted by not only the mandatory preferred claims (which will also apply if the secured creditors enforce the collateral by themselves), but also the bankruptcy cost (including the receiver's fee).

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Yes, there are several kinds of creditors which are generally regulated in the ICC, IBL and Law No. 6 of 1983 which was latterly Law No. 16 of 2009 regarding General Provision of Taxation ("Tax Law") which have preferential right, as follows:

- Creditor who holds any tax debts. Such creditor has a higher position than the creditor who is the holder of the security; this is regulated under Article 21 of the Tax Law and Article 1137 of the ICC.
- Separatist/concurrent creditor. Such creditor is the holder of the security as regulated under Article 1134 of the ICC.
- Preference creditors. Such creditors are categorised as general preference creditors under Article 1149 of the ICC and special preference creditors as stipulated under Article 1139 of the ICC.

When a bankruptcy estate is declared to be in a state of insolvency and the receiver decides to liquidate the bankruptcy estate to be distributed to the creditors of the bankrupt debtor, a certain ranking order will need to be applied.

The general rule on distributing the proceeds of a bankruptcy estate to unsecured creditors is one of equality, subject to the statutory priority rights of certain categories of creditors. Shareholders rank behind all creditors in the distribution of the proceeds of the bankruptcy estate. Based on various Indonesian laws and pieces of legislation, the ranking order of creditors under the bankruptcy is as follows:

- Specific expenses stipulated by the Tax Law consisting of:
  - legal expenses arising solely from a court order to auction movable and/or immovable goods;
  - expenses incurred for securing the goods; and
  - legal expenses arising solely from the auction and settlement of inheritance.
- Preferred creditors having ranks above the secured creditors as provided by the Indonesian Civil Code, for example: tax claims; court charges which specifically result from the disposal of a movable or immovable asset (these must be paid from the proceeds of the sale of the assets over all other priority debts, and even over a pledge or mortgage); and legal charges exclusively caused by sale and saving of the estate (these will have priority over pledges and mortgages).
- Bankruptcy estate creditors/post-bankruptcy creditors (i.e. claims against the bankruptcy estate), for example: (i) the fee of the receiver; (ii) the costs of liquidating the bankruptcy estate (fees of an appraiser, an accountant, etc.); (iii) new financing; (iv) the lease costs for the bankrupt's house or offices as of the date of the declaration of bankruptcy; and (v) the wages of the employees of the bankrupt debtor as of the date of the declaration of bankruptcy (Article 39, paragraph 2 IBL).
- Secured creditors, which under Indonesian law consist of: (i) mortgage (for land); (ii) pledge (over movable intangible assets); (iii) fiduciary transfer (over movable and intangible assets); and (iv) hypothec (for aircraft and ships having a size of more than 20 cubic metres).
- Specific statutorily preferred creditors, whose preference relates only to specific assets.
- General statutorily preferred creditors (for example, revenue authorities, etc.).

Other unsecured creditors receive their *pro rata* share of any of the remaining proceeds. The cost of the bankruptcy is shared *pro rata* among the statutorily preferred creditors and the unsecured creditors.

# 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Any entities can be declared bankrupt. However, there is a specific provision for entities that are restricted from the general bankruptcy proceedings:

- a. The petition for a declaration of bankruptcy for a Bank may only be filed by Bank Indonesia.
- The petition for a declaration of bankruptcy for a Security Company, Stock Exchange, Clearing and Custodian Institution, Settlement and Depository Institution may only be filed by the Capital Market Supervisory Board.
- c. The petition for a declaration of bankruptcy for an Insurance Company, Reassurance Company, Pension Funds, or State-Owned Enterprise may only be filed by the Minister of Finance.
- 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

No, there is no process other than court proceedings that is available to a creditor to seize the assets of the project company in an enforcement.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Currently, the only formal insolvency proceedings available in Indonesia are regulated under the IBL. However, in relation to debt restructuring and/or cramdown of dissenting creditors, as long as the company has not been declared bankrupt by the court, the parties can still conduct private negotiation regarding their outstanding obligations/debt.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

The directors shall conduct activities which are (i) legally determined under the scope of the Articles of Association of a company, and (ii) based on common business practice since the directors have fiduciary duty to the shareholders. If the directors conduct themselves in violation of (i) the Articles of Association of the company, or (ii) business practice, and such conduct is not approved by the shareholders of the company and reflected in the Financial Statement of the company, the directors may be personally liable for the loss.

# 6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Foreign investment in Indonesia in project companies is governed under Law No. 25 of 2007 on Capital Investment ("Investment

Law") and can only be made through the establishment of, or investment in, a limited liability ("PT") company, which must be registered with the Investment Coordinating Board ("BKPM"). For certain lines of business (e.g., mining, oil and gas, plantations, education, etc.) the recommendation of the relevant supervising Government institution must be obtained before registration with BKPM will be granted. In 2015, BKPM issued Regulation of Head of BKPM No. 14 of 2015 regarding the Procedures for Principle Licences ("Regulation 14") and Regulation of Head of BKPM No. 15 of 2015 regarding the Procedures for Licensing/Non-Licensing of Investment. Under such regulations, BKPM determines that: (i) a minimum investment shall be more than Rp 10,000,000,000 (ten billion rupiah) or the equivalent value in US dollars, outside the land and building investment, for each type or classification of business activity; (ii) a minimum issued and paid-up capital of approximately Rp 2,500,000,000 (two billion five hundred million rupiah) or the equivalent value in US dollars; and (iii) each of the shareholders of the company shall hold at least Rp 10,000,000 (ten million rupiah) or the equivalent value in US dollars and the percentage of share ownership is calculated based on the shares' nominal value. However, depending on the particular business sector, such as mining exploration or power plant, the BKPM may require an investment value exceeding the minimum investment value as provided under Regulation 14, based on its discretion, by considering the size and necessity of the project.

Foreign investors who wish to invest in Indonesia must comply with a specific regulation which lists specific lines of business in Indonesia that are open for foreign investment with certain requirements (usually a local party must hold a minimum percentage interest in the foreign investment company) and those business lines closed to investment (Negative List). Any business lines not on the Negative List can be opened for foreign investment (100% foreignowned). The current Negative List of Investment shall be referring to the President Regulation Number 44 of 2016 concerning the Lists of Business Fields that are Closed to Investment and Business Fields that Conditionally are Open for Investment.

Under the Negative List, the Government has opened foreign investment in geothermal projects to a maximum foreign shareholding of 95%. Foreign investment in certain construction contractor services has also increased by a maximum of 67%, including construction work for roads, railways, airport runways, bridges, flyovers, tunnels, subways, water pipelines, telecommunications networks and electricity cables.

# 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

The Indonesian Government has entered into the Protocol to Implement the Eighth Package of Commitments under the ASEAN Framework Agreement on Services with other members of ASEAN. Furthermore, this protocol was implemented into the current Negative List, as it provides an exemption for maximum foreign shareholding applicable for investors having their origin in an ASEAN member country.

The Indonesian Government has also entered into treaties with various countries which give special tax treatment for entities having their origin in such countries. Such treatment may be in the form of a reduction in net income of up to 30% of the amount invested, accelerated depreciation deductions, extension of tax losses carried forward for up to 10 years, and reduction of the withholding tax rate on dividends paid to non-residents to 10% (or lower if applicable).

# 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Pursuant to Article 7 paragraph 1 of Law No. 25 of 2007 regarding Investment, the Indonesian Government advised that it would not conduct any nationalisation or expropriation against the proprietary rights of investors, unless provided by law. If the Government takes measures in such nationalisation or expropriation, then the Government shall pay compensation, the amount of which shall be determined by market value.

#### 7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The relevant Government agencies or departments with authority over projects are, among others:

- the Ministry of Energy and Mineral Resources, for projects in the energy sector, such as mining, geothermal and electricity;
- b. SKKMigas, for projects in the oil and gas upstream sectors;
- c. BPHMigas, for projects in the oil and gas downstream
- the Ministry of Public Works and Ministry of Transportation, for the infrastructure sectors;
- e. the Ministry of Telecommunication and Information Technology, for the telecommunications sectors;
- f. the Ministry of Environment and Forestry, for any projects requiring environmental licences;
- g. the National Land Agency, for any projects requiring use of land; and
- Bappenas, as the coordinator and facilitator for general development planning activities.

There may be other agencies or departments with authority depending on the project sector. As an example, electricity projects will also involve a role for the Development and Finance Supervisory Board (Badan Pengawasan Keuangan dan Pembangunan or "BPKP") in determining the price of electricity. Furthermore, regional governments may have authority as well on project finance arising in their regions, especially in relation to licences issued by the regional government, such as environmental impact analysis (Analisis Mengenai Dampak Lingkungan or "AMDAL"), and spatial plans of the region.

Previously, BPMigas was the authorised Government agency that entered into contracts on behalf of the Government for projects in oil and gas upstream. However, BPMigas was dissolved and its authority transferred to SKKMigas which is structurally under the organisation of MEMR as an impact of the ruling of the Constitution Court of Indonesia under its Decision Number 36/PUU-X/2012 dated 13 November 2013.

7.2 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?

Presidential Decree No. 39 of 1991 regarding the Coordination of Management of Offshore Commercial Loans ("PD 39/1991") established the PKLN Team, a Government institution which reports

directly to the President of Indonesia. The general task of the PKLN Team is to manage the utilisation of offshore commercial loans as one of the sources for financing national development.

PD 39/1991 requires companies which intend to obtain offshore commercial loans to seek approval from the PKLN Team for the plan to borrow said loan, and must report the implementation of the loan and the repayment. The offshore loans that are under the coordination of the PKLN Team are: (i) offshore commercial loans relating to construction projects whose financing has the following nature/characteristics: "non-recourse", "limited-recourse", "advance payments", "trustee borrowings", "leasing", etc.; and (ii) offshore commercial loans relating to development projects whose financing is based on the scheme of "BOT" (build, operate and transfer), "B&T" (build and transfer), etc.

PD 39/1991 also provides that the following types of loans are not considered offshore loans under the management of the PKLN Team and thus do not require approval:

- a. offshore commercial loans for short-term trade purposes;
- offshore commercial loans obtained by private companies for financing projects which are not related to the Government of Indonesia ("GOI") or State-Owned Companies (including GOI institutions and PT Pertamina (*Persero*)) in the form of GOI capital participation, assurance on the supply of raw material, assurance of the purchase of the products or any other relation; or
- other offshore commercial loans as determined by the PKLN Team

Under Article 12 of PD 39/1991, the borrower of an offshore loan shall submit a regular report to the PKLN team regarding the implementation of the offshore loan obtained. In addition, there are reporting requirements for an individual, legal entity or other entity domiciled and/or planning to be domiciled in Indonesia having offshore loan obligations to non-residents, to Bank Indonesia, and/or to the Minister of Finance.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Foreign entities may not directly own land or natural resources or undertake the business of ownership or operation. Law No. 25 of 2007 on Investment requires a foreigner or foreign entity wishing to do business in Indonesia to establish a limited liability company. Such foreign-owned company will be able to obtain rights of land, such as rights to build (*Hak Guna Bangunan* or "HGB"), and licences, and/or undertake business of ownership or operation, such as leasing of land or buildings, so long as it complies with the Negative List of Indonesia.

#### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

With regard to extraction, there is an obligation imposed on certain mining and oil and gas companies to fulfil national needs of such mining and oil and gas products. Further, there are also non-tax revenue impositions including: (i) dead rent; (ii) exploration royalties; (iii) production royalties; and (iv) compensation for data information, toward companies holding mining business licences.

The Government of Indonesia, through several Ministries, enacted four (4) key regulations related to the obligation of mining companies to conduct processing and refining activities domestically

as embodied in Article 103 of Law No. 4 of 2009 on Mineral and Coal Mining ("**Mining Law**"). Those four (4) key regulations are as follows:

- Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities as amended lastly by Government Regulation No. 77 of 2014 ("GR 23/2010");
- Minister of Energy and Mineral Resources Regulation No. 1 of 2014 on the Increase of Added Value of Minerals Through Activities of Processing and Refining/Smelting Domestically as amended by Minister of Energy and Mineral Resources Regulation No. 8 of 2015 ("MEMR Regulation 1/2014");
- Minister of Finance Regulation No. 75/PMK.011/2012 on the Stipulation of Export Goods that are Subject to Export Duty and its Tariff as amended lastly by Minister of Finance Regulation No. 6/PMK/011/2014 ("MOF Regulation 6/2014"); and
- Minister of Trade Regulation No. 119/M-DAG/PER/12/2015 on the Provision for Exporting Mining Products Resulting from Processing and Refining ("MOT Regulation 119/2015").

GR 23/2010 requires the holder of the Contract of Work ("COW") and IUP for the Operation Production (locally known as *Izin Usaha Pertambangan Operasi Produksi* or "IUPOP") to refine their mined products domestically. Further, COW and IUPOP holders performing metal mineral mining and refining activities can conduct exports in a certain quantity.

Pursuant to MEMR Regulation No. 1/2014, each type of metal mineral mining commodity must be processed and/or refined by fulfilling at least the minimum requirements stipulated in the Attachment to MEMR Regulation No. 1/2014. Metal mineral mining commodities, including its by-products/waste products/ associated mineral, non-metal mineral and certain rocks which will be sold abroad, must meet the said minimum requirements. IUPOP and COW holders may export raw material or ore once they obtain recommendation from the MEMR. Such recommendation can be obtained if the IUPOP and COW holders have fulfilled the requirements of: (i) having adequate reserves to carry out processing and refining/smelting domestically on their own or in cooperation with another party, with due regard to the age of processing and refining/smelting facilities; (ii) having a commitment to build refining/smelting facilities directly or in cooperation with another party, by submission of a refining/smelting facility construction plan; and (iii) complying with good environmental management performance. An application to acquire recommendation shall be deemed compliant if accompanied by, inter alia: (i) the approved feasibility study documentation; (ii) the environmental documentation approved by the competent agency; (iii) the proof of payment to the State; (iv) a clear and clean certificate for a holder of a Production Operation Mining Permit; (v) the approved domestic refining/smelting facility construction schedule under the laws and regulations; (vi) the approved current year's working plans and budget; and/or (vii) the processing product sales planning that contains, inter alia, the product types and qualities, quantities, prices, and the port of loading.

Holders of IUPOP and COW of metal minerals, including nickel, are obligated to conduct the processing and/or refining of their minerals domestically, and this processing and/or refining process may be conducted directly by themselves. If the direct/self-processing and/or refining is viewed as unfeasible for economic reasons, the IUPOP and COW holder may do the processing and refining in cooperation with another IUPOP and COW holder. A cooperation between IUPOP and COW holders requires the approval of the Director General of Mineral Mining.

The cooperation may be in:

- the sale and purchase of ore or mineral concentrates; or
- the processing and/or refining process activities.

MOF Regulation 6/2014 regulates that Export Tariffs on exported processed mineral products, as intended, shall be those provided in the Attachment to MOF Regulation 6/2014. Mining companies that export processed mineral products are subject to progressive export duty tariffs. The export duty tariff will gradually increase per semester, starting from 20% (or 25% for copper) in the first half of 2014 until 60% in the second half of 2016. In particular, for copper, such export tariffs are applicable from 12 January 2014 up to 31 December 2016.

This MOT Regulation 119/2015 generally stipulates the limitation for several metal mining products as well as restriction to export several products including raw material or ore. The regulation further stipulates the requirement for a mining company which will export metal mining products as a result of processing and/or refining/smelting.

Export of metal mining products may be conducted by companies which hold Operation Production Mining Business Licence (IUP Operasi Produksi and Special Operation Production Mining Business Licence (IUPK Operasi Produksi) registered as clean and clear, Operation Production Mining Business Licence specifically for processing and refining, Industrial Business Licence (Izin Usaha Industri) or Industrial Certificate of Registration (Tanda Daftar *Industri*). Export of metal mining products as a result of processing, e.g. copper concentrate ≥15% Cu, anode slime, which have not passed a certain purified standard or as stated in Attachment II of MOT Regulation 119/2015, may only be conducted up to 12 January 2017. Until such deadline, an Export Approval from the Director General of International Trade is required for the export of those mineral products. On the other hand, the exports of minerals which have passed a certain purified standard or as listed in Attachment I can be conducted after the verification and technical study have been conducted and without a requirement to obtain Export Approval.

One of the requirements to obtain an Export Approval is a recommendation from the Director General of Mineral and Coal which must at least stipulate type, quantity and loading port for mining products resulting from processing. The Export Approval is valid for 6 (six) months and can be extended. Mining products resulting from processing and/or refining that will be exported must be verified and technically scrutinised by the surveyor appointed by the Minister of Trade. There are also provisions on reporting requirements and sanctions for Exporters and Surveyors.

Furthermore, on 14 October 2014, the Government issued Government Regulation No. 77 of 2014 on the Third Amendment of Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities ("Regulation 77"). Regulation 77 stipulates a new provision which states that every holder of a Mining Business Licence (locally known as *Izin Usaha Pertambangan* or "IUP") and a Special Mining Business Licence (locally known as *Izin Usaha Pertambangan Khusus* or "IUPK") who would like to change the investment status of the company may only change its investment status from a domestic investment company to a foreign investment company provided that the foreign ownership is not more than:

- 75% (seventy-five percent) for a company in the exploration stage;
- 49% (forty-nine percent) for a company in the production operation stage, in the event the processing and/or refining activities are conducted by third parties;
- 60% (sixty percent) for a company in production operation stage, in the event the processing and/or refining activities are conducted by the mining company itself; and

70% (seventy percent) for a company in production operation stage, in the event the mining company conducts an underground mining method.

Another major provision under Regulation 77/2014 is regarding the extension of Contract of Work COW ("COW") and Coal Contract of Work ("CCOW"). Based on Article 112 paragraph (2) of Regulation 77/2014, COW and CCOW will be converted into a first extension or second extension of IUPK depending on whether the COW or CCOW has previously been extended. The application for the extension may be submitted at the soonest two years prior to the expiration and at the latest six months prior to the expiration of the COW and CCOW.

# 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Concerning currency exchange, the Government of Indonesia has passed Law No. 7 of 2011 on Currency ("Currency Law") which provides that each and every transaction conducted in Indonesia must use the currency of rupiah, with exceptions for: (i) certain transactions in implementing State revenues and expenditure budgets; (ii) receipt or distribution of grants from or to an overseas country; (iii) international trade transactions; (iv) bank savings in foreign currency; or (v) international financing transactions.

Furthermore, Bank Indonesia has issued Bank Indonesia Regulation No. 17/3/PBI/2015 ("PBI 17/2015") on the Obligation to Use Rupiah. PBI 17/2015 imposes the obligation to use rupiah for every transaction (cash or non-cash) within Indonesian territory, including any payment transaction, fulfilment of other obligation which is satisfied by monies, and/or another financial transaction. Furthermore, PBI 17/2015 also implements such obligation for every contract executed in the Indonesian territory and/or involving an Indonesian party.

Law No. 24/1999 provides that a person may freely hold, use and transfer foreign exchange. The foreign exchange transfer to and from an overseas country is, however, subject to the reporting requirement to Bank Indonesia as regulated under Bank Indonesia Regulation Number 16/22/PBI/2014 on the Reporting of Foreign Exchange Activity and Implementation of Prudential Principle in the Management of Foreign Debt of Non-Bank Corporation dated 31 December 2014 ("PBI 16/22"). According to PBI No. 16/22, non-bank institutions owned either by state-owned, region-owned, privately owned or individually owned enterprises, are required to deliver monthly foreign exchange reports to Bank Indonesia no later than 15 months after the foreign exchange activity is conducted.

Certain transactions in rupiah have been restricted by Bank Indonesia Regulation Number 18/18/PBI/2016 dated 5 September 2016 and Circular Letter number 16/14/DPM dated 17 September 2014 as lastly amended by Circular Letter number 17/23/DPM dated 30 September 2015, concerning Foreign Currency Transaction Between Bank and Domestic Party ("PBI 18/18") and Bank Indonesia Regulation No. 18/19/PBI/2014 dated 5 September 2016 and Circular Letter No. 17/50/DPM dated 21 December 2015, concerning Foreign Exchange Transactions Against Rupiah between Banks and Foreign Parties ("PBI 18/19").

There are no restrictions or requirements which limit the availability or transfer of foreign currency, except that, pursuant to PBI 18/18 and PBI 18/19, the conversion of Indonesian rupiah to foreign currencies or the purchase of foreign currency in the amount of more than US\$25,000 per month (or its equivalent) per customer for Spot Transactions or in the amount of more than US\$1,000,000 either per month per customer, or per outstanding derivative transaction, must be based on an underlying transaction, with a maximum amount

required under the underlying transaction. The term "Underlying Transaction" is not defined in such regulation, but according to the amendment, the Finance Agreements would satisfy the requirement for an underlying transaction for the purpose of any conversion required for the project. In addition, the party purchasing the above-stated foreign currencies is required to submit the following documents to the bank making the conversion:

- (i) a copy of the underlying agreement;
- (ii) a Tax Registration Number for Indonesian parties (known as "NPWP"); and
- (iii) a statement from the party purchasing the foreign currencies that the underlying agreement is a valid document and that the foreign currency will only be used to settle the payment obligations under the underlying agreement.

Pursuant to Bank Indonesia Regulation No. 15/8/PBI/2013 dated 7 October 2013 as amended by Bank Indonesia Regulation No. 16/18/PBI/2014 dated 17 September 2014 concerning Hedging Transactions ("PBI 15/8"), the limitation for the underlying economic activities of hedging transactions is anything to be decided by Bank Indonesia, and any kind of hedging transactions shall be carried out in accordance with PBI No. 18/18 and Bank Indonesia Regulation No. 7/31/PBI/2005 as amended by Bank Indonesia Regulation No. 10/38/PBI/2008 concerning Derivative Transactions ("PBI 7/31"), as well as risk management regulations issued by the Financial Services Authority. Such hedging transaction shall be supported by a valid supporting document. Further, the settlement procedures will be carried out in accordance with PBI 18/18.

In the event that the local bank intends to conduct a hedging swap transaction with Bank Indonesia, the local bank shall also present the underlying transaction documents which are possessed by the local bank itself or its customers as stipulated under Bank Indonesia Regulation Number 15/17/PBI/2013 as amended by Bank Indonesia Regulation Number 18/13/PBI/2016 dated 10 August 2016 concerning Hedging Swap Transaction with Bank Indonesia ("PBI 15/17"). PBI 15/17 only covers any hedging swap transaction above US\$10,000,000. The hedging contract made by the local bank and Bank Indonesia shall be valid for a maximum of 3 (three) years but hedging swap transactions shall be valid for a 3 (three)-month period, 6 (six)-month period, or 12 (twelve)-month period and may be extended for a minimum of 3 (three)-month period to a maximum of 12 (twelve)-month period. Further, for this hedging swap transaction with Bank Indonesia, such transaction is considered as a pass-on to the derivative transaction position of the related party to the local bank.

Any Non-Bank Corporation that has foreign loans must implement prudential principles, by satisfying certain obligations to meet prescribed hedging ratios, liquidity ratios, and credit ratings as stipulated under Bank Indonesia Regulation Number 16/20/PBI/2014 dated 28 October 2014 on the Implementation of Prudential Principles on the Management of Foreign Loans of Non-Bank Corporations ("PBI 16/20"). The obligation to implement these prudential principles does not apply to foreign loans in foreign currency in the form of trade credits. Furthermore, the obligation to meet a certain credit rating does not apply to foreign loans in foreign currency for the following purposes: (i) refinancing; and (ii) financing obtained from international organisation(s) for infrastructure projects. Companies must report their implementation of these prudential principles for the management of their foreign loans, along with supporting documents that outline the following:

- hedging ratio, liquidity ratio and credit rating; and
- b. any applicable exemptions (as mentioned above).

The report must be delivered in accordance with PBI 16/22.

#### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Other than the above and the requirement of withholding tax upon certain types of passive income (e.g. interests, dividends, royalties, leases, etc.), we are not aware of any such restrictions, controls, fees on the remittance and repatriation returns or loan payments to parties in other jurisdictions. However, the currency of such remittance shall be foreign currency instead of rupiah.

#### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

We are not aware of any regulation restricting a company from maintaining foreign currency accounts in Indonesia and/or offshore accounts outside Indonesia. Thus, project companies should be allowed to maintain such types of account. Additionally, Bank Indonesia has enacted Bank Indonesia Regulation No. 16/10/PBI/2014 dated 14 May 2014 as lastly amended by Regulation 17/23/PBI/2015 dated 23 December 2015 on the Receipt of Export Foreign Exchange and Withdrawal of Offshore Loan Foreign Exchange ("PBI 16/10"). Such regulation specifically stipulates that the receipt of export foreign exchange and withdrawal of offshore loans have to be conducted at foreign exchange banks which have been appointed by Bank Indonesia. Failure to do so will cause the exporter or withdrawer to be subject to a monetary sanction.

# 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Indonesia or abroad?

Essentially, every shareholder is entitled to receive a dividend. However, Article 48 (3) of Law No. 40 of 2007 on Limited Liability Companies stipulates that a shareholder who does not fulfil the requirements of share ownership will not be able to exercise his/her/its rights as a shareholder, including receiving a distributed dividend.

Law No. 24 Year 1999 dated 17 May 1999 on the Flow of Foreign Exchange and Exchange Rate Systems provides that a person may freely hold, use and transfer foreign exchange. Any transfer of foreign exchange to and from abroad by such person is, however, subject to a reporting obligation to Bank Indonesia.

#### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The answer depends on what field a project financing is for. If the objective is to finance a project involving environmental affairs or other fields requiring health and safety protections, then specific environmental and or safety licences will be required. The authorities are, among others, the Ministry of Environmental and Forestry and Ministry of Manpower and Transmigration and Regional Governments, including representatives such as regents and mayors.

# 7.10 Is there any specific legal/statutory framework for procurement by project companies?

The Indonesian regulations of procurement would only apply to procurement of works which are financed (either entirely or partially) by the State Budget (*Anggaran Pendapatan Belanja Negara* or APBN or *Anggaran Pendapatan Belanja Daerah* or APBD) as set forth in Presidential Regulation No. 54 of 2010 on Procurement of Government Goods/Services as amended lastly by Presidential Regulation No. 4 of 2015.

In general, the appointment of construction companies in Indonesia is subject to tender requirements. Direct appointment is only permitted for very limited reasons. This tender requirement is stated in Government Regulation No. 29 of 2000 regarding the Implementation of Construction Services as amended by Government Regulation 59 of 2010 and Government Regulation 79 of 2015 ("GR No. 29/2000"). One notable amendment of GR No. 29/2000 is that a State-owned company may perform direct appointment only to another State-owned company or the subsidiary of the State-owned company.

#### 8 Foreign Insurance

#### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Generally, the object of insurance in Indonesia must be insured in Indonesia. Article 2 of Government Regulation No. 73 of 1992 on the Implementation of Insurance Business, as last amended by Government Regulation No. 81 of 2008 ("GR No. 73/1992"), stipulates that the insurance object in Indonesia may only be insured by an insurance company holding a business licence from the Ministry of Finance, unless:

- there is no insurance company in Indonesia, either severally or jointly, which has the capability to hold insurance risk of such object;
- there is no insurance company willing to cover insurance of such object; or
- the owner of such insurance object is not a citizen or legal entity of Indonesia.

In the event of exceptions, insurance coverage can be granted by an insurance company abroad.

# 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes. They can be payable to foreign secured creditors when there is an arrangement between the related parties, such as a banker's clause.

#### 9 Foreign Employee Restrictions

# 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The Minister of Manpower has issued Regulation No. 16 of 2015 regarding Procedure for the Utilization of Foreign Manpower as amended by Regulation No. 35 of 2015 ("**Regulation 16/2015**"). Under Regulation 16/2015, a company may hire a foreign worker

for a specific position only for a specific time. Regulation 16/2015 does not clearly provide restrictions on foreign works. However, there is an unwritten policy of the Ministry of Manpower, which requires the company to employ 3 (three) Indonesian employees for every employment of 1 (one) foreign employee. The Indonesian employee hired shall include at least 1 (one) assisting employee to the foreign employee for the purpose of transfer of knowledge. Failing to comply with this requirement may cause the application by the relevant company for the Foreign Manpower Utilisation Plan (Rencana Penggunaan Tenaga Kerja Asing or "RPTKA") to be rejected, or the revocation of the Work Permit (Izin Mempekerjakan Tenaga Kerja Asing or "IMTA") of the relevant foreign employee.

#### 10 Equipment Import Restrictions

#### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Pursuant to Law No. 10 of 1995 as amended by Law No. 17 of 2006 on Custom ("Law 10/1995"), goods imported into a customs area are classified as imported goods and are therefore subject to import duties. The tariff of import duties is determined and classified by the goods classification system.

# 10.2 If so, what import duties are payable and are exceptions available?

Article 26 of Law 10/1995 provides that the exemption or dispensation of import duties may be granted for particular imported goods. Among others, the import of goods and materials for industrial construction and expansion of the framework of investment are exempt. These goods and materials are defined as all goods or materials, for all types and composition that will be used as materials or components to produce finished goods. Machinery for industrial construction and expansion means all machines, tools, equipment and factory installations that shall be needed for industrial construction and expansion. Exemption from import duties will be granted as long as the imported machines and/or goods and materials:

- a. have not been produced domestically;
- have been produced domestically, but do not fulfil the specification; or
- have been produced domestically, but the volume of production has not yet fuled the industrial demand.

A foreign-owned company (Penanaman Modal Asing or "PMA") or a domestic-owned company (Perusahaan Milik Dalam Negeri or "PMDN") may apply for a fiscal facility to reduce, defer, or discharge the tariff imposed on machineries and goods/materials. A company that has already had a Principal Licence (Izin Prinsip) and is already a legal entity or has a valid Business Licence (Izin Usaha) can apply to BKPM to obtain a fiscal facility as stipulated in Head of BKPM Regulation No. 16 of 2015. Fiscal facilities consist of: (i) an import duty facility for imported machinery (excludes any spare parts); (ii) an import duty facility for imported materials and goods; (iii) the possibility to obtain a facility on Value Added Tax (Pajak Pertambahan Nilai) for the imported goods; and (iv) the possibility to obtain a facility on Income Tax (Pajak Penghasilan) for the entity. The approval of the application for import duty facilities shall be in the form of an approval letter on import duty facilities issued by the Head of BKPM (and the Minister of Finance). Pursuant to this regulation, import duty facilities are granted for a certain period and can be extended.

#### 11 Force Majeure

### 11.1 Are force majeure exclusions available and enforceable?

Yes. Force majeure is regulated under Articles 1244 and 1245 of the Indonesian Civil Code. As the Articles fall under Book III of the Contracts of the Indonesian Civil Code, the binding power of such Articles may be waived by the parties. Consequently, the force majeure exclusions clause may be available and enforceable so long as the parties agree.

#### 12 Corrupt Practices

#### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Corruption and bribery practices are specifically regulated under Law No. 31 of 1999 on Eradication of the Criminal Act of Corruption as amended by Law No. 20 of 2001 ("Anti-Corruption Law"). The Anti-Corruption Law identifies a wide scope of persons who can be charged with criminal acts of corruption, in that the law does not only apply to civil servants but also to people who work in private enterprises. In the event that the criminal act of corruption is committed by or on behalf of a corporation, a criminal prosecution can be undertaken against such corporation and/or its management board. The management board must represent the corporation in a lawsuit relating to a criminal act of corruption. The basic criminal sentence against a corporation shall only be a fine, with the imposition of an additional 1/3 (one-third) of the maximum fines mentioned above.

Civil and criminal penalties are applicable under the Anti-Corruption Law. Criminal penalties are in the form of imprisonment and/or a fine, while civil penalties can be granted through civil claims before a court. Civil penalties may be claimed based on illegal actions causing losses to State finances. It is regulated in the Anti-Corruption Law that in the event the investigator finds and assumes that there is insufficient evidence against one or more elements in the criminal act of corruption while State finances are suffering losses, the investigator shall submit the docket to the State attorney in order to process a civil suit, or deliver such docket to the institution harmed in order to file suit.

Indonesia established a Court of Criminal Act of Corruption through Law No. 46 of 1999. The Court is authorised to examine, hear and decide in cases of:

- a. criminal acts of corruption;
- b. criminal acts of money laundering originating from corruption; and/or
- c. criminal acts stipulated as corruption under the law.

The Court is also authorised to examine, hear and decide on corruption cases conducted by an Indonesian citizen outside the territory of Indonesia.

#### 13 Applicable Law

#### 13.1 What law typically governs project agreements?

Normally, these would fall under English law.

#### 13.2 What law typically governs financing agreements?

Normally, these would fall under English law.

#### 13.3 What matters are typically governed by domestic law?

Typically, the transfer of assets or security over assets located in Indonesian territory is governed by domestic law.

#### 14 Jurisdiction and Waiver of Immunity

#### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, submission to a foreign jurisdiction (subject to the proper nexus to such jurisdiction) and waiver of immunity should be binding and enforceable.

#### 15 International Arbitration

#### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, international arbitration clauses are recognised by local courts.

#### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes. Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981. However, Indonesia is not a contracting state to any other prominent dispute resolution conventions.

# 15.3 Are any types of disputes not arbitrable under local law?

Pursuant to Law No. 30 of 1999, the disputes that can be settled through arbitration are those of a commercial nature. As far as other types of dispute are concerned, this is not possible.

# 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No. The parties may choose to settle the dispute through domestic or international arbitration.

#### 16 Change of Law / Political Risk

# 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

The GOI has enabled the provision of infrastructure guarantees with the purpose of improving infrastructure projects' creditworthiness, as part of an effort to encourage private sector participation in Indonesia's infrastructure development. Infrastructure guarantees can be provided to infrastructure projects that are implemented under PPP schemes as regulated under Presidential Regulation No. 67/2005 on Public-Private Partnership, as lastly amended by Presidential Regulation No. 66/2013 ("Perpres 67/2005").

Perpres 67/2005 stipulates the provision of infrastructure guarantees by the Minister of Finance ("MoF"), which can be implemented through a State-Owned Enterprise ("SOE") mandated to process and provide infrastructure guarantee (Infrastructure Guarantee Entity or *Badan Usaha Penjaminan Infrastruktur* – "BUPI").

The process for infrastructure guarantee through a BUPI is further regulated through Presidential Regulation No.78/2010 on Infrastructure Guarantees in Public-Private Partnership Projects provided through the Infrastructure Guarantee Entity (BUPI) ("Perpres 78/2010"), as well as through Minister of Finance Regulation No. 260/PMK.011/2010 on Guidelines for Implementation of Infrastructure Guarantee in Public-Private Partnership Projects ("PMK 260/2010").

# The Establishment of the Indonesia Infrastructure Guarantee Fund ("IIGF")

The IIGF was established in 2009 through Government Regulation No. 35/2009 ("PP 35/2009") on the Republic of Indonesia State Equity Participation for the Establishment of a State Owned Enterprise in the Field of Infrastructure Guarantees. With the subsequent amendments to Perpres 67/2005, IIGF's role as BUPI is further defined within the framework for infrastructure PPPs.

#### Objectives of the IIGF

The primary objectives of the IIGF's establishment are:

- Providing guarantees for PPP projects in infrastructure.
- Improving creditworthiness, particularly bankability of PPP projects from the perspective of investors/lenders.
- Improving governance and transparent processes in the provision of guarantees.
- Minimising the possibility of sudden shocks to the APBN and ring-fencing the exposure of the Government's contingent liabilities.

As IIGF guarantees are aimed at improving the creditworthiness of Indonesia's infrastructure PPP projects, this will in turn reduce the risk of projects for private investors and lenders, thereby attracting more private investment and increasing competition among potential bidders in the tender process.

The lower degree of risk would also enhance the potential projects' credit ratings, and may reduce the cost of project debt and lengthen the maturity of available financing. Lower cost of debt would ultimately translate into lower tariffs for consumers. The higher ratings of project debt may allow some PPP project companies ("PCs") to issue bonds on the capital markets, including local markets, thereby contributing to the development of Indonesia's capital markets.

The IIGF operates as a "single window" for the management of the provision of all guarantees provided to infrastructure projects proposed by the Government's CA.

As the single-window administrator of infrastructure guarantees in Indonesia, the IIGF will:

- provide consultation and guidance to CAs interested in obtaining IIGF guarantees for their projects;
- screen infrastructure projects for the eligibility to receive IIGF guarantees;
- evaluate guarantee proposals for infrastructure projects in accordance with the IIGF project appraisal guidelines and, in turn, accept or reject guarantee proposals;
- customise the guarantee structure and, if needed, propose and coordinate other guarantee programmes with other coguarantors or GOI institutions; and

5. establish a monitoring framework and closely monitor projects supported by the IIGF.

#### **Infrastructure Guarantee Arrangements**

not aware of any political risk protections.

An infrastructure guarantee is a form of MoF fiscal support to privately financed infrastructure projects. It guarantees the commitment of a CA to fulfilling its financial obligations under a PPP agreement. Under the current regulations, such guarantee can be provided by a BUPI.

As a BUPI, the IIGF shall enter into a Guarantee Agreement with the investor or PC, guaranteeing the performance of the CA under the PPP Agreement, specifically for those risks allocated to the CA in the PPP agreement, and which have been agreed by the IIGF to be included under the guarantee structure. In providing such guarantee, the IIGF will require the CA to enter into a Recourse Agreement with the IIGF. Other than the above, and the explanation under question 6.3, we are

#### 17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, there are requirements to deduct or withhold tax from interest payable on loans made to domestic or foreign lenders, as stipulated in the Income Tax Law. Other than the interest and fees for various agents' portions of such proceeds, the proceeds of a claim under a guarantee or the proceeds of enforcing security should not be subject to the withholding.

17.2 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?

No tax incentives would be given to foreign creditors. The tax incentives which are provided preferentially to foreign investors are in the form of the following:

#### 1. Investment Allowance

The investment allowance has several types, including, among others:

- 30% of the invested capital;
- accelerated depreciation and amortisation;
- reduction of the Dividend Income Tax Rate; and
- extended loss carried forward.

#### 2. Tax Holiday

This type of facility consists of the following:

- Corporate income tax relief for 5 (five) to 10 (ten) years after commencing commercial production.
- An additional reduction of 50% on the corporate income tax payable for a period of 2 (two) years.
- Taking into account the competitiveness of national industry and the strategic value of certain business activities, the Minister of Finance may extend the period of the tax holiday.

The criteria for obtaining the tax holiday facility are as follows:

- The activity is in a "pioneer industry".
- Having a plan for new capital investment of Rp 1 trillion, which has been approved by the competent authority.

- Depositing capital in Indonesian banks in the amount of at least 10% of the total new capital investment plan. The fund cannot be withdrawn before the implementation of capital investment
- Having Indonesian legal entity status issued since/after/ at least 12 months before the issuance of the Minister of Financial Regulation (15 August 2011).

#### 18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

The Investment Coordination Board of Indonesia recently issued a regulation stating that minimum foreign investment shall be: (i) more than Rp 10,000,000,000 (ten billion rupiah) or the equivalent value in US dollars, beyond the land and building investment with an equity debt ratio of 1:3; (ii) a minimum of approximately Rp 2,500,000,000 (two billion five hundred million rupiah) or the equivalent value in US dollars of issued and paid-up capital; and (iii) each of the shareholders of the company shall hold at least Rp 10,000,000 (ten million rupiah) or the equivalent value in US dollars, and the percentage of share ownership is calculated based on the shares' nominal value.

Furthermore, there is a recent development regarding the language of the contract. The language of the contract may be one of the key issues since the stipulation of Law No. 24 of 2009 on Flag, Language, National Coat of Arms and National Anthem ("Law 24/2009"). Under Law 24/2009, Indonesian language is required in any MOU or agreement involving Indonesian parties. On 20 June 2013 the District Court of Jakarta Barat nullified a Loan Agreement executed only in English. The District Court interpreted that provision to mean that an agreement not using Bahasa Indonesia is void as a matter of law. The District Court decision was affirmed on 7 May 2014 by the Jakarta High Court, and the Indonesian Supreme Court announced that it had rejected the appeal filed by the petitioner on 31 August 2015, thus re-affirming the High Court's decision. Therefore, any party contracting with an Indonesian counter party, be it in a cross-border or domestic transaction, shall enter into an agreement in the Indonesian language or bilingually so as to comply with Law 24/2009. For any English-only agreement involving Indonesian parties concluded after the enactment of Law 24/2009 (July 9 2009), it is advised to re-execute the agreement in the Indonesian language (or bilingually) so as not to leave it vulnerable to challenge.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In order to obtain project financing, a company can issue bonds or stocks, the procedure for which is regulated by the Indonesian Stock Exchange and Capital Market Supervisory Board Financial Institution (*Badan Pengawas Pasar Modal Lembaga Keuangan* – "Bapepam-LK") which is currently known as the Financial Service Authority (*Otoritas Jasa Keuangan* – "OJK").

In the event that the company would like to issue stocks in the stock exchange through an Initial Public Offering ("IPO"), Decree of Chairman of Bapepam-LK No. Kep-122/BL/2009 concerning the

Procedure of Public Offering Registration ("Regulation IX.A.2") states that the company, as the issuer, shall submit the registration statement and any supporting documents to the OJK, as well as announcing the short prospectus in local newspaper. After the applications have been completed, the company will obtain the effectiveness of registration so that it can begin to offer its stocks to the public.

With regard to the bond issuance, Law No. 24 of 2002 regarding Government Bonds ("Law No. 24/2002") and Decree of Chairman of Bapepam – LK No. KEP-07/BL/2006 regarding Bond Transaction Reporting ("Regulation No. X.M.3") states that bond transactions may be conducted on the stock exchange or over the counter, but the issuer shall report any of its bond transactions (i.e. issuance or transfer) to the OJK.

Further, it is advisable to issue bonds or conduct an IPO after a project company has been established for a certain period. Basically, in the IPO or bond issuance process, the OJK will check the accountability and capability of the company in conducting business activity. Those are the important aspects which will be assessed by the people who would like to purchase the stocks or bonds issued by that company. In the newly established company, however, business activity has not been firmly conducted so the financial capability or assets of that company cannot be assessed or offered to the public. In the event that the newly established project company still intends to obtain funding from an IPO or bond issuance, accordingly its sponsor may conduct such IPO/bond issuance, then inject the funds to the newly established project company.

#### 19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Indonesia has applied and regulated the common structure of the application of the *Shari'ah* law *akad* in Islamic project financing, as described below:

#### a) Istisna'a

Istisna'a is an Islamic project financing conducted in schemes of sale and purchase. Pursuant to Instruction (Fatwa) of the National Shari'ah Board (Dewan Syariah Nasional) No. 06/DSN-MUI/IV/2000 regarding Istisna'a Sale and Purchase, Istisna'a akad is defined as a request/reservation of certain goods with specific terms and requirements that have been agreed by the purchaser and the seller in which the payment will be conducted via the instalment method.

Pursuant to Law No. 21 of 2008 regarding *Shari'ah* Banking ("**Law No. 21/2008**"), a *Shari'ah* bank is allowed to conduct project financing under *Istisna'a akad*. In practice, *Istisna'a akad* is commonly used for construction projects such as buildings or roads.

In corporate financing, commonly *Istisna'a* is conducted at two levels. At the first level, the *Shari'ah* bank will provide payment to the builder to construct the building in accordance with the *Shari'ah* bank's request (the specification of the *Shari'ah* bank's request has been agreed by its customer). Payment from the *Shari'ah* bank will be delivered to the builder depending on the term of completion that has been agreed by the parties; for instance, the first term payment is delivered after the completion of 30% of the requested building, and will be settled after the building has been fully constructed. At the second level, the *Shari'ah* bank will enter into *Istisna'a akad* with its customer for the same object. This method is advisable as long as the *Istisna'a akad* is conducted separately for each transaction.

After the completion of the building, at the first level of *Istisna'a* the right of ownership of the building will be owned by the *Shari'ah* bank, and subsequently the *Shari'ah* bank will transfer the right of ownership to the customer at the second level of *Istisna'a*.

#### b) *Ijarah*

In practice, financing under *Ijarah akad* is essentially similar to a leasing agreement. Pursuant to the Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 09/DSN-MUI/IV/2000 regarding *Ijarah* payment, *Ijarah* payment can be conducted by parties that have entered into a lease agreement either verbally or in writing.

Generally, in practice there are two forms of *Ijarah*, as follows:

- Al-Ijarah is an agreement for the transfer of rights to utilise goods and services for a period of time as stipulated in the lease agreement without being followed by the transfer of ownership of the lease object after the lease term has expired.
- Al-Ijarah Al-Muntahia Tamlik Bit-Ijarah is an agreement for the transfer of rights to utilise goods and services for a period of time as stipulated in the lease agreement, which is followed by the transfer of ownership of the lease object after the lease term has expired.

In practice, financing of projects by *Shari'ah* banks in Indonesia is preferable to using *Al-Ijarah Al-Muntahia Tamlik Bit-Ijarah* schemes for providing financial assistance for customers, since the *Shari'ah* bank does not need to maintain and hold the lease object after the lease term has expired.

#### c) Wakala

Wakala is essentially an agreement to act on behalf of another person, commonly known as power of attorney. In commercial practice, Wakala akad is used by many sectors, for instance, to perform Letter of Credit transactions, enter into insurance agreements or finance via Shari'ah banking.

In the insurance sector, pursuant to Instruction (Fatwa) of the National Shari'ah Board (Dewan Syariah Nasional) No. 52/DSN-MUI/III/2006 regarding Wakala Bil Ujrah Akad on Shari'ah Insurance and Re-insurance, Wakala Bil Ujrah Akad is used by an insurance company to act on behalf of its customer to manage their fund for insurance purposes and also to obtain a compensation fee (ujrah). In the banking sector, pursuant to Law No. 21/2008, a Shari'ah bank may act as a trust agent (wali amanat) for the holder of a warrant (surat berharga) under Wakala akad.

#### d) Murabaha

The structure of *Murabaha* generally is a financing method under the structure of a sale and purchase agreement. A *Shari'ah* bank will purchase goods from the seller and then sell the goods to its customer. Payment under the *Murabaha* structure can be conducted in cash or instalments depending on the agreement between the parties without interest (*riba*), pursuant to Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 04/DSN-MUI/IV/2000 regarding *Murabaha*.

After the purchase of goods, the right of ownership of goods will be owned by the *Shari'ah* bank, thus in order to transfer the right of ownership to its customer, such goods will be re-sold by the *Shari'ah* bank to its customer either by the instalment or cash method. If the method of payment under the *Murabaha akad* is based on instalments, the object of the *akad* shall be transferred to the customer at the beginning of the instalments. The purchase price is based on the price that has been agreed by the bank and its customer.

Both *Murabaha* and *Istisna'a* are *akad* under sale and purchase schemes, but there are differences between *Murabaha* and *Istisna'a* in Islamic financing, as described below:

- (i) under Murabaha akad, the object of the akad will be directly transferred from the Shari'ah bank to its customer in the beginning of akad, while under Istisna'a akad the object of the akad will be transferred after the end period of akad; and
- (ii) under Istisna'a akad, the object of the akad shall be based on the specification as requested by the buyer, while in Murabaha such object may be based on specific request, or has been provided by the Shari'ah bank and/or seller.

The above is the common understanding of each *akad* in Indonesia, particularly Indonesian project financing practice.

19.2 In what circumstances may Shari'ah law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of Shari'ah or the conflict of Shari'ah and local law relevant to the finance sector?

Not all principles of *Shari'ah* law can be chosen as governing laws of a contract. Only principles of *Shari'ah* law that have been regulated in the form of Indonesian law and regulations can be chosen as the governing law of a contract; for instance, the *Murabaha* principle may be a governing law for a sale and purchase agreement, since the principle of *Murabaha* has been regulated under Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 06/

DSN-MUI/IV/2000 regarding *Istisna'a* Sale and Purchase. This stipulation is required in order to prevent disputes between parties caused by a difference of interpretation of the governing law for such contract.

One of the notable cases is one regarding disputes in relation to *Murabaha akad* between PT Atriumasta Sakti and Bank Syariah Mandiri before the Supreme Court of Indonesia in 2010 regarding the annulment of award of National *Shari'ah* Arbitration Tribunal (*Badan Arbitrase Syariah Nasional*) by the judgment of Religious Court of Jakarta. The Supreme Court of Indonesia judged and declared that the annulment was invalid.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Generally, the inclusion of an interest payment obligation in a loan agreement is allowed under Indonesian law. However, if the parties of the agreement agree to choose the principle of *Shari'ah* law, as regulated under Indonesia law, as their governing law, then it will be conflicted if the agreement contains clauses which state an interest payment.



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