Joint Ventures

Contributing editors
Gavin Williams and James Farrell

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Joint Ventures 2018

Contributing editors

Gavin Williams and James Farrell

Herbert Smith Freehills

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2017
First edition
ISSN 2515-3765

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Indonesia

David Dawborn, Iril Hiswara, Matthew Goerke, Brandon Van Slyke, Renny Soependi and Intan Fauzia Rembah

Hiswara Bunjamin & Tandjung

Form

1 What are the key types of joint venture in your jurisdiction? Is the 'joint venture' recognised as a distinct legal concept?

There are no laws in Indonesia that specifically recognise or regulate 'joint ventures' as a distinct legal concept. However, the concept of a joint venture is recognised in Indonesia through incorporated joint ventures, whereby the joint venture parties set up an Indonesian legal entity. Indonesian joint venture companies with foreign investments (PMA companies) are the main vehicle through which foreign joint venture parties invest into Indonesia.

However, unincorporated joint venture arrangements are expressly permitted in certain business sectors (including the upstream oil and gas and construction sectors). In practice, in circumstances where unincorporated joint venture arrangements are not expressly permitted, such arrangements are not typically used. In the oil and gas sector, business activity is controlled by the Indonesian government as the grantor of relevant concessions, typically in the form of production sharing contracts. The applicable regulations allow foreign entities to directly participate in production sharing contracts through an unincorporated joint venture with other parties to the production sharing contract. In the construction sector it also possible for foreign entities (through a foreign construction representative office established in Indonesia) to form a project-based 'joint operation' in the form of an unincorporated joint venture with local construction companies.

As joint ventures involving foreign investors in Indonesia are predominantly implemented through incorporated joint ventures (ie, through the establishment of a PMA company), each of the responses below are based on the incorporated joint venture model.

2 In what sectors are joint ventures most commonly used in your jurisdiction?

All Indonesian companies (including PMA companies) are required to have at least two shareholders – meaning that, in effect, all companies in Indonesia are joint ventures.

Foreign investment in PMA joint venture companies is permitted in any business sector provided that the relevant sector is not listed as closed for foreign investment under the applicable 'Negative List'. The Negative List (issued by the Indonesian President) is a list of business sectors issued by the Indonesian government that are either completely closed to foreign investment or subject to a maximum limitation on foreign ownership. The list of sectors described in the Negative List follows the business classifications set out in the Indonesian Standard Business Classification published by the Indonesian Central Statistics Bureau. The Negative List regulates a very broad range of sectors including (but not limited to): agriculture; forestry; maritime; energy and resources; industry and trade; defence; public works; tourism; transportation; communication; banking and finance; and education and health.

Venture parties

3 Are there rules that relate specifically to foreign joint venture parties?

A PMA joint venture company (see question 1) may only be established to conduct a particular stated line (or lines) of business upon obtaining an investment licence from the Indonesian Investment Coordinating Board (BKPM). A PMA company is not permitted to conduct business activities outside the scope of its approved line of business under its BKPM business licence. Any proposed business expansion of a PMA company also requires BKPM approval.

Foreign government institutions, individuals and business entities can hold shares in a PMA company, subject to the Negative List (see question 2). Therefore, if a PMA company intends to engage in a business activity which is 100 per cent open to foreign investment under the prevailing Negative List, that company can be established by two or more foreign shareholders (including affiliates). In circumstances where a PMA company is subject to a particular foreign ownership limitation, then the foreign joint venture party must find an Indonesian partner (or partners, as the case may be) to make up the additional shareholding reserved for local ownership.

4 What requirements are there to disclose the ultimate beneficial ownership of a joint venture entity?

There are no specific requirements related to the disclosure of the ultimate beneficial owner of a private PMA joint venture company under Indonesian law. In establishing a PMA company or applying for an operational licence, the BKPM usually only requires information related to the immediate shareholders of the PMA company. However, the BKPM retains the discretion (based on its unwritten policies issued from time to time) to request such beneficial ownership information case by case. In particular, the Indonesian investment-law regime prohibits 'nominee arrangements' and renders void agreements encompassing statements by Indonesian shareholders that state that they hold shares in an Indonesian company for the benefit of a foreign beneficiary. On this basis, if there is any suggestion of a nominee arrangement in a PMA company (and this comes to the attention of BKPM officials), the BKPM may require the PMA company to disclose its ultimate beneficial owner.

If a joint venture company is publicly listed on the Indonesian stock exchange (which would require it to satisfy the various listing rules, including having at least 500 shareholders), capital market regulations and requirements administered by the Indonesian Financial Services Authority (OJK) will also be relevant. The OJK requires that any shareholder that owns 5 per cent or more of the shares in a listed company (whether directly or indirectly held) must report to the OJK and publicly disclose the shareholding and any change of 0.5 per cent or more to such a shareholding. This requirement applies to the direct shareholder of the relevant shares or any party who is part of the chain of the shareholding ownership up to the ultimate beneficial owner.

Setting up and operating a joint venture

5 Are there any particular drivers in your jurisdiction that will determine how a joint venture is structured?

The primary driver for structuring joint ventures in Indonesia relates to the foreign ownership restrictions (if any) applicable to the relevant business sector of the joint venture company, as set out in the Negative List (see question 2). In addition, as noted under question 1, certain sectors (such as the oil and gas and construction industries) allow for the establishment of unincorporated joint ventures. Other considerations in structuring an Indonesian joint venture company include tax considerations (see question 6) and accounting considerations (eg, do the parties want to consolidate the joint venture in their accounts).

In general, the Indonesian regulatory framework does not typically accommodate complex structuring arrangements (such as quasi-debt or quasi-equity instruments or even partially paid shares for PMA companies). However, the Indonesian Company Law does allow for different classes of shares and, in recent years, there has been an increased use of 'share' class structures to commercially allocate the voting and dividend rights between the relevant shareholders.

6 When establishing a joint venture, what tax considerations arise for the joint venture parties and the joint venture entity? How can tax charges be lawfully mitigated?

The main tax consideration for joint venture parties is in relation to the withholding and income tax payable on dividends from Indonesian companies. Unless a tax treaty applies, foreign shareholders will be subject to a 20 per cent final withholding tax on dividends paid from an Indonesian joint venture company. As a result, foreign joint venture parties often closely consider the jurisdiction through which to invest in Indonesian joint ventures to best take advantage of the available tax treaties; common foreign jurisdictions include Singapore, Hong Kong and the Netherlands. Different tax treatment can apply to foreign shareholders based on whether they hold a 'portfolio' or 'substantial' holding (as those terms are defined in each relevant tax treaty) in the relevant Indonesian joint venture company. In addition, dividends received by Indonesian incorporated joint venture parties are exempt from income tax if the relevant dividends have been paid out of the retained earnings of the joint venture company and the Indonesian incorporated joint venture party holds at least 25 per cent of the paid-up capital of the joint venture company.

7 Are there any restrictions on the contribution of assets to a joint venture entity?

The Indonesian Company Law regulates the process through which assets can be used as in-kind contributions to an Indonesian joint venture company. The value of the share capital to be issued from an in-kind contribution of assets must be based on a reasonable value determined in accordance with market prices or otherwise be determined by an independent expert valuer. In-kind contributions in the form of immoveable assets must be announced in at least one Indonesian newspaper no later than 14 days after the issuance of the shares.

However, not all kinds of 'assets' can be used as in-kind contributions to an Indonesian joint venture company. Only assets that are able to be transacted upon (ie, able to be sold, pledged as collateral security or attached upon or seized by a creditor) are able to be used as in-kind contributions. As a result, certain intangible assets, such as contractual receivables or registered intellectual property (IP), can, in theory, be used as in-kind contributions. However, other intangible assets, such as goodwill or certain contractual rights, are typically not applicable for use as in-kind contributions.

8 What is the interaction between the constitution of the joint venture entity and the agreement between the joint venture parties?

While joint venture entities may enter into an agreement between themselves (which may also include the relevant joint venture company), from an Indonesian legal perspective, the articles of association of the joint venture company will take precedence in relation to the corporate actions of the joint venture company. As the articles of association of a joint venture company is the effective legal document that guides the company's legal operations, any lawful actions that are taken in accordance with the articles of association will be legally valid and binding on the company in relation to third parties (irrespective of the provisions of any other contractual arrangements). However, if a joint venture party or a joint venture company takes an action that is consistent with the articles of association but is in breach of the relevant contractual agreement between the parties, then the non-defaulting party would be able to bring a breach-of-contract claim but would not be able to declare the relevant legal action of the joint venture company as void from the outset.

Given the general reliability and accountability issues in bringing and enforcing contractual claims in Indonesian courts, joint venture parties typically take substantial care to make sure that the articles of association of the relevant joint venture company reflects (to the extent possible) the provisions of any relevant contractual arrangements.

9 How may the joint venture parties interact with the joint venture entity? Are there any restrictions?

The way in which joint venture parties may interact with the relevant joint venture company will largely depend on the specific articles of association of the joint venture company. Typically, however, joint venture parties will primarily interact with the joint venture company through a general meeting of shareholders. An annual general meeting of shareholders must be held no later than six months after the end of the financial year of the joint venture company and must include the presentation of the company's annual report (as prepared by the board of directors of the joint venture company). Additional extraordinary general meetings of shareholders can be held at any time, including upon the request of a joint venture party who holds at least 10 per cent of the issued voting shares of the joint venture company.

The Indonesian Company Law also enshrines the right of joint venture parties to obtain information related to the joint venture company at any general meeting of shareholders, provided that it is connected with the agenda items and does not conflict with the joint venture company's interests. Joint venture parties that hold at least 10 per cent of the issued voting shares of the joint venture company can also (through a petition to the relevant district court) exercise inspection rights for the purpose of obtaining data or information if there is reasonable suspicion that the joint venture company has conducted unlawful actions that are detrimental to the joint venture parties. The Indonesian Company Law is otherwise silent on the ability of nominee directors to pass information about the joint venture company to the relevant nominating shareholder. In practice, whether or not information will be able to be disclosed by the joint venture company to the joint venture parties will depend on the status of the relevant information (including whether such information is subject to contractual or regulatory disclosure restrictions).

10 How may the joint venture parties exercise control over the joint venture entity's decision-making?

One of the most common control mechanisms for joint venture parties over a joint venture company's decision-making is to nominate members of the board of directors and board of commissioners of the joint venture company. Typically, the right to nominate members of the board of directors and board of commissioners of the joint venture company is set out in the contractual arrangements between the joint venture parties. In Indonesian companies, the board of directors serves as the body responsible for the operational and daily management of the joint venture company. The role of the board of commissioners is to supervise the activities of, and provide advice to, the board of directors. Joint venture parties will typically have significant flexibility in structuring the controlling mechanisms for the board of directors and board of commissioners (including in relation to the number of directors and commissioners, limitations on their powers and authorities and arrangements in relation to quorum and voting thresholds for meetings of the boards). While all members of the board of directors and board of commissioners will owe primary legal duties of good faith to the joint venture company and to act in its best interest, in practice, members of the board of directors and board of commissioners will also typically seek (wherever legally possible) to represent the views of the relevant nominating joint venture party.

Another common control mechanism for joint venture parties (especially minority investors, who will not typically have rights to appoint the majority of the board of directors or the board of commissioners) is through reserved matters set out in the articles of association of the joint venture company. These reserved matters typically set out a list of critical management or business decisions, which cannot be approved by the joint venture company without the unanimous (or near-unanimous) approval from the board of directors, board of commissioners or the general meeting of shareholders of the joint venture company. This mechanism will serve as an effective veto right for each of the joint venture parties in relation to the relevant critical decision.

11 What are the most common governance issues that arise in connection with joint ventures? How are these dealt with?

The most common governance issue in Indonesian joint ventures relates to deadlock (either owing to board compositions, reserved matters or the higher quorum and voting requirements for certain corporate matters under Indonesian law). Typically, the contractual arrangements

between the joint venture parties will include a framework for the resolution of such deadlock, including through referral of the issue to key management personnel, put or call options, casting votes or dispute resolution mechanisms such as independent experts (see question 22).

Another common governance issue in Indonesian joint venture companies is that, under the standard articles of association approved by the Indonesian Ministry of Law and Human Rights, the president director (or, in his or her absence for any reason, any other director) will have an almost unfettered right to act for and on behalf of the joint venture company. Unlike most jurisdictions (which would require, at the very least, approval from the board of directors for certain decisions), the custom in Indonesia is that the president director (or, in his or her absence for any reason, any other director) can act without consulting (or receiving the approval from) the other members of the board of directors. This issue is typically dealt with by expressly restricting the powers of the individual members of the board of directors (including the president director, if necessary) under the articles of association of the joint venture company or by otherwise imposing strict controls on the reporting and internal approval procedures for business decisions.

12 With an incorporated joint venture, what controls exist in your jurisdiction in relation to nominee directors? How should a nominee director balance the potentially conflicting interests of the joint venture company and the appointing shareholder?

Indonesian law does not include any specific controls in relation to nominee directors. However, as a general principle, all directors and commissioners of a joint venture company owe a primary legal duty of good faith and must act in the best interests of the joint venture company. If a director or commissioner fails to properly consider the interests of the joint venture company then he or she may be personally liable for any decisions that cause loss for the joint venture company.

Indonesian law prohibits members of the board of directors from representing a joint venture company if he or she has a personal conflict of interest with the joint venture company. However, the typical interpretation of this prohibition is that it does not apply in circumstances where the joint venture party that nominated the director (rather than the director, personally) has a conflict of interest with the joint venture company. As a result, in practice, nominee directors are not typically prevented from voting on matters that relate to the relevant nominating shareholder.

13 What competition law considerations are engaged by the formation and operation of the joint venture? Is approval needed?

No specific competition-law approval is currently required for the formation of a joint venture company in Indonesia (competition-law approval is only required in the context of the merger or a control acquisition of an existing joint venture company that satisfies prescribed asset or sales thresholds). However, there are currently policy proposals being considered to include the formation of joint ventures in the competition approval regime.

Nonetheless under Indonesian law, once established, the joint venture must operate its business in accordance with the relevant anti-monopoly laws and regulations and must not engage in monopolistic practices or unfair business competition.

14 What are the key considerations in your jurisdiction in structuring the provision of services to the joint venture entity by joint venture parties?

From a legal perspective, the directors and commissioners of the joint venture company will need to be able to satisfy themselves that any services contract entered into with a joint venture party is entered into in good faith and in the best interests of the joint venture company.

From a tax perspective, it will be necessary to consider the transfer pricing provisions under the tax laws. In general, if transactions between related parties have not been entered into on arm's length terms, then the Indonesian Tax Office will recalculate the taxable income or deductible costs arising from such transactions based on arm's length terms.

15 What impact do statutory employment rights have in joint ventures?

The Indonesian Manpower Law does not recognise the concept of a transfer of employees. As a result, if employees are transferred from an existing (Indonesian) joint venture party to the joint venture company, then individual employees must be approached and each employee must agree to such transfer. Strictly speaking, a transfer of employees constitutes a termination of employment with the (Indonesian) joint venture party and the entering into of a new employment arrangement with the joint venture company. If this transfer of employees occurs without the relevant employee voluntarily resigning from the (Indonesian) joint venture party, then this transfer will trigger the requirement for that (Indonesian) joint venture party to pay severance package entitlements to the employee under the Indonesian Manpower Law. However, joint venture parties frequently second employees to joint venture companies on a short-term basis to assist in its operations. The transfer of employees from a foreign party to an Indonesian joint venture company will be considered as the commencement of a new employment relationship under the Indonesian Manpower Law. Also, foreign employees must obtain a permit to work in Indonesia and can only be employed by one Indonesian company at a time.

Operationally, there are also certain restrictions on the ability of, and consequences for, a joint venture company to outsource the employment of its employees to an external payroll or employee outsourcing company (eg, only employees carrying out non-core activities are permitted to be outsourced).

16 How are intellectual property rights generally dealt with on the creation, operation and termination of a joint venture in your jurisdiction?

Foreign joint venture parties typically exercise great caution in relation to use of their IP rights by Indonesian joint venture companies. To best protect the interests of the relevant joint venture party, a common mechanism is for the joint venture party to register the relevant IP rights in Indonesia in its own name and to then grant a licence (based on the agreed commercial terms) to the joint venture company to utilise such IP. By structuring the arrangements in this way, the IP rights will also remain the property of the relevant joint venture party and will be protected in the event of a dispute with, or termination of, the joint venture.

Funding the joint venture

17 How are joint ventures generally funded in your jurisdiction? Are there any particular requirements relating to funding and security packages?

Indonesian joint venture companies must be at least partially funded through equity contributions (including in-kind contributions). The BKPM requires a total minimum investment of at least 10 billion rupiah, (excluding any investment for land and buildings) for the establishment of, or conversion of an existing Indonesian company into, a PMA company. More than 25 per cent of that minimum investment must be in the form of subscribed and paid-up share capital while the remaining investment can be in the form of loans, typically through third-party financing or joint venture party loans. The security packages offered for financing typically includes fiduciary security over the joint venture company's moveable assets, mortgages over the joint venture company's immoveable assets and share pledges over the joint venture parties' shares in the joint venture company. Financiers may also request parent company guarantees from the relevant joint venture parties or other forms of offshore security.

18 Are any restrictions on the injection of capital into, or the distribution of profits or the extraction of cash by other means from, the joint venture entity imposed by law or regulation?

Any injection of funds (whether equity capital or debt) into PMA joint venture companies must be approved by the BKPM. See question 7 in relation to in-kind capital contributions.

The Indonesian Company Law requires a company to set aside a certain unspecified amount of the net profits of each financial year as a 'mandatory reserved fund' until it accrues a reserve of at least 20 per cent of the total issued share capital. This obligation, however, will only apply in years where the company has a positive balance of profits. The Indonesian Company Law is silent on the time frame required for a

Update and trends

Historically, Indonesian notaries have displayed a general reluctance to agree to materially amend the standard articles of association approved by the Indonesian Ministry of Law and Human Rights. As a result, Indonesian joint venture companies have not been able to enjoy the full benefits of the additional flexibility offered by the latest Indonesian Company Law (issued in 2007). However, the current trend is for Indonesian notaries to be more commercially accommodating in their interpretation and practical application of the Indonesian Company Law. In particular, it is now possible to structure Indonesian joint venture companies with multiple classes of shares and to grant preference voting and dividends rights to certain share classes (including the classes of shares held by international investors).

The Negative List and the corresponding foreign ownership restrictions applicable to various business sectors in Indonesia has evolved over several years (typically alternating between more and less burdensome restrictions for international investors). However, the latest Negative List (issued in 2016) represented a relatively stable continuation of the previous Negative List, while also removing some of the protectionist foreign-ownership restrictions in various sectors, including forestry, healthcare, finance, technology and communication, tourism and creative economy, public works, trading, transportation, plantation and employment.

company to reach a reserve of at least 20 per cent of the total issued share capital. As a result, companies in Indonesia typically only set aside a very small amount of profits (if any) each year towards this statutory reserve. Otherwise, all net profits of an Indonesian joint venture company may be distributed to the joint venture parties as dividends (as approved by a general meeting of shareholders), provided that the joint venture company has a positive balance of profits. Interim dividends can also be issued if provided for in the joint venture company's articles of association.

19 What tax considerations should be taken into account in the operation of the joint venture?

See question 6 (regarding withholding tax for the distribution of dividends from joint venture companies) and question 14 (regarding transfer pricing issues for related party transactions).

20 Are there any noteworthy accounting or reporting issues for the joint venture partners regarding their investment in the joint venture?

A common accounting issue for joint venture partners will be whether or not they will be able to consolidate their investment in the joint venture company. Foreign joint venture parties will need to consider the accounting rules in their relevant jurisdiction to determine whether or not they can (or must) consolidate their investment. The Indonesian Financial Accounting Standards Board has also published several statements regarding the control test that will apply for consolidation purposes under the Indonesian Financial Accounting Standards. The consolidation control test is a substantive test, which should consider (among other things) the joint venture party's voting rights, contractual rights (including participating rights and veto rights), economic dependency, the size of its shareholding in comparison to other shareholders as well as voting patterns at shareholders' meetings.

Deadlock, exit and termination

21 What deadlock provisions are commonly included in joint venture agreements in your jurisdiction?

Generally speaking, joint venture agreements for Indonesian joint venture companies often follow international best practice and include the deadlock provisions one would expect to find in a joint venture agreement in other jurisdictions, including (for example):

- an obligation to resolve any deadlock in 'good faith' prior to progressing the matter further under agreed escalation and exit procedures;
- a stepped escalation mechanism to attempt to resolve the issue (ie, from the board of commissioners up to the principals of each joint venture party or to an independent expert for adjudication); and
- if the matter remains unresolved, exit rights to finally resolve the deadlock, including, for example, public auction of the company, liquidation of the company or put- or call-option rights (with pricing typically at a 'fair market value' determined under an agreed bidding or valuation procedure).

22 What exit provisions are commonly included? Does the law restrict any forms of mandatory transfer provision or any basis of calculation?

Exit provisions may be freely agreed between the contracting parties. Put and call options are the most commonly used deadlock exit mechanisms in Indonesian joint venture agreements (with various different valuation methodologies, including Russian roulette provisions, Texas shoot-out provisions or public auctions). If the joint venture involves a minority shareholder, drag-along and tag-along rights are often included to ensure that a sale of the whole joint venture can be made if desired. There are no Indonesian laws that expressly prohibit any form of mandatory transfer provisions agreed between the relevant joint venture parties, subject to any foreign ownership restrictions under the Negative List.

23 What are the tax considerations on termination of the joint venture?

If a joint venture party transfers its shares in an Indonesian private joint venture company, the transfer would be subject to Indonesian income tax in the amount of 5 per cent of the applicable transfer price. However, if the joint venture party is a tax resident in a country that is party to a tax treaty with Indonesia, these tax rates may be reduced or exempted. Any asset transfer conducted by an Indonesian joint venture company will generally be subject to 10 per cent VAT (with no exceptions for business transfers).

Disputes

24 In your jurisdiction, are there constraints on the choice of law or the method of dispute resolution provided for in joint venture agreements?

There are no express constraints on the choice of law or the choice of dispute resolution forum that may be provided for under a joint venture agreement in Indonesia. Indonesian law recognises the general principle of freedom of contract and parties are generally free to choose the governing law and the method of dispute resolution in their agreements. However, as a matter of Indonesian public policy, if the choice of law of the joint venture agreement has no nexus to the parties or the subject matter of the agreement, then there is a technical risk that an Indonesian court could refuse to accept or enforce such choice of law provision.

Also, foreign court decisions are unenforceable in Indonesia. As a result, joint venture agreements do not typically adopt a method of dispute resolution through a foreign court. However, Indonesia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, in theory, any international arbitration award made in another New York Convention country can be enforced in Indonesia through judicial recognition of the award and approval of its enforcement from the District Court of Central Jakarta. Given the well-known issues regarding the reliability and consistency of the Indonesian judicial system, there is a clear preference among foreign joint venture parties for international arbitration as the method of dispute resolution in Indonesian joint venture agreements.

25 What mandatory provisions of local law will apply irrespective of the choice of governing law?

There are numerous Indonesian laws and regulations (particularly those relating to operational or business conduct in Indonesia) that will apply irrespective of the choice of governing law of an Indonesian joint venture agreement.

For example, the Indonesian Language Law requires that any contract involving an Indonesian party must be bilingual or written in the Indonesian language. Bilingual versions are generally regarded as legally equivalent but parties are free to agree which language version shall prevail in the event of an inconsistency between the translations.

A further example is the Indonesian Currency Law, which requires the use of rupiah in the territory of Indonesia. Pursuant to the relevant

Bank Indonesia implementing regulations, parties to Indonesian contracts are required to use rupiah for all transactions conducted within the territory of Indonesia.

This applies to both cash and non-cash transactions, with only limited exceptions (including international financing transactions).

26 Are there any restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes? Are there any restrictions on the arbitration of shareholder claims?

We are not aware of any restrictions on the remedies a tribunal can grant that would have a bearing on the arbitration of joint venture disputes or of any restrictions on the arbitration of shareholder claims. As a general principle (subject to the rules of the relevant arbitral institution), the remedies available under an arbitration award will be substantially similar to those available through the Indonesian courts.

27 Are there any statutory protections for minority investors that would apply to joint ventures?

Yes, Indonesian law provides for minority-investor protections, which are applicable to Indonesian joint venture companies. For example each shareholder (irrespective of its shareholding) has the right to bring an action against the joint venture company for losses suffered by the shareholder due to acts that are 'inequitable and without reasonable basis' (eg, related party transactions that materially prejudice minority shareholders) and to request the joint venture company to purchase the shareholder's shares at a reasonable price if the shareholder disapproves of the actions of the joint venture company that have caused loss to the shareholder or to the joint venture company. Further minority-shareholder protections regarding access to information are set out in our response to question 9.

The Indonesian Company Law also provides protection for minority shareholders by imposing higher quorum (up to 75 per cent of the total issued share capital) and higher voting requirements (up to 75 per cent of the votes validly cast) for the shareholder approval of certain corporate actions (depending on the relevant corporate action). Additional minority shareholder protections apply to publicly listed Indonesian joint venture companies (including in relation to related party transactions, material transactions, rights issues and continuous disclosure).

28 How can joint venture parties have liabilities to each other beyond what is expressly agreed in the joint venture agreement?

Beyond the relevant joint venture agreement, liability for joint venture parties can, in practice, arise from an unlawful action claim (similar to a tort claim) brought by one of the joint venture parties. The Indonesian Civil Code stipulates that 'every unlawful action causing damage to another person obliges the person whose fault caused the damage to compensate for that damage'. On this basis, the non-offending joint venture party could bring an unlawful action claim at court against an offending joint venture party. To bring a successful unlawful action claim, the non-offending joint venture party would be required to prove that the relevant action was unlawful, the relevant joint venture party is at fault (either intentionally or due to negligence), the non-offending joint venture party suffered damage and there is a casual relationship between the 'unlawful action' or 'negligence' and the damage suffered by the non-offending joint venture party.

In addition, in general, there are only very limited circumstances in which the corporate veil of an Indonesian joint venture company can be pierced, including if a joint venture party has utilised the company for personal interest, or in bad faith, or if a joint venture party is involved in an unlawful act committed by the company, or a joint venture party (directly or indirectly) unlawfully utilises the company's assets and consequently makes the company insolvent.

29 Are there any particular issues that can arise in joint venture disputes in your jurisdiction concerning disclosure of evidence?

Indonesian civil procedure does not include a discovery process and each party must decide what documents and other evidence it will submit. As there is no discovery mechanism, legal professional privilege is not known in the way it is understood in common-law jurisdictions. However, the principle of lawyer confidentiality (which can only be waived in very limited circumstances) is recognised under the Indonesian Advocates Law and the Indonesian Advocates Code of Ethics. Under this principle, Indonesian lawyers are required to keep confidential all knowledge and documents obtained from their clients. An Indonesian lawyer's duty of confidentiality also continues to apply after the end of the relevant client engagement.

Market overview

30 What advantages does your jurisdiction offer for parties wishing to set up and operate joint ventures?

With the exception of a handful of specific sectors, in order to conduct business and generate revenue in Indonesia, international investors must operate in Indonesia through a joint venture company. As a result, the advantage of setting up and operating a joint venture in Indonesia is the advantage of being able to do business in Indonesia. In addition to any international treaty protections, all PMA joint venture companies have the benefit of the general investment protections such as most-favoured-nation treatment, fair and equitable treatment and protection from expropriation without compensation set out in the Indonesian Investment Law.

Hiswara Bunjamin & Tandjung

David Dawborn **david.dawborn@hbtlaw.com**
Iril Hiswara **iril.hiswara@hbtlaw.com**
Matthew Goerke **matthew.goerke@hbtlaw.com**
Brandon Van Slyke **brandon.vanslyke@hbtlaw.com**
Renny Soependi **renny.soependi@hbtlaw.com**
Intan Fauzia Rembah **intan.fauzia@hbtlaw.com**

23rd Floor, Gedung BRI II
Jl. Jend. Sudirman Kav. 44–46
Jakarta 10210
Indonesia

Tel: +62 21 574 4010
Fax: +62 21 574 4670
www.hbtlaw.com

31 Are there any particular requirements or restrictions relating to joint ventures in your jurisdiction that could deter international investors?

One of the primary deterrents of international investors in Indonesian joint venture companies is the foreign-ownership restrictions, which can prohibit 100 per cent foreign ownership or majority foreign ownership, depending on the sector. In the affected sectors, it is critical for international investors to find a strong and reliable local partner who is willing and strategically aligned with the business strategy of the international investor. Detailed due diligence on local partners can also be a powerful tool in ensuring such an alignment of interests and reputations.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Joint Ventures
ISSN 2515-3765

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law