

Real Estate 2021

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Real Estate 2021

Contributing editors**Patrick Williams and Devina Rana****Fried, Frank, Harris, Shriver & Jacobson LLP**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Real Estate*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Finland, Indonesia, Ireland, Spain, United Arab Emirates and Vietnam.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Williams and Devina Rana of Fried, Frank, Harris, Shriver & Jacobson LLP, for their continued assistance with this volume.



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Indonesia

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GENERAL

Legal system

1 | How would you explain your jurisdiction's legal system to an investor?

Indonesia has a civil law system, with written laws and regulations as the primary source of law. There are laws and regulations with national and regional scope. For real estate, key matters relating to land title, land registration, security and lease are generally regulated at the national level. Related aspects of real estate may be regulated at the regional level (eg, zoning and building construction requirements).

Court judgments are non-binding in nature as the principle of precedent does not apply. Courts are not obliged to follow previous rulings in similar cases. Court rulings must be based strictly on the rule of law, although customarily plaintiffs will request the judges to render their decision *ex aequo et bono* – to rule based on what is fair and just for the given circumstances.

In civil cases, the courts put a heavy weight on documentary evidence. The concept of parol evidence is not recognised, so if the parties to a contract wish to allow the admission of parol evidence they must do so through an express contractual provision. Contracts may be oral or written, provided that they satisfy the requirements for a valid contract under the Indonesian Civil Code. However, considering that oral contracts are difficult to prove in the event of a dispute, parties would be advised to clearly document their agreement in writing.

Land records

2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

There is a system for land title registration in Indonesia, and upon registration the land title holder will be issued the relevant land certificate. However, large areas of land that have not been registered and certificated still exist in many rural areas. The rights to this land are still governed by *adat* (customary) law. They are usually recorded in a land book maintained by the Head of Village or Head of Sub-District.

A land certificate guarantees the title holder the rights over such land, although the law grants interested third parties a certain period of time to challenge the validity of the land certificate after its issuance. Pursuant to Government Regulation No. 24 of 1997 Regarding Land Registration (8 July 1997), third parties may challenge the validity of a land certificate within five years after the date of its issuance.

Uncertified land is more prone to challenge and dispute, particularly if the landowner does not maintain complete and proper underlying documentation evidencing their ownership, or if the relevant Head of Village or Head of Sub-District does not properly maintain the land

book. Thus, for the acquisition of uncertified land, the buyer will generally require the seller first to register and certify the land.

The granting of lease over land or a building is not registered with the land office or recorded in the land certificate, but is based on a contractual arrangement between the lessor and the tenant. The lease agreement is therefore what guarantees the tenant's right over the leased property.

A form of security interest over real estate is security right, which is used to secure land with certain land titles and all the fixtures attached to the land. The security right must be registered, otherwise the security is invalid and cannot be executed. There may be more than one security right encumbered over one land certificate to secure more than one indebtedness, and the rank will be based on the date of its registration. Security right cannot be encumbered over uncertified land. To do so, the land must first be registered and certified.

Registration and recording

3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

In Indonesia, land is legally acquired upon the execution of a Sale Purchase Deed (AJB) by the seller and buyer, or a Land Relinquishment Deed (APH) in favour of the buyer. An AJB is used if the buyer wishes to acquire certificated title to the land of the same type as the seller's certificated title. An APH is used if the seller has certificated title to the land that is not the same type of title that the buyer can or wants to acquire, or if the seller does not yet have certificated title to the land to be sold.

An AJB or APH must be drawn up by a Land Deed Official (PPAT) having jurisdiction over the land and executed in the Indonesian language before the PPAT. Upon execution of the deed, the PPAT is responsible, on behalf of the buyer, for arranging certification and registration of the buyer's title with the relevant land office.

Lease is granted based on a contractual arrangement crystallised in a lease agreement between the lessor and the lessee. The lease agreement may be privately drawn up, but it is strongly advised to have it executed in notarial deed form, as it provides stronger evidentiary value. The lease agreement, either privately drawn up or in notarial deed form, is not required to be registered to the land office.

Transfer of title of and security over apartment units is subject to separate procedures under Law No. 20 of 2011 Regarding Condominiums (10 November 2011).

Security interest over land in the form of security right must be registered to the land office. Upon registration it will be recorded in the relevant land certificate over which the security right is encumbered. The security right grantor and the grantee must first execute a Deed of Granting of Security Rights before a PPAT having jurisdiction over the land, along with the submission of the required documents (eg, original land certificate, original loan agreement between the security right grantor and the grantee, and evidence of property tax payment).

The typical fees associated with the transfer of land title are as follows:

- duty for the acquisition of rights over land and buildings, in the amount of 5 per cent of the purchase price or such other amount as may be required by law, typically borne by the buyer;
- income tax, in the amount of 2.5 per cent of the purchase price or such other amount as may be required by law, typically borne by the seller;
- value added tax, if the seller is a taxable entrepreneur, in the amount of 10 per cent of the purchase price or such other amount as may be required by law, typically borne by the buyer;
- land and building tax (PBB) typically will be borne by the seller. The total amount of PBB paid is based on taxable object sale value less non-taxable sale value as applicable;
- sale of luxury goods tax, in the amount of 20 per cent, which applies for the sale of a house, apartment unit, condominium, or townhouse with a purchase price of 30 billion rupiah or more, typically borne by the buyer;
- PPAT fees, usually borne in equal portion by the seller and the buyer, but the parties to the transaction are free to agree on the allocation of fees; and
- land office fees associated with the registration of the land certificate in the name of the buyer, which can be freely agreed on by the parties to the transaction but are typically borne by the buyer.

Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are various types of land title in Indonesia, and not all of them can be acquired by foreign entities and individuals, even if such foreign individuals reside in Indonesia or the foreign entities have a presence or do business in Indonesia. Below are the types of land title and the parties who are permitted to acquire them:

- right of ownership: Indonesian individuals and specific Indonesian institutions;
- right to build: Indonesian individuals and Indonesian companies;
- right to cultivate: Indonesian individuals and Indonesian companies;
- right to use: Indonesian individuals, Indonesian companies, governmental institutions, religious and social agencies, diplomatic offices, international agencies, diplomatic offices, international agencies, foreign representative offices and foreign citizens;
- right to manage: government institutions (including regional governments, state-owned business entities, regional government-owned business entities, PT Persero, authority bodies and other government legal entities designated by the government);
- right of ownership over apartment units: parties who are entitled to hold title for the land on which the building is built; and
- lease: Indonesian individuals, Indonesian companies, foreign companies and foreign individuals.

As the types of title that can be held by foreign parties are very limited, foreign investors who wish to invest in the real estate sector will usually establish an Indonesian entity as an investment vehicle to acquire the desired land.

Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Foreign exchange transactions are regulated under the following:

- Bank Indonesia Regulation No. 18/19/2016 Regarding Foreign Currency Transaction Against Rupiah between Bank and Foreign Party (September 7, 2016) (BI Regulation No. 18/19/2016);
- Bank Indonesia Regulation No. 18/18/2016 Regarding Foreign Currency Transaction Against Rupiah between Bank and Domestic Party (September 7, 2016) (BI Regulation No. 18/18/2016); and
- Bank Indonesia Regulation No. 21/15/PBI/2019 Regarding Monitoring of Foreign Exchange Activities of Banks and Customers (January 2, 2020) (BI Regulation 21/15/2019).

The key provisions that must be observed in foreign exchange transactions include:

- Indonesian rupiah cannot be transferred overseas;
- the overseas transfer of more than US\$100,000 or its equivalent in foreign currency, which is the threshold set forth in BI Regulation 21/15/2019, must be supported by underlying documents as the basis of the transaction; and
- the conversion of rupiah to foreign currency, and vice versa, which meets certain thresholds under BI Regulation 18/19/2016 and BI Regulation 19/19/2016, must be based on certain underlying transactions as permitted in those regulations.

Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The owner or tenant of real estate may face environmental liability arising from, for instance, pollution, contamination or failure to manage hazardous and toxic materials or waste. Indonesian environmental law recognises strict liability in the event of damages resulting from a person's actions, business or activity that uses hazardous and toxic materials (B3), produces or manages B3 waste or causes serious threats to the environment. However, such liability usually does not extend to a lender who does not engage directly in the business activity causing the environmental liability.

Upon the transfer of title, the buyer assumes the rights and liability of the land, including any environmental liability.

A tort claim may be submitted if the landowner breaches a statutory obligation and causes loss or damage to a third party. For example, if there is an accident on the landowner's property, the landowner is not liable unless it can be proven that such accident was due to the landowner's negligence in implementing safety measures applicable to them under the prevailing laws and regulations.

Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Insurance that covers environmental liability is available, although it is more common for owners who are also businesses whose activities may adversely impact the environment.

To protect the buyer from potential third-party claims it is important to include in the relevant sale and purchase agreement representations and warranties on environmental compliance and indemnity for third-party claims for breach of environmental compliance by the seller.

Choice of law

8 How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

While the transacting parties have the freedom of contract to choose the governing law for a transaction, certain transaction documents for land transfer and security must be governed by Indonesian law. For example, an AJB or APH for land transfer must be governed by Indonesian law. Another example is a loan agreement between the lender and the borrower, which may be governed by foreign law, but the security documents must be governed by Indonesian law.

Jurisdiction

9 Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

A civil claim is submitted to one of the following courts:

- district court where the defendant is domiciled;
- district court where one of the defendants is domiciled, in the case of more than one defendant;
- district court where the lender is domiciled, if there is a lender and guarantor;
- district court where the plaintiff is domiciled, if the defendant's domicile is unknown;
- district court where the immovable asset is located; or
- district court as agreed between the parties.

In the case of a real estate dispute, for legal certainty, the claim is submitted to the district court where the land is located. The claim can proceed as long as there is a plaintiff and defendant. In certain cases where the issuance of a land certificate or the recordation of information in such a land certificate is being disputed, the relevant land office is usually a co-defendant by the plaintiff. If the land dispute relates to the government's authority or a decision made by such authority, then the dispute must be brought to the state administrative court.

Indonesian law does not recognise the concept of service of process.

Any interested parties, be they Indonesian or foreign parties, whose rights are affected from or in connection with a dispute may enforce remedies in Indonesia.

Commercial versus residential property

10 How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Generally, the laws regulating land title, tenancy and financing do not differentiate between commercial and residential properties.

Planning and land use

11 How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

The Indonesian government controls the development, construction and use of real estate by implementing spatial planning and zoning.

Every regional government is required to plan the use of land, which requirement is implemented pursuant to Law No. 26 of 2007 Regarding Spatial Layout (26 April 2007). The spatial layout scheme consists of the national spatial layout plan, provincial spatial layout plans and regency and municipal spatial layout plans.

A spatial layout plan for a regency or municipality must be stipulated by a regional regulation, issued by the relevant regent or mayor, which will become the basis for the issuance of location development permits and land administration.

Other ministries, such as the Ministry of Forestry, also prepare special layout plans, but their plans are more likely to affect land in rural areas than in developed areas and industrial estates with no forestry areas. Thus, for the development of real estate in rural areas, these plans will need to be reviewed, and it is necessary to approach the local offices of the Ministry of Forestry, Ministry of Energy and Mineral Resources, Ministry of Agriculture and other relevant ministries to research the permissible uses for, and existing rights in respect of, a parcel of land.

Building construction in Indonesia must adhere to technical requirements imposed by the government. Government Regulation No. 36 of 2005 Regarding the Implementation of Law No. 28 of 2002 Regarding Building (10 September 2005) imposes an 'intensity requirement' for the construction of a building, whereby a building must not exceed certain maximum density and height limits that are stipulated by the relevant regional government.

Government appropriation of real estate

12 Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Expropriation is usually enforced on the basis of land procurement for the public interest. Public interest is defined by Law No. 2 of 2012 Regarding Procurement of Land for Development in the Public Interest (14 January 2012) as the interest of the nation, state and society that shall be implemented by the government for the maximum benefit of the people, but there is no further explanatory criteria as to what constitutes 'public interest'. The reasons behind nationalisation or expropriation are subjective, but past cases of expropriation show that legitimate public interest objectives can include protection of public health, safety and the environment, and penalties for crimes.

There are two legal bases to protect foreign investors in Indonesia, ie Law No. 25 of 2007 Regarding Capital Investment (26 April 2007) (the Investment Law) and the ASEAN Comprehensive Investment Agreement (26 February 2009) (ACIA).

Pursuant to the Investment Law, the government of Indonesia will not, unless required by law, nationalise or take ownership of investors' assets. In the event that the government does so, it will provide compensation based on fair market value. If the government and the investor are unable to reach an agreement on fair market value the dispute shall be referred to arbitration.

Similarly, the ACIA, which is a multilateral investment treaty to which the Indonesian government is a party, protects ASEAN investors and their investments. Specifically, the ACIA provides protection from various measures that may be taken by host countries, including protection from expropriation, and the granting of fair market value compensation.

Forfeiture

13 Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Illegal activities conducted on a land area may entitle the government to impose administrative sanction on the person conducting such illegal activities, such as suspension of business activities or revocation of business licence. It is unlikely that the government would also revoke title over the land and building, as long as the owner legally acquired such land and building, unless the gravity of the illegal activities justified the government taking action over such land and building on the basis of protection of public interest.

Pursuant to Minister of Agrarian Affairs Regulation No. 13 of 2017 Regarding Procedures for Blocking and Seizure (9 August 2017), seizure is conducted for the purpose of dispute settlement (ie, if the land is an object in a civil case or of a tax debt, or if it is required for the purpose of a criminal investigation). This seizure is without compensation.

The seizure will be lifted upon the following conditions:

- in a civil case, upon the issuance of a final and binding court decision that the lawsuit is rejected or inadmissible or that the seizure is lifted, or through a court stipulation on the removal or lifting of the seizure;
- in a criminal case, upon the issuance of an Order on Cessation of Investigation and an application for the lifting of seizure by the police, or if the case is resolved based on a final and binding court decision; or
- in a tax case, upon the settlement of outstanding tax, based on a court decision, or based on a judgment by a tax dispute resolution body or a stipulation by the relevant minister or regional government.

Bankruptcy and insolvency

14 Briefly describe the bankruptcy and insolvency system in your jurisdiction.

A debtor will be declared bankrupt through a court decision if the debtor has two or more creditors and it fails to pay at least one debt that is due and payable. A bankruptcy petition may be submitted voluntarily or by one or more creditors.

A debtor will be insolvent by law if, in the verification meeting, there is no composition plan, the composition plan is rejected, or the composition plan is denied on the basis of a court decision.

There are three types of creditors in a bankruptcy of a debtor, based on their rank:

- preferred creditor, which ranks above secured creditor;
- secured creditor, which is a creditor that holds security over specific property owned by the debtor, such as a security right grantee; and
- unsecured creditor, which includes all other creditors.

Secured creditors, such as the holder of a security right over land, can exercise rights as if no bankruptcy has occurred. However, their rights will be stayed for 90 days following the declaration of bankruptcy. Transactions that assign the debtor's assets are stayed after the bankruptcy petition is granted. If the transaction is deemed to be detrimental to the debtor's assets the receiver may annul the transaction.

During the bankruptcy process, the debtor and creditors may instead agree on a suspension of debt payment obligations (PKPU). A PKPU allows a debtor that is unable to pay (or is expected to be unable to pay) a debt that has fallen due and payable to restructure the debts and pay their debts in the future, avoiding the need to declare bankruptcy.

During the PKPU process, the commercial court will appoint a supervisory judge and one or more administrators to jointly manage the debtor's assets with the debtor. The debtor requires approval from the administrator to take management and ownership of its assets, otherwise the suspension of payment will be terminated.

INVESTMENT VEHICLES

Investment entities

15 What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

For domestic investors, Indonesian law recognises various corporate vehicles, including those with non-legal entity status, such as a civil partnership, firm or limited partnership; or legal entity status, such as a limited liability company (PT) or co-operative.

For foreign investors, as generally required under the Investment Law, direct investment in Indonesia is implemented through the establishment of a limited liability company (usually referred to as a PT PMA, with PMA standing for foreign capital investment) or other forms allowed by law (eg, permanent establishment in the oil and gas sector).

All the foregoing corporate vehicles are able to acquire real estate, subject to certain limitations. PTs (for domestic investors) and PT PMAs (for foreign investors) are the preferred entities and most commonly used to acquire real estate and invest in the sector. A PT or PT PMA is also the best type of entity to shield the ultimate owners from liability, as it limits the personal liability of shareholders, directors and commissioners, unless the corporate veil is pierced because these corporate organs, for example, perform their duties in bad faith, jeopardising the company or in violation of the law.

Foreign investors

16 What forms of entity do foreign investors customarily use in your jurisdiction?

Pursuant to the Investment Law, direct investment in Indonesia is generally implemented through the establishment of a PT PMA or other forms allowed under relevant Indonesian laws and regulations. A PT PMA is able to acquire real estate with the types of title that may be granted to an Indonesian entity, namely right to build, right to cultivate and right to use.

Organisational formalities

17 What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Key formalities to establish a PT or PT PMA are as follows:

- there must be at least two shareholders, which may be an individual or an entity. Foreign individuals or entities may become shareholders, subject to foreign ownership limitations that may be applicable to the PT or PT PMA's business sector pursuant to the Indonesian Negative List;
- it must have authorised, issued and paid-up capital. For a PT, there is no minimum threshold for authorised capital, but the issued and paid-up capital must be at least 25 per cent of the authorised capital. A PT PMA is subject to a higher capital requirement, with a minimum issued and paid-up capital of 2.5 billion rupiah;

- a PT PMA is subject to a minimum investment requirement of more than 10 billion rupiah, excluding land and buildings, the source of financing for which can be from equity or loans. The minimum total value of shares that a shareholder must own in the PT PMA is 10 million rupiah;
- it must at least have one director and one commissioner. A foreign national may serve as director or commissioner; and
- it will need to obtain permits and approvals required for the establishment of a company, such as a Business Identification Number, Taxpayer Registration Number, Business Licence and other technical licences.

PT PMAs are imposed with the additional requirement to submit a periodic investment report to the Indonesian Investment Coordinating Board. Failure to comply with this requirement will be subject to administrative sanctions in the form of written warning, restriction of business activity, suspension of business activity or revocation of licences.

A PT PMA, as an investment vehicle for foreign investors, must obtain a taxpayer registration number, meaning that it is a tax subject to which Indonesian tax laws apply.

ACQUISITIONS AND LEASES

Ownership and occupancy

18 | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Below are the types of land title and the parties who are permitted to acquire each of them:

- right of ownership: Indonesian individuals and specific Indonesian institutions;
- right to build: Indonesian individuals and Indonesian companies;
- right to cultivate: Indonesian individuals and Indonesian companies;
- right to use: Indonesian individuals, Indonesian companies, governmental institutions, religious and social agencies, diplomatic offices, international agencies, diplomatic offices, international agencies, foreign representative offices and foreign citizens;
- right to manage: government institutions (including regional governments, state-owned business entities, regional government-owned business entities, PT Persero, authority bodies and other government legal entities designated by the government);
- right of ownership over apartment units: parties who are entitled to hold title for the land on which the building is built; and
- lease: Indonesian individuals, Indonesian companies, foreign companies and foreign individuals.

Pre-contract

19 | What are the typical pre-contractual steps?

The Indonesian Civil Code (ICC), as the regulatory foundation for contracts, does not regulate pre-contract documents, such as letter of intent, memorandum of understanding, term sheet or other non-binding agreements, although these are customary to be entered into by the transacting parties prior to executing a binding contract.

Before signing a contract, the buyer will conduct due diligence to identify any material risks that may affect the transaction. The result of the due diligence is crucial to determine the terms and conditions of the binding contract to be entered into by the parties, such as the conditions precedent to be imposed on the seller, representations and warranties from the seller and indemnity in favour of the buyer. The parties will usually execute a non-disclosure agreement before making any disclosure of documents, data and information for the purpose of the due diligence.

The use of a real estate broker is common for the sale or lease of property, but a real estate broker's business activity does not cover real estate financing. Pursuant to Minister of Trade Regulation No. 51/M-DAG/PER/7/2017 Regarding Property Brokerage Companies (3 August 2017), the activities of a real estate broker include services for property analysis, marketing, consultation and dissemination of information regarding property. A real estate broker will receive a commission for its services. For sale transactions, the commission ranges from 2–5 per cent of the transaction value, while for lease transactions it is 5–8 per cent of the transaction value.

The real estate brokerage business is closed for foreign investment and real estate brokerage companies must obtain a business licence from the Minister of Trade. The experts employed by brokerage companies must obtain a competence certificate.

Contract of sale

20 | What are typical provisions in a contract of sale?

Land is legally acquired in Indonesia upon the execution of a Sale Purchase Deed (AJB) by the seller and buyer, or an Land Relinquishment Deed (APH) in favour of the buyer. An AJB is used if the buyer wishes to acquire certificated title to the land with the same type as the seller's certificated title. An APH is used if the seller has certificated title to the land that is not the same type of title that the buyer can or wants to acquire, or if the seller does not yet have certificated title to the land to be sold.

An AJB or APH must be drawn up by a Land Deed Official (PPAT) having jurisdiction over the land and be executed in the Indonesian language before such PPAT. The clauses in the AJB or APH are normally standard clauses (eg, details of the land object, purchase price, transfer of proceeds and liabilities upon transfer of title or execution of the deed, allocation of fees, and dispute settlement forum). As AJBs and APHs are documents that would need to be submitted or provided to governmental authorities or other third parties for various purposes, the transacting parties usually refrain from disclosing therein arrangements that are commercial, sensitive or confidential in nature. These arrangements are customarily regulated in a separate sale and purchase contract between the parties.

Matters that are generally regulated in the contract include conditions precedent, representations and warranties of both the seller and buyer, undertakings or covenants, events of default, and indemnity.

Environmental clean-up

21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Upon the transfer of the title, the buyer assumes the rights and liability of the land, including any environmental liability. Therefore, it is crucial that environmental due diligence is performed before executing a contract. Any environmental issues identified at the due diligence stage will usually be included as the seller's conditions precedent to be settled prior to closing. If the severity of the issue makes it unfeasible to be resolved prior to closing it would become a condition subsequent, the seller's undertaking or a ground to adjust the purchase price. To further protect the buyer, the seller would be asked to provide environmental representations and warranties, and indemnity in case of breach or future environmental claims arising from environmental issues not previously disclosed by the seller.

The indemnity period can be freely negotiated between the buyer and seller. The buyer will usually take into account the statute of

limitation for environmental claims. Pursuant to Law No. 32 of 2009 Regarding Environmental Protection and Management (3 October 2009), the statute of limitation for filing an environmental lawsuit refers to the statute of limitation for general civil lawsuits under the ICC (ie, 30 years) as from the time the environmental pollution or damage is known. However, there is no statute of limitation if the environmental lawsuit concerns toxic waste and hazardous materials (B3 waste). For a criminal lawsuit, pursuant to the Indonesian Criminal Code, the statute of limitation depends on the possible length of imprisonment, ranging from six years to 18 years.

In many transactions, the parties usually agree to use the criminal statute of limitation for the indemnity period (usually six years), as it would be unreasonable to request a 30-year indemnity period.

Lease covenants and representation

22 What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Under Indonesian law, the tenant is protected should the lessor wish to sell or transfer the land to another party while the lease is still effective. Article 1576 of the ICC provides that leases as a matter of law survive the sale of property unless the lease agreement specifically states otherwise.

It is uncommon for a buyer to purchase land and a building with existing leases, unless the buyer also intends to acquire the business of the seller, in which case the transaction would be structured as a shares acquisition rather than an asset acquisition. Therefore, the typical representation made by the seller is that the property is not subject to any existing leases, and it will not enter into any lease prior to the closing of the transaction.

If the buyer wishes to purchase land and a building with existing leases, the seller will not be permitted to enter into new leases, or the buyer would normally request the seller to deliver the land and building in vacant condition. As such, the seller will need to terminate the existing leases in accordance with the relevant lease agreements. If, pursuant to the lease agreement, the termination of the lease would entitle the tenant to claim compensation or damages, the seller and the buyer can freely negotiate who will bear such payment.

Estoppel certificates are not common in Indonesia.

Leases and real estate security instruments

23 Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Lease agreements and security agreements are two separate agreements, hence a lease is not subordinate to a security instrument.

Unless otherwise provided under the lease agreement, the lease shall survive the encumbrance and execution of security right. The Deed of Granting of Security Rights may provide that the security right grantor can lease the secured land or modify the term of the existing lease on the secured land only with the prior written approval of the security right grantee.

The concept of ground and head leases is uncommon in Indonesia.

Delivery of security deposits

24 What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

It is common for a lessor to impose security deposits on the tenant. Although Indonesian law is silent on the form of deposits, the most common form is cash deposit. The payment of this deposit, including the amount, schedule and method of payment, is regulated in the lease agreement.

Rent resets or reviews can be freely negotiated between the lessor and the tenant based on the freedom of contract principle. Normally, the lessor shall require a rent increase upon the expiry of the initial lease term and the parties will have to agree to extend the lease.

Due diligence

25 What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

It is customary to conduct due diligence before execution of a contract, as the result of the due diligence may be one of the bases to negotiate the terms and conditions of the contract (eg, conditions precedent, representations and warranties, indemnity). The due diligence would normally cover the following:

- land ownership and land search: to ensure the seller is the legal owner and is entitled to transfer the land title. The documents that need to be reviewed depend on whether the land is certificated. A land search at the relevant land office is conducted to check the legal owner of the land and whether there is any security right or claim over the land;
- licences: to identify whether the existing licences associated with the land are relevant for the buyer and whether the buyer has obtained all required licences for the land and any building erected on it. If so, the buyer will also need to check the validity of the relevant licences. It is also necessary to check whether there are any obligations imposed under the licences (eg, reporting obligations, restrictions);
- agreements: the buyer will need to review all relevant agreements pertaining to the land (eg, lease agreement, financing or loan agreement making the land an encumbrance) and check any material provisions in the contract that could impede the contemplated transaction (eg, cross default, negative covenant);
- information on seller: if the seller is an entity, the buyer will need to check the seller's articles of association, authorised representative and other corporate documents relevant to the transaction. If the seller is an individual, the buyer will need to check the marital status of the seller and validity of any heir (if the obtainment is through inheritance); and
- miscellaneous: evidence of tax payment (eg, land and building tax, and land acquisition tax and duty), research at the relevant government institution to confirm zoning and spatial layout, and the map of the land. Additionally, in certain cases, it might be necessary to conduct a site visit and interview the relevant parties who know the status of the land.

Structural and environmental reviews

26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Legal due diligence for environmental issues is typically limited to compliance that can be assessed based on documentary due diligence, such as licences, reports or the existence of warning letters from governmental authorities. The buyer should also engage an environmental consultant to identify potential environmental liability from the seller's business activities that may require technical or on-site assessments.

An engineering review is typically performed by a technical team established by the buyer or a consultant engaged by the buyer.

It is customary, and in fact advisable from the buyer's perspective, for the seller to provide representations and for the buyer to be entitled to indemnity due to breach of such representations.

Environmental insurance is available.

Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Yes, lawyers usually review lease agreements. While lawyers may not dwell on technical matters of the lease, they will review key material provisions, which include:

- rent, conditions that may trigger adjustment of rent, payment schedule;
- actions that require prior approval from or notification to the lessor or the tenant;
- actions that are prohibited to be conducted by the tenant;
- occurrences that may constitute events of default and events that may trigger termination of the lease;
- costs that shall be borne by the tenant;
- liability to be assumed by the tenant with respect to the use of the property and who will bear the associated expenses arising therefrom (eg, in the event of renovation or modification of the leased space); and
- assignment and sub-lease.

In a sale transaction, an issue that needs to be highlighted is whether there is any existing lease, and whether it is a short or long-term lease. The lease agreement needs to be reviewed to identify the rights of the tenant that may be triggered (eg, the right to terminate the lease), and any financial obligation that may arise therefrom. If the buyer does not wish to continue the lease, the lease agreement needs to be reviewed to identify whether it allows unilateral termination by the lessor and any financial obligation that may arise therefrom.

A property management agreement may be entered into by the building owner with a third-party professional, and it constitutes a separate agreement with financing security instruments. The agreement may regulate the terms and conditions in the event that the property is used as collateral.

Other agreements

28 | What other agreements does a lawyer customarily review?

A lawyer will also customarily review financing or loan agreements, brokerage agreement, management agreement, and other services agreements relating to the use of real estate.

Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

For any transactions, the lawyer shall ensure that all conditions precedent are satisfied or duly waived, and all closing deliverables are in order.

Typical deliverables for a land acquisition include:

- official land registration statement letter from the land search issued by the land office confirming that the seller is the legal owner of the land and whether there is any security right or claim over the land;
- if the seller has certificated title to the land but such title is not the same type of title that the buyer can or wants to acquire, the land certificate which has been converted to the type that the buyer can or wants to acquire;
- if the seller does not yet have certificated title to the land to be sold, the certification of such land;
- spousal consent (if the seller is an individual) or corporate approval (if the seller is a company) that may be required pursuant to its articles of association;
- proof of associated tax payment for the land by the seller; and
- if the purchase price is to be deposited in an escrow account, the escrow agreement and proof of the money deposit, as well as necessary instructions to release the money at closing.

The payment of purchase price will be on the closing date.

For a lease, as this is a contractual arrangement between the lessor and the tenant, the procedure to close a lease agreement is more straightforward. The lessor will usually require the tenant to deliver its corporate documents or personal information (as applicable) and payment of deposit and rent, as well as initial payment of mandatory maintenance charges and administrative fees, with the amount and method of payment as agreed between the parties under the lease agreement.

For financing, it depends on who the lender is. If the lender is an affiliate company or a shareholder, the procedures are more straightforward and usually what is required is corporate approval of the borrower, as may be required under its constitutional documents. If the lender is a non-affiliate third-party lender, it will additionally perform due diligence to identify any material risks that shall be resolved prior to closing as conditions precedent (eg, non-compliance that may affect the borrower's business operations or project). The closing deliverables may include corporate approval of the lender and borrower and finance documents of the borrower to evidence the borrower's financial condition.

Closing formalities

30 | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The closing is normally done in person attended by all parties and a notary or PPAT because certain closing documents are required to be signed in notarial deed form before a notary or PPAT. For example, for a land acquisition, the AJB is signed before a PPAT. In the case of lease or financing, the lease agreement or loan agreement is also usually prepared in a notarial deed form signed before a notary.

Upon the signing of the notarial deeds, the notary or PPAT will prepare original copies of the deeds for each of the parties.

The presence of a governmental authority or official from the land office is not required.

Contract breach

- 31 | What are the remedies for breach of a contract to sell or finance real estate?

The non-breaching party may claim for damages against the breaching party in Indonesian courts or another dispute resolution forum chosen by the parties under the contract. Other forms of remedy, such as retention of down payment or penalty, are to be freely negotiated between the parties based on the freedom of contract principle.

Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The available remedies, including eviction, in the context of commercial or residential leases, can be freely negotiated between the lessor and the tenant based on the freedom of contract principle.

Normally, the remedy clause will stipulate that the remedy provided under the contract shall not be exclusive or limit any other remedies that may be available by law.

FINANCING

Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

In Indonesia, the most common form of security interest over real estate is a security right. A security right is used to secure land with certain land titles (ie, right of ownership, right to build, right to cultivate or right to use (*Hak Pakai*) over state land and right of ownership over apartment units over right of ownership, right to build or *Hak Pakai* land) and all the fixtures attached to the land.

The most common methods of real estate financing include:

- internal funding using the company's own capital funds;
- loan from a third party, including banks and international lenders;
- joint venture financing, if the acquiring party is a joint venture company and is using its own capital funds; and
- listing on the Indonesia Stock Exchange (IDX): there are numerous real estate companies in Indonesia that obtained funding by going public and listing part of their shares on the IDX.

There is neither a prohibition on granting security over real estate to foreign lenders nor restrictions on repayments being made to foreign lenders under a security document or loan agreement. Pursuant to Law No. 4 of 1996 Regarding Security Right over Land and Attached Fixtures (9 April 1996) (Indonesian Security Right Law), the underlying agreement of a security right (eg, the loan agreement) can be signed overseas and the associated parties can also be a foreign individual or entity, as long as the loan is used for a development within the territory of the Republic of Indonesia.

A *Hak Pakai* over state land that is not transferrable (eg, *Hak Pakai* of the government, *Hak Pakai* of a social or religious agency and *Hak Pakai* of the representative of a foreign country), whose validity is not governed and is granted for as long as the land is utilised for specific purposes, cannot be granted a security right.

Leasehold financing

- 34 | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The concept of ground or head lease is uncommon in Indonesia.

As for lease financing, the most common methods are using internal funding or a loan from a third party. There is no specific regulation on lease financing; therefore, there is no requirement on the minimum term for a lease being financed. An agreement on lease financing is to be negotiated between the parties based on the freedom of contract principle.

Form of security

- 35 | What is the method of creating and perfecting a security interest in real estate?

The most common form of security for real estate is a security right. This must be registered with the land office, and upon registration it will be recorded in the relevant land certificate over which the security right is encumbered. The security right grantee will also be issued a Security Rights Certificate.

Before registering the security right, the security right grantor and the grantee must first execute an Deed of Granting of Security Rights (APHT) before a Land Deed Official (PPAT) having jurisdiction over the land, along with the submission of required documents (eg, original land certificate, original transaction agreement between the security right grantor and the grantee, and evidence of property tax payment).

Valuation

- 36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Yes, the lenders normally require real estate appraisals to determine the value of the property, primarily to ensure that the value of the land to be encumbered is sufficient to secure the loan amount. The appraisal is conducted by an independent third-party appraiser, which must be licensed by the Ministry of Finance.

The appraisal is ordered by the lender.

Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

There is neither a prohibition on granting security over real estate to foreign lenders nor restrictions on repayments being made to foreign lenders under a security document or loan agreement. The elucidation of article 10(1) of the Indonesian Security Right Law expressly provides that the underlying agreement of a security right (eg, the loan agreement) can be signed overseas and the associated parties can also be a foreign individual or entity, as long as the loan is used for a development within the territory of the Republic of Indonesia.

The foreign lender does not need to have a presence or be licensed to do business in Indonesia.

In Indonesia, the most common form of security interest over real estate is a security right. Security right is used to secure land with certain land titles (ie, right of ownership, right to build, right to cultivate

or *Hak Pakai* over state land and right of ownership over apartment units over right of ownership, right to build or *Hak Pakai* land) and all the fixtures attached to the land.

The most common form of security for real estate is a security right. This must be registered with the land office, and upon registration it will be recorded in the relevant land certificate over which the security right is encumbered. The security right grantee will also be issued a Security Rights Certificate.

Before registering the security right, the security right grantor and the grantee must first execute an APHT before a PPAT having jurisdiction over the land, along with the submission of required documents (eg, original land certificate, original transaction agreement between the security right grantor and the grantee, and evidence of property tax payment).

If secured land is transferred, the security right will remain attached to the land, unless the security right is removed. The security right may be removed upon the occurrence of the following conditions:

- the loan secured by the security right is settled;
- the security right is released by the security right grantee;
- the security right is removed based on a court stipulation; or
- the forfeiture of land right encumbered with the security right.

Loan interest rates

38 How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The interest rate can be freely determined by the parties based on the freedom of contract principle, with due observance of the reasonableness principle. Indonesian law does not regulate a maximum interest rate. There is no differentiation based on the type of property (eg, commercial or residential).

Loan default and enforcement

39 How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

The remedy is normally enforced by way of executing the security, which for real estate is the security right.

A security right can be executed if a security right grantor (debtor) fails to fulfil an obligation stipulated under the loan agreement. Principally, a security right is enforceable without the need for the lender first to submit any claims to the court or to wait for any final and binding court decision on the basis that the Security Rights Certificate issued to the lender has naturally been conferred with executorial status written into the initial part of the certificate. This is in line with the nature of a security right, including that it is easy and certain to be executed.

The Indonesian Security Right Law provides two alternative security right execution methods: through a public auction or a private sale. The consent of both parties is required for the private sale method.

The execution of a security right by a public auction must be carried out based on a court order. It should be noted that the court order is not a court decision on whether the debtor was in default, but is merely a stipulation issued by the court converting the rights held by the security right holder into a real action, allowing the security right grantee to auction the secured land publicly.

Loan deficiency claims

40 Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Deficiency judgments are not recognised under Indonesian law, but the lender can submit a claim in a normal civil court proceeding to recover the outstanding loan balance that is not sufficiently covered from the proceeds of security enforcement.

Protection of collateral

41 What actions can a lender take to protect its collateral until it has possession of the property?

The nature of a security right is attached to the land object, regardless of whose possession it is in. The secured land object thus may still be occupied and utilised by the debtor or any other permitted party, until its execution by the lender. Therefore, the best way to protect the security right is by way of properly registering it. Once the security right is registered it will provide conclusive legal ground for the lender as the security holder and to execute the security right in the event of default.

As an additional note, there may be more than one security right encumbered over one land certificate. The holder of the first rank of security right is given priority to execute the security right, and so on.

The concept of security right grantee in possession is prohibited. The Indonesian Security Right Law provides that any covenant that grants entitlement or authority for the security right grantee to own the secured land object in the event of default by the debtor shall be null and void. In the event of default, the security right may only be executed by either public auction or a private sale. This is in line with the nature of security under Indonesian law, whereby a security is granted to secure the payment of indebtedness, and not as a method of acquiring or possessing the debtor's assets.

Recourse

42 May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Indonesian law does not differentiate between recourse and non-recourse loans. In principle, all assets of the borrower can be used as collateral. However, these assets will need to be clearly set forth under the loan agreement, because a specific security document for each collateral needs to be drawn up, and certain types of security must be registered with the governmental authority to perfect them (eg, security right and fiducia). Therefore, the lender must ensure the security documents are duly executed and the required registrations have been made, otherwise the collateral cannot be executed.

In bankruptcy proceedings, all assets of the debtor will be utilised to settle the debtor's liabilities. Secured creditors, such as the holder of a security right over the land, can exercise rights to execute their security as if no bankruptcy has occurred. However, their rights will be stayed for 90 days following the declaration of bankruptcy.

Cash management and reserves

43 | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

The implementation of a cash management system and reserves (including the purposes of such reserves) can be freely negotiated and agreed between the parties based on the principle of freedom of contract.

Credit enhancements

44 | What other types of credit enhancements are common? What about forms of guarantee?

The type and use of credit enhancements depends on the type of financing. Holdbacks and interest reserves are usually implemented if the loan is granted by a foreign lender and the loan agreement is governed by foreign law (eg, Singaporean law).

Letters of credit are common for trade financing.

Guarantees are also common, which may be in the form of a bank guarantee, corporate guarantee or personal guarantee. A bank guarantee is normally required for large-scale financing (such as project finance), while a corporate guarantee or personal guarantee are additional security that may be requested by the lender for financing in general.

A guarantee may be enforced upon default by the borrower.

Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Covenants that are commonly required by the lender from the borrower in loan documents include:

- it shall maintain and preserve all of its properties that are used in its business operations in good working order and condition;
- it shall preserve and maintain its corporate existence, all governmental licences and consents, and shall continue to engage in business of the same general type as now conducted by it;
- it shall cause the shareholders to maintain their current shareholding ratio in the borrower;
- it shall pay all taxes, assessments and governmental charges upon it or upon its properties promptly when due;
- it shall comply in all material respects with all applicable laws and regulations in relation to its business and the loan;
- it shall ensure that its obligations under the loan agreement shall at all times rank at least *pari passu* with all its other present and future instruments of indebtedness except for obligations accorded preference by mandatory provisions of Indonesian law;
- it will deliver to the lender its financial statements after the end of each fiscal year;
- it will promptly notify the lender if it knows or has reason to know that any default has occurred, or any certain conditions that may be required by the lender to be notified (eg, change of ownership structure);
- it will permit any officers or employees of the lender to visit and inspect its properties to review the credit of the borrower or relating to compliance with the loan agreement; and
- it will at all times institute, maintain and comply with internal procedures and controls satisfactory to the lender for the purpose of preventing it from being used for money laundering, financing of terrorist activity, fraud or other corrupt or illegal purposes or practices.

Other negative covenants that may be required by the lender from the borrower, on a case-by-case basis, include:

- it shall not encumber its assets with other encumbrances;
- it will not enter into any merger, consolidation or amalgamation, or liquidate itself, or enter into any reorganisation or corporate restructuring, or sell, transfer or otherwise dispose of all or substantially all of its property or assets;
- it will not create any other loan that is outside the ordinary course of business or that exceeds a certain threshold amount or without approval from the lender;
- it will not make any material change in the nature of its business;
- it will not enter into any transaction except in the ordinary course of business on ordinary commercial terms and on the basis of arm's-length arrangements; and
- it will not provide any borrowing or financing, or financial guarantee to any party that is outside its ordinary course of business or that exceeds a certain threshold amount.

Financial covenants

46 | What are typical financial covenants required by lenders?

Typical financial covenants required include the maintenance of liquidity and hedging ratio. A borrower obtaining an offshore loan is required to make periodic reports to Bank Indonesia (the central bank of Indonesia).

To periodically review the borrower's financial condition, the lender usually requires the borrower to submit financial statements after the end of each fiscal year, and to be granted access to examine the borrower's books and records.

Ongoing appraisals may be performed as agreed by the transacting parties.

Secured movable (personal) property

47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Typical securities over movable property include a pledge and fiducia security. There is no specific formality for a pledge to be complete aside from the requirement for a pledge agreement, which does not need to be registered to any governmental authority. Upon the encumbrance of a pledge, the movable property is in the possession of the pledgee, and the pledgor typically grants a power of attorney to execute the pledge if the debtor defaults.

Unless expressly provided in the pledge agreement, the lender must auction the movable property to receive repayment. A pledged asset can be exempted from auction if the pledgor and the pledgee have agreed this in the pledge agreement.

For a fiducia, the movable property will still be in the possession of the debtor. The right is formalised by a deed of fiducia security, and the fiducia must be registered with the Ministry of Law and Human Rights. Afterwards, a fiduciary certificate will be issued, which renders the fiduciary encumbrance complete.

Failure to obtain a fiduciary certificate would render the fiduciary right non-existent.

A control agreement is uncommon.

Single purpose entity (SPE)

48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Generally, a company may engage in more than one type of business provided that it is able to secure the relevant business licence for each type of business, except for certain businesses that by law require an SPE. Therefore, it is uncommon for a lender to require each borrower be an SPE, unless the borrower's business by law is categorised as a business to be engaged in by an SPE.

What is common is for the lender to impose a negative covenant to the borrower that it will not make any material alteration to its current business activity or engage in other business activities.

The concept of an independent director is not recognised in Indonesia.

UPDATE AND TRENDS

International and national regulation

49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction? (eg, transition to a new alternative benchmark rate upon cessation of LIBOR as benchmark rate?)

The coronavirus pandemic has inevitably impacted many business areas, including real estate. Many regions in Indonesia, in particular the country's capital, Jakarta, have implemented large-scale social restrictions, causing the closure of schools, offices, public spaces and entertainment venues.

The situation has caused a slowdown in the real estate sector. The market is unlikely to see new leases signed, and some local investors and developers are taking a step back from their real estate projects, both commercial and residential.

There have been no significant changes in the real estate regulatory framework in Indonesia, and, at the time of writing, few policies, if any, have been implemented to boost the real estate sector during the pandemic.

Indonesia's Ministry of Finance has enacted Minister of Finance Regulation No. 86/PMK.03/2020 Regarding Tax Incentives for Taxpayers Affected by the Coronavirus Pandemic (16 July 2020) (as amended), which grants certain tax incentives to business actors whose business activities are listed therein, including a few real estate business sectors (tourism areas and owned or leased real estate). However, the tax incentives are primarily for the payment of employees withholding tax and are aimed at preserving companies' cash flow. No incentives have yet been issued to boost the real estate sector in general.

On the administrative side, the National Land Office (BPN) has relaxed the time period for granting, extending or renewing expiring land rights. The new rules are contained in BPN Decree No. 88.1/SK-HR.01/IV/2020 (16 April 2020) Regarding the Extension of the Validity of Land Rights and the Extension for the Registration of the Decree on the Granting, Extension or Renewal of Land Rights that Have Expired or Will Expire during the Coronavirus Disease 2019 (COVID-19) Emergency Period (Decree 88/2020), which applies retroactively from 31 March 2020.

Decree 88/2020 extends the expiry date of land rights and the registration deadline for submitting the decree regarding the granting, extension or renewal of land rights, to December 31, 2020. This policy applies to all land rights with an expiry period, namely right to build, right to cultivate and right to use. It applies to all decrees on the granting, extension or renewal of land rights that expire from 31 March 2020 onward during the coronavirus emergency period.



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Land right certificates and decrees that expired before 31 March 2020, are excluded from the expiry date and registration deadline extension.

Coronavirus

50 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Indonesian government has issued numerous pieces of legislation and implemented many initiatives in various sectors in response to the coronavirus pandemic. Key points for each sector are, briefly, as follows.

- imports: Indonesia has taken measures to ensure the availability of basic commodities and the continuity of manufacturing. These measures include simplifying the import licensing process and maintaining the accessibility of essential goods and principal commodities;
- tax: the pandemic has slowed the Indonesian economy, cut state revenue and forced increased state spending and financing. In response, the Indonesian government has issued a new regulation aimed at providing tax relief for the coronavirus-battered economy. The new regulation lowers corporate tax rates, imposes tax on electronic transactions by foreign tax subjects, extends tax filing deadlines and empowers the Ministry of Finance to waive import duties in the context of responding to the pandemic and in responding to a threat to the economy or national stability;
- litigation: Indonesia has introduced court trials by teleconference as part of social distancing efforts in response to the coronavirus pandemic;
- pharmaceuticals: the Indonesian Food and Drug Supervisory Agency announced that it would follow other foreign food and drug agencies in accelerating the drug registration process using the Emergency Use Authorisation platform for any drugs with the potential to treat the coronavirus; and
- manpower: Indonesia has relaxed mandatory employer contributions to the Manpower Social Security Program, which includes a later deadline for the payment of monthly contributions, lower monthly contributions and the partial postponement of monthly contributions.

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Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

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