INDONESIA INVESTMENT UPDATES - CORPORATE GOVERNANCE IN INDONESIA: WHAT YOU NEED TO KNOW ABOUT THE BOARD OF DIRECTORS AND BOARD OF COMMISSIONERS

Posted on March 16, 2020

Category: CNPupdates

Date Published: 16 March 2020

Authors and Contributors: Jimmy Yap, Daphne Tan, and Lai Zheng Yong.

This article is the third in CNPupdate's series on Indonesia Investment Updates, and aims to provide you with a general overview of the laws and regulations governing foreign investments into Indonesia.

Board representation and control is of paramount importance to many and is therefore typically heavily negotiated in investment and joint venture agreements. Unlike common law jurisdictions such as Singapore, Malaysia, the United Kingdom, and Australia, Indonesia adopts a two-tier board system comprising of a Board of Directors and a Board of Commissioners. As the concept of a two-tier board may be foreign to many, this article aims to provide you with an overview of the key roles, duties, and liabilities of the members of each board.

What are the differences between the two boards?

The Board of Directors is responsible for the day-to-day management and operations of the company, whilst the Board of Commissioners, with no executive powers, merely supervises the Board of Directors. Both the Board of Directors and the Board of Commissioners are accountable to the shareholders of the company for their respective duties.
An individual may not serve on both boards simultaneously as that would defeat the purpose of the Board of Commissioners' supervisory function. Additionally, spouses should not respectively hold the office of

sole director and commissioner of a company, as Indonesian law may treat spouses as one and the same entity for the purposes of corporate governance.

How many members are required to sit on each board at any one time?

Indonesian law generally requires each company to have at least one (1) director and one (1) commissioner at all times. A higher requirement may be applicable for certain industries – for instance, commercial banks must have a minimum of three (3) directors, all of whom must be domiciled in Indonesia, and a minimum of three (3) commissioners.
Where there is more than one director or commissioner, a director and commissioner will be designated as the President Director and the President Commissioner. Where each board comprises more than one member at any one time, one among them must be designated as the President Director or President Commissioner, as the case may be.

What additional powers or obligations do President Directors and Commissioners have, as compared to the other members of the respective boards on which they sit?

The Board of Directors is authorised and able to act on behalf of the company, represent and bind the company in contracts with third parties, and undertake any act in relation to the management and operation of the company, subject to any restrictions or preconditions to their exercise of this authority as may be prescribed by the company's articles of association. However, unlike most common law jurisdictions where the indoor management rule applies, where any one director intends to bind the company, that individual director is typically required by third parties and governmental authorities to produce proof that they have in fact been authorised to bind the company in that particular transaction. A copy of the resolution passed by the Board of Directors is typically produced for this purpose. In contrast, a company's articles of association usually provides the President Director with the power to act for and on behalf of, and to bind the company without first having obtained a board resolution. The articles of association can also be amended to provide the President Directors with a casting vote.

Conversely, the President Commissioner does not enjoy any additional powers, relative to the other members of the Board of Commissioners. Further, where there is more than one member of the Board of Commissioners, the Board of Commissioners may act only as a collective body as opposed to individually. For this reason, it is advisable to ensure that there is at all times either an odd number of members on this board, or to provide the President Commissioner with a casting vote where there is parity in respect of the votes cast in relation to a particular resolution.

What are the general duties of the Board of Directors?

The Board of Directors' primary responsibility is to act in good faith and in the best interests of the company, in compliance with (i) the purposes and objectives of the company; (ii) the articles of association of the company; and (iii) the prevailing laws and regulations of Indonesia. The statutory duties, responsibilities, and authority of the directors are prescribed by Law No 40 of Year 2007 on Limited Liability Company ("**Indonesian Company Law**"). The relevant provisions of Indonesian Company Law should be construed and interpreted in accordance with the official elucidation thereto as may be amended from time to time. The duties prescribed by Indonesian Company Law includes, among others:

S/N	Statutory duties	Article of Indonesian Company Law
1.	To prepare and submit the company's annual work plan and budget for the subsequent financial year for review and approval from either the Board of Commissioners or the shareholders during the general meeting of the shareholders ("**GMS**"), as prescribed by the company's articles of association.	Articles 63 to 65
2.	To arrange for the preparation, compilation, and submission of the company's annual report to the shareholders at the GMS within six (6) months following the end of the company's financial year end.	Articles 66-67
3.	To ensure the upkeep and maintenance of the company's records, including, but not limited to: (a) the Register of Shareholders, which details the shareholding composition of the company; (b) the Special Register, which contains information on the shares held by members of the Board of Directors, Board of Commissioners, and their respective family members, in the company; these registers shall provide a chronological timeline of the change in shareholding composition and be made available in the domicile of the company; (c) the meeting minutes from the board meetings and the GMS; and (d) the accounting records of the company.	Articles 50 and 100
4.	Where required, to submit the company's financial statements to be audited by a certified public accountant. The audited financial statement shall be presented to the shareholders at the GMS after being signed off by both the Board of Directors and Board of Commissioners.	Article 68
5.	To declare the shareholding interest held by them, or their respective family members, in the company.	Article 101

What are the general duties of the Board of Commissioners?

The Board of Commissioners serves as a check and balance for the acts of the Board of Directors. The following are some of the statutory duties of the Board of Commissioners:

S/N	Statutory duties	Article of Indonesian Company Law
1.	To report on the performance and findings of their supervisory duties during the financial year to the shareholders during the GMS.	Article 116(c)
2.	To review and sign-off on the annual work plan and the audited financial statements.	Article 67
3.	To prepare and record meeting minutes of the Board of Commissioners' meetings.	Article 116(a)
4.	To declare the shareholding interest held by them, or their respective family members, in the company.	Article 116(b)

Indonesian Company Law confers the Board of Commissioners with a statutory right to (i) access the premises of the company; (ii) access the company's documents and records; (iii) inspect the company's accounts and financial statements; and (iv) require the Board of Directors to provide the Board of Commissioners with further information in relation to the affairs of the company at any time. Further, despite the determination of directors' remuneration being, by default, reserved for the GMS, Indonesian Company Law permits shareholders to delegate this duty to the Board of Commissioners. In the event where the responsibility is delegated to the Board of Commissioners, the decision will then be resolved by way of a resolution during the Board of Commissioners' meeting.

What are the liabilities of the members of each board?

The members of the Board of Directors are bound to act in good faith and in the best interests of the company. Indonesian Company Law provides that a director can be held personally liable for any loss suffered by the company as a result of misconduct or negligence in the performance of his duties. Where the board consists of more than one member, the members of the board are jointly and severally liable for the company's losses.

The Board of Commissioners may also be held accountable for the losses suffered by the company if the loss suffered by the company stems from the failure or negligence of the Board of Commissioners in performance of their supervisory function. In the specific case of a company's insolvency, the Board of Commissioners may be held jointly and severally liable with the members of the Board of Directors if the

Board of Commissioners' failure or negligence resulted in the company's insolvency.

On behalf of the company, action may be commenced against both or either of the Board of Directors and Board of Commissioners if shareholders, representing not less than 10% of the valid voting rights, approve the commencement of the action.

What are the general defences available to the members of the boards?

The members of the Board of Directors can avoid personal liability if they can prove all of the following:

- that the losses suffered by the company were not caused by any error or negligence on their part;
- that they had discharged their duties in good faith and with due care in the company's best interest and in accordance to the company's purposes and objectives;
- that in managing the affairs of the company, the director was not in a position of conflict of interest (whether directly or indirectly); and
- that sufficient measures were taken by the director to prevent the occurrence or continuation of such losses.

As for the members of the Board of Commissioners who are exposed to personal liability by virtue of the company's insolvency, personal liability can be avoided if it can be established that:

- the commissioner discharged their duties in good faith and with due care in the company's best interest and in accordance to the company's purposes and objectives;
- in supervising the management of the company, the commissioner was not in a position of conflict of interest (whether directly or indirectly); and
- the commissioner had advised the Board of Directors to prevent the occurrence or continuation of such losses.

Both the Board of Directors and Board of Commissioners hold significant legal responsibilities in operating a company. It is imperative for directors and commissioners to constantly stay abreast of regulatory development to ensure their working knowledge of the laws is up-to-date.