



TABLE OF CONTENTS

Schulz Noack Bärwinkel

- 2 Foreign Investment Construction License
- 2 Intellectual Property Rights
- 3 Import of Used Goods

LUBIS, SANTOSA & MARAMIS Law Firm

- 4 Labor
- 4 Divestment
- 5 Labor

Luther LLP in collaboration with Maqdir Ismail & Partners

- 6 Corporate Law
- 6 Environmental Law
- 7 E-Commerce Law

KPMG Indonesia c/o Siddharta & Widjaja

- 8 International Tax
- 8 VAT
- 9 Permanent Establishment

PT Roedl Consulting

- 10 Real Estate Taxation
- 10 Anti-Avoidance
- 11 Renewable Energies

Kudri & Djamaris, Attorneys – Counsellors at Law

- 12 Litigation
- 12 Legal Audit
- 13 Contract Law

14 Indonesian-German Business Forum

Dear Members, dear Readers,

Within the announcement of the 12th Economic Policy in April, 2016, President Joko Widodo stressed the importance of raising Indonesia's ranking in the World Bank's Ease of Doing Business (EODB) report from 109 to 40. To achieve this ambitious target, the Indonesian government seems committed to making the required improvements, both from a regulatory standpoint and in regards to licensing procedures and fees – especially for SMEs. The said policy is also accompanied by 16 new regulations, such as the Presidential Regulations on minimum paid-up capital for companies, the Ministry of Public Works Regulation on Building License (IMB), the Ministry of Home Affairs Regulation on the revocation of the Nuisance Act, as well as the Revision of Governmental Regulation No. 48/1994 on Income Tax and the Regulation on the Decrease of Acquisition of Land and Buildings Duty (BPHTB).

The much-anticipated regulation on the revision of the Negative Investment List – Presidential Regulation No. 44/2016 – as stated in the Indonesian Government's 10th Economic Policy announcement back in February 2016, has also been signed into effect. While some parties remained skeptical, we have seen an increase in inquiries from German investors, especially in the fields of infrastructure and construction.

In addition, in mid April, President Widodo's official visit to Germany, the United Kingdom, the Netherlands and Belgium, has resulted in a total investment commitment worth of US\$20.5

billion. The Head of the Indonesian Investment Coordinating Board (BKPM), Franky Sibarani, said the 11 economic policy packages had raised the interest of European investors for Indonesia. From Germany, President Jokowi managed to secure a total investment commitment worth \$875 million, including that of a smelter development between PT Aneka Tambang Tbk. and German-based companies Ferrostaal and Cronimet.

In this edition of EKONID's Newsletter Law & Taxes, our cooperation partners share their expertise on recent Indonesian legal and tax developments, including but not limited to Labor, Divestment Issues, Construction Business License for Foreign Investment Companies, Intellectual Property Rights, Regulation on Import of Used Goods, Value added tax, Permanent Establishment, Real Estate Taxation, Anti Avoidance, Renewable Energy, Legal Audit, Contract law and E-commerce.

The Network Law & Taxes could not have been completed without your highly regarded skills and support. Please note that you have my deepest thanks and I look forward to continue our cooperation to move our countries and companies forward.

Cassandra S. Paulira

Head of Corporate Services

Construction Business Licenses for Foreign Investment

Foreign investors intending to conduct construction services in Indonesia jointly with an Indonesian investor may establish a foreign-investment construction business (BUJK PMA). The Indonesian partner(s) must qualify as a “large” construction business or must have experience of a “large” construction business. The foreign ownership is restricted to 49%, 75%, 90%, 95% or 100%, depending on the business-field classification (KBLI) set out under the 2014 Negative Investment List.

Indonesia has issued a new regulation (Number 03/PRT/M/2016) on technical guidelines for the granting of construction business licenses for foreign investment, which came into force on February 4, 2016. To operate in Indonesia, every BUJK PMA must possess a construction business license, called IUJK PMA. To obtain this IUJK PMA, the construction business must lodge an application with the one-stop-integrated-services facility at the Indonesian Investment Coordinating Board (BKPM). Article 12 of the new regulation lists the required documents that must be enclosed with the application. If the IUJK PMA is granted, it is valid for three years. Afterwards, it can be extended upon application for extension, which requires the same attached documents as

the new application and must be requested at least 30 days before the IUJK PMA expires. Furthermore, an application at the BKPM can be lodged for amendment of the IUJK PMA data.

The new regulation also sets out the rights and obligations of BUJK PMAs with an IUJK PMA as well as the sanctions imposed on a business in cases of non-compliance. The obligations include, among others, that a BUJK PMA should only engage in high-technology, high-risk, and high-cost projects (contractors: Rp 100 billion projects; construction planners and supervisors: Rp 10 billion projects), the engagement in technology transfers and submission of a semiannual business report as well as import-realization report.



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Registration Process of Intellectual Property Licensing Agreements

In Indonesia, the holder of an intellectual property right (IPR) may license his IPR. According to the prevailing IPR Laws, licensing agreements are not binding for a third party unless they are registered with the Directorate General. The new Ministerial Regulation No. 8/2016, which was entered into force on February 24, 2016, clarifies the procedures for registering intellectual-property licensing agreements.

Under the new regulation, the licensor, the licensee, or its proxy must submit a registration application to the Ministry of Law and Human Rights. The application may only be submitted by an intellectual property consultant, if the applicant or the IPR holder is a foreign party. The documents required to be enclosed to the application include a copy/proof of the license agreement, a copy of the valid certificate or proof of the ownership of the IPR, the original signed power-of-attorney (if the application is submitted by a proxy), the original receipt of the payment of the registration application fee, as well as a letter signed by the applicant stating that the IPR are valid, are not detrimental to the interest of the national economics, do not impede the development of technology and do not contradict the prevailing laws and regulations, morality, or public order.

The Ministry will assess the application within ten days after the date of filing of the application. If the application is found incomplete, the applicant will be given written notice and must complete the required documents within ten days. Otherwise the application is considered to be withdrawn. Once the application is approved, the Ministry will register the licensing agreement and announce the registration on the website of the Directorate General of Intellectual Property. This registration is valid for five years and may be extended by submission of a new registration application.



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New Regulations on the Import of Used Capital Goods

Indonesia issued new regulations regarding import provisions for used capital goods. The regulation No. 127/M-DAG/PER/12/2015 (Reg. 127/2015) which has been effective since February 1, 2016 will remain in force until December 31, 2018, and repeals and replaces the prior regulation on the import of used capital goods (regulation No. 75/M-DAG/PER/12/2013). This regulation has been further implemented by regulation No. 14/M-IND/PER/2/2016 (Reg. 14/2016) which was put into force on February 25, 2016, and repeals and replaces the prior regulation No. 9/M-IND/PER/2/2014.

Reg. 127/15 defines used capital goods as goods that can be utilized as capital or used in order to produce other goods, to be re-conditioned, or to be re-manufactured. Contrary to the old regulation, under the new regulation, the import of used capital goods is based on business types. Only three business types are allowed to import goods: direct-user companies, re-conditioning companies and re-manufacturing companies.

For each business type, different types of used capital goods are allowed to be imported. For example, a direct-user company may import used capital goods with a maximum age of 15 years such as cruise ships or fishing vessels, as well as used capital goods with a maximum age of 20 years such as piston engines and air compressors. Additionally, certain used

capital goods need to meet special technical specifications set out by the competent authorities.

In order to import used capital goods, the company must be granted import approval by the Directorate General of Foreign Trade. Therefore, a written application with various documents attached must be submitted. The Directorate General of Foreign Trade shall assess the accuracy and validity of the documents within three days and will then issue or refuse the import approval. The import approval expires one year after the date of issue and can be extended for another 60 days.



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Office Presentation

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Schulz Noack Bärwinkel (SNB) is a German law firm based in Hamburg, which was established in 1929. Over the years we developed a strong focus on the Asian markets, especially China, Vietnam and Indonesia. Today SNB maintains offices in China and Southeast Asia with an international team led by highly experienced German attorneys.

Through our partnership with a leading Indonesian commercial and corporate law firm, we provide our clients with high quality legal services. Our team consists of German-speaking attorneys with substantial Asia experience and language skills, combined with a thorough understanding of the Indonesian business environment.



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Retirement Security Program

On June 30, 2015, the Indonesian Government enacted Government Regulation No. 45/2015 regarding the Management of the Retirement Security Program. Participants of the Retirement Security Program shall be: a) employees who work for state actor employers (this type of workers would be specifically governed under a separate Government Regulation); and b) employees who work for employers other than state actors. Employers shall be obligated to register its entire workforce with BPJS Ketenagakerjaan as participant in accordance with the stages of participation. While for new employees, employers shall register them no later than 30 days as of the date such employee begins employment.

Participation in the Retirement Security Program shall commence as of registration of such employee and first Premium paid and deposited by employers to BPJS Ketenagakerjaan. Retirement Security Premium shall be paid monthly in the amount of 3% of monthly salary that shall be jointly borne by employers and participant provided that 2% of salary shall be borne by the employer; and 1% of salary shall be borne by the Participant. The amount of Retirement Security Premium shall be evaluated no earlier than 3 years and such evaluation would be used

as basis for gradual increase adjustments of premium towards 8% of salary. Any delay in paying such premium shall be subject to a 2% fine calculated from the Premium that should have been paid by employers and this fine shall be borne solely by the employer. Retirement beneficiaries shall comprise of the: participants; one lawful spouse; not more than two children; or one parent. For the first time in history, retirement age shall be determined as 56 years of age. However, as of January 1, 2019, retirement age shall become 57 years and shall continuously be increased by 1 year for every subsequent 3 years, reaching up to the retirement age of 65 years.



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Divestment

New Divestment Policy: Indecisive Solution for Foreign Investor?

In the fourth quarter of 2015, the Indonesia Investment Coordinating Board (BKPM) enacted regulation number 14 of 2015 on the guidelines and procedures for investment principle license (Regulation 14), which reflects BKPM's position toward divestment. As the provision provides official understanding on investment, it also gives solution to a long-debate on divestment, since although the 2007 Investment Law does not require divestment to be made; legal wise, there is Government Regulation 20 of 1994 which imposes divestment against foreign wholly-owned company.

Regulation 14 states that divestment set forth in investment licenses issued before Regulation 14 should remain binding and enforceable. Consequently, foreign investment (PMA) company having such an investment license should divest its foreign portion. The Regulation 14, however, does not mention the percentage of foreign portion that needs to be divested. As such, a transfer of 'mere' 1% shares can be deemed as divestment. This is where the legal issue arises. In a case where a business is open to maximum 33% of foreign ownership, would divestment of 1% shares sufficiently satisfy the divestment obligation? On another case, if the said investment license states certain percentage of divestment, should the

divestment be made in accordance with the said investment license or the limitation under the Negative List (DNI)?

Another legal issue is with respect to the requirement to secure the approval of the Ministry of Law and Human Rights (MoLHR) for re-selling the divested shares to foreign party. While Regulation 14 is silent on the procedure to acquire this MoLHR's approval, this provision is contradicting with the 2007 Company Law whereas transfer of shares should only be notified to MoLHR.



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New Regulation on Religious-Holiday Allowance

The Indonesian Government recently issued a new regulation on religious holiday allowance (THR Allowance) through the Ministry of Manpower Regulation Number 6 of 2016 (Regulation 6/2016), on 8 March 2016. The Regulation 6/2016 obliges all employers to pay THR Allowance to their employees who have worked for a minimum period of one month. The amount of THR Allowance to be paid is (i) one month salary, for employees who work for over twelve months and (ii) proportionally with its employment period, for employees who have worked for one to twelve months.

Further, Regulation 6/2016 introduces THR Allowance provision for freelance workers. The calculation of THR Allowance for freelance workers are (i) the average wage over the last twelve months prior to his belief's religious holiday, for workers that have been working for over twelve months, and (ii) the average wages received each month during his employment period, for workers that have been working for less than twelve months.

THR Allowance must be paid once a year in cash and in Rupiah, no later than seven days prior to the religious holiday of the employee's beliefs, such as: (a) Eid Al-Fitr Day for Moslem employees; (b) Christmas Day for Christian and

Catholic employees; (c) Seclusion Day for Hindu employees; (d) Vesak Day for Buddhist employees; and (e) Chinese New Year's Day for Confucians employees.

The implementation of this Regulation 6/2016 is supervised by manpower inspectors. Employer that does not comply with the regulation is subject to a fine of 5% of total THR Allowance and other administrative sanctions. Regulation 6/2016 revokes the Ministry of Manpower Number PER.04/MEN/1994 (Regulation 4/1994). Previously, Regulation 4/1994 only imposed THR Allowance obligation to employers who engage employees who had worked for a minimum period of three months.



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practice is dedicated to the provision of prompt, effective and pragmatic legal, business planning risk management advisory services to clients seeking insightful solutions to sophisticated business development, operations and dispute resolutions concerns, We are committed to providing responsive attorneys, efficiently managed cases and transactions, and alternative billing options that succinctly meet the needs of our clients.

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Indonesia Substantially Eases Restrictions of Foreign Investment

On February 11, 2016, the Government of the Republic of Indonesia announced a major revision of the country's Negative Investment List (NIL) that defines restrictions on foreign direct investment in the listed business sectors by limiting foreign shareholding. The NIL had last been revised in 2014 when it continued to tighten restrictions in what seemed to be a broader tendency towards protectionism in Indonesia.

The wording of the amendment to the NIL made available after the respective Presidential Regulation (Presidential Regulation No. 44/2016) has been passed.

A number of business categories that were previously closed to foreign direct investment (FDI) have been fully or partially opened, affecting mainly the following sectors (% shows maximum amount of permitted foreign shareholding):

Health support services	67%	Film distribution	100%
Land transportation for passengers	49%	Extra-high voltage installation	49%

Categories that had been a part of the NIL have been removed, i.e. now allowing 100% foreign ownership in the following sectors:

- Crumb rubber;
- Cold storage;
- Tourism (restaurants, bars, cafes, recreation parks, sports centers);
- Film industry;
- E-commerce and online marketplaces valued at more than IDR 100 billion (approx. USD 7.4 million);
- Institutions for telecommunication equipment testing;
- Toll road management;
- Non-hazardous waste management;
- Medicine raw materials.

Relaxations were implemented for the following sectors, allowing foreign shareholders to own up to 67% of shares:

- Distributorship and Warehousing;
- Freight forwarding;
- Travel bureaus;
- Golf courses;
- Air transportation support services;
- Private museum management;
- MICE (Meeting, Incentive, Conference, and Exhibition);
- Construction services for work worth more than Rp 50 billion (approx. US\$3,720,000.00);
- Telecommunication networks integrated with telecommunication services.

Especially in the field of Distribution the changes reflect a major change. Foreign shareholding had been limited to 33% by the 2014 revision, leaving foreign businesses without a chance to hold a controlling stake in the distribution of their goods from overseas production in Indonesia.



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Environmental Law

Indonesia plans moratorium on new palm oil plantations and mining operations to prevent forest fires

According to a spokesperson of President Widodo, a moratorium on new operations in the palm oil and mining sectors is planned to be issued this year in order to prevent haze pollution from becoming as severe as in 2015. This announcement comes after the President issued Presidential Regulation No. 1/2016 that created the Peatland Restoration Agency (BRG) and appointed Nazir Foad – former conservation director at WWF – as its head.

While there is no certainty on the timing or the mode of implementation of the moratorium, its effect would focus on the palm oil and related industries rather than on the mining sector as the latter has not been actively pursuing activities in wooded areas.

Warnings by associations of palm oil industry members – that the moratorium would damage growth in this pillar of Indonesia's export industry – were addressed by stating that the existing plantation areas would be able to yield about twice the current output if managed more efficiently.

The move by the President seems to be part of the actions he announced to take following his attendance of global climate talks in Paris last year. Some major companies in the sector welcomed the Government's initiative to favor intensification over expansion and added that a moratorium would offer the opportunity to add capacity to the enforcement measures to prevent forest fires as well as such regulating the use of land by plantation companies.



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The Indonesian E-Commerce Roadmap – What we know so far

On January 14, 2016, the Indonesian e-commerce roadmap was announced after a widely publicized meeting between Coordinating Minister for Economic Affairs Darmin Nasution, Minister of Communications and IT Rudiantara, Minister of National Development Sofyan Djalil, Finance Minister Bambang Brodjonegoro, Trade Minister Thomas Lembong, Chief of Creative Economy Agency Triawan Munaf, and Deputy Governor of Bank Indonesia Ronald Waas. The three main points agreed by the government were to formalize an e-commerce roadmap as a national program to be launched by the end of January 2016, to appoint a program management unit to coordinate the efforts of various ministries and government agencies and the plan to formally launch the roadmap by the end of January 2016. The aspiration of the roadmap is to push the value of e-commerce transactions in Indonesia to US\$130 billion by 2020.

One month after the announcement, on February 10, 2016, the roadmap had not been completed according to plan. We learned however, that the roadmap would be in the form of a government regulation. It will cover seven strategic and critical aspects of the e-commerce business such as taxation, logistics, funding, consumer protection, communication infrastructure, education and human resources, and cyber security. Foreign investment has been further clarified and eased in the new negative investment list (Daftar Negatif Investasi / DNI) issued on May 18, 2016. Companies involved in e-commerce retail activities are open to foreign ownership so long as they fulfill the requirement of forming a partnership with local micro-, small- and medium-sized

enterprises. Companies that are involved in online marketplace activities are also open to foreign ownership; up to 49% for those with capital of under Rp 100 billion and 100% for those with capital equal to or more than Rp 100 billion.

The formalization of an e-commerce roadmap which led to its announcement in January 2016 was part of a long process that started way back in December 2014, but even then it was announced as a mere general plan without actual, concrete steps. At the time of writing – four months after the deadline set by the government – the e-commerce industry is still waiting to hear more about the roadmap.



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Luther LLP is one of the largest continental European lawfirms in Singapore. With our further lawfirms in Yangon and Shanghai as well as our corporate services offices in Kuala Lumpur, Delhi-Gurgaon, Shanghai and Singapore, we offer a comprehensive range of services to our clients. In Indonesia we have formed a strong collaboration with Maqdir Ismail & Partners in order to service our clients in their ventures in this interesting market. Maqdir Ismail & Partners are highly regarded for their expertise particularly in litigation, corporate law as well as in mergers and acquisitions.

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“Public” country-by-country reporting for multinational enterprises advances

A proposal in the European Union to require the public release by multinational enterprises on a country-by-country basis of the amount of taxes paid and public disclosure of relevant tax information relating to transactions in countries that are identified as “tax haven” jurisdictions advanced with its official publication by the European Commission on April 12, 2016. The proposal would require large multinational companies to publish annually a report disclosing the profit and the tax accrued and paid in each EU Member State on a country-by-country basis. In addition, these companies would be required to disclose how much tax they pay on the business they conduct outside the European Union (e.g., in Indonesia).

For those tax jurisdictions that do not abide by tax good governance standards (“tax havens”), this information would have to be disclosed on a disaggregated basis. Any multinational company—whether European or not—that is currently active in the EU’s single market with a permanent presence in the EU and that has a turnover in excess of €750 million would have to comply with these additional transparency requirements

(this may also apply to Indonesian multinationals). It is estimated that this requirement would affect approximately 6,000 multinational enterprises. Reporting would also include explanations on discrepancies between the amounts of tax actually paid and tax accrued. This information would have to be made available in a stand-alone report accessible to the public for at least five years on the company’s website. Companies would also have to file the report with a business register in the EU.

Once the proposal would be adopted, the new measures would have to be transposed into national legislation by all EU Member States, within one year after its entry in force.



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Indonesian VAT

A person (in any form – company or individual) which, in the course of its operations; produces, or imports or exports taxable goods, or renders taxable services, is required to register as a “Taxable Entrepreneur” with the Indonesian Tax Authorities (“ITO”). However, only a resident person or a PE can register for VAT. Registration by non-residents is not allowed. The current VAT rate is 10% and on exports (goods) 0%. VAT is, amongst others, imposed on:

- The delivery of taxable goods (tangible or intangible) in Indonesia by a “Taxable Entrepreneur”
- The importation of taxable goods
- The rendering of taxable services in Indonesia
- Utilization of offshore taxable services in Indonesia

VAT is determined by applying the tax rate of 10% to the sales price.

Monthly remittances to the government are required for the excess of output VAT over input VAT. Output VAT is VAT charged by a taxable entity on its sales of goods and services. Conversely, input VAT is the VAT incurred on purchases of goods and services used in the business. If input VAT exceeds output VAT for any month, it can be carried forward to the

next month or a refund can be claimed. A refund claim triggers a tax audit. There is a self-assessment obligation in relation to input VAT on offshore services purchased from non-residents for the benefit of residents. So if a German entrepreneur is rendering services to an Indonesian client (e.g., consulting), the German entrepreneur should invoice its client without any VAT. The Indonesian client should subsequently apply the so-called reverse charge method and pay Indonesian VAT on the invoice received from Germany to the ITO. Monthly VAT returns must be filed by the end of the following month and any VAT payable must be paid before the submission of the return.



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Permanent Establishment under Indonesian domestic tax law

Foreign companies may be fully subject to tax on their Indonesian sourced income if they have a permanent establishment (“PE”) in Indonesia. The Indonesian sourced income would be subject to corporate tax (“CIT”) at the rate of 25%. The Indonesian PE definition is very broad and generally covers representative offices, management base offices, branch offices, plants, warehouses, space for promotion and sales, computers, electronic agents, or automatic equipment that is owned, leased, or used by an electronic transaction operator to conduct internet business activities.

If a PE would be present on the basis of Indonesian tax law, then a tax treaty (“DTA”) between Indonesia and another country may restrict Indonesia’s right to levy tax. The problem is that the Indonesian definition of PE is much broader than the definition in most tax treaties. If a tax treaty applies with a more restrictive definition, Indonesia is not allowed to tax certain activities that would be taxable under domestic law. If the Indonesian tax authorities (“ITO”) would tax activities that they are not allowed to tax under a tax treaty, a so-called double taxation (both taxation of the same activity in the home

country of the company and in Indonesia) would occur. In this respect it is important to obtain tax advice before starting activities in Indonesia. It may be possible to discuss upfront with the ITO the planned activity and its tax consequences. If necessary, the envisaged structure could be amended in such a way that Indonesia would refrain from taxing the activity or the profit to be taxed could be reduced.



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KPMG Advisory Indonesia

KPMG Advisory Indonesia (KAI) has been providing business advisory services focusing on taxation and related business issues since 1957. KAI is one of the largest practices in the country, providing services to multinational corporations, joint ventures and domestic companies operating in a wide range of business sectors. Our experienced tax professionals

are drawn from a wide number of countries and backgrounds. Industry specialization, service line expertise and international exposure, together with continuous advanced training, equips them to work with our clients and to be their professional tax advisors in a wide spectrum of business matters.



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Taxation on Real Estate Investment Trusts

Compared to other countries on the region, Real Estate Investment Trusts (REITs) have not been well developed in the Indonesian market due to the high tax rates applicable on the sale of property, as well as double taxing situations. Recently, the government has done another revamp of tax regulations on REITs via the issuance of the Minister of Finance Decree No. 200/2015 (“MOF Decree 200”). In the recent 11th Economic Reform Package announced by President Joko Widodo, the government plans to even further reduce various tax burdens on REITs.

REITs have been regulated in Indonesia since 2007 as “Real Estate Investment Funding in the form of Collective Investment Contracts”. The 11th Economic Reform Package addresses the high tax rates applicable on the sale of property under REITs: The MOF Decree 200 stipulates that REITs in the form of a Collective Investment Contract (CIC) and Special Purpose Company owned by the REIT (SPC) are viewed as a single tax entity; therefore distribution of dividends from SPC to CIC is viewed as non-taxable event. Another tax facility includes the exemption of 5% final tax on transfer of land and building to the REIT; the seller is instead subject to normal corporate tax of 25% on the gain on sale of the said land and building. The application of 25% corporate tax on gain as a replacement to

the 5% final tax on transfer of land and building is not what was expected by the market. The expectation was a reduction or even an exemption of the 5% final tax.

The transfer of land and building is a Value Added Tax (VAT)-able delivery. Under the MOF Decree 200, REITs may obtain a so-called “low risk VAT entrepreneur” status from the Director General of Tax. Under this status, REITs shall be able to get an advance VAT refund mechanism within 1 month.

It remains to be seen whether the new package will increase the competitiveness of the domestic REIT market. Implementing regulations of the Economic Reform Package are awaited. The regulations are expected to provide further reductions on income tax and transfer tax on land and building.



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Anti Avoidance

A Recap on Anti-Avoidance Rules in Indonesia

The prevailing Indonesian Income Tax Law includes specific Articles which counteract the tax avoidance initiatives: Affiliate transactions must be carried out on arm's length basis and have reasonable commercial purpose. A Transfer Pricing Documentation must be maintained for cross border transactions exceeding Rp 10 billion with each affiliate party in a tax year. Specific approach consistent with Per-22/PJ./2013, Per-32/PJ./2011 as well as OECD TP Guidelines must be covered in the documentation. Affiliate transactions between Indonesia residents are generally not covered in the regulation except for transactions with a contractor in the oil & gas sector or transactions with companies which are subject to final tax regime.

Starting in the 2016 fiscal year, a maximum prescribed debt-to-equity ratio of 4:1 is introduced by the application of Ministry of Finance Decree No. 169/2015. In short, any borrowing cost of debt in excess of such a ratio will be considered non-deductible for tax purposes.

A controlled-foreign corporation (CFC) is a non-resident corporation, a minimum of 50% of its paid up capital is held

by an Indonesian tax resident or jointly held with other tax residents. The Indonesia tax authority can assess the undeclared dividend income derived from such a non-resident corporation. The rule applies if the CFC is a non-listed corporation.

Other anti-avoidance rules include restrictions to tax treaty benefits if the income is paid to a non-beneficial owner or the transaction has no economic substance by way of a structure/scheme with the sole purpose to benefit the tax treaty. Indonesia has introduced stringent measures on the access to tax treaty benefits. Foreign investors or non-residents transacting with Indonesia residents should well anticipate this.



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Indonesia and TPP

In the light of significant infrastructure deficits, the Indonesian government promotes the utilization of renewable energy to generate electricity; it is envisaged to generate 35,000 MW in 2019. Although various legal reforms to facilitate investment in this sector were conducted by the government, difficulties remain. Investors considering to engage in the renewable energy sector have no guarantee that the electricity generated by their power plant can be sold at proper price to the Indonesian state-owned company (PT PLN or Perusahaan Listrik Negara / State Electricity Company) holding the monopolistic right to provide electricity to end customers.

Aiming to attract investors, the Minister of Energy and Mineral Resources (MEMR) has issued regulations which oblige PT PLN to purchase electricity generated by way of solar photovoltaic, hydro, geothermal and city waste from the plant operator at a price as determined by the regulation. The feed-in-tariff, however, was challenged in June 2014 when the Supreme Court cancelled MEMR Regulation No. 17/2013 on Purchase of Power by PLN from Solar Photovoltaic Power Plants (Regulation 17). The decision, which was initiated through a petition submitted by Indonesian solar panel manufacturers aiming at mandatory local component requirements, was made public in late 2015. Due to the cancellation of Regulation 17, the

purchase price of PV electricity remains subject to individual agreements between plant operators with PT PLN. Up until the publication of this writing, the MEMR is still preparing new legislation to replace Regulation 17 which, according to informal discussion of MEMR, should be issued within 2016.

The issue is further addressed by the Indonesian government via the issuance of Presidential Decree No. 18/2016 granting rights to the Governor of DKI Jakarta, Mayor of Tangerang Selatan, Mayor of Bandung, Mayor of Semarang, Mayor of Surakarta, Mayor of Surabaya and Mayor of Makassar to appoint a local state-owned company or private company to develop power plants to generate energy from the cities' waste. The respective selling price to PT PLN will be determined by MEMR.



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Enforcement of Foreign Court Judgments in Indonesia

Before embarking on a litigation process, an important early consideration is the likelihood that a plaintiff will be able to enforce an order or judgment if he or she is ultimately successful. Such consideration is critical because being successful in court does not automatically translate into payment or recovery of money from a defendant. The same consideration also applies for a plaintiff who wants to litigate in a court outside Indonesia and to be enforced against a defendant in Indonesia.

As a general rule, foreign court judgments are not enforceable in Indonesia. It is stipulated under Article 436 of RV (Reglement of de Rechtsvordering – an Indonesian civil procedural regulation) which basically states that, unless otherwise provided under the law, a foreign court judgment cannot be enforced in Indonesia.

The enforcement of foreign court judgments in Indonesia is completely different from foreign arbitral awards. Foreign arbitral awards are enforceable in Indonesia pursuant to Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution. Indonesia is also a party to the 1958 United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

(New York Convention 1958). But, Indonesia is not a party to any international convention for recognition and enforcement of foreign court judgments. Accordingly, if a plaintiff wishes to enforce a foreign court judgment in Indonesia, a new lawsuit must be filed with the relevant Indonesian district court. Although not directly enforceable as such, the foreign court judgment is not totally worthless. It may be introduced as evidence in a new lawsuit filed in Indonesia. The court will be free to evaluate on whether and how far the foreign court judgment will be accepted. In principle however, the Indonesian district court will not be bound by the findings of the foreign court.



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Legal Audit

Importance of Legal Audit on M&A Transactions

Legal audit, also known as legal due diligence, refers to a process of examination that a person would take on legal aspects of a business before entering into a transaction. In Merger & Acquisition (M&A) transaction, legal audit is typically conducted prior to the signing of a binding agreement, but only after a preliminary understanding has been reached by the parties in the transaction.

Legal audit is carried out mainly to ensure that a decision to enter into a transaction is made with a thorough understanding of the facts about the business. A comprehensive understanding may be attained by the examining of all documents related to the transaction which shall include, among others, constitutional documents, licenses, assets, insurances, manpower, material agreements, litigation as well as the financial report(s) of the company. It may also be attained by way of interviews with the management, meetings, site visit (if deemed necessary) as well as cross checking of information with other advisers (such as accountant or financial adviser) and relevant government agencies.

With the comprehensive understanding of the facts, the parties to the transaction may identify the legality of the business, compliance

with constitutional document, contracts and various regulations affecting the business as well as the assets and liability of the business. Such understanding may further result in the purchase price being renegotiated, additional conditions, representation, warranties or covenants being added to the agreement. In some cases, it may also result with the cancellation of transaction.

In brief, a legal audit in M&A transaction will give the relevant parties with material information which are necessary for taking the decision on the transaction, hence giving comfort on concluding the transaction.



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Breach of Contract

Breach of contract refers to a condition whereby a party fails to perform its obligation under an agreement. Such failure may be in the form of (i) a total failure to perform the obligation; (ii) a failure to perform the obligation properly; (iii) a failure to perform the obligation in time; and (iv) performing an act which is not supposed to be done.

As a general rule however, mere failure to perform may not in itself constitute a breach of contract. The non-defaulting party will need to perform certain formality, i.e. to serve the defaulting-party with a warrant issued by the clerk of the district court or a letter issued by himself demanding that the obligation under the contract is due to perform. The demand is intended to give the defaulting-party a certain time limit during which he can still perform his obligation. If he does not perform within the specified time, or does not perform adequately, then there is a breach of contract. The demand is not necessary if the contract specifically requires the performance within a specified time, or if not specified, it is clear from the nature of the act to be performed.

As the effect of the breach, the non-defaulting party is generally free to demand for the performance of the obligation. The non-defaulting party may also claim for compensation to the defaulting-party on (i) expenditures, i.e., any actual cost incurred

by the non-defaulting party in relation to the contract (ii) losses, i.e., any injury to the property of non-defaulting party by reason of the breach and (iii) interest, which actually refers to lost profit. The claim for compensation is however limited to those which are foreseeable at the time of the contract conclusion and which are the direct result of the breach.



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EKONID hosts President Joko Widodo's visit to Berlin



At the Indonesian-German Business Forum held in Berlin during the early stages of President Joko Widodo's tour of Europe, EKONID had the pleasure to be reacquainted its Law & Taxes partners that are based there. If the work of EKONID and its initiated Network Law & Taxes are able to make a humble contribution to foster business relations across states and industries, then so much the better.

We are very proud to have been a part of this historic visit. It is our pleasure to announce that leveraging our expertise strengthens the German-Indonesian business community as well as the Indonesian economy as a whole. This leads to sustainable economic growth that will open opportunities for more German-Indonesian trade and investment for years to come.

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