

Strategi Mitigasi Risiko Pelaksanaan *Step-In Rights* dalam Perjanjian Pembiayaan Proyek Pembangkit Listrik di Indonesia

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Abstrak

Project financing infrastruktur di Indonesia sering memanfaatkan skema pinjaman jangka panjang antara kreditur dan perusahaan proyek. Salah satu klausul penting dalam perjanjian pembiayaan adalah *step-in rights*, yang memberi wewenang kepada kreditur untuk mengambil alih pengelolaan proyek jika terjadi wanprestasi oleh perusahaan proyek. Namun, implementasi *step-in rights* menghadapi beberapa tantangan, terutama terkait dengan ketidakjelasan pengaturan dalam perundang-undangan, kemampuan kreditur untuk mengambil alih operasional, serta koordinasi antara pihak-pihak terkait. Oleh karena itu, penelitian ini bertujuan untuk menganalisis strategi mitigasi risiko yang komprehensif dalam penerapan *step-in rights* pada kontrak pembiayaan proyek pembangkit listrik di Indonesia. Metodologi yang digunakan adalah studi literatur dan analisis peraturan terkait. Hasil penelitian menunjukkan perlunya pengaturan yang jelas mengenai *step-in rights* pada kontrak, analisis kemampuan kreditur untuk mengambil alih operasional, mekanisme transisi yang terencana, serta keterlibatan pemerintah dalam mengawasi dan memfasilitasi pelaksanaan hak tersebut. Rekomendasi strategi mitigasi risiko disusun berdasarkan temuan ini untuk memastikan efektivitas penerapan *step-in rights* dalam *project financing* infrastruktur di Indonesia.

Kata Kunci: strategi mitigasi risiko, *step-in rights*, *project financing* infrastruktur.

Risk Mitigation Strategies for The Implementation of Step-In Rights in Power Plant Project Financing Agreements in Indonesia

Abstract

Infrastructure project financing in Indonesia often utilizes long-term loan schemes between lenders and project companies. One important clause in the financing agreement is the step-in rights, which authorizes the creditor to take over the management of the project in the event of default by the project company. However, the implementation of step-in rights faces several challenges, mainly related to the unclear arrangements in the legislation, the ability of creditors to take over operations, and coordination between related parties. Therefore, this study aims to analyze a comprehensive risk mitigation strategy in the implementation of step-in rights in development project financing contracts in Indonesia. The methodology used is a literature study and analysis of related regulations. The results show the need for clear arrangements regarding step-in rights, analysis of the creditor's ability to take over operations, planned transition mechanisms, and government involvement in supervising and facilitating the implementation of these rights. Risk mitigation strategy recommendations are developed based on these findings to ensure the effectiveness of step-in rights implementation in financing development projects in Indonesia.

Keywords: risk mitigation strategy, *step-in rights*, development project financing.

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INTRODUCTION

The demand for electricity in Indonesia continues to increase in line with economic growth and population growth. To meet this demand, the Indonesian government has encouraged the development of power plants through project financing schemes, where lenders provide financing with the expectation of a return on their investment.¹ In a project finance scheme, the company that plans to build the infrastructure project (sponsor company) will set up a new company specifically for the purpose of building and operating the project.² This new company can be referred to as a Special Purpose Vehicle (SPV) or project company. The sponsor company will typically contribute 30% of the capital for the project. The remaining capital will be raised through creditors in the form of non-recourse debt. Under nonrecourse debt, if the project company fails to fulfill its obligations, the creditors are not entitled to claim the assets of the sponsor company. Creditors are only entitled to claim the fulfillment of their rights through assets owned by the project company.³ The scheme operates under a project finance agreement that is usually made for a long period of time, between 20 to 30 years. Anything can happen during this period, and risks that were unknown at the time of signing the agreement can suddenly emerge after a few years. Therefore, one of the most important things that must be considered in project finance is the risk allocation between the lender, project company, and various other shareholders. All of these parties must know the extent to which they should be liable when something goes wrong that harms their interests.⁴ In a project financing scheme, the lender as the party providing the financing needs collateral to increase the trust in financing the project. This guarantee is useful to minimize the risk of large losses on the creditor's side when problems occur in the funded project.⁵

In Indonesian law, there are several types of material security institutions, namely pledge, fiduciary, mortgages, and warehouse receipt guarantees.⁶ However, apart from these types of guarantees, there is a clause that is commonly used in project finance agreements and is quasi-secured, namely the step-in rights clause.⁷ Step-in rights is a clause that gives the creditor the right to take over the project when the project company fails to carry out the obligations stipulated in the project finance agreement.⁸

The step-in rights clause, which is a complement to various other collateral institutions, provides a sense of security to creditors to co-finance projects implemented by the project company. Step-in rights clauses in project financing agreements in Indonesia are important to mitigate the risk of project failure and protect the interests of creditors. However, specific regulation on Step-In-Rights has not been found in the Indonesian laws and regulations.⁹ The

¹ Irwanugroho, H. "Penjaminan Proyek Kerjasama Pemerintah Dengan Badan Usaha Melalui Badan Usaha Milik Negara Ditinjau Dari Hukum Jaminan". *Jurnal Poros Hukum Padjadjaran*, 1(1), 2019, pp. 1.

² Teitey, E. "The Role of Project Finance in Modern Financing", *International Journal of Research in Finance and Marketing*, Volume 6, Issue 5, 2016, pp. 100.

³ Agrawal, A. "Risk Mitigation Strategies for Renewable Energy Project Financing". *Strategic Planning for Energy and the Environment Journal*. Vol. 32:2, 2012, pp. 10.

⁴ Yuniarti, yuniarti, & Junita, F. "Prinsip Proporsionalitas Dan Governance Terhadap Alokasi Dan Transfer Risiko Dalam Skema Kerjasama Public-Private Partnership (Ppp)", *Yuridika*, 32(3), pp. 544.

⁵ Mulyati, E., & Aprilianti Dwiputri, F. "Prinsip Kehati-hatian Dalam Menganalisis Jaminan Kebendaan Sebagai Pengaman Perjanjian Kredit Perbankan", *Acta Diurnal Jurnal Ilmu Hukum Kenotariatan*, 1 (2), 2018, pp. 136.

⁶ Law No. 42 of 1999 on Fiduciary Guarantee; Law No. 4 of 1996 on Mortgage Rights.

⁷ Step-in rights are not a recognized security in Indonesian positive law. However, step-in rights clauses are commonly used as collateral in project finance agreements. In fact, the law of guarantee in Indonesia is closed so that the parties may not pledge anything other than what has been stipulated in Indonesian law. Therefore, the author refers to the practice of step-in rights as quasi-guarantee. See: Salim HS, 2014, *Development of Security Law in Indonesia*, Ed.1-8, Jakarta, Rajawali Pers, pp. 12-13.

⁸ M. Madykov, "Step-in Right as a Lender Protection Mechanism in Project Financed Transactions", *DePaul Business and Commercial Law Journal*, 2015, Vol. 13, pp. 273-275.

⁹ N. A Klarisa Sitompul et. al. "The Urgency of Implementing Step-In Rights Clauses in Project Financing Contracts in Indonesia", *Recht Studiosum Law Review*, Vol. 3 No. 2 (2024): Volume 3 Nomor 2 (November - 2024). pp. 223.

relevant regulations mostly regulate the transfer of contracts and concessions, including in certain sectors such as mining and electricity. Some regulations that allow the practice of step-in rights in Indonesia's infrastructure sector include; (i) Law No. 2 of 2017 on Construction Services; (ii) Government Regulation No. 27 of 2014 on the Management of State/Local Property; and (iii) Presidential Regulation No. 38 of 2015 on Government Cooperation with Business Entities in the Provision of Infrastructure.

Despite the absence of regulations that clearly regulate step-in rights, the implementation of Step-In Rights in practice can pose various challenges and risks, for example when creditors will exercise step-in rights when the project company fails to perform its obligations as agreed. When the creditor exercises step-in rights, the creditor will take over the management of the project at any level, whether in construction, operation, maintenance, and other obligations related to the project. The question that arises is, does the creditor, which is usually a banking company, have the necessary licenses to directly manage the project? In the context of a power plant project, for example, does the creditor have the required General Electricity Supply Business Licence (IUPTLU)?

In addition, although creditors are allowed to appoint other contractors to carry out project management, another question that arises is whether the time required in the process of transferring management will not interfere with the fulfillment of the creditor's obligations as the new project manager to other parties? For example, in the context of a power purchase agreement, where the manager of the power plant has an obligation to sell a certain amount of electricity in the amount and time agreed with PLN.¹⁰ If there is a halt in the operation of the power plant, this risks causing the electricity sales target to not be met. The consequence of not meeting the electricity sales target is that creditors may be charged with various costs that could have been avoided. For example, creditors may have to pay fines due to default on the power purchase agreement, or even bear other costs arising from the cessation of power plant operations.

The smooth transition process of project management is crucial to ensure that contractual obligations, especially related to electricity sales, can continue to be fulfilled without obstacles. Therefore, it is necessary to comprehensively assess the readiness and ability of creditors to directly take over project management, both in terms of the necessary licenses and the impact on the continuity of project operations as a whole. This is important to ensure that the implementation of Step-In Rights can be carried out effectively without causing bigger problems.

This study aims to analyze the risk mitigation strategies that can be applied in the implementation of Step-In Rights in power plant project financing agreements in Indonesia. The results of this study are expected to provide insights for stakeholders, including creditors, debtors, and the government, in drafting financing agreements that are more effective and balanced in accommodating the interests of various parties.

RESEARCH METHOD

The method used in this research is the normative juridical method which emphasizes research on secondary data. The secondary data in question are primary legal materials such as relevant laws and regulations, secondary legal materials consisting of book literature, scientific works of legal scholars, research in the form of journals and articles related to the problems to be studied, and tertiary legal materials such as online law, encyclopedias, and internet sites. The method used to analyze data in this research is a qualitative juridical method to produce descriptive data.

¹⁰ Muhammad Ghiffari, Budi Santoso, Hendro Saptono, "Tinjauan Yuridis Terhadap Perjanjian Power Purchase Agreement dan Finance Lease Agreement Pembangkit Listrik Tenaga Uap Tanjung Jati B Unit I-IV", *Diponegoro Law Journal*, Volume 6, No. 2, 2017, pp. 6.

DISCUSSION AND ANALYSIS

Implementation Risk of Step-In Rights as Quasi-Guarantee in Project Financing

Step-in rights are not a recognised form of security under Indonesian law. Nonetheless, the practice of applying a step-in rights clause that is quasi-secured makes this practice supposed to fulfill the requirements of a security. A thing is considered to fulfill the requirements of a guarantee if it provides certainty to the creditor that the collateral is available for execution at any time, if necessary, it can be easily cashed to pay off the debtor's debt. An object pledged by the debtor is the debtor's good faith to ensure the repayment of his debt to the creditor. Likewise, for the creditor, it will create confidence that the debtor has good faith in repaying his debt to the creditor. Therefore, the collateral should have economic value and be tradable. Having economic value means that the collateral object is an object that can be valued in money, while being tradable means that the collateral object can be transferred to another person.¹¹ Thus, it can be concluded that the most important thing about a guarantee is whether it can be executed or not. A collateral that cannot be executed will certainly not provide any benefit to the creditor who receives the collateral.¹² Even worse, do not let the collateral that is difficult to execute actually provide losses to the creditor.

Step-in rights clauses are usually applied in project finance agreements. Project finance agreements can be applied to housing projects and office buildings as well as to vital infrastructure projects such as toll roads and power plants. As explained earlier, the step-in rights clause gives the creditor the option to take over the management of a project when the debtor defaults. The project can be taken over at any stage, including management. The execution of a step-in rights clause in a private project finance agreement may not face any problems in its execution. However, it will be very different from the execution on vital infrastructure projects where the implementation requires complicated licenses. For example, to take over an office building project, the creditor only needs to temporarily stop the operation of the building and then restart it when a new implementation contractor has been appointed. This changeover process can be done in a short period of time if the procurement process goes off without a hitch. In fact, the changeover process can be done without stopping building operations. The potential loss from the change of management is limited to the increase in operational costs, such as construction workers' salaries and equipment costs.

An example of the application of step-in rights can be found in the case of *The Royal Bank of Scotland v. Chandra*. In this case, The Royal Bank of Scotland provided a loan to Chandra to build a hotel project. Both parties agreed to give The Royal Bank of Scotland the right to step-in when Chandra experienced difficulties in building the project. Unlike the practice of step-in rights in general, the step-in rights held by the bank on Chandra's project also acted as collateral security. When the project encounters problems, the project will be temporarily halted and Chandra will notify the bank to exercise the step-in rights.¹³

In addition, the practice of step-in rights also applied in France, a country that adheres to the Civil Law system. However, there is no written law that specifically regulates step-in rights but this practice is carried out with a contractual approach.¹⁴ In addition to the step-in rights clause between the bank and the project company, the step-in practice will also be supported

¹¹ Supianto. *Hukum Jaminan Fidusia Prinsip Publisitas Pada Jaminan Fidusia*, Jember: Garudhawaca, 2015, pp. 29.

¹² Khifni Kafa Rufaida dan Rian Sapiro, "Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial yang Sah", *Jurnal Ilmu Hukum*, 2019, Volume 4, No. 1, pp. 30.

¹³ Graham D. Vinter. *Project Finance : A Legal Guide*, Sweet & Maxwell, 2006, pp.295.

¹⁴ Antoine A. Maggiar, "Step-in Rights: Report for France, 56th Congress of Int'l Assoc of Lawyers 2 (Oct. 31 - Nov. 4, 2012), on Murat Madykov, "Step-in Right as a Lender Protection Mechanism in Project Financed Transactions", *DePaul Business and Commercial Law Journal*, 2015, Volume 12, Issue 2, pp.291.

by the *'pour autrui'* clause in each agreement between the project company and the contractors. The clause states that when the bank exercises the step-in rights, the contractor's employment agreement will be transferred to the bank. In essence, the contractor will continue to carry out its duties as a fulfillment of contractual obligations to the bank. The bank will take over the project company's position on any contracts related to the project, including all rights and obligations originally held by the project company.¹⁵

Back to the concept in Indonesia, unlike housing and office building projects, infrastructure projects such as toll roads and power plants carry greater risks. As a basis, infrastructure projects are usually implemented through build-operate-transfer (BOT) or build-own-operate-transfer (BOOT) schemes. In the BOT scheme, the project is built at the expense of the project company.¹⁶ After the project is built, the project company is given the right to operate the project for the agreed period of time and then return the project to the government as the project owner.¹⁷ This scheme can be found in Government Regulation Number 27 of 2014 concerning Management of State/Local Property, Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure, and Minister of Home Affairs Regulation Number 19 of 2016 concerning Guidelines for the Management of Regional Property. Meanwhile, in the BOOT scheme, the project that is established belongs to the project company. The project is built at the full cost of the project company and operated by the project company for a certain period of time. After the period ends, the infrastructure built in the project is handed over to the government. Examples of projects that apply the BOOT scheme are power plant construction and operation projects.¹⁸ Both schemes emphasize that in the end, the project that has been built by the project company will be handed over to the government. Therefore, all parties involved in project finance must be able to ensure that the construction and operation of the project with a limited time can provide benefits for all parties.

The link between the two schemes and the risk of implementing step-in rights is that the process of implementing the scheme must go through a very long process, for example through a tender, auction, or direct selection/appointment mechanism. Although the laws and regulations allow for the transfer of project operation rights, in reality, the transfer of rights cannot be implemented easily. The business entity that becomes the successor contractor must ensure that it has all the business licenses to continue the construction and/or operation of the project. For example, in a power plant project for the public interest, the business entity must have a General Electricity Supply Business Licence (IUPTLU). In addition, the appointment of a replacement contractor by the creditor (which is generally a banking company) must follow the procurement procedures for goods and/or services in accordance with Good Governance in Banks as referred to in Article 116 of the Financial Services Authority Regulation Number 17 of 2023 concerning the Implementation of Governance for Commercial Banks. This is in accordance with the principle of prudence where in carrying out its business activities, banks must be careful, thorough, professional, based on good faith, and comply with all laws and regulations.¹⁹ These two examples are only a small part of the various procedures that make the implementation of step-in rights until the creditor can resume project operations take a lot of time.

On the other hand, certain infrastructure projects impose obligations on both the project

¹⁵ *Ibid*, pp. 292.

¹⁶ Helena Primadianti Sulistyningrum, *Karakteristik Perjanjian Build Operate Transfer (BOT) Sebagai Bentuk Perjanjian Innominate*, Lex Lata: Jurnal Ilmiah Ilmu Hukum Vol 2, No 1 (2020): Vol 2, No 1, Maret 2020, pp. 2.

¹⁷ Ima Oktorina, *Study on Financing Cooperation with BOT System in Traditional Market Revitalization*, Semarang: Diponegoro University, 2010, pp. 12.

¹⁸ Article 4 paragraph (3) Minister of Energy and Mineral Resources Regulation No. 10/2017.

¹⁹ Hermansyah, *Hukum Perbankan Nasional Indonesia*, Jakarta: Prenadamedia Group, 2014, pp. 19.

company and the creditor that has taken over the project to fulfill certain performance obligations to third parties (government or state-owned enterprises) on an ongoing basis within a certain period of time. For example, in a power plant project, the party that is bound by a Power Purchase Agreement (PPA) with PLN is obliged to provide electricity as agreed in the PPA. If it fails to do so, it must pay a penalty to PLN.²⁰ The penalty is an additional expense that certainly has a loss impact, especially for creditors who have just exercised step-in rights. Such potential loss can be avoided from the beginning by mitigating the project finance agreement between the project company and the creditor.

Risk Mitigation Measures for The Implementation of Step-In Rights in the form of Project Transfer from Debtors to Creditors in Project Financing

In the case of step-in rights, the creditor must consider whether the option will prevent the company from incurring losses or rather it will increase the company's losses. The creditor should also consider whether it will operate the expropriated power plant itself for the remainder of the plant's operating life or only temporarily until another contractor is willing to take over the operating responsibility.²¹ Even if the creditor is convinced to take this option, the creditor must also consider whether the time, situation and conditions are right to exercise the step-in rights.²² In addition to near-execution considerations, risk mitigation for the exercise of step-in rights can also be done during the preparation of the cooperation contract with the project company.

There are several ways that can be an option to avoid losses due to the risk of step-in rights exercise as described in the previous section. The first way is to include a transition-out obligation clause in the project finance agreement. This clause will regulate that when the creditor exercises the step-in rights, the project company is obliged to continue operating the project until the creditor obtains a contractor who can take over the operation of the project.²³ This clause should also regulate the responsibility for financing project operations during the transition period in a way that is not burdensome to both parties. However, this solution also carries the risk of the project company falling into bankruptcy. In the event of bankruptcy, the control of the project company will be exercised by the curator where all assets owned by the project company will be used to pay all debts owed by the company.²⁴ Therefore, the implementation of the transition clause can be constrained and ultimately become part of the debt that can only be paid in the form of money through the bankruptcy estate. In fact, the main issue faced by the creditor in this case is not money, but a company that is able to operate the project on behalf of the creditor to fulfill the performance with third parties until the creditor succeeds in appointing a new contractor.

To deal with such risks, creditors may include penalty provisions in the transition clause. Such penalties will bind the project company, including the curator, to perform the obligations under the transition clause. Basically, this clause will not bind the receivers directly. However, the amount of the fine stipulated in the clause will make the curator consider it as a going concern that can increase the bankruptcy estate or at least keep the bankruptcy estate from decreasing. This is in accordance with the curator's obligation to manage and/or administer the bankruptcy estate.²⁵ In addition, this practice is also permitted by the laws and regulations in the field of bankruptcy.²⁶

²⁰ Article 16 paragraph (1) and (2) Minister of Energy and Mineral Resources Regulation No. 10/2017.

²¹ Wick, Peter --- "Step-in Rights: A Supplier's Perspective", AUMPLawAYbk 9; (1997) Australian Mining and Petroleum Law Association Yearbook, 1997, pp. 122.

²² J. Dalhuisen, *Transnational Comparative, Commercial, Financial and Trade Law*, Oxford and Portland, Oregon, 2016, pp. 611.

²³ Rossi, Carla Milani do Prado, *Step-In Rights Mechanisms in Project Finance Transactions and Lenders' Liabilities – The English and Brazilian Legal Approaches* (January 23, 2018). FGV Direito SP Research Paper Series, pp. 5.

²⁴ Article 16 paragraph (1) of the Bankruptcy Law.

²⁵ Rio Christiawan, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*, Depok: Rajawali Press, 2020, hlm. 120.

²⁶ Article 104 of the Bankruptcy Law.

The second solution is to take over control of the project through the execution of a pledge of project company shares. The advantage of this mechanism is that the creditor does not need to find a new contractor to operate the repossessed project. In addition, the creditor can use all the resources owned by the project company so there is no need to incur additional costs to demobilize the available equipment. Most importantly, there is no operator transition period that may interfere with the fulfillment of the third-party performance. However, this solution can face problems when the shares in the project company are partially or wholly owned using state finances, either through BUMN or BUMD. Based on Article 50 of Law Number 1 Year 2004 on State Treasury, money or goods owned by the state/region or controlled by the state/region are prohibited from being confiscated by anyone. Therefore, creditors cannot take over project company shares owned by BUMN or BUMD. This solution can still be applied if the shareholding by the BUMN or BUMD does not represent the majority of shareholding and/or does not have special rights to control the company. To face this risk, creditors must be observant in looking at the composition of the shareholders of the project company.

The second solution also has another problem, which is that the execution of a share pledge or fiduciary does not necessarily make the creditor own shares in the project company. This is in accordance with the provisions of Article 1154 of the Indonesian Civil Code (ICC) and Article 33 of Law No. 42/1999 on Fiduciary Guarantees. According to both regulations, the creditor may not include an agreement to own the object of the pledge and fiduciary guarantee when the debtor defaults.²⁷ This is also in accordance with the principle of *pactum commissorium*.²⁸ The execution of pledge and fiduciary guarantees must follow the applicable execution procedures. To solve this problem, the creditor can require the debtor not to mortgage the project company's shares. Instead of mortgaging the shares, the creditor can enter into a conditional agreement with the sponsor company in accordance with the provisions of Article 1253 of ICC where when the project company fails to fulfill its obligations as stipulated in the project finance agreement, the sponsor company agrees to surrender its shares in the project company to the creditor. The implementation of this agreement will follow the procedures for transferring share ownership in accordance with the provisions of the prevailing laws and regulations.

The third solution that can be used as an option is to prepare a replacement contractor company before exercising step-in rights. The replacement contractor can come from another business entity engaged in the relevant business field or by establishing a subsidiary that is specifically prepared to execute the takeover of project management involving the parent company as a creditor. Creditors that finance more than one project in the same field should have a subsidiary that has a business license to operate the project. Regardless of which business entity is prepared as the replacement contractor, the business entity should be ready to operate before the step-in rights are exercised. If possible, the replacement contractor can also be involved in the project finance agreement with the project company.

The disadvantage of such a solution is that it may require the creditor to pay additional costs to ensure the readiness of a replacement contractor whose services may not necessarily be utilized by the creditor. In addition, given that the project finance agreement is implemented over a very long period of time, there is no guarantee that the business entity prepared as the replacement contractor is still operating when the creditor exercises its step-in rights. To deal with these risks, creditors must be selective in choosing business entities that will be prepared as replacement contractors. It is not enough for creditors to look at the current state of the company, but they must also look at the prospects of the company in the next 20 to 30 years.

The purpose of the three solutions above is to minimize the possibility of obstructing the

²⁷ Ashibly, *Hukum Jaminan*, Bengkulu: Min Unihaz, 2018, pp. 8.

²⁸ Rossi, Carla Milani do Prado, *Step-In Rights Mechanisms in Project Finance Transactions and Lenders' Liabilities – The English and Brazilian Legal Approaches*. FGV Direito SP Research Paper Series No. 160, 2018, pp. 5.

fulfillment of achievements to third parties. Each solution has its own advantages and disadvantages. Risk mitigation in project finance does not only involve legal aspects. These risks must also be anticipated using an economic and business approach, especially in calculating how much the proportion of risk allocation that provides mutual benefits to the parties involved in project finance.

In addition to contractual solutions, there are regulatory solutions. For example, under Article 13 of the Turkish Electricity Market License Regulation, the electricity license holder (in this case including the project company) can request the Energy Market Regulatory Authority to transfer its license to another party (in this case including the lender).²⁹ This authority will assess and decide whether the request is accepted or not. This regulation can be used as an example to develop regulations in Indonesia, which currently do not allow the transfer of IUPTLU.

CLOSING

Conclusion

Project finance is a solution to accelerate infrastructure development in Indonesia. Project finance can provide financing for infrastructure development projects in the midst of limited government and business funds. However, project finance has many risks following the risk to the successful development and operation of the infrastructure project itself. Therefore, to protect the rights of creditors who co-finance the project, the debtors' debts are secured by various types of collateral, such as pledge, fiduciary, and mortgage. In addition, project finance agreements usually also contain step-in rights clauses that allow creditors to take over the construction and operation of the project. The exercise of this clause apparently poses a risk of obstruction in the fulfillment of performance with third parties, which can charge the creditor with adverse penalties. Therefore, creditors must be able to mitigate this, one of which is with a legal aspect approach.

There are three ways that can be used to mitigate this risk, namely with a transition-out obligation clause, the project company's control takeover, and the provision of a replacement contractor to take over the construction and/or operation of the project. All of these solutions apply the principle of freedom of contract with reference to the conditions stipulated in Article 1320 of ICC. Both parties must be able to mitigate problems long before they occur.

In addition, although step-in rights have been implemented with a contractual approach, the government can facilitate this practice by making regulations that allow the transfer of IUPTLU. This regulation will allow the bank or a company appointed by the bank to obtain the IUPTLU with a simpler process than applying for IUPTLU from the beginning. When the project company and the bank agree to exercise the step-in rights, the project company and the bank will apply to the Ministry of Energy and Mineral Resources to transfer the IUPTLU to the bank or a party appointed by the bank. Of course, the transfer of this license must still consider the ability of the bank or the indicated party to carry out its rights and obligations arising from the license.

Recommendation

First, there needs to be a clear regulation on step-in rights in Indonesian laws and regulations. Currently, step-in rights are only regulated indirectly through several regulations related to the transfer of contracts and concessions, but there is no comprehensive regulation on this matter. Second, it is necessary to further analyze the ability of creditors to take over the management of the project directly, especially in relation to the ownership of the necessary permits. This is very important to ensure the smooth operation of the project after the creditors exercise their

²⁹ Turkish Electricity Market License Regulation, accessed via <https://www.lawsturkey.com/regulation/28809-electricity-market-licensing-regulation> on October 29, 2024.

step-in rights. In addition, a well-coordinated transition strategy between debtors, creditors, and the government is needed to ensure the continuity of fulfillment of contractual obligations.

Of course, a comprehensive risk mitigation strategy is required in the preparation of the project financing agreement. This strategy must accommodate the interests of all parties, including creditors, debtors, and the government, so that the implementation of step-in rights can run effectively. Another important thing is the government's involvement in monitoring and facilitating the implementation of step-in rights to prevent bigger problems, especially related to the sustainability of project operations.

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