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Key Legal and Commercial Impacts on 2020 Indonesian Mining Law

On 10 June 2020, the Indonesian government has enacted Law No. 3 of 2020 on Amendment of Law No. 4 of 2009 on Minerals and Coal Mining (“Mining Law 3/2020”) as a response to certain issues on the implementation of Indonesian coal and mineral mining operations, which have so far been governed by the 2009 Mining Law. The following alert briefly highlights the new provisions and certain key legal and commercial impacts introduced by Mining Law 3/2020.

Overview

Mining Law 3/2020 contains several amendments, including, but not limited to:

- Mining areas determination;
- Centralization of authority for mineral and coal management;
- Re-arrangement of licensing matters;
- Investments and divestment obligations;
- Continuation of operations of Contracts of Work (*Kontrak Karya* or “**KK**”) and Coal-Mining Concession Work Agreements (*Perjanjian Karya Pengusahaan Pertambangan Batubara* or “**PKP2B**”) holders; and
- Other matters related to good mining practice (including, strengthening of restoration and reclamation/post-mining obligations).

The Indonesian government is currently preparing a series of government regulations (*Peraturan Pemerintah*) to implement Mining Law 3/2020. It is expected that these regulations can be issued within 6 (six) months from the Mining Law 3/2020 being enacted (based on media reports, we understand that these regulations are planned to be issued before the end of December 2020). Accordingly, many details and implementing regulatory framework for the law will be subject to these upcoming regulations.

Notwithstanding to the above, it is worth noting that certain parties have lodged a judicial review with the Constitutional Court on Mining Law 3/2020 and the case is currently in progress. Consequently, this needs to be monitored as the outcome may affect the overall regulatory framework governing Indonesian mining matters.

Determination of Mining Area

The initial key change under Mining Law 3/2020 is that a mining area is part of a mining jurisdiction (*wilayah hukum pertambangan*). As part of the mining jurisdiction, the mining area shall be the basis for determining mining business activities. The mining area is determined by the central government (following inputs from the relevant provincial government in accordance with its authority and consultation with the House of Representatives of the Republic of Indonesia). Having said that, it should give more assurance to mining companies, especially with respect to the point that when an area has been determined as a mining area, such zoning of the mining area will not be changed in the future.

In addition, the mining area is defined as an area that has mineral and/or coal potential in which such area is not limited by government administrative boundaries that are part of national spatial plans. Mining areas can therefore be located across regions or provinces, subject to mineralization, coal basins outline, etc. – hence, the centralized license approach as is discussed further below.

However, there is still a lack of clarity with respect to traditional overlapping issues (e.g. with forestry, palm oil plantations, and oil & gas concessions). Thus it is expected that usual area usage licenses/settlement arrangements (including the need to obtaining a forestry *Pinjam Pakai/Right to Borrow* license, where appropriate) are still applicable (especially, for pre-existing mining concessions which are subject to overlapping issues).

Assignment on State-owned Entity, Regional-owned Entity, and Private Entity

Ministry of Energy and Mineral Resources (“MEMR”) may be able to assign state research institutes, State-owned Entities (“SOEs”), Regional-owned Entities (“ROEs”), or private entities to conduct exploration and studies in the context of preparing Mining Business License Areas (*Wilayah Izin Usaha Pertambangan* or “WIUP”) for ferrous mineral and coal. SOEs, ROEs or private entities that receive such assignments of an area which is determined as WIUP, will have the right to match in respect of the WIUP area when it is being tendered out by the Indonesian government.

Such assignment will be further regulated in the implementing regulations. However, this still leaves some uncertainty since this assignment of prospective mining areas has never been regulated in previous regulations (although a similar concept has been adopted in other sectors e.g. geothermal, and oil & gas). From the perspective of SOEs and ROEs, it could be a concern that this approach might not be particularly supportive at face value given that these companies might need to incur exploration and study costs first, when the only incentive to do so is a right to match when the tender for the WIUP area in question is being held (unless financial sponsors/backers who might provide favorable terms for funding for pre-tender study costs can be identified).

It is also noteworthy that during the tender process, other parties can increase their bids significantly to a level not acceptable to SOEs or ROEs by paying more to win a concession (that may have already been subject to preliminary exploration by the SOEs/ROEs). It should be noted that when tendering, the government is required to disclose all relevant data about the WIUP area on an equal basis to all bidders/interested parties.

In addition, it is not entirely clear as to what would be the treatment when such other parties win the tender related to a WIUP area (with or without the SOEs/ROEs invoking their right to match). Would the Indonesian government reimburse pre-tender costs incurred? If so, what would be the timing and mechanism for such reimbursement? Would any reimbursement be made with interest? The rationale being that if there is no government assignment, the SOEs/ROEs can otherwise invest/deposit their funds which will provide some returns/interest.

Accordingly, this is something that will have to be carefully assessed by SOEs/ROEs/private investors who receive such government assignments.

Wider Range and Variety of Licenses

Companies engaged in the mining sector are required to obtain licenses which will be regulated under Mining Law 3/2020, such as:

- Mining Business License (*Izin Usaha Pertambangan* or “**IUP**”);
- Special Mining Business License (*Izin Usaha Pertambangan Khusus* or “**IUPK**”);
- IUPK for the Continuation of Operations of KK or PKP2B;
- Community Mining License (*Izin Pertambangan Rakyat* or “**IPR**”);
- Authorization Letter for Rock Mining (*Surat Izin Penambangan Batuan* or “**SIPB**”);
- Assignment License (*Izin Penugasan*) for mining activities relating to radioactive minerals;
- Transportation and Sales License (*Izin Pengangkutan dan Penjualan*);
- Mining Services Business License (*Izin Usaha Jasa Pertambangan* or “**IUJP**”); and
- IUP for Sales (*Izin Usaha Pertambangan untuk Penjualan*).

Based on Mining Law 3/2020, the authority to issue mining-related licenses is centralized with the national government. However, central government has the right to delegate its authority to provincial government level, for example in the case of delegation to provincial governments for issuing the IPRs and SIPBs.

Furthermore, subject to the contents of Mining Law 3/2020 implementing regulations which they are issued, it appears that under the new regulatory framework there may no longer be separate “Exploration” and “Production” licenses. If this is actually the case, this would simplify the licensing process and provide assurance to IUP holders that they can continue mining activities to the next stage without being restricted until they apply for another type of license, as long as they meet their statutory obligations, comply with the necessary reporting requirements and generally comply with relevant regulations related to mining licensing matters.

In respect of C-class minerals (e.g. rocks, clay, and limestone) licensing which has traditionally been reserved for locally-owned companies, albeit local-holding structures may have already been pre-existing, foreign-owned/controlled mining companies and their groups (e.g. cement companies) may need to review Mining Law 3/2020 and its future implementing regulations to ensure that their SIPB/C-class mineral mining licenses can still be held by their local subsidiaries (their group) and no restructuring will be required.

As a side note, Mining Law 3/2020 also requires certain adjustments of mining-related licenses within 1 (one) to 2 (two) years from Mining Law 3/2020’s enactment. These adjustments need to be processed and complied with by mining-related companies and local governments. It is likely that stakeholders of mining companies (e.g. lenders, off-takers) would want to have this obligation to be complied with and this may affect the terms of commercial arrangements between such stakeholders and the relevant mining companies.

New IUP/IUPK provisions

Mining Law 3/2020 introduces several matters with regards to IUP that would need to be considered by mining companies in carrying out their business activities, including:

- Mining Law 3/2020 introduces a one IUP one company concept (except for SOEs or IUPs for non-metal mineral and/or rock commodities, which can hold more than one IUP and/or IUPK). This means, unless being grandfathered, that one mining company having multiple IUPs will need to undertake a spin-off or certain corporate actions and assign its “other” IUP to an affiliated company which may lead to additional administrative burdens and requirements (e.g. separation of administrative reporting, contracts, and teams).
- An IUP holder that discovers other minerals in its WIUP area will be granted the priority to commercialize these other minerals. However, if the IUP holder elects not to do so, then an IUP for these other minerals can be granted to other parties.

- Under Mining Law 3/2020, an IUP for “integrated” metal mineral mining and coal mining shall be valid for 30 (thirty) years and guaranteed with an extension for a period of 10 (ten) years, after fulfilling the requirements in accordance with applicable laws and regulations. Although an IUP extension would need to comply with and meet statutory obligations, the word “guaranteed” sends a positive message to investors that to the extent they are meeting their statutory obligations and complying with applicable regulations related to extension of their IUP, Mining Law 3/2020 guarantees such extension. However, the drafting of Mining Law 3/2020 is not clear for integrated IUP metal/coal mining companies on whether the 10 (ten) year extension period extension is applicable until the life of the mine expires or it is for the usual 2 x 10 (ten) years extension period. It is expected that this would be clarified in the implementing regulations.
- In contrast to the previous mining law, Mining Law 3/2020 allows the transfer of IUP/IUPK, subject to MEMR approval. The minimum requirements to obtain such approval include (i) IUP/IUPK holders must have completed their exploration activities which can be evidenced by the availability of resources and reserves data; and (ii) IUP/IUPK holders must fulfill the administrative, technical, and financial requirements. IUP/IUPK companies and their stakeholders would need to consider the requirements which need to be met in connection with a transfer of IUP/IUPK, but at least there is currently no explicit reference in Mining Law 3/2020 about the IUP/IUPK transferor having to own 51% (fifty one percent) of the IUP/IUPK transferee (as previously regulated).

The detailed requirements related to IUP/IUPK transfers are expected to be included in the upcoming Mining Law 3/2020 implementing regulations. Accordingly, it will be prudent for mining companies and investors to wait to consider how this IUP/IUPK transfer regulatory framework would be outlined (including, if the abovementioned requirement for an IUP/IUPK transferor to own at least 51% (fifty one percent) of the IUP/IUPK transferee is re-introduced).

Assuming that the 51% (fifty one percent) ownership requirement of the IUP/IUPK transferor in the IUP/IUPK transferee is no longer required, an IUP/IUPK transfer may provide convenience when conducting restructuring in the secondary market for mining concession sales/M&A activities (e.g. avoid assuming unnecessary risks when the transaction is a share-based transaction where the buyer needs to buy the target company’s shares in order to obtain control/ownership/holding of the target concession IUP) and depending on the stage and scale of such target mining companies (e.g. green-field, or brown-field).

Stand-alone Smelters – Mining Processing/Refining Business Licenses

Mining Law 3/2020 has given clarity to the dualism of the licensing regime for stand-alone/non-integrated mining smelters/processing/refining companies by regulating that licenses for this type of companies will only be issued by the Ministry of Industry.

Having stand-alone/non-integrated smelters provides structuring flexibilities between the mining asset and the smelting asset given that those two assets can be held by different stakeholders/project sponsors and with a different set of capital and financing structures (including security package) and, indirectly, avoid “divesting” the smelting asset when a mining company requires to meet its mandatory divestment obligations. However, careful tax planning would need to be made particularly related to off-take arrangements (for both feedstock and final processed products) given potential tax-leakage which may arise in this structure.

Divestment Obligations

Mining Law 3/2020 stipulates that a foreign-owned IUP holder company is required to gradually divest 51% (fifty one percent) of its shares to the central government, regional government, SOE, ROE, and national private entity. In the event that direct divestment cannot be implemented after the gradual divestment procedures, such divestment can be carried out through an initial public offering of the mining company on the Indonesian Stock Exchange.

However, Mining Law 3/2020 does not specifically provide detailed timing requirements for such divestment. Previously, divestment was regulated to be started at the latest after the 5th (fifth) year of production and total 51% by the 10th (tenth) year of production. Whether or not this timing concept will be re-introduced in Mining Law 3/2020 implementing regulations remains to be seen and monitored given that the absence of a specific divestment timing framework may lead to debates that

such divestment, technically, can be implemented at a very late stage of mining operation when the resources have been depleted and the mine is no longer economical.

KK/PKP2B Extension

Under Mining Law 3/2020, upon meeting certain statutory requirements (specifically as to an increase of tax and non-tax state revenues), an extension of the KK/PKP2B concession period shall be “guaranteed”. In connection with the extension period itself, if the KK/PKP2B has not been previously extended, the extension can be made for 2 (two) times each for a maximum period of 10 (ten) years. If the KK/PKP2B has previously received its first extension, then such KK/PKP2B can receive its second extension for a maximum period of 10 (ten) years. The abovementioned extensions are made in the form of IUPK for the Continuation of Operations of KK/PKP2B.

Applications for extension of the KK/PKP2B (together with all the necessary administrative requirements and documentation), will have to be submitted to the MEMR at the earliest 5 (five) years and the latest 1 (one) year prior to the expiration date of the respective KK/PKP2B.

Mining Law 3/2020 also mention matters related to plans for developing the existing mining area of the KK/PKP2B as part of the extension consideration. It is not entirely clear whether the existing mining area can still be preserved when the extension is granted or whether the government will require some portion to be relinquished. If there is a reduction/relinquishment of mining area, this might adversely impact the relevant KK/PKP2B companies and remains something to be monitored. A reduction/relinquishment of mining area should not be the case given that the original extension provisions under the KK/PKP2B contracts mainly deal with concession period extension issues and not mining/concession area. To the extent that the Indonesian government and the relevant KK/PKP2B companies can agree on matters related to state revenues, and assuming that other statutory administrative matters related to such extension are being fulfilled, the extension period should be able to be granted without the need for any relinquishment (unless the KK/PKP2B companies themselves voluntarily are willing to relinquish part of their existing mining/concession area).

If the extension is granted, this would allow KK/PKP2B companies to continue mining operations and consequently this may allow them to revisit their funding needs which may lead to them undertaking fund raising activities to support their operations going forward (including where necessary refinancing existing loans which may be maturing soon). In addition, mining service contractors which are serving those the KK/PKP2B companies may also expect that their mining service contracts will be extended by these KK/PKP2B companies as well, and if their mining service contracts are also extended, these mining service contractors may also similarly revisit their funding needs and consider their own fund raising activities.

Others Matters to be considered in Mining Law 3/2020

Export of Unprocessed Minerals/Ores

KK/IUPK/IUP mineral holders can still export raw and unprocessed minerals/ores within 3 (three) years from the enactment of Mining Law 3/2020 subject to meeting prescribed requirements (e.g. has conducted refining activities (or is in the process of developing refinery facilities)) and/or has entered into refinery cooperation with local smelters, pay export levies, etc. Whilst the concept reflects previous practice and framework, the additional 3 (three) years period gives relief for mineral ore exporters as they may resume ore production for export and thereby create some interim cash flow.

Dedicated Mining Road

Holders of IUP and IUPK are required to utilize dedicated mining roads during their mining activities. These roads may either be constructed by themselves or in cooperation with other IUP or IUPK holders which have already constructed mining roads or other parties that are in possession of mining roads. This provision reflects current practice. But this leaves open the question of whether local governments (and NGOs/non-governmental organizations) would push this point somewhat aggressively and pressure mining companies to allocate both Capex and Opex to build and maintain dedicated mining roads (which is what has happened in several locations across Indonesia).

Reclamation and Post-mining Plans & Funds and Activities

Mining Law 3/2020 require IUP and IUPK holders to prepare reclamation and post-mining plans and funds. Further, IUP and IUPK holders in production o are required to implement the relevant reclamation and post-mining activities with a 100% success rate prior to reducing the size of or returning their WIUP or WIUPK. Failure to comply with such provisions may result in sanctions imposed on IUP and IUPK holders in the form of a maximum of 5 (five) years of imprisonment and a maximum fine of IDR 100,000,000,000 (one hundred billion Indonesian rupiah). There has yet to be a clear technical explanation about this, but it is expected that further explanation will be provided in the upcoming implementing regulations.

Postponement of New Licensing Issuance

Based on letter number 742/30.01/DJB/2020 dated 18 June 2020, issued by the Directorate General of Mineral and Coal, a provincial Governor is still able to supervise and implement his authority on mineral and coal mining activities within his provincial area, up until 6 (six) months from 10 June 2020 or the issuance of Mining Law 3/2020 implementing regulations (whichever is earlier). However, the Governor cannot issue new licenses (IUP, IPR, Temporary Transportation and Sales License, IUP of Production Operation for processing and/or refining, IUJP, and IUP of Production Operation for sales) during this period. License applications that have been submitted to the Governor before 10 June 2020 (but have not been issued) cannot be processed.

Applicability to Special Autonomous Provinces Unless Regulated Otherwise

Mining Law 3/2020 stipulates that it is also applicable to special autonomous provinces (such as Papua, West Papua, Aceh, Yogyakarta and Jakarta) to the extent that mining-related matters regulated under Mining Law 3/2020 are not specifically regulated otherwise in the relevant laws governing the special autonomous nature of such provinces. It suggests that this Mining Law 3/2020 is intended to be applicable throughout all of Indonesia including those areas which have special autonomy characteristics and implies an equal treatment and assurance, unless there is a strong legal basis to deviate from the mining regulatory framework set out under Mining Law 3/2020.

With the issuance of the Mining Law 3/2020, Indonesian mining companies and stakeholders may need to revisit their licensing, business structures and operational matters so as to ensure that they are in full compliance with such law and be mindful with the upcoming implementing government regulations which would be issued by the Indonesian government. Clearly, more technical and detailed regulatory framework would be addressed in these implementing government regulations and accordingly these are something which need to be anticipated and carefully assessed.

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