

International **Comparative** Legal Guides



Project Finance **2021**

A practical cross-border insight into project finance

10th Edition

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1 Overview

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

The requirement to obtain approval from the Offshore Commercial Loan Team (PKLN Team) for offshore commercial loans for projects developed under schemes such as Build-Operate-Transfer, Build and Transfer, Build-Operate-Own-Transfer (BOOT), etc., and for financing that has the characteristics of “non-recourse”, “limited-recourse”, “advance payments”, “trustee borrowings”, “leasing”, etc., involving State-Owned Enterprises, was removed in July 2020.

The new e-mortgage system requires the following mortgage services to be carried out electronically: mortgage registration; transfer of mortgage; change of creditors; de-registration of mortgage; and data correction. With e-mortgages, the foregoing services can only be carried out by creditors duly registered in the (e-mortgage) system.

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

The most noteworthy project financings to have taken place in recent years in the public infrastructure sector have been for power plants, toll roads, and water treatment and supply. In the private sector, such financing has mainly been used for smelting plants in relation to copper and nickel, and for oil-to-fuel processing plants.

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?

In Indonesia, a specific arrangement is required in relation to each type of asset. Security interests in Indonesia are generally

limited to those prescribed by law, and cover *in rem* and *in personam* security. The prescribed *in rem* security interests are: (i) mortgage for land, buildings and fixtures above and attached to land; (ii) fiduciary security for movable and immovable tangible assets (including buildings and fixtures that cannot be secured by a mortgage), receivables, insurance proceeds and intellectual property; and (iii) share pledges and bank accounts.

The *in personam* security interest is a guarantee. However, under a strict legal interpretation, Indonesia does not allow parties to freely determine or create a security interest contractually. In practice, “contractual security” as conditional assignment or novation and power of attorney to exercise contractual rights over the contractual arrangement of the borrower and generally, and managing the business of the borrower, are still used by lenders. This is regardless of its validity being questionable and possibly deemed invalid by Indonesian courts, as it may be considered circumvention of Indonesian security laws.

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. The form of security over real property and the buildings and fixtures attached to the land (including plant, machinery and equipment) is a land mortgage (*bak tanggungan*). A mortgage is created through the signing of a mortgage deed before a land deed official, usually known as a PPAT (*Pejabat Pembuat Akta Tanah*) in Indonesia, and registration of the mortgage deed with the E-Mortgage Deed Registration System.

Each lender or creditor must initially register itself in the E-Mortgage Party Registration System before registration of the mortgage deed in the E-Mortgage Deed Registration System so that the lender or creditor can be registered as the mortgagee in the System. The mortgage is established and finalised once the electronic mortgage certificate (E-Certificate) and annotation note are issued, and will be sent to the mortgagee via e-mail. The annotation note must be printed and attached to the original land certificate(s).

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, security can be taken over receivables by way of fiducia security. A fiducia security is created by entering into a written agreement in the form of notarial deed. The fiducia security agreement must be registered (online) at the Fiducia Registration Office within 30 days of the date of the fiduciary security agreement.

If within 30 days the fiduciary security agreement is not registered, the parties must re-execute the fiducia security agreement. The fiducia security becomes effective on the date of registration in the Fiducia Registration Book kept by the Fiducia Registration Office. Upon acceptance of the registration application, the fiduciary transferee will receive a Fiduciary Security Certificate issued by the Fiduciary Registration Office on the same date as registration.

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

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

It is market practice to grant a “pledge” over a bank account where the cash is deposited. It is also market practice to have the pledge agreement made as a notarial deed of pledge or executed privately. It is advisable that a pledge of bank account is executed as a notarial deed because of its evidentiary weight in court.

The pledge of bank account created must be notified to the relevant bank and acknowledgment from the bank must be obtained as evidence that the bank agrees to the provisions set out in the notice. Further, in practice, a pledge over bank accounts is normally accompanied or supported by power of attorney to manage bank accounts. However, this power of attorney neither creates nor is regarded as *in rem* security interest relative to the pledge agreement.

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

Yes, security can be taken over shares in companies in Indonesia as a pledge of shares or fiducia security. However, the pledge arrangement is more common in all types of financing, including project financing. Similar to the pledge of bank account, a pledge of shares is normally executed as a notarial deed.

The pledge must be registered and annotated in the shareholders register of the company. For a pledge of shares in a listed company or pledge over listed shares, it is also customary to have the shares “frozen” by either blocking the sub-account where the shares are deposited or the shares themselves, such that the shares could not be traded or moved out of the relevant

sub-account during the life of the pledge and without the consent of the beneficiary. Confirmation by the Indonesian Central Securities Depository (*PT Kustodian Sentral Efek Indonesia*) will be issued to confirm the block or freeze and for whose benefit it is carried out (typically, the security beneficiary).

The company and the Stock Administration Bureau must be notified of the pledge and the pledge must be recorded in the register of shareholders with the Stock Administration Bureau.

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)?

The notarisation fees vary, since a notary is given the freedom to determine them. The stamp duty applicable in Indonesia is Rp 10,000, affixed to the notarial deed or privately executed agreements. Mortgage and fiducia security are subject to registration fees or charges and Non-Tax State Revenue (PNBP) paid to the government.

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?

For fiducia security, the process of filing, notification or registration with the Fiducia Registration Office is relatively straightforward and generally does not involve a significant amount of time and expense.

For e-mortgages, the government’s intention is to simplify the process and reduce the cost of mortgage registration. However, since the online registration system is new and unfortunately still in Bahasa Indonesia only, registration of creditors with the system may be burdensome for offshore creditors or lenders, and may take a significant amount of time to complete. The cost of registration of an e-mortgage is not significant, with a maximum PNBP of Rp 50 million per mortgage deed.

There is no requirement to register the pledge with any government office.

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.?

Generally, no. However, in the event that land title held by the project company is granted upon land with management rights held by the government, the creation of a mortgage may require approval from the relevant government institution, depending on the underlying arrangement for the land cooperation or utilisation agreement entered into between the project company and the relevant government institution as the basis to apply for the land title. It is to be noted that the creation of security over all assets of a company (which is the case with project financing) requires approval from the general meeting of shareholders of the company. Further, if the borrower is a state-owned company, it cannot grant security over its assets or provide a guarantee due to the restriction applicable under Indonesian regulation and the World Bank Negative Pledge.

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?

Yes, a security agent is commonly used in project financing in Indonesia.

3.2 If a security trust is not recognised in your jurisdiction, 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?

The concept of security trust is not recognised in Indonesia; however, the concept of security agent is recognised and commonly used in project financing in Indonesia. The security agent can act on behalf of the individual lenders to sign the security documents and enforce the security.

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 restrictions with respect to enforcement of security in Indonesia that may impact the timing and value of enforcement. Security interest in Indonesia can be enforced by way of public auction or private sale. In theory, the secured lenders may sell the secured assets without any court decision in the event of default. However, in practice, the state auction body sometimes still requires a court decision or order to be provided before it will proceed with a public auction.

Enforcement of security interest by way of private sale is possible. For fiducia security, a private sale may be based on mutual consent of the fiduciary transferor and the fiduciary transferee if, by private sale, the highest proceeds giving greatest benefit to both parties can be obtained.

Similar conditions and issues as set out in the foregoing are also relevant and occur in the enforcement of mortgages and pledges by way of public auction or private sale. The enforcement of a pledge of shares may also be subject to the following restrictions: (i) the sale of pledged shares through enforcement of the pledge will be subject to restrictive provisions contained in the articles of association of the company whose shares have been pledged. If the articles of association provide that other shareholders have a right of first refusal, or that the general meeting of shareholders must first approve a transfer of shares, the creditor as pledgee must comply with such provisions; and (ii) in some cases, licences of the company may include restrictions on changes of control of the licence holders, and thus the sale of pledged shares on enforcement of the pledge may trigger these change-of-control provisions.

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

Yes, restrictions apply in such cases.

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?

A bankruptcy proceeding may affect the ability to enforce security; in particular, during the so-called “stay period”, which is 90 days from the rendering of a bankruptcy declaration; and during the entire period of the “suspension of payments” period, which can be a maximum of 270 days, as of the granting of a suspension of payments decision.

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?

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

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

No entity is excluded from bankruptcy proceedings. However, certain financial institutions can only be the subject of a bankruptcy petition made by a relevant government institution. For example, insurance companies can only be petitioned by the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan* – OJK). The applicable regulation is Law No. 40 of 2014 on Insurance.

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 other process is available within the context of a creditor’s intention to seize a certain object for the purposes of 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?

In addition to a formal insolvency proceeding, the bankruptcy law provides an opportunity for project companies to launch court-supervised debt moratorium and restructuring proceedings, in which an approved restructuring plan is formalised as a court decision and applies to all creditors’ claims, without exception.

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 Indonesian law or statute applicable to directors would not go into such specific detail; but in general, a director must act in good faith and take full responsibility for the company and its shareholders. Nonetheless, every member of the board of directors is fully liable personally for any losses the company may sustain should the relevant member be at fault or negligent in performing its duties – including if the losses were caused due to trading whilst a company was in financial difficulty and the act was not done in good faith or was negligent.

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 direct investment is subject to restrictions, typically in the form of regulations or decrees issued by the President or his/her line ministries or other government institutions. The restrictions or requirements vary from one line of business to the next, and include, for example: (i) limited foreign shareholding; (ii) minimum capital contribution; or (iii) certain cooperation with micro, small, and medium-sized enterprises.

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

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

No, there are no such treaties.

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

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

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 ministries are as follows:

- for the energy sector, it is the Ministry of Energy and Mineral Resources; specifically for power with a BOOT scheme, it is *PT Perusahaan Listrik Negara (Persero)* (PLN), a state-owned company that will become the sole off-taker;

- for transportation (ports, airports and railways), the Ministry of Transportation;
- for water, waste management and toll roads, the Ministry of Public Works and Housing; and
- for telecommunications (e.g., satellites and underground cables), the Ministry of Communications and Information.

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?

No. However, upon the signing of the financing documents, the borrower must report to Bank Indonesia and the Ministry 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)?

Yes, generally, ownership and operation of assets requires a licence. The land title granted upon land used for projects normally financed through project financing is Right to Build (HGB) or Right to Use (HP). Ownership of the land title (including HGB and HP) is typically reserved for Indonesian legal entities, with a minor exception for foreign national ownership of apartment title, which still is very difficult to achieve in practice.

Typically, projects involving the construction of infrastructure will require a particular construction licence. Projects situated within a forestry area will require a licence (i.e. a Borrow-Use Permit of Forestry Area or IPPKH) from the Ministry of Environment and Forestry.

To conduct business activities in Indonesia, a business licence is required; and operation of the assets also necessitates certain commercial or operational licences such as an environmental licence, etc. These licences can only be granted to an Indonesian legal entity, or in some cases to a Permanent Establishment.

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

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

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

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

amount specified under the underlying transaction, and the party purchasing the foreign currency is required to submit supporting and underlying documents to the exchange bank.

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 bank fees, no restrictions are applicable.

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

Yes, they can.

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 your jurisdiction or abroad?

In general, there are no restrictions on the issuance of dividends to foreign shareholders.

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?

Yes, generally, infrastructure and energy projects in Indonesia are subject to environmental, health and safety regulations. The governmental authorities that administer these laws and regulations are as follows:

- For environmental law and regulations, it is the Ministry of Environment and Forestry.
- For health and safety regulations, it depends on the sector. In the energy and mining sector, it is the Ministry of Energy and Mineral Resources. For other infrastructure (toll roads, water treatment and supply and waste management and processing facilities) and construction in general, it is the Ministry of Public Works and Housing. The Ministry of Manpower administers safety regulations on certain equipment used in a project.

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

Yes. Generally, procurement by the project company for public infrastructure projects or projects involving a state-owned company is subject to open tender, and only in certain cases may the appointment of a project company be carried out by way of direct selection or appointment.

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?

No. However, payment of the insurance premium received by foreign insurance companies is subject to income tax in Indonesia (at 20%).

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

Yes, insurance policies over project assets are payable to foreign secured creditors if the insurance policies are subject to fiducia security and the relevant insurance company has provided its acknowledgment of the fiducia security or assignment.

9 Foreign Employee Restrictions

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

Employment of foreign workers, technicians, engineers or executives by a project company requires the project company to initially obtain the necessary permits, i.e. through the Approval of Foreign Personnel Utilisation Plan. In certain sectors such as geothermal energy, there is a requirement that the head and deputy head of geothermal engineering cannot be foreign workers and must be Indonesian nationals.

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?

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

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

Foreign investment companies can utilise the tax facilities provided by the government and apply for exemption from import duties and VAT for capital goods.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Yes. Under the Indonesian Civil Code, parties to an agreement are excused from performing their obligations (including payment of compensation of costs, damages and interest) if non-performance is due to a *force majeure* event. In practice, the parties to an agreement can further define and determine arrangements with respect to *force majeure* in a contract (i.e., setting out what events amount to *force majeure*, and the grace period before deemed performance and deemed payments kick in).

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?

Yes. A person found guilty of corruption is liable to a sentence

of life imprisonment, or between four and 20 years' imprisonment and a fine of Rp 200 million to Rp 1 billion. The Anti-Corruption Law (Law Number 31 of 1999 on Eradication of Criminal Acts of Corruption, as amended by Law Number 20 of 2001) also provides additional penalties in the form of: (i) confiscation of movable or immovable goods; (ii) compensation of up to twice the gain derived from the act of corruption; and (iii) whole or partial closure of a company for a maximum period of one year. For a company, the criminal sanction is a fine, with the maximum fine applicable to individuals increased by one-third when applied to companies.

13 Applicable Law

13.1 What law typically governs project agreements?

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

13.2 What law typically governs financing agreements?

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

13.3 What matters are typically governed by domestic law?

Domestic law typically governs matters that involve performance by the parties that are conducted entirely in Indonesia, and matters related to financing or security upon assets that are located in Indonesia. Certain contracts, such as for engineering, procurement and construction (EPC), are required by law to be governed by Indonesian 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?

In general, a party's submission to a foreign jurisdiction and waiver of immunity is generally legally binding and enforceable. However, foreign court decisions are not enforceable in Indonesia; the nation is not a party to any treaty or bilateral agreement that recognises the enforcement of foreign court judgments. A foreign court judgment can be used as evidence in the retrial of the merits or substance of a case in an Indonesian court.

15 International Arbitration

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

Yes, such provisions are recognised.

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

Yes, Indonesia is a contracting state to such conventions.

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

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

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

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

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?

Generally, political risk is borne by or allocated to the government/state-owned company in the public infrastructure project; and in certain types of project, it is covered by a government guarantee, or a guarantee by *PT Penjaminan Infrastruktur Indonesia (Persero)* for PPP projects.

It is common for lenders to require, and for the government/state-owned company to provide, a direct agreement (usually a consent letter), which also serves as an acknowledgment of security interest created upon the contracts and the rights (and obligations) of the project company.

To our knowledge, there has never been any enforcement of direct agreement or political risk guarantees against the government/state-owned company *PT Penjaminan Infrastruktur Indonesia (Persero)*.

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 is a requirement to deduct or withhold tax (normally at 20%) from interest and certain fees payable on loans to domestic or foreign lenders or the proceeds of a claim under a guarantee or enforcement of security.

The withholding tax is to be collected by the borrower, and normally the borrower is required to indemnify, or bear any tax obligation that may be applicable to, the lenders. The proceeds of a claim under a guarantee or enforcing security will be subject to capital gains tax.

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?

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

Tax incentives (e.g., lower income tax for dividend, automatic exemption of income tax for import of equipment required for the operation of a renewable project, and income tax relief through a reduction of net income of the total investment (up to 30% applied within a six-year period, with a reduction of 5% per year)) are also applicable to foreign investors in renewables and pioneer industries.

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

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?

For investors in the power sector (especially non-geothermal power plants), there is a restriction under the regulation in which shareholders cannot transfer their shares before the commercial operation date (COD). Power projects with PLN as the off-taker normally have stricter restrictions on the transfer of shares, set out in the sponsor's agreement.

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.

The issuance of bonds or similar capital market instruments must observe the provision of "Public Offering" under Law No. 8 of 1995 on Capital Markets (Capital Markets Law) where it is defined as an offer of securities (which includes both shares and options) to the public, made by an issuer in the manner stipulated in the Law and its implementing regulations.

In a public offering, the issuer must obtain prior approval from the OJK by submitting certain documents, among others: (i) prospectus; (ii) audited financial statement; (iii) prospective financial statement on financial forecast; (iv) due diligence report and legal opinion; and (v) underwriting agreement (if any) and other agreements related to the public offering. Upon the first registration to OJK, the OJK will send their comments and request for further documents, which must be responded to and fulfilled before the OJK grants the public offering approval. Further, in a public offering, the issuer appoints supporting professionals to prepare the required documents; among others, an underwriter, legal consultant, accountant and notary.

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.

Financiers often apply *murabaha* in investment and working capital financing, particularly the procurement of goods. *Murabaha* can

also be used in short-term money market operations and (when linked with *ijarah*) refinancing on a sale and leaseback basis.

In Indonesia, financiers tend to apply *al bai' bittsaman ajil*. In this scheme, financiers provide full or partial financing for the purchase of specific *balal* goods, and the repayment of the financing by the customers is in instalments within an agreed period of time.

The financiers' profit is based on margin over the costs. This requires specific *balal* goods as well as a fixed sale price and margin (and fee, if any) – which together constitute the *murabaha* financing value – and repayment to be determined in advance between the financiers and the customers.

Financiers can require down payment for the purchase of the goods, which needs to be agreed in advance by the parties. *Murabaha* also allows financiers to receive collateral in the form of the *murabaha* objects and other assets of the customers.

Istina'a is used in construction and industrial project financing. *Istina'a* is also adopted in the Islamic bond issuance structure. Fixed pricing of the goods is required in *istina'a*. For this purpose, *istina'a* allows the financiers and the customers to agree in advance on fixed pricing, including the profit margin, although the goods are not yet available. Since the margin is pre-determined, financiers may bear the risk of default in the delivery of the goods.

Ijarah is normally used in bond issuance in Indonesia. Various Islamic bonds have been issued by the Indonesian government based on an *ijarah* (asset-to-be-leased) scheme to finance multiple infrastructure projects.

Wakala is commonly used in export and/or import settlement financing, where financiers collect export receivables and/or make payment for import payables on behalf of customers. A recent development in the use of *wakala* is in the Jambaran–Tungur Biru project financing – the largest upstream oil and gas project to reach financial close in Indonesia in the past decade with Islamic finance and a combination of a conventional loan and an Islamic structure.

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?

We are not aware of any notable cases on conflict between *Shari'ah* and Indonesian law in the finance sector. No circumstance requires *Shari'ah* law to be the governing law; instead, *Shari'ah* banking principles have been incorporated into Indonesian law with regard to *Shari'ah* banking products.

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?

All *Shari'ah* transactions must comply with the *Shari'ah* principles that have been incorporated into Indonesian law, which includes the non-inclusion of interest. While the inclusion of an interest payment obligation in a financing agreement will not affect the validity and/or enforceability of the financing agreement from an Indonesian law perspective, its inclusion will relinquish the *Shari'ah* elements of the financing agreement and the financing agreement will lose its *Shari'ah* benefits (e.g., tax).



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As head of ABNR's project finance & development practice, Emir has been involved in most of the major power projects developed in Indonesia in recent years, including: the USD 1.74 billion, 1,000 MW Cirebon Expansion Project; the USD 3 billion, 2,000 MW Java 9&10 project; and the USD 2.7 billion, 2 × 660 MW Tanjung Jati A project.

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In project finance, he advised a consortium of domestic state-owned banks and international lenders on the recently closed, USD 1.846 billion "Trustee Borrowing Scheme Financing" provided to PT Pertamina EP Cepu (a wholly owned subsidiary of Indonesia's state energy company, PT Pertamina Persero) for the development of the Jambaran-Tiung Biru gas project – the financing consisted of a USD 1,746,400,000 conventional facility and a USD 100,000,000 *Shari'ah*-based *Wakala* facility.

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As Indonesia's longest-established law firm (founded 1967), ABNR pioneered the development of international commercial law in the country following the reopening of its economy to foreign investment after a period of isolationism in the early 1960s.

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