BUDIARTO
— LAW PARTNERSHIP —
NEWSLETTER
blp.co.id

Issue 2 DECEMBER 2013

Trust Under Bank Indonesia Regulation

I. Bank Indonesia Regulation on Trust Services

In November 23, 2012, Bank Indonesia (the central bank of the Republic of Indonesia) issued Bank Indonesia Regulation Number 14/17/PBI/2012 concerning Bank Business Activity in the Form of Trust ("**Regulation No. 14**"). Regulation No. 14 provides certain requirements that have to be met before a Bank can embark on this trust services business. The regulation also provides some basic legal framework of the trust but it gives the parties the freedom to agree on the details. One of the conditions for the trust is that the trust can only be created over financial assets.

In this newsletter, we will make some notes on the basic legal framework by comparing the Regulation No. 14 trust and the common law trust.

II. Common Law Trust

In general, there are 3 parties in the common law trust; i.e. the settlor, the trustee, and the beneficiary. Normally, a trust is created by way of the settlor transferring his asset to the trustee for the trustee to hold the asset for the benefit of the beneficiary. As such, if the asset is a land title, the name of the trustee will appear in the land register as the owner of the land title. Notwithstanding this, the beneficiary does have a beneficial interest in the trust asset (and this interest is proprietary in nature) and the trustee has a so-called fiduciary obligation to manage the trust asset for the benefit of the beneficiary.

Once a trust is created, the settlor will have no ownership in or control over the trust asset. If the settlor becomes insolvent, his creditors will have no recourse against the trust asset. Likewise, if the trustee becomes insolvent, his creditors will have no recourse against the trust asset. If the trustee dies, the trust asset will devolves on his personal representative who will continue to hold the trust asset on trust for the benefit of the beneficiary until a new trustee is appointed.

III. Trust under Regulation No. 14

Trust is defined in Regulation No. 14 as an activity of custodianship with management of [a] settlor's assets based on a written agreement between [a] bank as trustee and [the] settlor for the interest of [a] beneficiary.

It is stated further in Article 5(1) that the trustee may act as:

(a) paying agent;

(b) investment agent based on conventional principles and/or based on sharia principles; and/or

(c) borrowing agent and/or financing agent based on sharia principles; for and on behalf of a settlor in accordance with the trust agreement.

It seems that the main feature of this trust is the acting of the trustee for and on behalf of the settlor. Indeed, in article 6 of Regulation No. 14, it is stated that the trust assets must be kept in the account of the settlor which is specifically opened by the trustee for the settlor for the purpose of the trust asset administration.

IV. Comparison between the Trusts

Regulation No. 14 trust, despite adopting the terms used in

the common law, is definitely different from the common law trust. The main differences are:

(a) ownership of the Regulation No. 14 trust asset remains with the settlor and as such, if the settlor becomes insolvent, the trust asset is subject to the claims of the settlor's creditors;

(b) the Regulation No. 14 trustee is managing the trust asset for the settlor (instead of managing it for the beneficiary);

(c) the beneficiary does not have any proprietary interest in the financial asset;

(d) the only interest the beneficiary has is to claim for payment from the settlor via the trustee (and this claim is a personal claim and ranks pari passu vis a vis the other creditors of the settlor).

Mostly, in the commercial context, the common law trust is used to protect the interest of a party (the "**beneficiary**") who has provided something (for example a seller who has delivered the sale goods or a lender who has disbursed the loan) in consideration of the promise of the other party (the "**settlor**") to pay or repay something in the future (for example the promise of a purchaser to pay the purchase price or the promise of a borrower to repay the loan). In this context, the beneficiary may require the settlor to create a trust over his future cash flow so as the beneficiary can have a beneficial interest in the future cash flow and therefore does not have to compete with the other creditors of the settlor. Hence, the common law trust is created for the benefit of the beneficiary.

The Regulation No. 14 trust, while provides the settlor with protection from the insolvency risk of the trustee (which is indeed unnecessary considering the undoubted credit of the bank), cannot be used to achieve the above stated purpose as the ownership of the Regulation No. 14 trust asset will remain with the settlor. From the beneficiary's point of view, it is therefore imperative that the Regulation No. 14 trust agreement be properly drafted to protect its interests and to cover all foreseeable eventualities.

BUDIARTO
— LAW PARTNERSHIP —

Guidance on Environmental Permit

On October 28, 2013, the Minister of Environment of the Republic of Indonesia has enacted Regulation of the Minister of Environment Number 8 Year 2013 concerning Guidelines for the Assessment and Examination of Environmental Documents and the Issuance of Environmental Permit ("Regulation No. 8/2013"). Regulation No. 8/2013 is an implementing regulation of Government Regulation Number 27 Year 2012 concerning Environmental Permit ("Regulation No. 27/2012"). Regulation No. 27/2012 is enacted generally to provide environment protection and act as a mandate of Law Number 32 Year 2009 concerning Environmental Protection and Management ("Environmental Law").

The key points of Regulation No. 8/2013 are to give guidance relating to the following matters:

a. The management of KPA

   KPA[1] will be divided into central KPA, provincial KPA, and municipal KPA and in order to be official, it must obtain the license from the minister, governor, or mayor/regent based on his authority. KPA will be managed by a chief, a secretary, and members but a technical team and a secretariat will help too. KPA is in charge of giving recommendations about the environmental propperness or improppernes based on the assessment result of the study as mentioned in Andal[2] and RKL-RPL[3].

b. The guidelines for the assessment of Amdal[4] and the issuance of environmental permit

   KPA will assess the documents of Amdal. The duration from the assessment of terms of reference until the submission of assessment recommendation (whether it is propered or not) will be maximum of 105 days. The minister, governor, or mayor/regent based on his authority will issue environmental feasibility decision and environmental permit concurrently if the plan is decided as environmental feasible. The issued environmental permit should be announced in mass media not later than 5 business days from the issuance of the permit.

c. The guidelines for the examination of UKL-UPL[5] and the issuance of environmental permit

   The form of UKL-UPL will be examined by the minister, governor, or mayor/regent based on his authority. The duration of the examination of UKL-UPL is 14 days since the form of UKL-UPL is declared administratively complete. The minister, governor, or mayor/regent based on his authority will issue the recommendation of approval of UKL-UPL and environmental permit concurrently if the document is approved. The issued environmental permit should be announced in mass media not later than 5 business days from the issuance of the permit.

d. The guidelines for SPPL[6]

   SPPL is prepared and signed by the initiator and it should be submitted to the environmental agency (based on its authority) for the verification procedure. The environmental agency will issue the proof of registration of SPPL if the document is approved.

e. The funding for the assessment of Amdal, the examination of UKL-UPL, and the issuance of environmental permit

The funding for the assessment of Amdal, examination of UKL-UPL, and issuance of environmental permit will be allocated from State Budget and Regional Government Budget.

The ongoing assessment of documents of Amdal and the ongoing examination of UKL-UPL before enactment of Regulation No. 8/2013 will be conducted in accordance with the previous guideline and regulation until the issuance of environmental feasibility decision and environmental permit (for Amdal) and recommendation of approval of UKL-UPL and environmental permit (for UKL-UPL). The enactment of Regulation No. 8/2013 is hoped to give clearance explanation about the guidelines regarding environmental permit.

1 KPA stands for Assessment Comission of Enviromental Impact Analysis

2 Andal stands for Enviromental Impact Analysis Report

3 RKL-RPL stands for Environmental Management Plan and Environmental Monitoring Plan

4 AMDAL stands for Enviromental Impact Analysis

5 UKL-UPL stands for Environmental Management Efforts and Environmental Monitoring Efforts

6 SPPL stands for Letter of Statement of Enviromental Management and Monitoring (Surat Pernyataan Kesanggupan Pengelolaan dan Pemantauan Lingkungan Hidup)

BUDIARTO
— LAW PARTNERSHIP —

The Indonesia Supreme Court Quashed Regulation No. 7 of 2012 of the Minister of Energy and Mineral Resources

The Supreme Court has recently accepted a judicial review application brought by Alias Wello, a bauxite mine business owner from Central Kalimantan, on the Regulation of Minister of Energy and Mineral Resources No. 7 of 2012 regarding the Increase of Value Added Of Mineral through Processing And Refining/Smelting ("MOEMR Reg No. 7/2012"). The judgment No. 13P/HUM/2012 of Supreme Court stated that MOEMR Reg No. 7/2012 was inconsistent with Law No. 4 of 2009, being a law of higher authority, and consequently MOEMR Reg No. 7/2012 is no longer valid and has no binding effect. The Supreme Court instructed the issuer (the Ministry of Energy and Mineral Resources – "MOEMR") to revoke the MOEMR Reg No. 7/2012.

The MOEMR Reg No. 7/2012

The MOEMR Reg No. 7/2012 is the implementing regulation of Law No. 4 of 2009 ("Law No. 4/2009") regarding the Mining of Mineral and Coal. It was issued by MOEMR on February 6, 2012. The main point to note under the MOEMR Reg No. 7/2012 is the certain restrictions of mineral export products. The MOEMR Reg No. 7/2012 restricts the selling of raw material for export. Before the products are exported, all mined materials or coal have to be refined or smelted in Indonesia. The object of this MOEMR Reg No. 7/2012 is to maintain the domestic supply and to gain benefits for Indonesia in the future with the establishment of more processing and refining/smelting plants. This restriction is addressed to holders of Operation Production Business Licence (Izin Usaha Pertambangan Operasi Produksi).

This restriction is mandated by Law No. 4 of 2009. Article 103 (1) of Law No. 4/2009 provides that:

"The holder of an Operation Production Business License or a Special Operation Business License is obligated to undertake processing and purification activities of mine products domestically."

The mining company, who fails to comply with the restrictions, will be liable to the following administrative sanctions:

(a) Written warning;
(b) Temporary suspension of activities; and
(c) Revocation of business licenses.

The Plea and the Contradictions

Law No. 4/2009 provides that the restriction will come into effect on the 5th years after the issuance of Law No. 4/2009 i.e. January 12, 2014. In contradiction to this law, MOEMR Reg No. 7/2012 provided that the restriction had to come into effect in the 3rd month after the issuance of MOEMR Reg No. 7/2012 i.e. May 6, 2012. MOEMR Reg No. 7/2012 had shortened the permitted period for mining companies to prepare or build smelter or find partner to conduct the refining and smelting domestically.

Based on the contradiction above, Alias Wello submitted a plea to the Supreme Court on May 7, 2012 for a judicial review. Although he was then the vice secretary of bauxite and iron ore entrepreneur association, the plea was brought in his personal capacity. The objection was about the inconsistency on the deadline for the restriction to come into effect. Based on the Indonesia hierarchy of law, MOEMR Reg No. 7/2012 shall not contradict with Law No. 4/2009. Alias Wello as the pleader was of the view that MOEMR Reg No. 7/2012 was conflicting with the higher regulation. Further, he opined that it was impossible for mining companies to export half-processed mineral within 3 months after the issuance of MOEMR Reg No. 7/2012. To process the mined minerals into half-processed products, mining companies require substantial investment and high technology and for which, as he asserted, the mining companies need times to prepare. He calculated that the investment may require more than hundred billions of Rupiah. These are deterrents to many investors.

The Supreme Court Verdict

After duly consideration, the Supreme Court shared the view of the pleader that MOEMR Reg No. 7/2012 contradicted the higher regulation i.e. Law No. 4/2009. The judges of the Supreme Courts decided in their judgment:

(a) to accept the plea on the Judicial Review submitted by Alias Well;
(b) that the MOEMR Reg No. 7/2012 is no longer valid and has no binding effect; and
(c) the Minister of Energy and Mineral Resources Indonesia is therefore ordered to revoke MOEMR Reg No. 7/2012.

Under the Supreme Court Regulation No. 1 of 2011 regarding the Judicial Review, the MOEMR has 90 days to revoke MOEMR Reg No. 7/2012. If after the 90-day the MOEMR does not revoke the regulation, then by law such regulation will automatically become null.

Potential New Rulings on APERD

The increasing of use of sale agent (**Agen Penjual Reksa Dana or "APERD"**) by Investment Manager in selling its mutual funds is forcing the Indonesia Financial Services Authority (Otoritas Jasa Keuangan or "**OJK**") to make new rulings on the registration of APERD and the rules of conduct of APERD. In October, 2013, OJK has released on its website, www.ojk.go.id, drafts of new regulations regarding registration of APERD ("**Draft Regulation on Registration of APERD**") and of rules of conduct of APERD ("**Draft Regulation on Rules of Conduct of APERD**"). APERD is a party who is allowed to sell a mutual fund based on a contract made between APERD and the Investment Manager. Currently, the Registration of APERD is regulated by Regulation No. V.B.3 and the Rules of Conduct of APERD is regulated by Regulation No. V.B.4.

The followings are several major changes that have been proposed in the Draft Registration of APERD Regulation and Draft Rules of Conduct of APERD Regulation.

Form of APERD

It is not stated in Regulation No. V.B.3 who can apply for an APERD license. However, in the Draft Regulation on Registration of APERD, it is specifically stated that only limited company can apply for APERD license. Furthermore, the Draft Regulation on Registration of APERD states that the legal entity that can apply for APERD are: (i) Securities Company that has been licensed as Securities Underwriter and/or Securities Trading Broker; (ii) Bank; (iii) a limited company specializing itself in the business of APERD ("**APERD Company**"); and (iv) (licensed) Pawn Shop, Insurance Company, Multifinance Company, Pension Fund provided that the legal entity is not prohibited by the regulation which regulates its core business from entering into the business of selling mutual funds. It is also stated that before an APERD conducts its business, it shall firstly register itself with the OJK.

The Draft Regulation on Registration of APERD also states that APERD Company shall have a paid-up capital of at least Rp200 million and shall from time to time maintain at least a positive equity of Rp200 million (as shown by annual

audited financial statement). It is also stated that the ownership of an APERD Company shall be 99% locally owned.

Obligation to Report

In the Draft Regulation on Registration of APERD, APERD shall report:

(i) its annual business plan;
(ii) its plan to establish a new branch (for OJK's approval);
(iii) any changes to its or its branch's address
(iv) new agency contract with any Investment Manager;
(v) termination of its agency contract with any Investment Manager;
(vi) its total sales (of each branches); and
(vii) its investors' profiles.

The reporting obligation is not known under the current Regulation No. V.B.3.

Revocation of Registration Letter of APERD

In the Draft Regulation on Registration of APERD, it is clearly stated that the following matters can cause the revocation of the Registration Letter of an APERD:

(i) APERD voluntary returns its registration letter;
(ii) APERD violates any capital market regulation; administrative or criminal.

Strict Interpretation on Law No. 24/2009

The District Court of West Jakarta Decision No. 451/Pdt.G/2012/PN.Jkt.Bar on 10 July 2013 annulled a loan agreement between an Indonesian business and a non-Indonesian lender on the ground that it failed to comply with Article 31 (1) the Law No. 24 of 2009 regarding the National Language, Flag, Emblem and Anthem ("**Law No. 24/2009**").

The Law No. 24/2009 came into force on 9 July 2009. It took the legal and business communities by surprise, as there had been no general consultation or prior warning but several of its provisions appeared to have significant impact on commercial and corporate transactions. The most significant Article of Law No. 24/2009 is Article 31 (1) which provides that the Indonesian Language shall be used in memorandum of understanding or contracts (including contracts in International public law) which involve a state institution, a government institution, a private Indonesian entity or an Indonesian citizen. This provision has an important question for the Indonesian business community on the legal impact of having a contract to which an Indonesian entity is a party and which is executed only in the English language. This question has been clarified by the issuance of a letter dated 28 December 2009 by the Indonesian Minister of Law and Human Rights in which the Minister stated that the local language rule, whilst a formal requirement, would not affect the status and enforceability of a contract written in English or in both Indonesia language and English and the implementation of Article 31 (1) would have to wait the issuance of President Regulation as mandated by Article 40. This means that the language requirement would not be enforced until the Presidential Regulation is issued. The Ministerial Guidance provided some comfort to the Indonesian legal practitioners and business communities contracting with Indonesian entities in the English only. However, the decision of the District court of West Jakarta disregarded the Ministerial Guidance and this should serve as a warning that the Ministerial Guidance has no legal force and has no more than persuasive value, at the very most, when adduced as evidence in court.

While the decision is currently being appealed to the Jakarta High Court (and therefore not enforceable as yet), legal practitioners and those involved in cross-border transactions should mitigate all possible risks under Article 31 by ensuring that contracts involving a foreign party and an Indonesian party are written both in Indonesian and non-Indonesian. This

is practice is not new and indeed it is quite common to see contracts with Indonesian counterparties written in both English and Indonesian Language (the two texts are frequently written side by side in each page). When two languages are used in a contract, there is ordinarily a provision that says which language shall govern in the event of conflict of interpretation between the two languages. This is because translation from one language to another cannot be precise and one of the languages must prevail over the other in the event of conflict. Article 31(2) of Law No. 24/2009 permits the use of dual language in memoranda and contract involving foreign parties. However, Article 31(2) puts the dual language solution into question, as in its elucidation, it says that each of the languages will be treated as "original". It is not clear what is meant by "original". It is not clear also whether the parties are free to agree on which language to govern and prevail when a dispute arises. Until the implementing regulations are issued, this legal lacuna is a potential ground for litigation.

BUDIARTO
— LAW PARTNERSHIP —
The AXA Tower - Kuningan City, 28th Floor, Suite 03
Jl. Prof Dr. Satrio Kav.18, Kuningan - Setiabudi
Jakarta 12940, Indonesia
t : +6221-3048 0718
f : +6221-3048 0715
e : budiarto@blp.co.id