



ICLG

The International Comparative Legal Guide to:

Corporate Governance 2018

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A practical cross-border insight into corporate governance

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EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Corporate Governance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Corporate Governance, Investor Stewardship and Engagement, particularly from a US perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 38 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Sabastian V. Niles of Wachtell, Lipton, Rosen & Katz for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The discussion will focus on a limited liability company (*perseroan terbatas* (“PT”)) set under Law No. 40 of 2007 concerning limited liability companies, and its implementing regulations (“**Indonesian Company Law**”). PT is the corporate entity form allowed within the context of foreign direct investment in Indonesia (with some exceptions on the banking and oil and gas sectors under production sharing contracts or the construction sector in the scheme of joint operation) and can take the form of a private company or a public company (also known as PT Tbk, with a minimum of three hundred shareholders and issued and paid-up capital of a minimum of IDR 3 billion).

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

Corporate Governance of Indonesian limited liability companies is mainly governed by: (i) the Indonesian Company Law; (ii) for foreign investment companies, Law No. 25 of 2007 on investment and its implementing regulations (“**Investment Law**”); and (iii) for public companies, Law No. 8 of 1995 on Capital Market including its implementing regulations (“**Capital Market Law**”). For banks and non-bank financial companies, they are regulated under the regulations of the Financial Services Authority (“**OJK**”).

Articles of Associations provide more specific corporate governance rules for each PT.

The Indonesian Company Law sets the general rules on corporate governance of PT – the duties, roles, rights, obligations and liabilities of PT and each organ of PT consisting of (i) General Meeting of Shareholders (“**GMS**”), (ii) Board of Directors (“**BOD**”), and (iii) Board of Commissioners (“**BOC**”). The rules and provisions set by the Indonesian Company Law are generally applicable to all limited liability companies.

The Investment Law works in conjunction with the Indonesian Company Law as one of the main sources of corporate governance practice for foreign investment companies. While most of the corporate governance rules are covered by the Indonesian Company Law, the Investment Law provides additional obligations/requirements such as: restrictions on nominee-share ownership arrangements and the requirement for a foreign direct investment to be conducted in the form of a limited liability company.

For the corporate governance rules of public companies, the Capital Market Law is more detailed and requires the public companies to also comply with OJK and Indonesia Stock Exchange (“**IDX**”) rules. These rules require public companies to have an independent commissioner (constituting of at least 30% of the BOC members) and an independent director. Aside from the foregoing organs of PT, the Capital Market Law requires other structures consisting of: (i) a Corporate Secretary; (ii) an Audit Committee; and (iii) an Internal Audit Unit. In addition, the public companies may also establish a Nomination and Remuneration Committee.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

There have been no changes to general corporate governance matters set by the Indonesian Company Law, since 2007. Some notable changes that have been applied by the Indonesian government for specific sectors include, among others:

- (i) issuance of the new Investment Coordinating Board (“**BKPM**”), which came into force on 2 January 2018. The new regulation shows supportive changes from the government on foreign direct investment policies, among others: allowing trading/services activities to go through only one stage of licensing, compared to two stages of licensing under the previous BKPM regulation; and
- (ii) issuance of specific regulations on fintech companies by OJK in 2017, followed by some supporting personal data privacy regulations.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The government is starting to recognise the importance of promoting sustainable value creation over the long-term and therefore encouraging long-term investment. While, this is not implemented comprehensively in all business sectors yet, we have seen a change in government regulation. For example, the government now extends the investment period of Venture Capital Company to a maximum of 20 years (compared to a 10-year maximum in the previous regulation).

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Operation or management duties and functions are basically the roles of the BOD (under the supervision of the BOC).

Nonetheless, Indonesian Company Law sets certain minimum limitations to the BOD's/BOC's roles, i.e., approval from the shareholders (in a GMS or BOC as the case may be) must be obtained for the matters/actions as outlined below, which, in turn, provide certain strategic power to the shareholders. In addition, shareholders may also set limitation to the roles of the BOD and/or BOC in the company's articles of association.

Matters requiring approval of the shareholders or the BOC (as the case may be) set by Indonesian Company Law, are as follows:

- subscription of shares by way of in kind participation;
- conversion of loan to equity by a shareholder and/or other creditor;
- buy-back shares of the company;
- an increase in the issued and paid-up capital within the limit of the authorised capital, or a reduction in the capital of the company;
- approval of business plans (either by the BOC approval or the GMS as provided in the articles of association of the company);
- approval of annual reports, including financial statements and report of the BOC's duties;
- appropriation of net profits including: the determination of the amount to be allocated for the reserve fund; declaration of dividends; and determination of the uncollected dividends;
- division of duties and authorities of management amongst the members of the BOD;
- amendments to the articles of association of the company including any increase in the authorised capital, reduction in authorised, issued and paid up capital;
- merger, consolidation, acquisition, spin-off, bankruptcy, extension of the company's duration, and dissolution of the company;
- appointment of other party(ies) to represent the company if all members of the BOD or the BOC have a conflict of interest with the company;
- transfer or encumber of the company's assets with a value exceeding 50% of the net assets of the company in one or more transactions, whether related or unrelated;
- appointment, replacement and dismissal of the members of the BOD and/or the BOC;
- provisions on the amount of salary and allowances of the members of the BOD (to be approved by the GMS or BOC meeting/resolution);
- provisions on the amount of salary and allowances of the members of the BOC;
- approval for the BOC to conduct managerial activities for certain circumstances and definitive period or appointment of independent Commissioners;
- approval of report submitted by liquidator; and/or
- appointment of the liquidator.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders do not have a particular corporate governance responsibility under Indonesian Company Law.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Indonesian Company Law divides shareholders meeting into two types: (i) Annual General Meeting of Shareholders ("AGMS"); and (ii) Extraordinary General Meeting of Shareholders ("EGMS").

An AGMS is intended to approve the management and supervision duties and roles by the BOD/BOC of the company of the previous year (and release and discharge the liabilities of BOD/BOC of the previous financial year, as well as allocation of net profit). An AGMS must be convened at the latest six months after the end of the company financial year.

For EGMS, there are no limitation as to agendas that may be approved in an EGMS (except for the agendas relating to annual report which is specifically required to be approved in the AGMS). An EGMS may also be convened at any time, as deemed necessary, based on the request of shareholders holding at least 1/10 voting rights in the company and/or the BOC (or based on the court's decision if the incumbent BOD and/or BOC of the company fail to convene the requested EGMS).

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

No, unless any of the following situation occurs:

- when their company loses its legal entity status;
- when a shareholder directly or indirectly abuses the company for their personal benefit;
- when a shareholder is involved in an unlawful act committed by the company;
- when the shareholder directly or indirectly uses the company's assets unlawfully resulting in the assets becoming insufficient to pay off the debts of the company;
- when the number of shareholders remain at only one member after six months; and
- when the first GMS has not been conducted to approve all legal acts committed by the shareholder before the company became a legal entity.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The Indonesian Company Law provides the following rights of enforcement to the shareholders:

- (a) The right to file a claim towards the company (at a district court), if a shareholder experiences loss and deems that the GMS, BOD, and/or BOC pass an un-just and un-reasonable resolution.

- (b) One or more shareholder(s), whom represent at least 1/10 of all shares, with a voting right may file a written request to a district court (where the company is domiciled) to conduct an investigation upon the company, for any alleged:
- (i) tort act by the company that causes losses to the shareholder(s) or third party(ies); or
 - (ii) tort act by the BOD or BOC (and/or its members) that causes losses to the company, the shareholder(s), or third party(ies).
- (c) The right to request the company buys back its shares if the shareholder(s) disagree with any of the following actions of the company, following an action that causes a loss to the shareholder(s) of the company:
- amend the company's articles of association;
 - transfer or encumber the company's asset exceeding 50% of the company's net asset; or
 - merger, consolidation, acquisition, or division of the company.

Certain additional requirements apply for a buy-back scenario and the number of buy-back shares must not exceed 10% of the issued and paid-up capital. The company must procure third party(ies) to purchase the remaining shares (if any).

The OJK regulations require for a public company to disclose information of the buy-back to the public and the OJK. This must be done within two days of the GMS approving the buy-back, consisting of:

- (i) description for buy-back of shares;
- (ii) name of shareholders;
- (iii) share prices and pricing procedures; and
- (iv) buy-back period.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Under the OJK regulation, a shareholder who owns 5% or more shares (directly or indirectly) in a public company, is required to report such ownership to the OJK at the latest 10 days (or five days if the report is submitted by an attorney) after the transaction occurs.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Generally, no, except for a public company, there is a requirement to disclose material information/facts (i.e. any important or relevant information/facts regarding events that may affect the price of securities and/or the decision of investors, prospective investors or any other party concerned over such information/facts, including any plan for holding a GMS), to the OJK and announce the material information/facts to public.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The BOD is responsible for the day-to-day management of an Indonesian limited liability company. This includes representing the company inside or outside the court. This management duty, is supervised by the BOC. For public companies, the OJK rule

requires the BOD and BOC of a public company to consist of at least two persons/members.

While the Indonesian Company Law mandates that the management role must be performed by the BOD, it does provide certain exceptions and/or additional requirements which includes:

- a) Any member of the BOD who (i) has an ongoing dispute with the company in a court, or (ii) has a conflict of interest with the company, may not represent the company. In this case, the Company must be represented by the BOC, other Director [it is possible for the company to be represented by more than one director] with no conflict of interest, or other party appointed by the GMS [it is possible for the company to be represented by more than one party] (in case all member of the BOD/BOC have conflict of interest with the company).
- (b) For any transfer or encumbrance of company's asset exceeding 50% of the company's net asset, the BOD must first obtain approval from the GMS.

The shareholders can provide a stricter rule to those provided under the Indonesian Company Law in their company's Articles of Association.

For public companies, the OJK rule also requires a Corporate Secretary to assist the BOD and BOC with, among others, the implementation of corporate governance, as follows:

- to disclose information to the public, including on the public company's [this should refer to the website of the public company] website;
- submission of a report to the OJK on a timely basis;
- arrangement and documentation of GMS;
- arrangement and documentation of BOD and/or BOC meeting; and
- implementation of an induction programme for the BOD and/or BOC.

3.2 How are members of the management body appointed and removed?

The GMS should appoint and remove members of the BOD and BOC. For certain financial service sectors, the OJK requires a fit and proper test before members of the BOD/BOC can be appointed.

Indonesian Company Law allows a BOC to temporarily suspend any members of BOD by giving the relevant BOD member a prior written notice, stating the reason of suspension (during such suspension period the relevant member of the BOD is prohibited from representing the company and performing their management duties and role as a BOD member). Within 30 days as of the effective date of suspension, the company must hold a GMS either to remove or affirm the suspension. If the resolution of the GMS affirms the suspension, such member of the BOD will be permanently discharged; however, if within the 30-day period no GMS is held, or the GMS fails to reach a resolution, the suspension will be automatically cancelled. In relation to the foregoing, the same general rules apply for public companies, but the OJK rule provides a longer period for a public company to hold the GMS, i.e. within 90 days as of the temporary suspension date. In addition, the public company must disclose the information to the public and report to the OJK.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

Remuneration of BOD/BOC members is determined by the shareholders in the GMS (for BOD members the authority of the GMS to determine remuneration can be delegated to the BOC).

The Indonesian Company Law and Indonesian civil code specifically impact contracts with the BOD/BOC (Indonesian manpower laws and regulations do not apply for BOD/BOC members as they are not deemed as employees within the context of Indonesian manpower law).

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

The Indonesian Company Law provides no limitation for the BOD or BOC to hold shares/securities in the company or any other company. In this case, the Indonesian Company Law mandates the BOD to maintain a special shareholders register which contains detail on shares/securities that members of the BOD or BOC (as well as their family member (wife, husband, and/or children)) holds in the company or any other company.

For public companies, under the OJK regulation, members of the BOD or BOC are required to report their ownership and any change to their ownership of the public company's shares (directly or indirectly) to the OJK.

3.5 What is the process for meetings of members of the management body?

For non-public companies, there are no specific procedures required by the Indonesian Company Law to convene the BOD (or members of the management body) meetings and therefore the procedure can be freely determined in the company's Articles of Association. For public companies, the OJK regulations require a BOD meeting to be held at least once a year with notice sent to the members at least five days before the scheduled meeting which must be attended by at least a majority of the members. In addition, public companies are also required to hold a joint BOD-BOC meeting at least once every quarter.

3.6 What are the principal general legal duties and liabilities of members of the management body?

The BOD of the company is generally entitled and authorised to manage the company in good faith and full responsibility within and outside the court in all matters and in all events, to the extent there is no ongoing court case or conflict of interest between the Director and the company. In the event the BOD is guilty or in negligence for performing its duties, each member of the BOD (jointly liable in case there is more than one member of the BOD) shall be fully liable personally for the loss of the company.

Some of director(s)' duties specifically set out under Indonesian Company Law are elaborated in question 3.7 below.

Members of the BOD are jointly and severally liable for, among others, the following events:

- losses incurred by good faith shareholders arising from a buy-back which is void by law; and
- any losses incurred by the company in the event the shareholders are unable to return the interim dividends, in which the BOD, together with BOC, of the company shall be responsible for these losses.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Specific duties mandated by the Indonesian Company Law to the BOD or BOC of a company are:

- a) BOD, among others:
 - (i) to perform a managerial role and represent the company inside or outside the court (including representing the company as a contracting party);
 - (ii) to create and maintain a shareholder register, special shareholder register, minutes of the GMS, and minutes of the BOD meeting;
 - (iii) to prepare an annual business plan, annual report and other financial documents;
 - (iv) subject to review by the BOC, to prepare and obtain approval from the GMS for the annual report of the preceding financial year within a period of no more than six months after the financial year ends;
 - (v) to maintain all documents, minutes, and financial documents in the company's domicile;
 - (vi) to disclose/report to the company, on his/her/families' share ownership in the company or other company, to be registered in a special shareholder register; and
 - (vii) to convene an AGMS and EGMS based on the request of: (a) shareholder(s) having 1/10 (one-tenth) or more shares with voting rights; or (b) BOC.
- b) BOC, among others:
 - (i) to perform a supervisory role in the policy and management of the company and give advice to the BOD;
 - (ii) to disclose/report to the company, on his/her/families' share ownership in the company or other company, to be registered in a special shareholder register;
 - (iii) to maintain the minutes of the BOC meeting;
 - (iv) to report the result of its supervision duty during the preceding financial year;
 - (v) to review the company's annual report prepared by the BOD; and
 - (vi) to represent the company, in case (a) all members of BOD have a conflict of interest with the company, and/or (b) there are currently no BOD members that are available (due to vacancy of all BOD positions or unavailability).

From the perspective of a compliance issue, the key challenges are to maintain updated internal rules in accordance to the everchanging regulations. Many non-compliance issues occur due to ignorance of the legal compliance division of a company on the issuance of new regulations instead of intentional negligence. This is especially true for companies in the financial sector which is heavily regulated.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

There is no prohibition under Indonesian Company Law to provide insurance or indemnity to BOD and BOC members.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Indonesian Company Law sets a general and broad authority to the BOD to represent the company inside or outside a court (but

subject to limitations provided in its Articles of Association). This means that the BOD has an important role in setting the course and changing the strategy of the company.

4 Other Stakeholders

4.1 What, if any, is the role of employees in corporate governance?

Indonesian Company Law does not specifically determine the role of employees in the corporate governance of a company.

Nonetheless, in practice, it is not uncommon for a company to disclose, discuss and negotiate certain management matters with their employees or the labour unions (if any), as factually employees become one of the most important elements in implementing good corporate governance in the company.

4.2 What, if any, is the role of other stakeholders in corporate governance?

There are no specific roles of shareholders in corporate governance under the Indonesian Company Law. However, certain corporate actions of the Company must first be approved in the GMS as elaborated in question 2.1 above.

4.3 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Indonesian Company Law and its specific implementing regulation (i.e. Government Regulation No. 47 of 2012 concerning Social and Environmental Responsibility of Limited Liability Companies) mandate companies that are engaged in the business field of or related to natural resources to implement Corporate Social Responsibility (“CSR”) programmes. The implementation of such programme is conducted by the BOD of the company, based on the company’s annual plan upon being approved by the BOC or GMS of the company. Both regulations state that failure to do the same shall be subject to sanctions under the laws and regulations, but without specifically mentioning the details of such sanction.

In addition, there is also a CSR obligation which is regulated under Indonesian Investment Law applied to investment companies (either domestic or foreign). Its elucidation defines CSR as “*responsibility that is attached to every investment company to maintain and create a harmonious and balanced relationship with local communities in accordance with the environment, values, norms and culture of the surrounding communities*”. Failure to comply with this obligation may result in certain administrative sanctions.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The BOD with the supervision of the BOC is responsible for the disclosure and transparency of a company.

For public companies, in addition to the BOD, certain disclosure should be conducted by their Corporate Secretary (provided that they have been authorised to do so by the BOD).

5.2 What corporate governance-related disclosures are required?

The Decision of the Minister of Industry and Trade No. 121/MPP/Kep/2/2002 concerning the Provisions of Annual Financial Report of Company Submission requires an Indonesian company with the following criteria to submit the Company’s Annual Financial Statement (*Laporan Keuangan Tahunan Perusahaan – “LKTP”*) and company profile (signed by management of the company and affixed by company stamp) to the Ministry of Trade:

- (a) (i) public company, (ii) a PT engaging in public fund raising – excluding Bank Perkreditan Rakyat (“BPR”), (iii) a PT issuing any acknowledgments of indebtedness, (iv) a PT having total assets of at least Rp 25,000,000,000, or (v) a PT which is a debtor and whose annual financial statements are audited by its bank;
- (b) a PMA company; or
- (c) a State-owned Limited Liability Company (*Persero*), Public Corporation (*Perum*), and Regional State-Owned Company (*Perusahaan Daerah*).

Specifically for public companies, OJK regulations require them to disclose, incidentally, any material information/facts which could affect the value of their securities and/or the investor’s decision within two working days of the existence of said material information/fact. In addition, they are required to procure certain reporting and disclosure periodically, and/or for specific corporate actions, among others, as follows:

- (i) annual report (i.e., accountability report by the BOD and BOC relating to the management and supervisory of the public company);
- (ii) annual financial report and semi-annual financial report;
- (iii) appointment and replacement of corporate secretary;
- (iv) report on the performance of duties of the remuneration and nomination committee (if a remuneration and nomination committee is established);
- (v) the GMS agenda and minutes of the GMS;
- (vi) increase in capital with or without rights issue;
- (vii) voluntary tender offer;
- (viii) public company takeover;
- (ix) public company merger and consolidation;
- (x) buy-back shares;
- (xi) Material Transactions; and
- (xii) Affiliated Transactions.

5.3 What is the role of audit and auditors in such disclosures?

An independent auditor will perform an audit of the Annual Financial Report in question 5.2 to be submitted to the Ministry of Trade and specifically for companies under categories # (a) and (b) in question 5.2 above. An independent auditor may also represent the company in submitting the report on behalf of the company.

For public companies, the legal auditor will perform a legal audit and issue a legal opinion.

5.4 What corporate governance-related information should be published on websites?

There are no requirements of mandatory disclosure to be published on websites by private companies.

For public companies, specific corporate governance-related information must be available on the website. These are, among others:

- The BOD and BOC working guidelines.
- Appointment and replacement of Corporate Secretary and Audit Committee.
- Company Ethics Codes.
- Audit Committee Charter.
- Committee's working guidelines.
- Management Risk Policy.
- Procedures for nomination and remuneration.

In addition, the disclosure of material information/facts by a public company must also be announced to public through the public company's website, in Indonesian or a foreign language (at least in English).

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