



Country Comparative Guides 2023

Indonesia

REAL ESTATE

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INDONESIA

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1. Overview

The basic law for land in Indonesia is Law No. 5 of 1960 on Agrarian (the “**Agrarian Law**”), a complex underlying law adopting customary (*adat*) laws developed over hundreds of years at rural village level, and as further modified by the Dutch colonial rules. Prior to the issuance of the Agrarian Law, *adat* law and western law coexisted, governing land registration for Indonesians and foreigners respectively. The Agrarian Law, as further implemented by various implementing regulations, creates a uniform regime and ends the dualism on land matters while still maintaining the communal concepts applicable to land under *adat* laws.

2. What is the main legislation relating to real estate ownership?

The main legislation for real estate ownership in Indonesia is the Agrarian Law, Law No. 20 of 2011 on Apartments, Law No. 4 of 1996 on Mortgage over Land and Objects Related to Land and Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation (which has been stipulated as Law by virtue of Law Number 6 of 2023) (the “**Omnibus Law**”), Law No. 28 of 2002 on Building as amended by Omnibus Law, Law No. 26 of 2007 on Zoning/Spatial Plan as amended by Omnibus Law (the “**Zoning Law**”), all of which are supplemented and implemented by numerous implementing regulations, including:

- Government Regulation No. 24 of 1997 on Land Registration (“**GR 24/1997**”);
- Government Regulation No. 18 of 2021 on Management Right (*Hak Pengelolaan*), Land Titles, Strata Title, and Land Registration;
- Government Regulation No. 13 of 2021 on the Implementation of Apartments;
- Government Regulation No. 21 of 2021 on the Implementation of Spatial Plans (“**GR 21/2021**”);
- Government Regulation No. 16 of 2021 on the Implementation Regulation of Law No. 28 of

2002 on Building;

- Government Regulation No. 14 of 2016 as amended by Government Regulation No. 12 of 2021 on the Implementation of Housing and Housing Areas;
- Government Regulation No. 22 of 2020 as amended by Government Regulation No. 14 of 2021 on the Implementing Regulation of Law No. 2 of 2017 on Construction Services;
- Minister of Agrarian Affairs and Zoning/Head of the National Land Agency (“**BPN**”) Regulation No. 3 of 1997 as amended several times and lastly by BPN Regulation No. 16 of 2021 on the Implementing Regulation of GR 24/1997;
- BPN Regulation No. 5 of 2020 on the Electronic Integration of Mortgage Services; and
- Minister of Agrarian Affairs and Zoning/Head of the National Land Agency (BPN) Regulation No. 3 of 2023 on Issuance of Electronic Documents in relation to Land Registration Activities.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

No.

4. How is ownership of real estate proved?

The Agrarian Law set a rule for all land in Indonesia to be registered with BPN. Therefore, as a general rule, the ultimate evidence of legal ownership of a real estate is a land title certificate issued by BPN where the land is located (with 5 years grace period after the issuance of land title certificate for a claim to be brought against the land title certificate).

Note, however, there are still many land banks located in rural areas that have not yet properly registered; hence lacking land certificates. In this case, the ownership of the real estate could be indicated by, for example, proof of tax payment by the “occupier”.

5. Are there any restrictions on who can own real estate?

Yes. The Agrarian Law divides titles over land title into several types, each is for a specific purpose and can be owned by a specific person (as elaborated in Q6).

6. What types of proprietary interests in real estate can be created?

The most common land/property titles recognised under Indonesian law related to real estate developments are as follows:

Right of Ownership (*Hak Milik*) or freehold gives the holder the fullest right a person can possess over land in Indonesia for an unlimited period. Only Indonesian citizens and certain limited Indonesian legal persons or entities can hold a *Hak Milik*.

Right to Build (*Hak Guna Bangunan - HGB*) allows its holder to construct buildings or facilities. An HGB is limited to a duration of 30 years, with a possible extension of 20 years and possibility for renewal(s). An HGB may be held by Indonesian individuals and Indonesian legal entities, including foreign investment companies (“**PT PMA**”).

Right to Cultivate (*Hak Guna Usaha - HGU*) allows its holder to cultivate the land for agriculture, plantation, fishery or livestock business. An HGU is limited to a duration of 35 years, with possibility for extension and renewal(s). Similar to HGB, HGU may be held by Indonesian individuals or Indonesian legal entities, including PT PMA.

Right to Use (*Hak Pakai*) authorises its holder to utilise land or to collect products from the land. A *Hak Pakai* may be held by Indonesian citizens and Indonesian legal entities, as well as foreign citizens who reside in Indonesia. A *Hak Pakai* can be granted for a maximum period of 30 years, with a possible extension of 20 years and possibility for renewal(s).

Right to Manage (*Hak Pengelolaan*) is granted for governmental bodies and agencies: such as: regional governments and state-owned companies to manage and control state lands.

Aside to the land titles, Indonesian law also acknowledges strata title ownership. Expatriates are now allowed to hold strata title over multistorey housing unit (such as apartment, condominium etc) build on an HGB land provided that the unit is located in a special economic area designated by the regulation, including a special economic zone, a free trade zone and an industrial estate area.

7. Is ownership of real estate and the buildings on it separate?

Yes, conceptually Indonesian law recognizes a horizontal ownership division principle (*horizontale scheiding*), where ownership of a land can be separated from the ownership of objects upon the land, including buildings. To have this separation of ownership, the building owner must sign an agreement with the landowner.

8. What are common ownership structures for ownership of commercial real estate?

For foreign investors, the real estate must be owned through their Indonesian investment company or PT PMA.

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

Buyers typically engage a local law firm to carry out a legal due diligence over the assets (e.g., land and building document and licences, existing contracts) and in some cases over the capacity of the seller. The process for assets legal due diligence is as follows:

- documents review to verify the details of the land, including registered owner, location, area, title validity;
- land verification check with BPN to confirm the existence of any mortgage or dispute over the land; and
- court verification to confirm the existence of any legal proceeding involving the land.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

Mostly factual matters, including environmental pollution, unknown/illegal occupants, and existing land and building condition.

These factual matters are normally dealt with land

surveyors or other consultants and included as representations, warranties and indemnifications in the transaction documents.

11. What is the usual process for transfer of commercial real estate?

The transfer of title of certificated land is done by way of the seller and the purchaser signing an Indonesian language land sale and purchase deed (*Akta Jual Beli* – “**AJB**”) in front of an Indonesian authorised land deed official (*Pejabat Pembuat Akta Tanah* – “**PPAT**”) that has jurisdiction over the transacted land is located. Legally, the title is transferred once the AJB is signed by the parties. Following the signing of the AJB, the PPAT must register the transfer with the land registry of BPN for recordation.

As the form of AJB is prescribed by the law, typically, in addition to the AJB, parties would also sign a separate sale and purchase agreement (SPA) to include their specific representation, warranties, undertakings, payment mechanisms as well as indemnification clauses.

12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Yes, this is quite common, especially considering the property acquisition tax (*Bea Perolehan Hak Atas Tanah* – BPHTB) of maximum 5% (depending on the location) of transaction price (or the property's taxable value, whichever is higher) applicable to buyer and 2.5% of the purchase price income tax applicable to seller in a real estate transaction.

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Yes, particularly for the period after the transfer, unless otherwise contractually agreed.

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

There are several various classifications of security, but the most common security for real estate (including land and building) is mortgage or locally known as *Hak Tanggungan*.

A holder of Hak Tanggungan can enjoy certain rights,

such as contractual prohibition on the real estate owner to transfer the ownership without a prior approval of the holder of Hak Tanggungan; and in the case of a default by the real estate owner, the holder of Hak Tanggungan (as a preferred creditor) has a right to offset any amount owed against the sale proceeds of the real estate.

15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

No, Indonesian law does not recognize beneficial ownership concept. The registered owner in the land certificate is considered as the legal owner of the land.

16. Is public disclosure of the ultimate beneficial owners of real estate required?

No, there is no beneficial ownership concept of real property under Indonesian law.

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

For an asset transfer deal, the seller is subject to income tax in the amount of 2.5% of the purchase price and the buyer is subject to the BPHTB in the maximum amount of 5% of the purchase price (or the property's taxable value, whichever is higher) depending on the region where the land is located.

The above is in addition to any applicable VAT and potential luxury-goods sales tax if the transaction value meets certain threshold.

Given that we are not qualified to advise on tax, we advise clients to consult with a qualified tax/financial adviser for further details on these taxation elements prior to transacting their real estate.

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

No prescribed commercial leases terms; but in practice, the common terms of commercial leases are, among others, the purpose of land utilization, duration of lease, rights and obligations of lessor and lessee (including whether there is any right to sub-lease, first right of refusal in case of land sale), termination of lease, lease renewal procedure.

No regulatory controls that limit the terms of commercial leases, other than standard regulatory protection rights for lessors and lessee provided under the Indonesian civil code zoning rules, and building utilization rules. This is a pure contractual matter.

In practice, land lease is normally longer (at least 2.5 – 5 years) than lease of office unit (starting from 1 year).

19. How are use, planning and zoning restrictions on real estate regulated?

Under the Zoning Law and GR 21/2021, the central government sets the general norms, standards and criteria of zoning plans, to be further implemented by the regional governments in their respective areas.

Specifically for forestry and coastal areas, these are subject to the respective regimes of the Minister of Environment and Forestry and the Minister of Marine Affairs and Fisheries.

The government controls the compliance with the zoning rules through, among others, issuing business licences and/or building construction approvals (*Persetujuan Bangunan Gedung* – PBG).

20. Who can be liable for environmental contamination on real estate?

Indonesian environmental laws adopt the “polluter pays” principle, which puts the environmental liability on the party which causes the environmental pollution/damage. On this basis, if the buyer can prove that it was not involved in the environmental contamination, the buyer should not be responsible for the contamination merely by possessing a property in the location concerned.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

Yes, certain class of buildings with high intensity, such as (i) mixed-use residential buildings with more than 4 storeys, office space with an area of more than 50,000 sqm, or (ii) warehouses, factories and shops with an area of more than 5,000 sqm and more than 4 storeys, are required to satisfy the ‘green building’ technical standards set out by the Government Regulation No. 16 of 2021 and the Minister of Public Works and Public Housing Regulation No. 21 of 2021.

The standard criteria cover various aspects, including

the land management planning, energy and water usage, air quality, eco-friendly material and waste management, eco-friendly supply chain for construction material, and eco-friendly construction process. Failures to comply with the applicable green building standards may be subject to certain administrative sanctions ranging from warning letter, suspension of construction to building demolition.

To encourage parties, such as, building owners and developers to meet the “green building” requirements, the government also introduces certain incentives such as reduction of governmental levies, and relaxation of building area coefficient ratio.

22. Is expropriation of real estate possible?

Yes, but only for limited reasons for public use set by the law, for example: roads, airports, terminals, oil and gas infrastructure for the national/regional spatial planning, in which case the law requires the government to pay compensation to the landowners.

The compensation form and amount will be determined based on the result of valuation by independent valuer appointed by the government. If the landowner does not agree with the compensation, it can file an objection to the court and request the court to determine the new compensation form and/or amount.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, to create a mortgage, the mortgagor and the mortgagee must sign a deed of mortgage before an authorized PPAT and have it registered with the BPN where the real estate is located.

The mortgage is created only after the registration of the mortgage with BPN is completed, which would be evidenced by a mortgage certificate.

In an enforcement event, the mortgagee cannot possess the land, but it must sell the land through a public auction or if certain conditions are met, through a private sale. Theoretically, the mortgage certificate has a self-executionary power without the need to obtain a court order for execution.

24. Are there material registration costs associated with the creation of mortgages over real estate?

Yes, there are certain fees and taxes payable when creating a mortgage that are payable to the PPAT and BPN, including the fees for the preparation, execution and registration of the mortgage deed. The fees are generally calculated on a percentage basis of the amount secured by the mortgage.

25. Is it possible to create a trust structure

for mortgage security over real estate?

No, Indonesian law does not recognize trust structure for security over real estate. The common structure recognized under the Indonesian law is for lenders (particularly foreign lenders) to appoint an Indonesian bank as their security agent to hold and administer mortgage security over real estate in Indonesia for and on behalf of the lenders including the foreign lenders.

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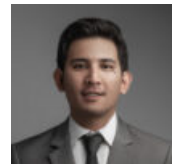
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