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NEW WORK PERMIT RULES – MORE PROBLEMS FOR ENERGY, MINING AND O&G COMPANIES [1][2][3][4][5]

INTRODUCTION

Much publicity has been given to the Government's recent decision to drop the controversial proposal that expatriate workers in Indonesia should be required to establish their proficiency with the national language, Bahasa Indonesia, as a pre-condition to obtaining or renewing their Work Permits ("**IMTA's**"). This is being hailed as a sign of the Government's new found interest in encouraging foreign investment.

There are, however, other features of Minister of Manpower ("**MoM**") Regulation No. 16 of 2015 re Procedures for the Utilization of Foreign Manpower ("**MoMR 16/2015**"), issued in late June, which seem to have completely escaped most people's attention.

MoMR 16/2015, among other things, (i) to a significant degree limits the use of Business Visas for short term visits to Indonesia with a work related purpose and (ii) expands the scope of the IMTA requirement as it applies to expatriates coming to Indonesia, even temporarily, for work related purposes ("**IMTA Requirement**"). Of even greater concern, is the extension of the IMTA Requirement to **offshore**, expatriate commissioners and directors of Indonesian companies who are **not** physically working in Indonesia.

MoMR 16/2015 is surely going to be the source of many new problems for energy, mining and oil & gas ("**O&G**") companies operating in Indonesia, whether foreign owned or locally owned, and which have a need for occasional expatriate expertise.

It may well be that companies will come to regard the previously mooted Bahasa Indonesia proficiency proposal as a mere "side show" and far less significant, not to say far less potentially inconvenient and onerous, than the reality of the new requirements introduced by MoMR 16/2015.

In this article, the writer will review the main changes made by MoMR 16/2015 as well as the implications of the same for energy, mining and O&G companies operating in Indonesia, whether foreign owned or locally owned.

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[5] This article appeared in the September - October 2015 issue of Coal Asia Magazine.

BACKGROUND

MoM's tightening of the IMTA Requirement has, undoubtedly, been motivated, at least in part, by the legitimate concern that Business Visas have long been used for purposes for which they were not really intended.

Business Visas were originally intended to cover expatriate visits to Indonesia, for not more than 60 days and for the purpose of attending meetings, seminars and arranging purchases of goods and products manufactured or produced in Indonesia but not for the purpose of performing services or selling goods or products manufactured or produced outside of Indonesia (Article 8(2) of the Immigration Act 2011 and its Elucidation).

As it has become more difficult and expensive, over time, to obtain Work Permits, however, many companies, both foreign owned and locally owned, operating in Indonesia have increasingly relied upon Business Visas for the purpose of bringing expatriate workers to Indonesia for short term and not such short term assignments even though the activities to be performed by the relevant expatriate workers go far beyond that which is actually allowed for Business Visa holders. Further, foreign services providers, looking for short term consultancy type projects in Indonesia, have not wanted to incur the considerable costs and endure the considerable regulatory burdens associated with establishing and maintaining a PMA company in Indonesia and using that PMA company to employ expatriate workers on an extended basis. At the same time, Indonesia's onerous income tax rules for individuals, which (i) deem Work Permit holders, who must also have Temporary Stay Permits ("**KITAS**"), to be resident in Indonesia for tax purposes and (ii) make the world wide income of deemed residents subject to Indonesian tax, have caused many expatriates to be very reluctant to obtain Work Permits.

The Government's concern about the misuse of Business Visas has, most likely, been heightened, in recent times, by increasingly nationalistic and anti-foreign sentiment in Indonesia which has led to moves to reduce the number of expatriates working in Indonesia and thereby, supposedly, create more employment opportunities for Indonesians. As the writer likes to say, "Indonesia still wants foreigners' business, capital, expertise, intellectual property, investment and technology, it just does not want foreigners themselves any more".

Finally, the Government may see the need to restrict the use of Business Visas in advance of the ASEAN free trade zone becoming a reality, something it might be feared will result in a significant increase in the number of workers, from other ASEAN countries, seeking to come to Indonesia for both short and long term work related purposes.

COMMENTARY

1. Overview

MoMR 16/2015 applies to all **companies, foundations and professional services organizations, in all industries**, which want or need to utilize the services of expatriate workers. However, the energy, mining and O&G industries are, undoubtedly, one of the main focuses of MoMR 16/2015 as these industries have many characteristics that make them of particular concern to the Government including (i) traditional use of large numbers of expatriates, (ii) high paying employment opportunities, (iii) critical roles in Indonesia's economic development and (iv) control of and interface with scarce natural resources, something that has increasingly attracted nationalist interest. At the same time, the energy, mining and O&G industries have been particularly hard hit by the extended downturn in mineral commodity and oil prices thereby, arguably, making many companies operating in these industries particularly willing to and creative in exploring more flexible and cost effective ways of obtaining access to needed short term, expatriate services as an alternative to actual employment of expatriates pursuant to Work Permits.

MoMR 16/2015 is to be properly seen as the end result of the various considerations and forces outlined above. As a result, it is not surprising that MoMR 16/2015 has as its stated objectives to (a) set out new application and renewal procedures for (i) the Foreign Manpower Utilization Plans ("**RPTKAs**") which must be prepared, filed and maintained by every company in Indonesia wanting to employ expatriates and (ii) Work Permits (**i.e.**, IMTAs); (b) expedite foreign manpower utilization procedures and (iii) **introduce a stricter regime for foreign manpower utilization**. The writer would suggest that this last stated objective is, in fact, the dominant objective of MoMR 16/2015.

2. Major Changes

2.1 Expanded Temporary Work Definition

2.1.1 **Outline**: The definition of "Temporary Work" has been expanded to include:

(a) providing guidance, counseling, and courses in the implementation and innovation of industrial technology to improve the quality and design of industrial products as well as cooperation in marketing for Indonesia abroad;

(b) commercial movie making as permitted by the relevant authorities;

(c) lecturing;

(d) **attending a meeting held by the principal office or representative office in Indonesia**;

(e) **conducting audits, production quality control, or inspection of branch offices in Indonesia**;

(f) foreign workers undergoing probation;

(g) **"one time" work**; and

(h) **any work related to machinery installation, electrical installation, after sales service, or products subject to business trial (Article 16 of MoMR 16/2015)**.

Any expatriate coming to Indonesia, for the purpose of carrying out Temporary Work, is required to obtain a Temporary Work Permit.

As a Temporary Work Permit can only be obtained on the basis of an application from and the support of an Indonesian sponsoring entity, this necessarily implies that the Indonesian entity, for which the Temporary Work is to be performed, must ensure the expatriate, who is to carry out the Temporary Work, is included in the Indonesian entity's RPTKA that has been approved by the Department of Manpower ("**DoM**").

2.1.2 **Assessment**: The expanded definition of "Temporary Work" and the consequent need for expatriates performing Temporary Work in Indonesia is, unquestionably, going to give rise to immense compliance difficulties. This is because Temporary Work now includes many if not most of those activities that have, traditionally, been performed by expatriates in reliance upon Business Visas even if this involved (as it often did) some modest abuse of the intended scope of the permitted activities under Business Visas.

The designations, as Temporary Work, of (i) attending a meeting held by the principal office or representative office in Indonesia, (ii) conducting audits, production quality control, or inspection of branch offices in Indonesia, (iii) **"**one time work" and (iv) any work related to machinery installation, electrical installation, after sales service, or products subject to business trial, are particularly concerning for any number of reasons including the fact that:

(a) Multinational companies, with a presence in Indonesia, routinely have people from headquarters and regional offices, outside of Indonesia, come to Indonesia to attend meetings being held by their Indonesian offices. In some instances, this will involve trips to Indonesia, for local office meetings, by many people every month. Local office meetings, attended by headquarters and regional experts, to consider exploration results, geological, geophysical and petrochemical data, drill logs, work programs and budgets are a very common occurrence in the energy, mining and O&G industries.

(b) The head offices of multinational companies need to send, on a regular basis, staff to Indonesia to carry out audits, production quality control and inspection of branch offices in Indonesia. This is just part of the normal audit, control and management cycle of almost every multinational energy, mining and O&G company with a presence in Indonesia.

(c) Although no explanation is provided as to what exactly is meant by "one time work", it sounds very much like a "catch all" term intended to cover one-off, non-recurring short term consulting and project support assignments of the type very much relied upon by

energy, mining and O&G companies to gain access to the expatriate assistance they need, from time to time, and without having to incur the expense of employing expatriates on a permanent basis. Further, this type of short term consulting and project support assignment is actively sought by the numerous foreign services companies that target Indonesia-based energy, mining and O&G companies.

(d) Indonesia-based suppliers of machinery, equipment and spare parts used in the energy, mining and O&G industries rely heavily on the ability to have head office and regional office technicians and support staff come to Indonesia, for short periods, to oversee the installation of new equipment and machinery for customers as well to attend to after sales service needs of customers. In many instances, it would just not be economic to have these technicians and support staff stationed permanently in Indonesia.

Put simply, it is quite impractical to expect and require that every expatriate, who comes to Indonesia for the purpose of "Temporary Work" (as now so expansively defined), to obtain a Temporary Work Permit.

The time and cost involved in managing the Temporary Work Permit process for large numbers of expatriates engaged in Temporary Work will, inevitably, mean that (i) many Indonesian entities will ignore the new IMTA Requirements and (ii) expatriates carrying out Temporary Work will be forced to either (i) keep using Business Visas despite being in clear breach of MoM 16/2015 or (ii) rely on even less defensible alternatives than Business Visas such as Tourist Visas. This then exposes expatriates carrying out Temporary Work, as well as the Indonesian entities for which the Temporary Work is being carried out, to an unacceptable risk of sanctions, arrest and deportation.

Further, although this remains to be seen in practice, it is probable that Indonesia will become increasingly reluctant to issue Business Visas at all following the coming into effect of MoM 16/2015 as the clear intention behind MoM 16/2015 is, unquestionably, to reduce the number of expatriates coming to Indonesia on the basis of Business Visas. As few companies will want to sponsor Temporary Work Permits, this is also likely to force many expatriates to resort to using Tourist Visas despite the obvious risks associated with so doing.

2.2 Increase in Minimum Indonesian to Foreign Worker Ratio

2.2.1 **Outline**: The number of local workers that must be employed, by an Indonesian company, for every expatriate employed has been increased to **10:1** (Article 3(1) of MoMR 16/2015) from:

(a) 1:1 as per the common interpretation of the predecessor regulation to MoMR 16/2015 (**i.e.**, MoMR 12/2013) which required an expatriate to confirm, in writing, his willingness to transfer knowledge to an appointed Indonesian colleague (**i.e.**, one Indonesian employee only); or

(b) 3:1 as per the unofficial policy of the Investment Co-ordination Board in the case of PMA companies.

Although the new 10:1 requirement apparently applies to the expatriate head of a foreign representative office, it does **not** apply to expatriates who are:

(a) Board of Directors ("**BoD**") members or Board of Commissioners ("**BoC**") members in the case of Indonesian companies;

(b) Advisory Board, Executive Board or Supervisory Board members in the case of Indonesian foundations (**i.e.**, "yayasans");

(c) employed to carry out "emergency" or "urgent" work;

(d) employed to carry out Temporary Work; or

(e) employed to carry out "impresariat work" (**i.e.**, work in the entertainment industry or work related to sports and the arts (Article 3(2) of MoMR 16/2015).

No guidance is provided as to what constitutes "emergency" work or "urgent" work.

DoM's somewhat disingenuous explanation for the new 10:1 ratio is that "a ratio of 10:1 provides a better way to facilitate the transfer of knowledge".

2.2.2 **Assessment**: The extent of the endemic problem of unemployment and underemployment, in Indonesia, is well known and it is understandable the Government wants to do something about the same. However, the dramatic increase in the minimum required ratio of local workers to expatriates seems more likely to result in a decrease in the employment opportunities for local workers as the cost of complying with the 10:1 ratio is certainly going to be prohibitively expensive for many smaller energy, mining and O&G companies. This much increased compliance cost may well provide just another reason for foreign energy, mining and O&G companies to think again about investing in Indonesia. At a time when low mineral commodity and oil prices are making foreign energy, mining and O&G companies extremely cost sensitive, the need to employ large numbers of superfluous local workers is, inevitably, going to receive a lot of attention from head office decision makers tasked with determining whether or not to open a new office or expand an existing office in Indonesia.

2.3 Extension of IMTA Requirement to Offshore Board Members

2.3.1 **Outline**: The IMTA Requirement has been extended to offshore (**i.e.**, non-resident) expatriates who are:

(a) members of the BoD of an Indonesian company;

(b) members of the BoC of an Indonesian company;

(c) members of the Advisory Board of an Indonesian foundation;

(d) members of the Executive Board of an Indonesian foundation; and

(e) members of the Supervisory Board of an Indonesian foundation (Article 37 of MoMR 16/2015).

In other words, expatriates who (i) reside **outside** of Indonesia (eg, in Australia, the United States, Japan, Korea, Singapore or elsewhere) and (ii) have board positions with Indonesian companies or foundations will now be obliged to obtain a Work Permit even though they are not physically working in Indonesia and have no intention to do so. By implication, the Indonesian sponsoring entities will be obliged to include such offshore, expatriate board members in their RPTKAs.

As Work Permits have, traditionally, only been required for expatriates who are actually employees of an Indonesian company (and physically working in Indonesia), it might have been reasonably expected that DoM would, at least, confine this onerous extension of the IMTA Requirement to those non-resident expatriate board members who actually have employment contracts with an Indonesian company or foundation. In this regard, it is important to note that directors and commissioners of Indonesian companies are not automatically regarded, for Indonesian law purposes, as "employees" of the relevant Indonesian companies but, rather, are regarded as "organs of company management" unless they have an employment agreement in which event they are regarded as being both (i) organs of company management and (ii) employees. Unfortunately, the writer's present understanding is that DoM intends to strictly interpret and apply Article 37 of MoMR 16/2015 with the result that DoM's position may be summarized as follows:

(a) DoM does **not** accept that only those offshore board members, who are also employees of the relevant Indonesian company or foundation, are required to have Work Permits. In other words, **all** offshore board members are required to obtain Work Permits and regardless of whether or not they are employees of the relevant Indonesian company or foundation; and

(b) having regard to (a) above, even those offshore board members who are actually employees of a foreign holding company/foundation or affiliated company/foundation of the relevant Indonesian company/foundation will be obliged to obtain Work Permits.

It will **probably** not be necessary, however, for offshore board members, holding Work Permits, to obtain a KITAS **(i.e.**, Temporary Stay Permit). This is important because the holding of a KITAS has traditionally been regarded as giving rise to a presumption that the holder is resident in Indonesia for tax purposes such that, unless the presumption can be rebutted in some way, the resident's worldwide income will be subject to Indonesian tax.

As a KITAS is a required supporting document, in the case of foreigners applying for Taxpayer Numbers ("**NPWPs**"), the **probable** absence of any KITAS requirement (**if confirmed**) presumably means that offshore board members, holding Work Permits, are **not** required to obtain NPWPs although this is yet to be definitively confirmed by the Director General of Taxation ("**DGT**").

According to DoM, the Immigration Office will **supposedly** issue a statement letter clarifying that offshore board members, holding Work Permits, are **not** automatically deemed to be residents of Indonesia merely by virtue of holding Work Permits.

Assessment: The extension of the IMTA Requirement to offshore board members of Indonesian companies and foundations is clearly a serious setback for common sense, business and foreign investment.

Many offshore board members of energy, mining and O&G companies operating in Indonesia provide invaluable experience, international business/commercial/financial/government contacts and technical knowledge to these energy, mining and O&G companies. Self-evidently, this is why, in most cases at least, they were appointed to their positions. It will be hardly surprising if these offshore board members are less than enthusiastic about the prospect of having to obtain a Work Permit and, so, reconsider the wisdom of continuing on the boards of the relevant energy, mining and O&G companies. The resulting loss in experience, international business/commercial/financial/government contacts and technical knowledge will not be easily overcome and must, inevitably, reduce the competitiveness of the energy, mining and O&G companies concerned. It is very hard to see how this can be in the interests of Indonesia.

The **probable** absence of any KITAS requirement (**if confirmed**) **may** go some way to addressing the entirely understandable concern of most offshore board members that, once they have Work Permits, they will be treated as residents of Indonesia for tax purposes, thereby potentially exposing their worldwide income to liability for Indonesian tax. No Indonesian tax exposure for offshore commissioners/directors would also be consistent with the Income Tax Law which provides that, in order to be subject to Indonesian tax on personal income, one has to either (i) reside in Indonesia or (ii) be in Indonesia for a minimum of 183 days. Nevertheless, some offshore board members will surely be of the view that it makes no sense whatsoever to take the risk of exposing themselves to Indonesian tax. Further, in order to convincingly and thoroughly address the potential tax issue facing offshore board members, there will need to be a level of co-ordination and co-operation among DoM, the Immigration Office and DGT which has been rarely witnessed in the past. The writer does not hold out a lot of hope this will be the "break though" case that demonstrates seamless co-ordination and co-operation among ministries and government authorities has suddenly become the norm in Indonesia.

2.4 Unification of Visa Recommendation ("TA-01") and IMTA Requirement

2.4.1 **Outline**: It will no longer be necessary to obtain a TA-01 from DoM in order to apply for a Work Permit ("**TA-01 Requirement**").

DoM's unofficial explanation of and justification for the abolition of the TA-01 Requirement is that abolishing the TA-01 Requirement will:

(a) expedite and simplify the procedures for obtaining Work Permits;

(b) provide a better supervisory regime for the flow of expatriate workers into Indonesia; and

(c) ensure that every expatriate working in Indonesia pays his/her Compensation Fund on the Utilization of Foreign Workers contribution ("**DKP-TKA**").

2.4.2 **Assessment**: Anything that simplifies the Work Permit process must be a good thing and, as such, doing away with the TA-01 Requirement is to be welcomed. However, if doing away with the TA-01 Requirement is really being offered as some sort of "quid pro quo" or "offset" for the much expanded IMTA Requirement, it is unlikely to be seen by Indonesian energy, mining and O&G companies, their expat Temporary Workers or offshore board members as representing any meaningful concession. In addition, the writer finds it impossible to identify any plausible connection between abolishing the TA-01 Requirement and (i) "providing a better supervisory regime for the flow of expatriate workers into Indonesia" or (ii) "ensuring that every expatriate working in Indonesia pays his/her DKP-TKA" as advanced by DoM.

2.5 No Introduction of Bahasa Indonesia Proficiency Requirement

2.5.1 **Outline**: The basic requirements for expatriates wanting to work/working in Indonesia are now as follows.

(a) having an educational background that correlates with the requirements of the proposed job position;

(b) having a certificate of competency or having a minimum of 5 years' prior work experience relevant to the proposed job position;

(c) providing a statement letter confirming acceptance of his/her obligation to conduct transfer of knowledge to assigned Indonesian colleagues as evidenced by reports of education and training of Indonesian colleagues undertaken;

(d) having an NPWP in the case of expatriates who will work for more than 6 months in Indonesia (although, hopefully, not in the case of offshore expatriate board members);

(e) having an insurance policy issued by an Indonesian insurance company; and

(f) being a registered member of the National Social Security Program in the case of expatriates who will work for more than 6 months in Indonesia (together, "**BEE Requirements**") (Article 36 of MoMR 16/2015).

It is noticeable the BEE Requirements do **not** include passing a Bahasa Indonesia language proficiency test as had been previously mooted.

None of the BEE Requirements are applicable to expatriates who are employed for "emergency" and "urgent" purposes, whatever the same may be.

BEE Requirements (a), (b), (c), (d) and (f) above are **not** applicable to expatriates (i) carrying out Temporary Work or (ii) engaged in "impresariat" (**i.e.**, entertainment and arts related) activities.

BEE Requirements (a), (b) and (c) above are **not** applicable to expatriates who are (i) BoC members or BoD members in the case of Indonesian companies or (ii) Advisory Board members, Executive Board members or Supervisory Board members in the case of Indonesian foundations (**i.e.**, yayasans).

2.5.2 **Assessment**: Yes, it is true there is no Bahasa Indonesia language proficiency test. However, this was ever only a proposal and had never been required in practice. Accordingly, while it is good that a wholly impractical idea never became part of MoMR 16/2015, it hardly justifies the hugely positive press coverage which, almost without exception, has focused just on the non-inclusion of a Bahasa Indonesia language proficiency test requirement in MoMR 16/2015 and made no mention at all of the major changes that have been included as part of MoMR 16/2015.

3. Effective Date

The effective date of MoMR 16/2015 is 29 June 2015 which means, in theory, that it is already applicable to expatriates working or wanting to work in Indonesia. DoM has, however, informally indicated that "some time for socialization" is necessary before MoMR 16/2015 can be fully implemented.

DoM has certainly shown itself to be the "master of understatement" with its acknowledgment of there being a need for "some time for socialization" in the case of MoMR 16/2015 and the changes to the IMTA Requirement brought about by it. The writer would suggest that even a whole lifetime is unlikely to be sufficient to "socialize" MoMR 16/2015 in a way that makes it acceptable to most energy, mining and O&G companies operating in Indonesia.

SUMMARY AND CONCLUSIONS

MoMR 16/2015 is completely "out of sync" with the current difficult economic situation facing Indonesia and the energy, mining and O&G industries.

At a time when Indonesia needs to (i) maximize foreign investment in the local energy, mining and O&G industries and (ii) ensure that energy, mining and O&G companies operating in Indonesia have access to the best expertise available, it makes no sense at all to be expanding the IMTA Requirement to new categories of Temporary Work and to offshore board members.

A more pragmatic and sensible approach would have been to expand the permitted activities that may be carried on by expatriates in reliance upon Business Visas. Such an alternative approach would be more consistent with the present reality that the existing Business Visa permitted activities are unduly restrictive when Indonesia actually needs to be making itself more attractive, not less attractive, to

potential foreign investors and their expatriate employees.

In every sense, MoMR 16/2015 is a product of the mindset that Indonesia does not need foreigners and foreign investment but, rather, it is foreigners and foreign investment which need Indonesia such that Indonesia can impose whatever obligations it likes and foreigners and foreign investment will still "beat a path to Indonesia's door". While that mindset may have had some temporary validity during the last mineral commodities boom and when oil prices were buoyant, it is simply bankrupt and totally indefensible today.

There will surely be much "pushback" against MoMR 16/2015 and the expansion of the IMTA Requirement will undoubtedly become a prime lobbying issue for foreign chambers of commerce and industry groups supported by energy, mining and O&G companies operating in Indonesia.

It can only be hoped that MoMR 16/2015 will be quickly recognized as a "mistake" by the Government and quietly jettisoned, thereby becoming just one more of the policy "flip flops" that Indonesian ministries and government authorities seem incapable of avoiding.

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