Newsletter

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New PPP Legislation in Indonesia and Other Developments

While we have introduced various outlines of PPP frameworks on a country by country basis in Vol. 1 - Vol. 5 of this newsletter, from this issue we will report on major developments in legislation relating to private sector - driven infrastructure projects and the financing for such projects in the area collectively. This issue deals with the following topics:

- **Establishment of a New PPP Law (Indonesia)**
- **Extension of the Period for the Second Fast Track Programme (Indonesia)**
- **PLN 35,000 MW Program (Indonesia)**
- **Amendment to the Civil and Commercial Code and its Impact on Project Finance (Thailand)**
- **Establishment of the Eleventh Malaysia Plan (Malaysia)**

I. Establishment of a New PPP Law (Indonesia)

In Indonesia, the PPP framework has been significantly changed through Presidential Regulation No. 38 of 2015 which was issued in March 2015 ("**PR38/2015**"). PR38/2015 revoked and replaced in full the previous Presidential Regulation No. 67 of 2005 (as amended, "**PR67/2005**"), which was the basic PPP regulation in Indonesia until then. The key changes implemented by PR38/2015 are as follows.[1]

1. Eligible Sectors: Social infrastructure such as educational facilities and medical facilities, and public housing, are added as sectors eligible under the PPP scheme.

2. Selection of Developer: In addition to a tender mechanism, a direct appointment mechanism is allowed if:

   a. the project is an infrastructure project which was developed or operated by the same developer;

   b. the infrastructure project utilizes a new technology only such developer can provide; or

   c. such developer has acquired all or a majority part of the land required for the project.

[1] For further details, please refer to the newsletter issued by Hadiputranto, Hdinoto & Partners (Baker & McKenzie Jakarta) (http://www.bakermckenzie.com/alindonesianewppprulesmay15/). For information on the previous Indonesian PPP system, please refer to the newsletter, ASEAN Infrafinance Legal Update Vol. 1.

3.	Land Procurement:	The private developer can carry out land procurement by exercising administrative authority given to the relevant government institution under the New Land Acquisition Law, on behalf of the government institution.[2]
4.	Form of Cooperation:	The concession license scheme was abolished. Thus, the implementation of a project is possible only through public and private project agreements.
5.	Unsolicited Projects:	Simplification on criteria for projects to be proposed by private developers as PPP projects, and the rate of additional assessment point granted to a private initiator in a tender process was changed from "up to 10%" to a "fixed" rate of 10%, equally applied to all such private initiators.
6.	Investment Return:	In addition to a scheme whereby an investment in a project is recouped through usage fees paid by the end users ("**Stand Alone Project**"), PR 38/2015 expressly stipulate a scheme whereby the government or government institution pays the amount covering private capital costs and a certain amount of profit in relation to a project, based on the availability of the services ("**Availability Payment Project**") which seems to reflect the payment method which is generally used in base-load PPP thermal power projects.[3]
7.	Other:	a. English can be used as the "official translation" of a project agreement.[4] b. The extension period to reach financial close was shortened from 12 months to 6 months from the date of execution of a project contract, however, the extension can be granted "from time to time", without any express stipulation of the maximum number of extensions that can be granted to the developer.[5]

The framework of the IIGF Guarantee and the VGF remains unchanged.[6]

II. Extension of the Period of the Second Fast Track Power Program (Indonesia)

In 2010, the President issued Presidential Decree No. 4/2010 which assigned the state utility company (i.e. PLN) to implement what has become to be known as the Second Fast Track Power Program. The program was initially set to expire on 31 December 2014. However, to date, a large number of the projects remain unrealised. The government has extended the period of the

[2] For further details on the New Land Procurement Law, please refer to the newsletter, ASEAN Infrafinance Legal Update Vol. 1.
[3] While social infrastructure such as educational facilities and medical facilities are contemplated as examples of projects subject to the Availability Payment Project, it can be also applied to transportation projects such as toll roads.
[4] It may be interpreted that, if there is any conflict between local language and English, the English language version of the terms may take precedence, however this point is not entirely clear.
[5] In the PR67/2005, the period, in principle, is for one year.
[6] Please refer to ASEAN Infrafinance Legal Update Vol. 1.

program to 31 December 2019.[7] The Business Viability Guarantee (BVG) scheme for covering monetary obligations of PLN concerning the power business under this program has been unchanged.[8]

The program consists of power plants with renewable energy (38%), i.e. geothermal and hydro power plants, as well as coal fired power plants with a more efficient technology and gas fired power plants (62%). Most of the projects (68%) will be implemented by private developers while the remaining 32% will be implemented by PLN.[9] The list of projects under the Second Fast Track Power Program has been revised several times, with the latest list being issued on 31 December 2014.[10] Currently, the list has 76 power plants with a total capacity of around 17,000 MW, 16 of which are developed by PLN while the remaining 58 projects are offered to private developers.

Given that electricity generated under the second Fast Track Programme to date has been only 55 MW (as of April 2015)[11], the second Fast Track Program may well be further updated.[12]

III. PLN 35,000 MW Program[13] (Indonesia)

In April 2015, the President announced a plan to develop 35,000 MW of new electricity generation projects until 2019. This plan is also a part of the PLN's 2015-2024 Power Supply Business Plan. For this program, PLN will build power plants to produce 10,000 MW of electricity. The remaining 25,000 MW will be offered to independent power producers. Moreover, these projects are estimated to require aggregate investments of more than IDR 1,100 trillion (around USD 110 billion). The main objective of this program is to increase the ratio of electrification in Indonesia from 87.35% in 2014 to 97.35% by the end of 2019. The government believes the increase of the electrification ratio will support the economic development in Indonesia.

This program is aimed to develop: [14]

(a) 291 power plants

(b) 732 transmission networks that consist of 75,000 sets of tower, and

(c) 1,375 relay stations.

81% of the projects included in this program are expected to be in commercial operation phase in 2018 and 2019, while the other projects are expected to be in commercial operation from 2015 to 2017.[15]

No details have been offered yet on whether the Government will provide any government guarantees for these projects, and if so, in what form (e.g., a business viability guarantee letter issued by the Ministry of Finance (MOF) for

[7] Presidential Regulations No. 194 of 2014 on the Second Amendment to the Assignment to State Electricity Company (PT PLN Persero) To Undertake The Acceleration Of Electricity Generations Development Utilizing Renewable Energy, Coal And Gas
[8] Please refer to ASEAN Infrafinance Legal Update Vol. 1.
[9] Strategic Plan of Ministry of Energy and Mineral Resources 2015-2019 as stipulated under Minister of Energy and Mineral Resources Regulation No. 13 of 2015.
[10] Minister of Energy and Mineral Resources Regulation No. 40 of 2014 on the Fourth Amendment of Regulation No. 15 of 2010.
[11] Strategic Plan of Ministry of Energy and Mineral Resources 2015-2019 as stipulated under Minister of Energy and Mineral Resources Regulation No. 13 of 2015.
[12] MEMR Presentation on the Target of Development of 35,000 MW Power Plants, presented on 2 September 2015.
[13] For further details, please refer to the newsletter issued by Hadiputranto, Hdinoto & Partners (Baker & McKenzie Jakarta)
http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/al_jakarta_plnprogram_apr15.pdf
[14] PLN's Presentation on 35,000 MW Program, presented on 2 September 2015.
[15] MEMR Presentation on the Target of Development of 35,000 MW Power Plants, presented on 2 September 2015.

Second Fast Track Program Projects[16]), while we understand that the Government is preparing a scheme for offering government guarantee for some of these 35,000 MW projects. In this connection, it is noted that a number of projects listed in this new plan (e.g., the Hasang 40 MW hydro power project, the 2,000 MW Jawa-5 coal-fired power project, and the Sumsel 9 and 10 mine-mouth projects) are already slated to be covered by either the BVGL or the joint guarantee scheme from the MOF and the IIGF prior to the issuance of this 35,000 MW plan. It should be also noted that the Indonesian Government has recently introduced a new form of guarantee for international finance institutions that provide loans to state-owned enterprises for development of infrastructure under certain conditions. [17]

IV. Amendment to the Civil and Commercial Code and its Impact on Project Finance (Thailand)

In Thailand, on 11 February 2015, the amendment to the Civil and Commercial Code concerning changes made to the guarantee and mortgage system came into force (the "**First Amendment**"). However, due to a full-scale abolition of joint guaranty, the adverse impact brought by excessive protection of guarantors to business has been pointed out. In order to solve this issue, a partial amendment was made to the content of the First Amendment and the further amended Civil and Commercial Code was established and came into force on 15 July 2015 (the "**Second Amendment**"). A series of major amendments in connection with the above will be introduced as follows.[18]

	The First Amendment	The Second Amendment
1. Joint and several guaranty	Not permitted.	Joint and several guarantee by juristic persons is permitted.
2. Guarantee for future and conditional obligations	A guarantee agreement without detail of guaranteed obligations (purpose, underlying debts, maximum amount of guarantee and guarantee period) i.e. a once-and-for-all guarantee is void.	Unchanged.
3. Notice to the guarantor	Notice to the guarantor is required within 60 days from the occurrence of a default of the guaranteed obligation.	Unchanged (with clarification that any provision contrary to the left will be void).
4. Guaranty by a third party mortgagor	Provision of guarantee by a third party mortgagor is prohibited.	If the primary debtor is a juristic person, and the mortgagor is an individual having the management power over the primary

[16] Some of the projects listed in the 35,000 MW program are also listed in the Second Fast Track Power Program.
[17] For further details, please refer to the newsletter issued by Hadiputranto, Hdinoto & Partners (Baker & McKenzie Jakarta) http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/al_hhp_stateownedinfrastructure_sep15.pdf
[18] For further details, please refer to Client Alert issued by the Bangkok office of Baker & McKenzie http://f.datasrvr.com/fr1/715/87677/Second_Amendment_to_Laws_on_Guarantees_and_Mortgages.pdf

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			debtor, the mortgagor will be permitted to grant a guarantee for the same underlying debt.
5.	Extension of time to perform the debtor's obligations	Advance consent by the guarantor to an extension of time period for the performance of the debtor's obligations will be void. Thus, if the creditor agrees with the debtor to extend the time period for the performance of the debtor's obligations after the default occurs and fails to obtain the guarantor's consent in relation thereto, the guarantor shall be discharged from its obligation.[19]	The Second Amendment clarifies that consent from the guarantor is not required if the creditor agrees with the debtor to extend the time of payment of the debt and/or reduce the guaranteed obligations after the debtor is in default.
6.	Rights to request public auction	After secured obligation is overdue, the mortgagors are entitled to request the mortgagees to conduct a pubic auction of the mortgaged property.[20]	Unchanged.

Limited recourse type project financing commonly used for infrastructure projects will not be affected by amendments with respect to guarantees among the above given that they usually do not include guarantees provided by a sponsor or a third party in a scheme.

If the scheme includes a guarantee (for example, (i) sponsor's completion guarantee includes guarantee for a project company's obligations towards lenders, (ii) in case of acquisition finance in connection with a brown field project, the target company guarantees the acquiring company's obligations as the borrower, or (iii) in case of a portfolio project where multiple project companies provide mutual guarantee),[21] arrangements considering the amendments in connection with the guarantee shall be made. Especially in the case of (ii) above, it should be noted that a target company cannot provide a mortgage and a guarantee in relation to the same underlying debt in Thailand, due to the rule specified in Item 4 of the above chart, although such scheme is commonly used in acquisition finance.

The right to request public auction specified in Item 6 will affect a number of projects that include mortgages. This is applicable to the case where the mortgager is the borrower. In this regard, the positions of the law is not clear as to whether such right can be waived by the mortgager in advance.

V. Establishment of the Eleventh Malaysia Plan (Malaysia)

[19] This provision is to protect a guarantor, however, it has been pointed out that this provision makes it difficult for a creditor to reschedule performance, which leads to disadvantages caused to the guarantor.
[20] If a public auction is not held within one year from such claim, a mortgagor will be exonerated from liability (to be excluded from secured obligations) with respect to interest arrears or damages which accrue after one year has passed.
[21] As an example of a project in (iii), Small Power Producer (SPP) projects are contemplated.

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On 21 May 2015, Malaysian Prime Minister Datuk Seri Najib Tun Razak tabled the Eleventh Malaysian Plan (2016 - 2020) ("**11MP**") to the House of Representatives. Malaysia is aiming to become a developed country by 2020, based on the so-called 'Vision 2020' concept and this 11MP will be the final development plan for the remaining 5 year-period to achieve Vision 2020. The 11MP clearly specifies that public and private sectors will continuously work together to reinforce infrastructure development in Malaysia, including infrastructure projects especially such as transportation and logistics, water supply, energy and digital infrastructure, in furtherance of the previous Tenth Malaysia Plan. The Prime Minister also announced that there is a plan to budget RM 260 billion for the execution of the entire 11MP, however, the amount to be allocated to PPP projects remains undisclosed.

There have not been any major changes to the legal framework relating to PPP projects itself, however there has been some changes to the Facilitation Fund Guidelines (Version 4.0) (currently only available in Malay), the guidelines for the fund to support public projects which will be provided by the Government, uploaded on the UKAS website as of 8 May 2015.[22] Previously, project companies were required to have paid-up capital of at least RM 3 million to be qualified for a grant under the Facilitation Fund. Following the recent amendments, the amount has been reduced and a project company only needs to have at least RM 300,000. However, it should be noted that there are some newly added requirements, such as the obligation for a project company to obtain certain approvals and permits, including development permits, before making an application for the grant. At the time the Facilitation Fund was established, RM 20 billion was initially allocated to the Facilitation Fund and for a period from 2011 to 2014, the total amount of RM 6.1 billion was paid out from the Facilitation Fund for projects relating to infrastructure, universities, power facilities and joint development projects. Currently, it is not clear whether or not any additional budget will be further allocated.

In relation to the 11MP, the Prime Minister launched a new social service model for collaboration with the public and private sectors for the well-being of Malaysian citizens ("**Social PPP**"). This Social PPP aims at swift provision of low-cost and high quality social services made available through funds mutually contributed from the public and private sectors. Information on this Social PPP has not been fully disclosed, however it appears that it is more suited to fulfil the corporate social responsibility of companies rather than for the pursuit of profit.

[22] For the Facilitation Fund, please refer to ASEAN Infrafinance Legal Update Vol. 4.