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The International Comparative Legal Guide to:

Private Equity 2018

4th Edition

A practical cross-border insight into private equity

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General Chapters:

Country Question and Answer Chapters:

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Private Equity*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of private equity.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key private equity issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private equity laws and regulations in 34 jurisdictions.

All chapters are written by leading private equity lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Richard Youle and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

The most common types of private equity transactions in Indonesia are private equity transactions through direct equity participation, mezzanine loans, and convertible notes or bonds where the loan can be converted into shares in the call of the private equity investor upon certain events (e.g. IPO, change of laws, etc.). For certain tax purposes, the loan plus warrant would replace the convertible notes/bonds structure.

The current state of the market for private equity transactions in Indonesia is stable at the moment, but will start focusing on the unicorn of tech digital companies on top of healthcare, financial institutions and mining sectors.

There has been no significant change in the types of private equity transactions being implemented in the last two to three years. However, we note that there are more private equity investors who invest directly through equity instead of loans right now due to the change in regulation which now allows some types of business activities, which were previously closed for foreign investment, to be owned directly by a foreign investor.

1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in your jurisdiction?

Despite experiencing slowing growth, Indonesia's economy keeps growing. Indonesia also has a large domestic consumption base and natural resources. These factors make investment in Indonesia interesting.

Even though Indonesia is an interesting market for private equity investments, some of the investors still doubt investing their money in Indonesia due to its complicated bureaucracy, lack of infrastructure, high corruption rate and the uncertainty of the laws and regulations.

Nevertheless, Indonesia's investment climate remains conducive and attractive for private equity investors. The government also realises the potential of private equity investment for economic growth. In this regard, the government has tried to simplify the investment process to make it easier for investors to invest in Indonesia.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction? Have new structures increasingly developed (e.g. minority investments)?

As previously stated, private equity investors would prefer to invest in equity directly to the target unless the negative lists or certain regulations prevent them from doing so. They normally would have a holding company in a jurisdiction with a good tax treaty with Indonesia. They also would provide mezzanine loans to the target to not only boost the financial support to the target, but also to the mechanism to control the target as lender.

There is a new structure/trend that is developing for targets that are start-up tech/digital companies. In this case, the investors usually require the founders of the start-up company to establish a foreign holding company (in a country that they consider friendly for their investment, usually in Singapore). The investors will invest directly in the newly set up foreign holding company and then this entity will acquire 100% of the shares of the Indonesian target company.

2.2 What are the main drivers for these acquisition structures?

The main drivers for these acquisition structures are: (a) the exit possibility; (b) the negative list issued by the authorities where some business activities are closed or restricted for foreign investment; and (c) the dividend repatriation and tax consideration.

Factors (a) and (c) are the two factors that drive the new trend of setting up a foreign entity for investment purposes (as mentioned in question 2.1 above). The investors request the founders of the target company to establish a new entity in a country which they consider to be investment friendly for them (in regard to the tax treatment and exit possibility) so that they can achieve their main goal – i.e. exit from the investment with optimum upside.

For factor (b), if the line of business is closed or restricted for foreign investment, then the private equity investor cannot easily invest through equity in the Indonesian target company. Therefore, they will use convertible bonds where they will require the same rights as if they are shareholders in the target company, or use other sophisticated structures such as back door listing, utilisation of venture capital or mutual funds as a holding company, etc.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

The equity structure of the target company may be in the form of: (i) common/ordinary shares; and/or (ii) other classes of shares having different rights (voting right, dividend right, liquidation right or right to nominate directors/commissioners) and/or a different nominal value compared to the common shares. Law No. 40 of 2007 regarding Limited Liability Companies (**Company Law**) permits the issuance of these different categories of shares and it is quite common in private equity transactions.

It is also possible and quite common for an Indonesian company to have a management or employee stock option plan. For this type of stock option plan, there are two common ways being used by the company, i.e. (a) the stock option plan has been issued and held by the founders to be later given to the eligible employee/management, or (b) the stock option plan will only be regulated in the shareholders' agreement and will be issued later on once the rights have arisen.

2.4 What are the main drivers for these equity structures?

Private equity would have a special right in the target company either via a shareholders' agreement or other instrument.

The different classes of shares provide the equity investor with the ability to: (i) accelerate the return of its investment via the dividend preference and/or mandatory IPO; and (ii) avoid higher risk by having liquidation preference and anti-dilution protection.

2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

Members of key management or key employees of the target company are typically included in the management incentive plan. The vesting period for this management stock option plan varies from one private equity investor to the other. A two to three-year vesting period is often seen (subject to any lock-up provisions under the relevant laws and regulations).

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

There would not be many different structuring considerations other than having stricter reserved matter, options to increase ownership percentage and a certain put option for the exit. Please refer to our explanation in question 2.4 above.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

The following features are frequently included in the governance agreement of private equity investments in Indonesia:

- Investor's representation on the board of directors and board of commissioners.
- Certain protective rights to the investor (reserved matter) which require that certain actions cannot be taken without the affirmative approval of the investor.
- Right of first refusal and tag-along right.
- Certain information and audit rights.
- Exclusivity to key personnel.
- Non-compete and non-solicitation provisions (if applicable to the business of the target company).
- Deadlock mechanism.

The Company Law does not require that the abovementioned governance agreement must be made publicly available in the articles of association of the company. They can stay in the shareholders' agreement between the parties. However, usually the private equity investors will pursue that right to be included in the articles of association of the target company so that it will be publicly available to the other third parties.

3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

As discussed in question 3.1 above, the private equity investors and the other shareholders of the target company may agree on a list of reserved matters, outlining the key decisions which require the investors' approval, either at the shareholder level or at the board level (through the directors and/or commissioners nominated by them). This effective veto ensures that no key decisions are entered into without the consent or approval of the investors.

For a private equity investor who takes a position as a minority shareholder, they usually require the following reserved matters to protect their rights: (a) issuance of new shares or convertible instrument coupled with anti-dilution rights; (b) transfer of shares of the other shareholders combined with tag-along; (c) change of articles of association and management team; (d) entry into affiliated parties or material transaction; (e) dividend distribution and buyback shares; (f) proposed merger, acquisition, liquidation and litigation of the target company; (g) approval of the business plan; and (h) put option.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

There should be no limitations on the effectiveness of the veto arrangements at either the shareholder level or the director nominee level. The only problem is if this arrangement is not stated in the articles of association of the target company. In that case, if the board of directors of the company take some reserved matter actions without the approval of the private equity investors, the action still binds the company and protects the third party in good faith.

In order to minimise that kind of problem, the private equity investors should make sure that the veto arrangements are perfectly written in the articles of association of the company so that the third party understands the veto arrangement as well.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

Indonesian law does not recognise the concept of fiduciary duty of majority shareholders to the minority shareholders as recognised in the U.S. jurisdiction system. However, for special transactions such as merger and acquisition transactions, the Company Law requires the company to pay attention to the right of the minority shareholders and to buy back the minority shares to a certain extent.

In addition, the Company Law also regulates the rights that the minority shareholders with a minimum of 10% of the shares in the company have rights to: (i) commence a court proceeding against the board of directors and board of commissioners of the company; (ii) request the court to commence an investigation against the company; and (iii) seek the dissolution of the company.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

Although shareholders' agreements often contain a provision stating that its terms would prevail over the articles of association of the company if there is any discrepancy between them, Indonesian courts would generally give credence to the articles rather than the terms of the shareholders' agreement, since the articles of association is a public document whereas the shareholders' agreement is merely a contractual obligation amongst the parties to the agreement. As such, in the case of a dispute (and there is discrepancy), the investor's rights under the shareholders' agreement would be enforced under contract law.

There is no clear restriction that the shareholders' agreement cannot be governed under foreign law. However, considering that the object of the shareholders' agreement is the target company which is located in Indonesia, it is better to govern the shareholders' agreement under Indonesian law. In addition, kindly be advised that foreign court judgments cannot be enforced directly in Indonesia. Therefore, it will be difficult if the governing law of the shareholders' agreement is foreign law.

For this reason as well, the preferred dispute resolution mechanism in a contract involving a foreign investor is to utilise arbitration in an internationally recognised arbitration venue. In the event that a foreign investor successfully obtains an arbitral award off-shore, the enforcement against the Indonesian party requires registration and enforcement of the award through the Indonesian courts.

Indonesian law does not have a clear limitation and restriction on the content of the non-competition and non-solicitation provisions in a shareholders' agreement.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies under corporate law and also more generally under other applicable laws (see section 10 below)?

In general, the member of the Board of Commissioners (**BOC**) and Board of Directors (**BOD**) must comply with the requirements set out under the Company Law, i.e.:

- has never been declared bankrupt;
- has never been appointed as a member of a board of directors or board of commissioners of a company and declared guilty for causing the company to be declared bankrupt; and
- has never been convicted for any criminal actions that damaged the finance of the state and/or the relevant financial sector.

In particular, Indonesian law clearly stipulates that a director of human resources must be an Indonesian citizen.

Members of the BOD or the BOC may be held to account personally for "losses" suffered by the company pursuant to the Company Law. However, no liabilities would attach in this context if the members of the BOD can prove that: (i) the losses did not arise due to their negligence or fault; (ii) they have performed their duties in good faith and prudence for the benefit of the company; (iii) no conflict of interest existed; and (iv) they have taken actions to prevent such losses. For members of the BOC, no liabilities would attach in this context if the members of the BOC can prove that: (i) they have conducted the supervision duty in good faith and with prudence for the benefit of the company and in accordance with the objectives and purposes of the company; (ii) they do not have a personal interest in the action of the BOD that is causing the losses; and (iii) they have given advice to the BOD to prevent the losses or the continuance of the losses.

The Company Law does not regulate the responsibility of the nominator of the BOD or BOC held accountable for actions in the company.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

In the case of an actual conflict, the Company Law is unequivocal that such director may not act on behalf of the company. In the case of a potential conflict, such director should exercise their business judgment to assess if he/she should participate in a decision that would likely lead to an actual conflict. Otherwise, they may be held accountable if something goes wrong and causes losses to the company due to their actions (as explained in question 3.6 above).

In practice, it may be difficult as a nominated director has to balance their actions for the best interest of his/her nominator and for the best interest of the company (which has more than one shareholder).

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

Since most private equity transactions involve a foreign investor, an approval from the Investment Coordinating Board (**BKPM**) is required before the investor can invest as a shareholder in the target company. This usually takes the most time because it involves discussion with the BKPM to decide the most appropriate Business Classification Code Number for the activities of the company as well as the minimum amount of the investment. In certain cases, consent from a creditor would also take some time.

Furthermore, there are a number of notifications that need to be made to creditors, employees and other public disclosures in the event of a takeover or merger.

These notices include: a. The company's creditors would need to be notified at least 30 days before the notice of the general meeting of shareholders (**GMS**). Any objections the creditors have must be submitted at least seven days before the notice of the GMS. The merger may not proceed until all objections have been resolved; and b. The employees of the companies must be notified at least 14 days before the notice of the GMS. Investment in certain industries (for example, telecommunications and transportation) may require additional licensing and notification requirements to the relevant governmental agencies. In a direct investment by a foreign investor, approval from the Investment Coordination Board would also be required. Finally, KPPU reporting may be required in certain takeover situations.

In the case that the target is a public company, Indonesia's capital market regulator, the Financial Service Authority (**OJK**) may request additional information and the investor who would be the new controlling shareholder would be required to do a tender offer post-closing transaction.

4.2 Have there been any discernible trends in transaction terms over recent years?

The round down trend quite often happens in transactions involving tech companies. The red-hot industries of the target of private equity include FinTech (the most popular FinTech industry at the moment is that of peer-to-peer lending), unicorn tech companies, healthcare, financial services, mining and retail.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

In order to be able to "go private" the target company must obtain an approval from the independent shareholders and be ready to purchase all shares from dissenting shareholders, in addition to extensive disclosure requirements and tender offer of the remaining shares. In this regard, the company must comply with the minimum capital requirement set out by the Company Law.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

Although there is no restriction on the break-up fee arrangements, it is not a common practice in Indonesia.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Consideration structures which are typically preferred by private equity investors (on the sell-side) would be an IPO and trade sales of shares in a holding company residing in a tax haven country.

While on the buy-side, direct investment to the equity in the target company via its own vehicle in a low-tax jurisdiction.

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

The warranties/indemnities offered usually relate to the ownership of the shares and no threats or pending obligations that they owe in relation to such ownership.

In addition, the private equity seller would normally ask for a limitation of liability for the seller. For factual matters relating to the company, the management of the company would be able to give these only for the period where they are in office with standard clauses such as the due incorporation, constitutional documents and no threats or pending obligations.

The other warranties would normally be subject to the best of their knowledge.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

The other covenants, undertakings and indemnities usually relate to the ownership of the shares or the conditions precedent or subsequent relating to the transaction documents. The management team would covenant limited matters relating to the lack of compliance of the target company.

6.4 Is warranty and indemnity insurance used to "bridge the gap" where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

This is not common in Indonesia, although several insurance carriers do provide this service nowadays.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

Typical limitations include: (a) time limitation; (b) *de minimis*; (c) claim threshold; or (d) cap for the liability amount.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

It is not common. However, the buyers may obtain a bank comfort letter or other proof of fund documentations.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

The private equity buyers may show a bank comfort letter to show the finance ability of the private equity buyers. In the agreement, the sellers usually set out some kind of liquidated damages to cover the non-payment of the commitments by the buyers.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

These are not common in Indonesia.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

The Indonesian government provides quite strict regulation for a company to be able to conduct an IPO. The main challenges to do an IPO would include the long process of the registration statement, thorough verification by the authority, minimum floating, lock-up for founder shares and shares resulting from the debt equity conversion.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

If the private equity sellers obtain the shares (within the period of six months prior to the submission of the registration statement to OJK) with a lower price than the IPO's price, then such shares will be locked up until eight months after the effectiveness of the registration statement to the OJK.

Further, if the private equity sellers obtain the shares during the IPO by converting its convertible bonds issued by the target, the shares could not be traded in the stock exchange for one year after the conversion.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

Based on our understanding, the dual-track exit process here means that the private equity company plans to exit by conducting an IPO while also pursuing a possible M&A exit at the same time. In that case, this method is common in Indonesia.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

Utilisation of debt to fund private equity transactions is not common in Indonesia.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

The laws and regulations prohibit the use of debt for injection of capital for some line of businesses, such as multi finance companies and venture capital companies. In addition, banks are also prohibited from granting loans to an individual or to a company other than securities companies if the loan is used for the purpose of shares trading.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

The key consideration for private equity investors and transactions would be the most efficient tax exposure when the private equity exits from its investment and when the return from the investee is repatriated to it. The private equity would normally concern the tax treatment for the dividend, interest and royalty payment and the exit scheme.

Off-shore structures are also common (as we explained in question 2.1 above).

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

The key tax consideration must be the capital gain tax for the transfer of the shares in the jurisdiction of investee and investor. Further, the management teams would seek that the new acquisition structure has a better tax treaty benefit for the private equity investor. The management team should also consider the minimum amount of shares percentage in the investee that they need to maintain in order to have the lowest withholding tax rate for the dividend payment.

9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, "entrepreneurs' relief" or "employee shareholder status" in the UK)?

Management teams should consider the maximum tax treaty benefit that they will receive so that they can exit the investment with the lowest tax exposure. In between the investment and the exit, they should wisely choose the jurisdiction of the investee and the beneficial owner, so that they can get the lowest corporate tax rate pursuant to the tax treaty.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

Here are the changes in tax legislation which might impact private equity investments:

- The Minister of Finance set out the debt to equity ratio that will be considered in the calculation of income tax in 2015. Pursuant to this regulation, the maximum allowed debt to equity ratio is 4:1.
- The Minister of Finance set out transfer pricing regulation and country by country report (**CbCR**) to combat tax avoidance and BEPS practices in Indonesia. Pursuant to this regulation, a taxpayer who conducts a transaction with affiliated parties must maintain some kind of documentation and information to be reported to the authority. To supplement this regulation, the DGT just issued a new regulation concerning the classification of the taxpayers required to submit the country-by-country report and the procedures for the submission.
- The Minister of Finance signed a Multilateral Competent Authority Agreement on 3 June 2015. Following the signing of this agreement, the Automatic Exchange of Information with 94 other jurisdictions will automatically apply in September 2018.
- Regulation of the Minister of Finance No. 258/PMK.03/2008 regarding Withholding of Income Tax regulates that a transfer of shares of a company which was established in a tax haven country and has a special relationship with an Indonesian company or permanent establishment in Indonesia is subject to 20% of the estimated net sales amount.
- Regulation of Directorate General Taxation No. PER-62/PJ./2009 (as last amended by Regulation of Directorate General Taxation No. PER-25/PJ./2010) regarding the Prevention on the Abuse of Double Taxation Avoidance regulates that one kind of abuse is that the recipient of the income is not the beneficial owner. In this case, the tax treaty arrangement will not be applied and the Indonesian Income Tax Law will apply.
- The President of the Republic of Indonesia has just issued Perpres No. 13 of 2018 which concerns the beneficial owner of legal entities in Indonesia. This regulation focuses on amongst other things: (a) the criteria of a beneficial owner; (b) the reporting; and (c) the possibility of automatic exchange of information with another institutions, either nationally or internationally. Even though the purpose of this regulation is to combat terrorism and money laundering, many believe that this will impact taxation and transfer pricing activities as well, seeing as the beneficial owner is one of the most important factors in determining tax avoidance or illegal transfer pricing practices.

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in your jurisdiction, including those that impact private equity transactions differently to other types of transaction?

The Investment Regulations, the Company Law and tax regulations are the two key regulations for a private equity transaction in Indonesia. There is, however, no specific regulation that differentiates the type of private equity transaction from other types of transaction.

10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

The government has just released a new negative list in 2016 which amends some lines of business which were previously closed for foreign investment to be open for foreign investment with some limitations, i.e. retail activities which were previously closed for foreign investment are now open for the online selling of specific goods, as long as the sellers cooperate with small and medium enterprises.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

The scope of due diligence usually depends on the value of the transaction and the industry of the target. If the value is high, the investor usually requires a full-blown due diligence covering corporate documents, licences, manpower, agreements with lenders, suppliers and customers, assets, insurances, environmental compliance, litigation and court searches. On the other hand, if the value of the transaction is not material, the investor usually requires only a limited due diligence that covers only corporate documents, licences, assets, and material agreements.

The investor usually engages an Indonesian counsel to conduct the due diligence process.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

Normally, yes. The jurisdiction of the investor would determine the risk appetite of the investor in this regard. Investors coming from a country with very strict anti-bribery protection like the U.K., U.S. or Japan would be very concerned about this.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

Generally, shareholders of an Indonesian company would not be held liable for the company's losses beyond the value of the shares they held.

In theory, a "piercing" of the limited liability veil may take place in the event that it can be proven that certain shareholders unlawfully squandered the company's assets such that the company is unable to meet its obligation. The risk to the private equity investor is, however, quite low.

The risk to other portfolio companies is even more unlikely because, normally, the investor would create a separate SPV to hold shares or interests in each of the portfolio companies, reducing the risk of lateral exposure of debts from other portfolio companies to remote at best.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

There is nothing major other than the factor that we have stipulated above in question 10.4. Some minor concerns that the investors might need to consider are:

- Any agreement with an Indonesian party would need to be translated pursuant to Article 31 of the Law on Flag, Language, Emblem and National Anthem.
- Law No. 13 Year 2003 (the "Labour Law") contains several provisions that may adversely impact private equity investment in a company, including:
  - In the event of a change of a company's status, merger, consolidation or a "change of ownership" (frequently associated with a change of the controlling shareholder, but a change in the management's policies regarding employees' rights and entitlements may also qualify for a change of ownership), its employees would have the right to choose whether to remain or to terminate their employment with the company (Article 163(1) of the Indonesian Labour Law), in which case severance entitlement could be payable. However, recently there has been a Judicial Review Decision from the Constitutional Court under Decision Number 117/PUU-X/2012 deciding that the right of termination is in the hands of the employer, meaning that the employer is the one to decide whether to terminate or not. The right of the employee to decide not to continue the employment relationship in the event of a change of ownership is <u>conditional only if there is a restructurisation, rotation, reposition, inter-department transfer (*mutasi*), promotion, demotion, and change of working conditions of the employee</u>. If there is no such condition, the employer may reject the request of termination and the employee will be deemed to have voluntarily resigned from the company. However, our research with the Ministry of Manpower to discuss this issue indicates that given that the term "may" as stipulated in Article 163 is vague, the mediator and Industrial Relations Court may have different interpretations on this clause.
  - Under Article 163(2) of the Labour Law, the employer has the right to dismiss employees only in the event of a change of the company's status, merger and consolidation, but not in the event of a "change of ownership".
- Some joint ventures may be subject to mandatory merger control requirements (Article 28 of Law No. 5 of Year 1999 (the "Anti-Monopoly Law")).
- Rupiah must be used in certain cash and non-cash transactions occurring in the territory of Indonesia (Bank Indonesia Regulation No. 17/3/PBI/2015).
- The BKPM issued a new regulation in 2017 (PerBKPM No. 13 of 2017) which regulates new procedures for application of investment licences to BKPM, among others regulating that some lines of business which do not require construction activities or facilities from the BKPM can directly apply for a business licence to BKPM without the necessity to apply for principle licence/investment registration approval.

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At ABNR, she has been part of the teams of lawyers that assist clients in general corporate, antitrust, intellectual property rights, pharmaceutical and food industry matters as well as in commercial litigation. She has ample experience in handling start-up entrepreneur cases and has been involved in projects relating to restructuring, suspension of payment, investment and acquisition. She also contributes articles to *Getting the Deal Through*, *Lexis Nexis* and *Thomson Reuters*.

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