

THE REAL ESTATE M&A  
AND PRIVATE  
EQUITY REVIEW

THIRD EDITION

**Editors**

Adam Emmerich and Robin Panovka

THE LAWREVIEWS

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AND PRIVATE  
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**Editors**

Adam Emmerich and Robin Panovka

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# INDONESIA

*Oene Marseille, Emir Nurmansyah and Gustaaf Reerink<sup>1</sup>*

## I OVERVIEW OF THE MARKET

To date, Indonesia's market for investment-grade real estate assets has been rather illiquid, showing very limited M&A and private equity activity. Many foreign investors consider Indonesia to be a risky place to do business. Until mid-2017, Indonesia's credit ratings were still below investment grade.<sup>2</sup> Furthermore, the legal framework is generally deemed to be unsupportive of cross-border transactions. Indonesia's investment law and land law impose restrictions on foreign investment. Banking and capital market legislation creates only limited room for creative financial structures. Creditors can establish security rights on land, shares and other assets, but in practice it may not always be easy to enforce these rights.

Being the world's fourth most populous country, with a fast-growing middle class, Indonesia has the potential to develop into a major market for real estate M&A and private equity. An increasing number of foreign investors, particularly from Japan, Korea and China, who already have some experience in doing business in Indonesia, recognise this potential and invest in the country's real estate market. Generally, the ASEAN market has an increased interest among foreign investors. Indonesia, perhaps together with Vietnam, Myanmar and Malaysia, is one of the countries that receives particular attention. Recent pro-foreign investment measures of the Jokowi administration, consisting of, *inter alia*, deregulation measures, a loosening of foreign investment restrictions, and tax and other incentives, contribute to this development.

Some measures that should specifically boost the Indonesian real estate sector are the relaxing by the Indonesian Central Bank (Bank Indonesia) of the macro-prudential policy by raising the loan-to-value ratio, or financing-to-value ratio, for property loans. The policy should not only benefit individual home owners, but also developers, who can now provide a lower guarantee when taking out a loan from the bank. The Jokowi administration has also relaxed foreign ownership in residential property, albeit with limited short-term benefits expected. Finally, the Minister of Finance and the Indonesian Financial Services Authority

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1 Emir Nurmansyah is a partner, and Oene Marseille and Gustaaf Reerink are foreign counsel at Ali Budiardjo, Nugroho, Reksodiputro. The authors would like to thank Craig Williams and Anton Sitorus of Savills Indonesia for their valuable input on current developments in Indonesia's real estate market. In addition, the authors would like to thank Ayezsa Nafira Harfani, associate at ABNR, as well as Marit Steijn and Sophie Hewitt, legal interns at ABNR, for their assistance in updating this contribution.

2 Standard & Poor's was the last of the three major credit rating agencies to raise Indonesia's credit rating to investment grade on 19 May 2017.



(OJK) have taken several measures to make the use of real estate investment funds in the form of a collective investment contract (DIRE) – the Indonesian equivalent of real estate investment trusts (REITs) – more attractive.

There are generally four types of foreign investors active in Indonesia's real estate market:

- a* public real estate companies;
- b* DIREs or REITs;
- c* sovereign wealth funds; and
- d* private equity.

Foreign investors will need to invest through an Indonesian limited liability company with foreign investment status, a PMA company (as discussed in Section IV) or with a public listing. There are currently around 60 public real estate companies listed at the Indonesian Stock Exchange (IDX). Many of these companies have foreign participation. Well-known names with a strong presence are Agung Podomoro, Ciputra, Summarecon, Lippo and BSD. Most of the public real estate companies in Indonesia are traditionally developers, but some are trying to diversify their income streams, for instance, by investing in REITs, as discussed in further detail in Section III.

Foreign investors generally invest in four categories of real estate in Indonesia:

- a* commercial buildings for offices, hotels or retail;
- b* residential buildings;
- c* hospitals and healthcare; and
- d* land for development.

Most of the investments are for the long term, but particularly the investments in commercial buildings and residential buildings are sometimes only made to support development, after which individual units or parts of the property are sold.

In addition, some foreign conglomerates whose core business is not necessarily real estate are becoming active on Indonesia's real estate market. This also applies to certain financial institutions and insurance companies. These companies are often investing in commercial real estate for their own domestic occupation, for instance, for foreign employees who need to be housed in Indonesia.

In terms of transaction structure, the investments are generally still rather conventional. Most acquisitions consist of plain vanilla sale and purchase of direct property, and sometimes involve the sale and purchase of shares in local real estate companies, either directly or through the IDX. Again, the legal framework puts limitations on the creation of more sophisticated structures. Often, foreign investors create a joint venture with local partners, which indeed may be a requirement under Indonesian investment legislation.

In terms of deal value, the investments may sometimes be significant, but generally not as large as in countries with a more developed real estate market.

## II RECENT MARKET ACTIVITY

### i M&A transactions

M&A activity on Indonesia's real estate market is limited, but increasing. Recent transactions include the acquisition in May 2017 by PT Jakarta Setiabudi Internasional Tbk of 670 hectares of land near Medan for the development of an independent city of mixed-use and landed houses. The project involves an initial investment of 450–500 billion rupiah,

including 200 billion rupiah for land acquisition. In July 2017, PT Patra Jasa, a subsidiary of state-owned oil company Pertamina, acquired two apartment complexes, Tamansari Urbano in Bekasi and Tamansari Amarta Yogyakarta in Yogyakarta, from Wika Gedung at a value of 1 trillion rupiah.<sup>3</sup> At the end of 2017, PT Bumi Serpong Damai Tbk, which forms part of the Sinarmas group, acquired 24 floors, totalling 35,989 square metres, of the Sinarmas MSIG Tower, at Jalan Sudirman in a prestigious Jakarta business district, from Asuransi Jiwa Sinarmas MSIG at a value of 954 billion rupiah. The building consists of 68,525 square metres of office space. A few months earlier, the company acquired 13 floors, totalling 17,000 square metres, of the Bakrie Tower in Kuningan, Jakarta, another major business area, from the Bakrie Group at 476 billion rupiah.<sup>4</sup>

There is also a significant number of new projects on Indonesia's real estate market. Most of these projects involve investment from foreign corporations through joint ventures with local companies. For example, Osaka based-company Hankyu Realty Co. works with Sumimoto Corp. JOIN (Japan overseas infrastructure investment corporation for transport and urban development) and PT Sentul City Tbk through the Indonesian joint venture PT Izumi Sentul Realty on building a condominium complex of three condo towers with a total of 1,095 units for US\$108 million in the city of Sentul.<sup>5</sup> Another Osaka based-company, Dawai House Industry, is together with JOIN investing US\$63 million to develop a mixed use complex urban area on a site of about 12 hectares in South East Jakarta.<sup>6</sup> Located in the centre of Jakarta, Tokyu Land and JOIN through the Indonesian joint venture PT Tokyu Land Indonesia have started to develop a high-rise condominium complex on 1 hectare of land in the Mega Kuningan area. In addition to this, Tokyu Land is collaborating with PT Summit residential Indonesia and PT Copylas Indonesia to build another condominium complex of about 600 units in West Jakarta.<sup>7</sup> Mitsubishi Corporation announced in October 2016 its plan to participate in a mixed-use development project in Bumi Serpong Damai City, Tangerang, with PT Bumi Serpong Damai TBK, an affiliated company of Sinarmas Land Ltd. The project involves the development of around 1,000 units on a 19-hectare plot of land and will cost approximately US\$260 million.<sup>8</sup> The project is still ongoing. Sydney-based property developer The Crown Group in collaboration with PT Pembangunan Jaya Ancol Tbk is planning to develop the Ancol waterfront project, an apartment complex in North Jakarta, for an estimated US\$500 million. The Joint Venture is to build five apartment towers consisting of 3,000 residential units on a 4.7-hectare site.<sup>9</sup> One of the most recent developments is by Sinarmas Land from Singapore, which has 40 per cent participation in a joint venture with Indonesia-based Kawan Lama group. The Joint Venture is investing 1.2 trillion rupiah to develop a living world on 8.5 hectares in Kota Wisata Cibubur in East Jakarta.<sup>10</sup> In August 2017, Sinarmas Land, together with two Japanese joint venture

3 See <https://www.industri.kontan.co.id/news/patra-jasa-akuisisi-dua-apartemen-senilai-rp-1-t>.

4 See [www.beritasatu.com/bisnis/478407-bsd-akuisisi-bakrie-tower-dan-msig-tower.html](http://www.beritasatu.com/bisnis/478407-bsd-akuisisi-bakrie-tower-dan-msig-tower.html) and [www.katadata.co.id/berita/2018/02/13/kucurkan-rp-476-miliar-bsd-resmi-akuisisi-13-lantai-bakrie-tower](http://www.katadata.co.id/berita/2018/02/13/kucurkan-rp-476-miliar-bsd-resmi-akuisisi-13-lantai-bakrie-tower).

5 See [www.japantimes.co.jp/news/2018/02/21/business/corporate-business/japans-hankyu-realty-taps-indonesian-condo-market/](http://www.japantimes.co.jp/news/2018/02/21/business/corporate-business/japans-hankyu-realty-taps-indonesian-condo-market/).

6 See [www.daiwahouse.com/English/about/release/pdf/release\\_20170809\\_e.pdf](http://www.daiwahouse.com/English/about/release/pdf/release_20170809_e.pdf).

7 See [www.tokyuland-id.com/media/news/doc/20180316NewsRelease\(English\).pdf](http://www.tokyuland-id.com/media/news/doc/20180316NewsRelease(English).pdf).

8 See [www.beritasatu.com/bisnis/466518-sinar-mas-land-gandeng-mitsubishi-corporation.html](http://www.beritasatu.com/bisnis/466518-sinar-mas-land-gandeng-mitsubishi-corporation.html).

9 See [www.jakartaglobe.id/business/australias-crown-group-announces-first-500m-project-indonesia/](http://www.jakartaglobe.id/business/australias-crown-group-announces-first-500m-project-indonesia/).

10 See <https://industri.kontan.co.id/news/sinarmas-land-gandeng-kawan-lama-group-bangun-mixed-use-di-kota-wisata-cibubur>.

partners Itochu Corporation and Shimizu Corporation, invested 1.5 trillion rupiah into the Aerium apartment project at Taman Permata Buana in West Jakarta. The project consists of two apartment towers and 18 townhouses, built on a site of 1.8 hectares.<sup>11</sup> Another Singapore based company Sumimoto Forestry Singapore Ltd together with PT Summarecon Agung Tbk will, starting in December 2018, build 160 units of landed housing on 44,000 square meters in the Summarecon Bekasi area. The amount invested in the project is US\$30 million.<sup>12</sup> GIC Private Ltd, PT Intiland Development Tbk and PT Raharja Mitra Familia have entered into a joint venture to develop two mixed-use condominium towers on an area of 1.3 hectares in Central Jakarta.<sup>13</sup> In Sentul City, Bogor, Singapore-based corporation Perennial Real Estate Holdings Limited is going to develop 1,700 residential units, including landed houses and condominiums, for approximately US\$153,400. It will jointly develop the site with Indonesian company PT Cipta Harmoni Lestari<sup>14</sup> Vasanta Group is in a joint venture with Korean company Lotte Engineering & Construction and PT Premier Qualitas Indonesia reintroduced the Saumata Premier project of approximately 6,014 square metres, a 2 trillion rupiah project that consists of 502 condominiums and apartments in Alam Sutera, Tangerang, Banten.<sup>15</sup> The City Gate 88 project is another development by Vasanta Group, together with Korean construction company GS Engineering & Construction. They are building a 1,145-household apartment complex in West Jakarta. Vasanta Group has acquired the land, while GS E&C has invested US\$20 million in the project.<sup>16</sup> Aside from the foreign companies that are investing in the Indonesian property market through joint ventures, there is a purely local collaboration between PT Modernland Realty Tbk and PT Waskita Realty Tbk. Their project is by far the largest as it comprises of 350 hectares in Bekasi, West Java. The plan is to develop a city with toll roads that are integrated with public transportation facilities.<sup>17</sup>

## ii Private equity transactions

Private equity activity on Indonesia's real estate market is very limited. A noteworthy transaction dating from a few years ago is the creation of a joint venture between subsidiaries of Warburg Pincus LLC and the Indonesian public real estate company PT Nirvana Development Tbk in 2015. PT Nirvana Development specialises in the development of hypermarket anchored retail centres in emerging cities across the country. Since 2009, the company has developed five mixed-use projects in second and third-tier cities across Java and Kalimantan. The company's aim is to development more projects in other cities in Indonesia,

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11 See [www.ascend.co.id/en\\_US/2017/08/07/sinar-mas-itochu-shimizu-invest-idr-1-5-t-aerium/](http://www.ascend.co.id/en_US/2017/08/07/sinar-mas-itochu-shimizu-invest-idr-1-5-t-aerium/).

12 See [www.summarecon.com/id/media/news/summarecon-bekasi-cooperates-with-sumitomo-forestry-present-new-cluster](http://www.summarecon.com/id/media/news/summarecon-bekasi-cooperates-with-sumitomo-forestry-present-new-cluster).

13 See [www.gic.com.sg/wp-content/uploads/2018/02/intiland-and-gic-enter-joint-venture-to-own-and-develop-fifty-seven-promenade\\_final.pdf](http://www.gic.com.sg/wp-content/uploads/2018/02/intiland-and-gic-enter-joint-venture-to-own-and-develop-fifty-seven-promenade_final.pdf).

14 See <https://sbr.com.sg/residential-property/news/perennial-real-estate-holdings-develop-1700-unit-indonesian-site-1534m>.

15 See [www.beritasatu.com/ekonomi/493830-vasanta-gandeng-lotte-dan-premier-bangun-proyek-rp-2-triliun.html](http://www.beritasatu.com/ekonomi/493830-vasanta-gandeng-lotte-dan-premier-bangun-proyek-rp-2-triliun.html).

16 See [www.businesskorea.co.kr/news/articleView.html?idxno=20642](http://www.businesskorea.co.kr/news/articleView.html?idxno=20642).

17 See [www.jakartaglobe.id/corporate-news/waskita-karya-reatly-to-collaborate-with-modernland-reatly-develop-toll-road-city/](http://www.jakartaglobe.id/corporate-news/waskita-karya-reatly-to-collaborate-with-modernland-reatly-develop-toll-road-city/).

including Sumatera, Sulawesi and Nusa Tenggara. As part of the investment, the private equity firm committed US\$125 million, with the option to invest up to an additional US\$75 million.<sup>18</sup>

### III REAL ESTATE COMPANIES AND FIRMS

#### i Publicly traded REITs and REOCs – structure and role in the market

As briefly touched upon above, there is currently no legal basis in Indonesia for the establishment of REITs. Instead investors who wish to invest in income-producing real estate in Indonesia can do so through DIREs. In contrast to REITs, DIREs are not legal entities, but are based on collective investment contracts (KIKs). DIREs are regulated by the OJK. In December 2017, the OJK issued a new regulation on DIREs.<sup>19</sup> Furthermore, in July 2016, it issued a regulation regarding DIREs based on shariah principles.<sup>20</sup>

A DIRE scheme involves a custodian bank and an investment manager who makes a collective investment in, *inter alia*, real estate and assets that are related to real estate (i.e., securities of real estate companies that are listed on the IDX or issued by real estate companies, or both). The 2017 OJK regulation introduced a new restriction that, of the DIRE portfolio's net assets, at least 80 per cent must be real estate assets, while assets that are related to real estate may only be a maximum of 20 per cent. It is not possible for a DIRE to invest in vacant land. However, the 2017 OJK regulation now permits a DIRE scheme to invest in real estate that is under development as long as it generates revenue within six months of its ownership being transferred to the DIRE. Several restrictions apply in such case, including that the investments cannot amount to more than 10 per cent of the DIRE net value, there must not be any significant dilution of the DIRE's revenue (i.e., 20 per cent of revenue or more) during the period of construction, and there must be no construction issues relating to the construction not being completed. It would also be possible for a DIRE to invest in a special purpose company (in the form of an Indonesian limited liability company), established solely to invest in real estate assets. If a special purpose company is used, the DIRE must own at least 99.9 per cent of the issued shares of the special purpose company.

Unresolved matters include how a DIRE can directly invest in real estate or own shares in a special purpose company, considering that a DIRE is not a legal entity, while under the Indonesian Agrarian Law, only Indonesian individuals and certain legal entities can have title to land in Indonesia, and under the Indonesian Company Law, shares in an Indonesian limited liability company can only be held by legal entities or individuals.

The maximum percentage for DIRE schemes to borrow funds is 45 per cent of the total value of the real estate to be purchased. Additionally, the 2017 OJK regulation now permits DIRE schemes to borrow funds by way of issuing debt securities. However, such issuance may only be undertaken for the purpose of purchasing real estate assets that have already generated revenue, and may only be worth 45 per cent of the total value of the real estate to be purchased. Just two DIREs are currently active in Indonesia.<sup>21</sup> The first of these was DIRE Ciptadana Properti Ritel Indonesia, which has been listed on the IDX since 2013. It owns a shopping centre in Solo, Java. The second, DIRE Bowsprit Commercial & Infrastructure,

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18 See [www.reuters.com/article/indonesia-press-nirvana-dvlpmt-warburg-p-idUSL3N0WR0NL20150325](http://www.reuters.com/article/indonesia-press-nirvana-dvlpmt-warburg-p-idUSL3N0WR0NL20150325).

19 OJK Regulation No. 64/POJK.04/2017 on DIREs in the form of KIKs.

20 OJK Regulation No. 30/POJK.04/2016 on Sharia DIREs in the form of KIKs.

21 See [www.web.ksei.co.id/isin\\_codes/dire](http://www.web.ksei.co.id/isin_codes/dire).

was launched by Indonesian public real estate company PT Lippo Karawaci Tbk in early 2017 and has been listed on the IDX since March 2017. This DIRE's funds have been used to acquire office towers and a distribution centre currently managed by PT Lippo Karawaci Tbk (Berita Satu Plaza in South Jakarta at around US\$29 million, Menara Matahari in Tangerang at around US\$39 million, Menara Asia in Tangerang at around US\$29 million and Balaraja Distribution Centre at around US\$34 million). An amount of around US\$52 million will be used to participate in PT Mitra Wijaya Wisesa, which manages Life Tower in Kuningan, South Jakarta. The remainder, of around US\$1 million, will be allocated as working capital.<sup>22</sup>

Apart from DIREs, some offshore REITs are active on the Indonesian real estate market. Two noteworthy examples are Lippo Malls Indonesian Retail Trust (LMIR Trust) and First REIT, both REITs listed on the Singapore Exchange Securities Trading Limited (SGX), sponsored by PT Lippo Karawaci Tbk. LMIR Trust has a diversified portfolio of 23 shopping centres and seven retail spaces across Indonesia.<sup>23</sup> First REIT has a portfolio of 12 hospitals, two integrated hospitals and malls, one integrated hospital and hotel and one hotel and country club in various cities in Indonesia, in addition to several assets in Singapore and South Korea.<sup>24</sup> In December 2017, LMIR Trust and First REIT announced their joint acquisition of an integrated development of hospital and shopping centre assets in Yogyakarta, Java.<sup>25</sup> Lippo has just announced that it will transfer its SGX-listed REITs to the IDX. The transfer will be conducted in stages, with the first stage involving the transfer of a REIT with a value of 10 trillion rupiah. It is unclear when the transfer will become effective.<sup>26</sup>

We can conclude that DIREs are not very popular among investors. A likely reason for the limited popularity of DIREs is the lack of corporate and financial transparency that these funds and Indonesian companies generally often show. It is unlikely that recent measures aimed at making the use of DIREs more attractive will change the generally negative sentiment among foreign investors regarding these funds.

## ii Real estate PE firms – footprint and structure

As discussed above, private equity activity on Indonesia's real estate market is very limited. In the case of the aforementioned investment by Warburg Pincus LLC, a joint venture was created through an acquisition by Adventure Holdings BV, an affiliate of Warburg Pincus LLC, of 35 per cent of the shares in PT Nirvana Wastu Pratama, a subsidiary of PT Nirvana Development Tbk.<sup>27</sup>

22 See [www.bowsprit-am.com/](http://www.bowsprit-am.com/); [www.thejakartapost.com/news/2017/02/14/lippo-group-launches-its-first-reit-in-indonesia.html](http://www.thejakartapost.com/news/2017/02/14/lippo-group-launches-its-first-reit-in-indonesia.html).

23 See [www.lmir-trust.com/our-portfolio.html](http://www.lmir-trust.com/our-portfolio.html).

24 See [www.first-reit.com/about-overview.html](http://www.first-reit.com/about-overview.html).

25 See [www.lmir-trust.com/newsroom.html](http://www.lmir-trust.com/newsroom.html) and [www.firstreit.listedcompany.com/newsroom.html](http://www.firstreit.listedcompany.com/newsroom.html).

26 See [www.cnnindonesia.com/ekonomi/20170719085611-92-228797/lippo-group-alihkan-dire-rp30-t-dari-bursa-singapura-ke-bei/](http://www.cnnindonesia.com/ekonomi/20170719085611-92-228797/lippo-group-alihkan-dire-rp30-t-dari-bursa-singapura-ke-bei/) and [www.finance.detik.com/bursa-dan-valas/d-3757707/lippo-jual-aset-rp-834-miliar-ke-dire-singapura](http://www.finance.detik.com/bursa-dan-valas/d-3757707/lippo-jual-aset-rp-834-miliar-ke-dire-singapura).

27 See [www.reuters.com/article/indonesia-press-nirvana-dvlpmt-warburg-p-idUSL3N0WR0NL20150325](http://www.reuters.com/article/indonesia-press-nirvana-dvlpmt-warburg-p-idUSL3N0WR0NL20150325).

## IV TRANSACTIONS

### i Legal frameworks and deal structures

As discussed above, investments in Indonesia's real estate sector are generally still rather conventional, consisting of plain vanilla sale and purchase of shares in local real estate companies, either directly or indirectly (i.e., through the IDX). A direct sale and purchase of shares in a local real estate company may be subject to foreign investment restrictions, for example, by imposing a cap on foreign ownership in Indonesian companies. Indonesia's 2007 Investment Law creates authority for the president to compile a list of business lines that are closed and conditionally open to foreign investment. A revised version of this 'Negative List' became effective in May 2016. A common business line for a real estate company in Indonesia would be '68110 – Real estate that is privately owned or rented'. This business line includes buying, selling, renting and operating of self-owned or leased real estate, such as apartment buildings, dwellings and non-residential buildings. As this business line is not included in the 2016 Negative List, a local real estate company with activities covered by this business line should in principle be 100 per cent open to foreign investment. If the real estate company is not only active in buying, selling, renting and operating of self-owned or leased real estate, but also other activities (e.g., the construction or operation of real estate), different business lines are relevant, which may be included in the Negative List and can therefore be closed or conditionally open to foreign investment.<sup>28</sup> In any event, from experience, although not explicitly listed as a business field that is closed or a business field that is conditionally open in the Negative List, certain business fields may in reality not be open to foreign investment. Furthermore, an Indonesian limited liability company (PT) should have at least two shareholders, so even if no foreign restrictions apply, it is common to have a local shareholder to hold part of the shares. There may also be commercial reasons to have local participation in the company.

A foreign investor wishing to purchase shares in a local real estate company requires a licence to convert the company into a foreign investment (PMA) company. The government of Indonesia just enacted a new regulation that temporarily transfers the authority for the processing and issuance of permits and licences from ministers, agencies, governors and regents/mayors to the Coordinating Ministry for Economic Affairs (the Coordinating Ministry).<sup>29</sup> As a result, as of 29 June 2018, the Indonesia Investment Coordinating Board (the BKPM), which previously had the authority to process and issues investment registrations and business licences for any PMA company, suspended its licensing activities. The Coordinating Ministry launched the Online Single Submission (OSS) system through <http://oss.go.id/oss/> on 9 July 2018. Based on BKPM's announcement on 10 July 2018, the BKPM only handles applications that are not regulated under the aforementioned new regulation, including business licences for property development and management and business licences for the development of public works and public housing.

The new regulation stipulates that any business actors that wish to start their business in Indonesia are no longer required to apply for an investment registration to the BKPM. Instead, they need to be registered in the OSS System and obtain a single identity number (NIB). This new rule also applies to any existing Indonesian company, whether a PMA

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28 See also Section V on foreign investment restrictions to companies active in providing integrated services for the support of facilities as well as cleaning services for buildings.

29 Government Regulation No. 24 of 2018 concerning Online Single Submission Services.

company with foreign shareholders or a local company with only Indonesian shareholders, including a local company which intends to convert its status to become a PMA company as a result from a transfer of shares from an Indonesian shareholder to a foreign shareholder. This NIB will serve as an Investment Registration Number, Importer Identification Number, Number of Company Registration Certificate, Social Security for Manpower and Social Security for Health Number, and Custom Identity Number. Once the company obtains an NIB, the company may apply for a business licence or commercial or operation licence through the OSS system, provided the company meets certain requirements as set out in the new regulation.

The new regulation does not revoke prevailing BKPM regulations. Therefore, the provisions under BKPM regulations remain valid, including those that create a distinction between foreign investment companies engaged in the development and management of the following types of property:

- a* property in the form of an entire building or an integrated residential estate, where a foreign investor should invest more than 10 billion rupiah, including land and buildings, and the foreign investment company's issued and paid-up capital should be at least 2.5 billion rupiah with a minimum share participation of 10 million rupiah; or
- b* units of property that are not an entire building or an integrated residential estate, where a foreign investor should invest more than 10 billion rupiah, excluding land and buildings, and the foreign investment company's issued and paid-up capital should be at least 2.5 billion rupiah with a minimum share participation of 10 million rupiah with a debt-to-equity ratio of 4:1.

Before the shares in the local real estate company with only Indonesian shareholders are transferred, it will generally be required to amend the articles of association of the company; for instance, to increase the issued and paid-up capital to at least 2.5 billion rupiah. This amendment shall be made in notary deed form and be approved by the Minister of Law and Human Rights. These documents should be uploaded to the OSS system to obtain an NIB. Since the BKPM regulations have not been revoked, each PMA Company still needs to meet the requirements as set out in these BKPM regulations, including but not limited to submitting quarterly activity reports, which are used by the BKPM to monitor the implementation of the investment plan. As soon as the investment plan has been realised and the company is ready for operation, a business licence can be obtained. If the real estate company already has the status of a foreign investment company, it will still be required to obtain approval from the BKPM. This approval is again in the form of an investment registration or, if the investment plan has already been realised and the company is already operating, an investment registration for amendment. It usually takes around a month to obtain an investment registration from the BKPM.

Foreign investment restrictions also do not apply to a venture capital company (PMV); any equity participation by a PMV would be deemed to be domestic investment rather than foreign investment – even if one or more shareholders of the PMV are foreign. A PMV can be established in the form of a limited liability company, cooperative or limited partnership (CV). The minimum capital requirement to establish a PMV in the form of a limited liability company is 50 million rupiah. A PMV in the form of a PT can be 85 per cent owned by a foreign entity or institution. However, the maximum direct capital participation in a PMV by a foreign entity as a shareholder is limited to the maximum amount of the entity's net equity. Business activities in which a PMV may be engaged are equity participation,

quasi-equity participation or financing through purchase of securities issued by business partners. Business partners can be individuals or companies, including micro, small, medium businesses and corporations receiving equity participation based on a profit-sharing principle from the PMV and financing of productive business. A PMV may participate in a real estate company provided that the value of participation in one business partner (in this case, the real estate company) is a maximum 25 per cent of the venture capital company's equity. Furthermore, this participation may only last for 10 years. After the lapse of this period, the PMV must divest its shares in the real estate company as the purpose of a PMV is to help start-up companies. Parties wishing to establish a PMV must obtain a business licence from the OJK.

It would also be possible for a foreign investor to carry out an asset deal. However, asset deals are not very common in Indonesia, as the transfer of assets in general and land, buildings and fixtures in particular can be a rather complicated, time-consuming and costly process. If a foreign investor decides on an asset deal, it will be necessary to establish a PT first. This company should obtain its own licences to be active in the real estate sector, as licences can generally not be transferred under Indonesian law.

Irrespective of whether it has the status of a normal limited liability company or a foreign investment company, a PT cannot hold an ownership right on land; this right is strictly reserved for individuals with Indonesian nationality. However, a PT can hold three other types of land rights: right of cultivation, right to build and right of use. In practice, the right to build is the type of land right most commonly used by real estate companies. It is granted for a maximum initial period of 30 years and is extendable for another period of 20 years, with a possibility of renewal. On top of an ownership right, right to build and right of use, a right of ownership to a multi-storey unit can be established. This right can be issued to owners of residential, commercial or retail units in multi-storey buildings such as condominiums, strata-title office buildings or trade centres. The validity period depends on the expiry date of the land right on which the right of ownership to a multi-storey unit has been established. The ownership right, right to build, right of use, and of ownership to a multistorey unit can be sold, exchanged, transferred, bequeathed or mortgaged.

## **ii Acquisition agreements terms**

Given the illiquid character of the Indonesian real estate market, it is hard to provide a description of the typical terms of real estate M&A and PE transactions. However, it is common for parties to enter into a share purchase agreement for the acquisition of existing shares or a share subscription agreement for the subscription for new shares in a local real estate company.

Although in-kind contribution is also possible under the law, shares are normally acquired or subscribed for by payment of a cash consideration. The purchase price is often paid directly to the sellers or issuers of the shares (i.e., without the use of an escrow account). Price-adjustment mechanisms are sometimes used, normally in the form of closing accounts, rather than locked-box mechanisms.

Given that foreign investment is strictly regulated in Indonesia, parties in M&A and private equity transactions will normally need to agree on conditions precedent relating to regulatory approvals, in addition to corporate and third-party approvals that need to be obtained. As a result, it may take a relatively long time for a transaction to be closed. For this reason and also given the uncertainties in the market, material adverse change clauses are also



commonly used and accepted by parties. Equally, it is common for parties to agree on a broad list of pre-closing covenants. The use of a long stop date for the fulfilment of the conditions precedent is also generally accepted. Break fees are sometimes used, but not very common.

Just like other companies, real estate companies in Indonesia often have compliance issues. For this reason, it is common and in any event advisable to conduct extensive legal, financial and tax due diligence on a target company. Warranties and specific indemnities are commonly agreed on to mitigate at least part of the potential liabilities. To the extent these liabilities cannot be sufficiently mitigated, it may be advisable to do an asset deal, despite the fact that – as discussed above – the transfer of assets can be a rather complicated, time-consuming and costly process.

When foreign investors choose to create a joint venture with local partners for their real estate investment, parties often enter into an additional joint venture agreement or shareholder agreement. These agreements commonly create rights for certain shareholders to, *inter alia*:

- a* nominate members of the board of directors and board of commissioners of the company;
- b* list reserved matters at the level of the board of directors, board of commissioners or the general meeting of shareholders;
- c* set out a deadlock mechanism for when shareholders or their nominated directors or commissioners cannot agree on the reserved matters; and
- d* contain terms in business plans and reporting, financing of the company, the distribution of dividend, create restrictions on the transfer of shares.

Some of the provisions of the joint venture agreement or shareholders' agreement may also be covered by the articles of association of the company.

### **iii Hostile transactions**

There do not appear to have been any recent hostile transactions in Indonesia's real estate sector.

### **iv Financing considerations**

M&A and private equity transactions in Indonesia's real estate sector are typically financed by a combination of equity and debt. As discussed above, when a foreign investor wishes to purchase shares in a local real estate company, the company will need to have the status of a foreign investment company. This also implies that more than 10 billion rupiah per business line should be invested; at least 2.5 billion rupiah of this amount should come in the form of equity. If the company has more than one business line, the investment requirement is multiplied by the number of business lines.

Certain reporting requirements apply to a recipient of a foreign loan in Indonesia. Furthermore, when certain monetary thresholds are met, the conversion of Indonesian rupiah to foreign currencies or the purchase of foreign currency against Indonesian rupiah conducted by a bank and its customers must be based on an underlying transaction.

Under Indonesian law, lending obligations can be secured by various types of security. Rights to land as well as buildings and fixtures can be mortgaged. Shares in a PT can be pledged. Security on movable assets can be established in the form of a 'fiduciary transfer'. Other than in the case of a pledge, the creditor-transferee holding a security in the form of fiduciary transfer will normally not have physical control of the assets.

To be able to create security such as the above, generally, consent from existing creditors is needed. In addition to creditor consent, shareholder approval is also required. The Indonesian Company Law and the articles of association of an Indonesian company normally stipulate certain requirements to obtain corporate approval from the organs of the company (i.e., the board of commissioners or the general meeting of shareholders). Lack of corporate approval would legally affect the validity of the loan and pledge agreements and cause the board of directors to be held liable for any loss in relation thereto.

#### **v Tax considerations**

The proceeds from a sale of shares in an Indonesian company may be subject to capital gains tax, which, where the shares are not listed, is 25 per cent when the seller is a company and 30 per cent when the seller is an individual. The sale of shares listed on the IDX is subject to a tax of 0.1 per cent of the transaction value.

Dividends received by a resident company from another Indonesian company are exempt from tax, provided the dividends come from retained earnings and the recipient company holds at least 25 per cent of the capital of the company distributing the dividend. If the recipient company holds less than 25 per cent of the shares, the received dividend is subject to 15 per cent withholding tax, which represents an advance payment of the company's tax liability. Dividends distributed to a non-resident are subject to 20 per cent withholding tax, unless the rate is reduced under a tax treaty. Dividend distributions to individual shareholders are subject to 10 per cent withholding tax. Dividend income of individual shareholders is subject to another 10 per cent final income tax.

In the case of an asset deal, the sale of assets is subject to 10 per cent VAT. Furthermore, any capital gain on the sale of assets (non-land or buildings) is subject to a 25 per cent income tax. The transfer of land will trigger the obligation for the seller to pay income tax, which is 5 per cent of the purchase price of the land (unless the seller is foreign and the rate is reduced under a tax treaty), and the purchaser to pay an administrative fee for the transfer of land rights, which is approximately 4.7 per cent of the purchase price of the land.

Land and building tax is payable each year on land, buildings and fixtures. The rate is determined by the regional governments and therefore depending on where the assets are located. However, the rate is typically no more than 0.3 per cent of the estimated value of the assets.

#### **vi Cross-border complications and solutions**

As discussed above, a direct sale and purchase of shares in a local real estate company may be subject to foreign investment restrictions. To circumvent foreign investment restrictions, foreign investors sometimes resort to an investment structure involving nominee arrangements, on the basis of which an Indonesian individual or entity holds the shares on behalf of the foreign shareholder. However, in Article 33 of the 2007 Investment Law, an express prohibition was introduced to the effect that: 'Domestic investors and foreign investors who make investments in the form of a limited liability company are prohibited from entering into an agreement or making a statement asserting that share ownership in a limited liability company is for and in the name of another person.' Such agreements are invalid and unenforceable. Article 33 of the Investment Law also provides for these agreements to be null and void.

In practice, there is still much uncertainty as regards the correct interpretation of the nominee prohibition. However, any element of the contractual arrangements that goes

beyond a true financing arrangement runs the risk of running foul of the law. This means that in very broad terms these arrangements should best avoid powers of attorney to exercise ownership rights and of assignment of dividends and voting rights. However, a true financing arrangement (which could be strengthened and secured by a right of pledge) should be allowed under the law. Under Indonesian company law, the voting rights on shares must remain with the pledgor.

## **V CORPORATE REAL ESTATE**

There does not appear to be any trend in the Indonesian real estate market in separating corporate real estate from operating companies.

It is common in Indonesia to separate the ownership of real estate from building management. Building management activities could, for example, be covered by the following business lines: '81100 – Integrated services for the support of facilities, such as general interior cleaning, maintenance, waste disposal, guard and security, mail routing, reception, laundry and related services'; '81290 – Cleaning services for buildings'; and '81300 – Services for garden maintenance'.

Note that activities under business lines 81100 and 81300 may be, and 81290 are, closed to foreign investment.

## **VI OUTLOOK**

The prospects for Indonesia's real estate market are rather positive. Momentum is picking up. The effects of recent and ongoing pro-foreign investment measures by the Jokowi administration are already evident and are to likely have greater impact in the longer term. Having said that, it is likely that Indonesia's legal framework will have to improve further before the country's market for investment-grade real estate assets can achieve full potential.

## ABOUT THE AUTHORS

### **OENE MARSEILLE**

*Ali Budiardjo, Nugroho, Reksodiputro*

Oene J Marseille graduated from the University of Amsterdam faculty of law in the Netherlands, in 1995, and completed his law master's at Duke University School of Law, North Carolina. He worked for almost six years with NautaDutilh in its offices in Rotterdam, New York and Jakarta, and also with White & Case in Jakarta and Singapore from August 2001 until April 2005. His areas of practice include corporate law, foreign investment, capital markets, corporate and financial restructurings, project finance, energy and resources, aircraft financing, leasing and mergers and acquisitions.

### **EMIR NURMANSYAH**

*Ali Budiardjo, Nugroho, Reksodiputro*

Emir Nurmansyah graduated from the University of Indonesia faculty of law in 1989, majoring in economic law. In 1993, he obtained his LLM degree from the faculty of law at Bond University in Australia, majoring in international transactions. He has, since 1993, dealt with a large number of transactions involving privatisation, corporate restructuring, and project and debt financing. He has been involved in most of the restructuring projects in which ABNR is involved, both as a member and as the leader, of the ABNR team. He has also acted as the adviser to the Indonesian Bank Restructuring Agency in several restructuring and asset-disposal projects.

### **GUSTAAF REERINK**

*Ali Budiardjo, Nugroho, Reksodiputro*

Gustaaf Reerink graduated from Leiden University, where he obtained an LLM in private law and an MA in Indonesian studies, and completed his PhD on Indonesian land law. In addition, he studied French at the University of Burgundy in Dijon, and read law at King's College London and the School of Oriental and African Studies in London. Prior to joining ABNR, Mr Reerink worked as an associate in the Amsterdam and Brussels offices of Dutch law firm De Brauw Blackstone Westbroek. His current practice encompasses foreign investment, corporate, mergers and acquisitions, energy and natural resources, and related regulatory and compliance matters.

**ALI BUDIARDJO, NUGROHO, REKSODIPUTRO**

Graha CIMB Niaga, 24th Floor  
Jalan Jenderal Sudirman Kav 58  
Jakarta 12190

Indonesia

Tel: +62 21 250 5125

Fax: +62 21 250 5001

[omarseille@abnrlaw.com](mailto:omarseille@abnrlaw.com)

[enurmansyah@abnrlaw.com](mailto:enurmansyah@abnrlaw.com)

[greerink@abnrlaw.com](mailto:greerink@abnrlaw.com)

[www.abnrlaw.com](http://www.abnrlaw.com)

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