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# Shipping

**Indonesia**

Dyah Soewito, Stephen Igor Warokka  
and Revaldi Nathanael Wirabuana  
SSEK Legal Consultants

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# 2021

# INDONESIA

## Trends and Developments

*Contributed by:*

*Dyah Soewito, Stephen Igor Warokka  
and Revaldi Nathanael Wirabuana  
SSEK Legal Consultants see p.6*



Last year saw a major overhaul of Indonesia’s shipping law regime. In the middle of a pandemic, the government of Indonesia passed Law No 11 of 2020 on Job Creation (the “Omnibus Law”), which revises various provisions in laws across numerous sectors, including more than 60 articles in Law No 17 of 2008 regarding Shipping (the “Shipping Law”).

The Minister of Transportation (MOT) also enacted regulations intended to attract more foreign investment to Indonesia’s shipping industry, as further discussed below. This appears to be consistent with the agenda of the administration of President Joko Widodo to bolster investment and create jobs by streamlining regulations and removing barriers to doing business in Indonesia, especially for foreigners. In addition, the president has emphasised on numerous occasions, during both his previous as well as his current term, that he intends to transform Indonesia into a global maritime axis. Thus, the authors expect this trend will continue in 2021 with the enactment of new regulations aimed at increasing investment in the shipping sector.

### Sea Transportation Strategic Plan

The MOT has enacted MOT Regulation No 80 of 2020 regarding the Strategic Plan of the MOT for 2020–2024 (“MOT Reg 80/2020”), which acts as a framework for the Ministry’s agenda and policy goals for the next five years. With regard to sea transportation, MOT Reg 80/2020 stipulates that the government will focus on building nationwide maritime connectivity and simplifying various regulations and the bureaucracy in order to ease the implementation of sea transportation. This includes integrating the administration of various shipping and navigational affairs, such as vessel identification, the Shipping-Navigation Aid (*Sarana Bantu Pelayaran-Navigasi*) and the stipulation of sea routes into an electronic/digital platform. Note that as of this moment, it is unclear when this planned platform will be up and running.

Indonesia will also direct its focus to providing competitive infrastructure (ports), vessels and human resources (seafarers), taking into account the various national and international provisions on safety and environmental protections at sea. This includes upgrading seven ports in Indonesia and transforming them into an integrated port hub. The seven ports are:

- Kuala Tanjung (North Sumatra);
- Batam (Riau Islands);
- Tanjung Priok (Jakarta);
- Tanjung Perak (East Java);
- Makassar (South Sulawesi);
- Bitung (North Sulawesi); and
- Sorong (Papua).

A massive investment will be required to finance the development of Indonesia’s maritime infrastructure. It is apparent from MOT Reg 80/2020 that a key policy goal for the sector is to simplify the bureaucracy to ease and attract foreign investment, which will be key to revitalising Indonesia’s maritime sector.

### Removal of Capital Requirement

One of the key regulatory changes in 2020 was the revocation of MOT Regulation PM 45 of 2015 regarding Capital Ownership Requirement of Business Entities in the Transportation Sector (“MOT Reg 45/2015”).

Under MOT Reg 45/2015, shipping companies were subject to a minimum issued and paid-up capital requirement of:

- IDR12.5 billion for a sea transportation company;
- IDR25 billion if the sea transportation company intends to construct and operate a special terminal (*terminal khusus*) and for a dredging/reclamation company;
- IDR25 billion to IDR1 trillion for a port operator company (*badan usaha pelabuhan*) (depending on the size and function of the port);
- IDR750 million (for non-joint ventures) or IDR1.5 billion (for a joint venture) for a salvage and/or underwater works company; and
- IDR750 million for a ship manning agency. For completeness, MOT Reg 45/2015 also imposes a minimum capital requirement for land and air transportation companies.

The articles imposing a minimum capital requirement for sea transportation companies were revoked by MOT Regulation No PM 24 of 2017 regarding the Revocation of Capital Requirement for Business Entities Engaging in Sea Transportation, Ship Agency, Stevedoring, and Port Management (“MOT Reg

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24/2017”). Further, with the issuance of MOT Regulation No 64 of 2020 regarding the Revocation of MOT Reg 45/2015, the entire regulation was effectively revoked as of 1 September 2020.

In the absence of these industry-specific capital requirements, the minimum capital required for shipping companies in Indonesia now follows the applicable requirement for companies in general. For companies with entirely domestic investment, there is no minimum issued and paid-up capital, provided that the issued and paid-up capital is at least 25% of the company’s authorised capital (as provided under Law No 40 of 2007 regarding Limited Liability Company and Government Regulation No 29 of 2016 regarding Change of Capital in Limited Liability Company). For companies with foreign investment (*penanaman modal asing*), the minimum issued and paid-up capital is IDR2.5 billion and there is a minimum investment value of more than IDR10 billion (as provided under Capital Investment Coordination Board (BKPM) Regulation No 1 of 2020 regarding Guidelines for the Implementation of Electronically Integrated Business Licensing Service). In practice, “investment value” is supervised by the BKPM based on the authorised capital of the company.

The removal of the minimum capital requirements significantly lowers the barrier to investment in Indonesia’s maritime sector, which should allow more small and medium-sized companies to enter the market.

## Utilisation of Foreign Vessels in Indonesia

The Omnibus Law adds a provision to the Shipping Law that foreign-flagged vessels may be used to conduct special activities in Indonesian waters (aside from carrying passengers and/or goods) if Indonesian-flagged vessels are “unavailable”, defined in the elucidation as when Indonesian-flagged vessels are not available or sufficient. Further provisions regarding the use of foreign-flagged vessels as well as other changes to the Shipping Law are to be governed under a government regulation (*peraturan pemerintah*) that has not been issued as of this writing, which may or may not affect the contents of this piece.

Prior to the Omnibus Law, the utilisation of foreign vessels for special activities in Indonesian waters was regulated by ministerial regulation, the most recent of which was MOT Regulation No PM 92 of 2018 regarding Procedures and Requirements for the Granting of Foreign Vessel Utilization Approval for Activities Other than Domestic Carriage of Passengers and/or Goods as lastly amended by the MOT Regulation No PM 46 of 2019 (“MOT Reg 92/2018”).

The MOT very recently issued a new MOT regulation that revokes MOT Reg 92/2018; ie, MOT Regulation No PM 2 of 2021 regarding Procedures and Requirements for the Grant-

ing of Foreign Vessel Utilization Approval for Activities Other than Domestic Carriage of Passengers and/or Goods (“MOT Reg 2/2021”). One of the biggest changes introduced by this new MOT regulation is that unlike prior MOT regulations where utilisation of foreign vessels was allowed until a certain “deadline” (eg, MOT Reg 92/2018 allowed utilisation of foreign vessels until the end of December 2020), there is no longer a deadline under MOT Reg 2/2021. Similar to MOT Reg 92/2018, MOT Reg 2/2021 provides an exhaustive list of the types of activities for which foreign vessels may be used, namely:

- oil and gas survey;
- drilling;
- offshore construction;
- offshore operational support;
- dredging;
- salvage and underwater works;
- electricity activities (done by power plant vessels); and
- terminal construction.

However, in the recently enacted Government Regulation No 31 of 2021 regarding the Administration of Shipping Affairs (2 February 2021) (“GR 31/2021”) (which is the implementing regulation of the Omnibus Law in relation to the shipping sector), there does not appear to be any provision on the utilisation of foreign vessels for the above-mentioned activities.

## Appointment of a General Agent for Foreign Shipping Companies

Currently, under Government Regulation No 20 of 2010 regarding Transportation on Waters, as amended by Government Regulation No 22 of 2011 (“GR 20/2010”), a foreign shipping company conducting shipping activities at a port or special terminal that is open for international trade is required to appoint a national shipping company or special sea transportation company to act as its general agent. This provision specifically requires that the agent be a shipping company and not merely a shipping agent. As such, foreign shipping companies will be required to partner with an existing Indonesian shipping company or set up a new shipping company. Please be advised that a shipping company in Indonesia is required to own a vessel with at least 175 gross tonnage for companies with entirely domestic investment, and 5,000 gross tonnage for companies with foreign investment.

GR 31/2021 revokes the relevant provision in GR 20/2010 discussed above. Due to this revocation, a foreign shipping company will be able to conduct shipping activities in Indonesia without having to appoint a national shipping company as a general agent. If required, the foreign shipping company may simply appoint (or establish) a shipping agency company, which is not required to own its own vessel. This would greatly

reduce the barrier faced by foreign shipping companies seeking to do business in Indonesia because it adds more options for Indonesian companies to act as agents. In addition, this also benefits Indonesian shipping agents because they are now no longer required to be a shipping company (owning a vessel) to serve foreign clients.

## Centralisation of Licensing and Certification

One of the most significant changes to the Shipping Law under the Omnibus Law is the centralisation of the licensing and certification authority with the central government. This change is in line with the existing push by the government of Indonesia to centralise business licensing through the Online Single Submission (OSS) system, pursuant to Government Regulation No 24 of 2018 regarding Electronically Integrated Business Licensing Service (“GR 24/2018”), as well as MOT Regulation No PM 89 of 2018 regarding Norms, Standards, Procedures and Criteria for Electronically Integrated Business Licensing Service in the Sea Transportation Sector (“MOT Reg 89/2018”).

Previously, licences/approvals related to the carriage of goods and port activities were issued by the MOT, and vessels operating in Indonesia were required to obtain various certifications related to safety, security and seaworthiness from multiple institutions, including the Sub-Directorate of Vessel Pollution Prevention and Safety Management (under the Directorate of Sea Transportation at the MOT), local port authorities and a classification agency appointed by the MOT. Under the Omnibus Law, these licences and certifications are now issued by the central government (or an institution appointed by the central government for certain certifications). Based on GR 24/2018, vessel certifications are now already issued by the central government through the OSS system. These certifications are known as the “Commercial/Operational License”.

The centralisation of licensing and certification may minimise licensing costs (eg, the time and money spent on applications, meeting with officials, facilitation/application fees, renewals or extensions), which would benefit investors. However, it may take some time for these processes to be fully integrated under the OSS system.

## Public and Legal Concerns

One of the biggest concerns with the overhaul of the shipping legal regime is that these changes could heavily favour large investors, especially foreign investors. Indonesians have a deep sentimental connection with the country’s waters, which are a symbol of unity connecting the sprawling archipelago (hence the term “*tanah air*”, which means “land and water”). Indonesia’s shipping and maritime sector is one of the most heavily regulated in the country. As such, it is no surprise that the overhaul of the shipping industry has been met with criticism

and warnings that local businesses will be unable to survive the expected surge of foreign investors. Perhaps the government’s most pressing concern will be to balance the interests of local business against the need to accelerate growth and development by attracting more foreign investment.

Assuming the government of Indonesia is going to focus fully on development and growth, the authors note that there are still legal barriers to investment that are yet to be addressed. For example, MOT Regulation No PM 93 of 2013 regarding Administration and Operation of Sea Transportation, as amended by MOT Regulation No PM 74 of 2016 and partially revoked and replaced by MOT Reg 24/2017 (“MOT Reg 93/2013”), still requires a company with foreign investment engaging in the sea transportation business to own (leasing does not suffice) at least one vessel with 5,000 gross tonnage. This clearly adds an obstacle for foreign investors who wish to establish a sea transportation business in Indonesia, as not all sea transportation business requires a vessel of such tonnage. This requirement has not been revoked or amended by recent regulations.

Indonesia also still lacks the necessary regulation regarding ship arrest. The Shipping Law provides that a vessel may be arrested by way of a written court order if the vessel is involved in a criminal or civil case. With regard to a civil case, there are several “civil claims” that are deemed prioritised under Indonesian law (a list of which is provided in the Indonesian Civil Code). In the case of maritime claims, a written court order for arrest may be issued without initiating civil court proceedings. For completeness, “maritime claims” (some of them provided under the Indonesian Commercial Code) is defined as:

- claims involving loss or damage due to the operation of a ship;
- loss of life or fatal injuries due to the operation of a ship;
- damage to the environment, ship or cargo due to salvage work;
- damage or potential damage to the environment, coastline or other interests caused by a ship;
- costs for lifting, removal, repair or rescue related to the ship;
- costs for the use or operation of freight;
- cargo loss or damage;
- general average;
- towage costs;
- pilotage costs;
- bunkering;
- costs of repair, reconstruction or recondition;
- port, canal, dock, harbour, shipping lane fees;
- crew wages;
- financing or disbursements incurred for the interest of the ship;

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- maritime insurance premium (including “mutual insurance call”); and
- commission, broker or agency fees; and
- several maritime dispute costs.

Further provisions on the procedures for vessel arrest at Indonesian ports are supposed to be provided by MOT regulation, but no such regulation has been implemented to date. If Indonesia really wants to increase its maritime activity, it should put in place a robust system for ship arrest, as the increase in vessel activity in Indonesia will likely be accompanied by a rise in disputes or claims related to maritime activities.

## **Sailing Forward**

There has been a very consistent development in the regulatory framework for the Indonesian shipping sector. Recent key regulations are meant to remove barriers to foreign investment, while further regulations may be required to provide further clarity on how the shipping industry will be regulated in the future.

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**SSEK Legal Consultants** is a leading shipping firm. The practice covers the full spectrum, from advising companies in the natural resources sector on Indonesia's cabotage rules to advising foreign cruise lines on their operations in Indonesia. SSEK is active in advising clients on complex cabotage issues in Indonesia. The team has handled numerous major port projects and its lawyers have advised some of the biggest port operators in the world. SSEK is active in representing both lenders and

buyers in ship and rig leases. Founding partner Dyah Soewito is acknowledged for her mastery of Indonesian law, which benefits her numerous shipping clients. Stephen Igor Warokka, a junior partner, is a rising star in the shipping practice. Igor was the senior associate for many of the shipping matters handled by SSEK. His more recent experience includes representation of various foreign shipping companies in the acquisition and sale of vessels.

## Authors



**Dyah Soewito** specialises in shipping and maritime law, projects and real estate. She is particularly adept at guiding clients through Indonesia's regulatory maze in the energy sector and is extremely active advising clients on cabotage issues and ship financing. Dyah has been recognised as a leading lawyer in Indonesia for shipping law. She is named by *Asialaw* as a leading individual for corporate law and M&A, and was named in the *Asia Business Law Journal* 2020 list of Indonesia's Top 100 lawyers. Dyah recently authored the shipping chapter of SSEK's commentary on Indonesia's Omnibus Law.



**Revaldi Nathanael Wirabuana** has a practice that includes shipping and maritime law, mergers and acquisitions, foreign capital investment, land acquisition, data protection and IT, and oil and gas law. His more recent experience includes advising a foreign oil and gas company on maritime logistics, representing a dredging and maritime contractor company in a restructuring exercise, and advising a large Indonesian packaging company on an initial public offering. Revaldi recently co-authored the shipping chapter of SSEK's commentary on Indonesia's Omnibus Law.



**Stephen Igor Warokka** has a practice that includes mergers and acquisitions, general corporate law and foreign capital investment, specialising in shipping and maritime law. He has represented foreign shipping companies in the acquisition and sale of vessels; acted for an Indonesian

shipping company in connection with a syndicated facility agreement; and advised shipping companies on foreign ownership restrictions, shipping agency and cabotage issues. Stephen was a featured speaker at a webinar hosted by *Maps and Globes Specialists* on the changes to the 2008 Shipping Law under the draft Omnibus Law.

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## SSEK Legal Consultants

14th Floor  
Mayapada Tower I  
Jl. Jend. Sudirman Kav 28  
Jakarta 12920  
Indonesia

Tel: +6221 2953 2000  
Fax: +6221 521 2039  
Email: [ssek@ssek.com](mailto:ssek@ssek.com)  
Web: [www.ssek.com](http://www.ssek.com)



Indonesian Legal Consultants