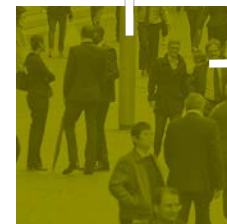


Indonesia – A Legal Framework

Indonesia Now Seminar



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- Background to the Indonesian legal system
- Property ownership
- Commercial arrangements and enforcement
- Intellectual property
- Trade law & foreign investment regulation
- Corruption & bribery

Indonesia – A Legal Framework Background

- **Civil Law system** as opposed to a Common Law system (as in Australia)
- Derived from the French and German models via Dutch colonisation (350 years of influence)
- Three strands of law:
 - Adat or customary law
 - Dutch colonial law
 - More modern legislative law
- The overriding legal document is the **1945 Constitution**, below which all other laws sit
- There are a range of **statutory laws, regulations and Presidential decrees**, etc as well as regional regulations which may need to be considered

Indonesia – A Legal Framework Background

- There are several levels of **mainstream courts**
 - the **Supreme Court** is the highest court in the land
 - below that are some 20 **High Courts**
 - below that are 250 **State Courts**

- There are a variety of **specialist courts**
 - Human Rights Court
 - Corruption Court
 - Commercial (or Bankruptcy) Court
 - Taxation Court
 - Constitutional Court

Indonesia – A Legal Framework Background

- There are also several types of lawyer
 - **Notaries** – these are the most senior members of the legal profession and handle more complex and important commercial and business matters
 - **Lawyers** – legally trained but generally handle litigation and criminal matters
 - **Legal consultants** – generally assist with obtaining permits, visas, translations, etc
- No concept of **precedent** so courts are not bound by prior decisions
- No juries – cases are heard by '**inquisitorial**' judges
- Rare to have a dissenting judgement
- Judgements are usually short
- Accordingly there is little need to formally report cases
- Unlike Australia, case law (common law) does not combine with statutory law

Indonesia – A Legal Framework

Property ownership

- The nature of property ownership and use is quite complex – always ensure you get **professional advice** before entering into any transactions relating to land

- Land rights can be divided into two categories
 - Adat land (customary land) - not registered with the Indonesian land office
 - Certified land – title is governed by the **Basic Agrarian Law of 1960** and is registered

- Under the Basic Agrarian Law there are five (5) types of land rights
 - **Right of ownership** (Hak Milik)
 - consistent with freehold title and
 - can only be held by Indonesian citizens
 - this right can be transferred or mortgaged (hypothecated)

Indonesia – A Legal Framework

Property ownership

- Under the Basic Agrarian Law there are five (5) types of land rights (cont'd)
 - **Right to cultivate** (Hak Guna Usaha)
 - right to cultivate or exploit State-owned land for agricultural purposes
 - valid for 35 years but extendable for a further 25 years
 - can be held by Indonesian citizens and entities as well as Indonesian incorporated *foreign joint venture companies*
 - this right can be mortgaged
 - **Right to build** (Hak Guna Bangunan)
 - right to develop and own buildings on land owned by others (including State-owned)
 - valid for 30 years but extendable for a further 20 years
 - can be held by Indonesian entities as well as Indonesian incorporated *foreign joint venture companies*
 - this right can be transferred or mortgaged

Indonesia – A Legal Framework

Property ownership

- Under the Basic Agrarian Law there are five (5) types of land rights (cont'd)
 - **Right of use** (Hak Pakai)
 - right to use State-owned land or land owned by others for specific purposes (eg religious worship, embassies, etc)
 - valid for 25 years but extendable for a further 20 years
 - can be held by Indonesian citizens and entities, Indonesian incorporated *foreign joint venture companies, foreign individuals (residing in Indonesia) or representative offices of foreign entities*
 - this right can be transferred subject to the approval of the land owner
 - **Right to operate or manage** (Hak Pengelolaan)
 - right to operate State-owned land for specific purposes approved by the authorities
 - can be held by government institutions or State-owned companies for an unspecified period of time

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Commercial arrangements and enforcement

- Indonesia has some very distinct differences in contract law
- The **Indonesian Civil Code** is the governing law
- Overriding requirement is that parties must perform contracts in **good faith** – **relationships** are critical to a long term successful business in Indonesia
- This may see MOUs or agreements to agree deemed enforceable
- To be enforceable there must be a **Bahasa version** (bilingual versions are generally permissible) – note recent West Jakarta District Court decision!
- Choice of law – even if a foreign law is chosen, Indonesian courts can ignore (although it will definitely be persuasive)

Indonesia – A Legal Framework

Commercial arrangements and enforcement

- Enforcement – build in **alternative dispute resolution provisions**
- Disputes can be resolved through mediation, conciliation, arbitration and / or civil proceedings but where possible **avoid litigation**
- Foreign judgements are not enforceable in Indonesia but both domestic and international arbitration awards are recognised
- Commercial agreements often choose the **Indonesian National Board of Arbitration (BANI)** as the arbitration forum
- A common alternative, particularly where there is a foreign party or offshore assets is to use the **Singapore International Arbitration Centre (SIAC)** – but it can be more complicated to enforce in Indonesia

Indonesia – A Legal Framework

Intellectual property

- Indonesia has framework for protecting patents, trade marks, designs and copyright (but it is still not as rigorous as Australia)
- Relevant Government body is the **Directorate General of Intellectual Property Rights (DGIP)**
- DGIP's website can be searched for patents, trade marks, designs and copyright
- Applications are generally lodged via an **Indonesian IP attorney or agent**
 - Trade marks – first-to-file rule (so get in early)
 - Patents – two types of protection: normal (20 yrs protection) and simple (10 yrs)
 - Designs – industrial design protection is available for a 10 yr period
 - Copyright – registration is possible and recommended (depending on the asset)

Indonesia – A Legal Framework

Trade law & foreign investment regulation

- Foreign direct investment is regulated by the **Capital Investment Law**
- Foreign investment approval is issued either by the **Capital Investment Coordinating Board (BKPM)** in Jakarta or by an Investment Board in each province.
- This is typically done through a licensing procedure controlled by BKPM
- Such foreign investment is usually done via a limited liability **foreign investment company (or PMA)** incorporated in Indonesia (for a 30 yr period)
- Depending on the industry, the foreign investors can hold up to 100% of the PMA company
- The maximum percentage ownership permitted varies from sector to sector and can range from 45% to 100%

Indonesia – A Legal Framework

Trade law & foreign investment regulation

- In sectors where foreigners are permitted to invest typically there are few restrictions on how this investment is funded or whether the business is focused on exports or domestic consumption
- Certain sectors are prohibited to foreign investment. These are identified by Presidential Regulation (referred to as the **Negative List**)
- **Presidential Regulation No. 39 of 2014** (effective 24 April 2014) provides a mix of deregulation, opening up some sectors (e.g. advertising). However, several areas in the energy sector, previously open to foreign investment, are now restricted or closed completely
- The grandfathering provisions in the new regulation means that a foreign investor's current investment is protected

Indonesia – A Legal Framework

Trade law & foreign investment regulation

- The Presidential Regulation reveals an example of '**Indonesianisation**' (or economic nationalism), particularly in this case of the oil and gas sector
- A relatively **bureaucratic regulatory environment** means there may be overlap between different ministries and between central and provincial governments
- Also worth looking into the whether any benefit may be found through the **ASEAN-Australia-New Zealand Free Trade Area** (came into force in early 2012)
- There are also on-going bilateral trade talks between Australia and Indonesia designed to build on the ASEAN-Australia-New Zealand FTA, as well as the roll out of **ASEAN's regional free trade area**
- It is important to **properly prepare, investigate** and **assess risk** before making an investment decision

Indonesia – A Legal Framework

Corruption & bribery

- Corruption continues to be a **major concern** for doing business in Indonesia
- It is relatively wide spread in the bureaucracy, especially in respect to obtaining licences and permits, and certain parts of the judiciary
- Often referred to as **‘facilitation’ or ‘irregular’ fees** these can be a real issue
- The Indonesian Government has taken steps to combat corruption and there have been a number of high profile prosecutions
- Accordingly, whilst Indonesia still ranks very high in the corruption indices, there has been **some improvement** in recent years (but the reality is that it may require generational change)

Indonesia – A Legal Framework

Corruption & bribery

- When the issue relates to the winning of government contracts this can cause problems beyond Indonesia (e.g. Foreign Corrupt Practices Act)
- In Australia, the **Criminal Code Act 1995** provides for criminal penalties for:
 - Australian citizens or Australian companies
 - which give or attempt to give a foreign official a benefit to secure a business advantage
 - which benefit is not legitimately due to that official
- So it is incumbent on Australian businesses to ensure they are not leaving themselves open to prosecution



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