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RESEARCH ARTICLE

# THIRD-PARTY RISK IN THE AVAILABILITY PAYMENT: THE PALAPA RING WESTERN PACKAGE

Andrew William John Nathaniel<sup>1</sup>, Yetty Komalasari Dewi<sup>2</sup>    
Shatila Dhiyaannisaa Sani<sup>3</sup>

<sup>1,2</sup> Faculty of Law, Universitas Indonesia, Depok, Indonesia

<sup>3</sup> School of Law, University of California-Berkeley, The United States

 yettykomalasari@gmail.com

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## ABSTRACT

The Palapa Ring Western Package is the first Public Private Partnership infrastructure project in Indonesia implementing Availability Payment (AP). Prevailing regulations allow the Government Contracting Agency (GCA) and Implementing Business Entity (IBE) to determine the system of incentives and penalties of AP in their project contract. This research explores two main issues: (1) whether the IBE has obligation for contingent cost liabilities outside of

the contractually determined AP amount in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability and (2) whether the GCA has the right to penalize AP amount to the IBE in the occurrence of damage by a third party which interrupts or disrupts service availability. By applying normative legal research using the statute approach, this research concludes that in this project, the IBE has obligation for contingent cost liabilities outside of contractually determined AP amount in the occurrence of damage by a third party and the GCA has the right to penalize AP amount if the IBE fails to maintain service availability. The contractual allocation of operational and maintenance risk to the IBE creates obligation to bear costs during the project lifetime including those due to third-party risk. Further, the use of formula to calculate AP to IBE is solely based on performance data in maintaining service availability according to contractually agreed standards. Thus, the use of AP in the Palapa Ring Western Package may be a point to reference for future Public Private Partnership infrastructure projects.

**Keywords:** Availability Payment, Contract, Public Private Partnership, Third-Party Risk.

## TABLE OF CONTENTS

ABSTRACT .....	339
TABLE OF CONTENTS .....	341
INTRODUCTION .....	342
RELATIONSHIP OF RISK & OBLIGATION .....	348
CONTRACTUAL OBLIGATION OF IBE .....	362
RISKS IN PPP SCHEME .....	352
AVAILABILITY PAYMENT ROI SCHEME IN PUBLIC PRIVATE PARTNERSHIPS .....	367
CONTRACTUAL RIGHTS OF THE GCA IN THE PALAPA RING WESTERN PACKAGE .....	374
AVAILABILITY PAYMENT IN THE PALAPA RING WESTERN PACKAGE PPP PARTNERSHIP AGREEMENT .....	379
CONCLUSION .....	382
REFERENCES .....	383



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## INTRODUCTION

INFRASTRUCTURE IS A FUNDAMENTAL need to encourage economic growth and achieve effective development especially for developing countries.<sup>1</sup> In the early 1990s, Public Private Partnership (“PPP”) began to be developed in several countries to accommodate for limited financing for infrastructure development activities while at the same time encouraging performance optimization and cost efficiency.<sup>2</sup> In 2005, the Government of Indonesia (“GoI”) recognized the country’s distressing need for infrastructure development and included it as a key objective in creating the 2005-2025 *Rencana Pembangunan Jangka Panjang Nasional/Long-Term National Development Plan (“LTNDP”)*, a 20 (twenty) year national development planning document.<sup>3</sup> The 2005-2025 LTNDP, regulated under Law Number 17 Year 2007 on LTNDP (“Law 17/2007”), is divided into 5 (five) year periods known as the Medium-Term National Development Plans (“MTNDP”), which has entered its last stage (2020-2025).<sup>4</sup>

In order to make use of PPPs. the GoI issued Presidential Regulation Number 67 Year 2005 on Cooperation Between Government and Business Entities in Infrastructure Provision (“PR

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<sup>1</sup> Jean-Jacques Dethier & Alexander Moore, *Infrastructure in developing countries: An overview of some economic issues*, ZEF- DISCUSSION PAPERS ON DEVELOPMENT POLICY (2012).

<sup>2</sup> Andre Ribeiro, Karisa; Dantas, *Private-Public Partnership Initiatives Around the World: Learning From the Experience*, UNIVERSITY OF CANTERBURY (2006).

<sup>3</sup> Bappenas, *Visi dan Arah Pembangunan Jangka Panjang (PJP) tahun 2005-2025*, BADAN PERENCANAAN PEMBANGUNAN NASIONAL (2005).

<sup>4</sup> LAW NUMBER 17 YEAR 2007 ON THE LONG-TERM NATIONAL DEVELOPMENT PLAN OF 2005-2025 (STATE GAZETTE OF INDONESIA YEAR 2007 NO. 33), (2007), <https://peraturan.bpk.go.id/Home/Details/39830>.

67/2005") to regulate infrastructure PPPs.<sup>5</sup> However, since 2005, Indonesia's infrastructure development has had no notable progress despite multiple amendments to PPP regulation. Such is reflected in the World Economic Forum's *Global Competitiveness Report 2019*, where Indonesia's infrastructure performance came out to rank 72<sup>nd</sup> out of 141 countries with a score of 68, lower than the East Asia and Pacific Average.<sup>6</sup> Further, the World Bank's *Logistic Performance Index Global Rankings 2018*, shows that Indonesia's infrastructure performance lags behind other countries in the region such as Singapore, Thailand, Vietnam and Malaysia as well as other developing countries.<sup>7</sup>

In 2015, President Joko Widodo reiterated the GoI's resolve for infrastructure development by issuing Presidential Regulation Number 38 Year 2015<sup>8</sup> ("PR 38/2015") replacing past regulations, considering that slow progress indicated a need for new strategy to increase investment attractiveness and assure private participation would not be impeded.<sup>9</sup> This need to increase attractiveness is to meet infrastructure targets in Presidential Regulation Number 2 Year 2015 on MTNDP for Years 2015 - 2019 ("PR 2/2015"), which also states that national development must follow the MTNDP document drawn up

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<sup>5</sup> PRESIDENTIAL REGULATION NUMBER 67 YEAR 2005 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION, (2005), <https://peraturan.bpk.go.id/Home/Details/42594/perpres-no-67-tahun-2005>.

<sup>6</sup> KLAUS SCHWAB, THE GLOBAL COMPETITIVENESS REPORT 2019. INSIGHT REPORT (2019).

<sup>7</sup> The World Bank, *Logistics Performance Index* (2018), <https://lpi.worldbank.org/international/global>.

<sup>8</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), (2015), <https://peraturan.bpk.go.id/Home/Details/41764/perpres-no-38-tahun-2015>.

<sup>9</sup> *Id.*

by the Ministry of National Development Planning/National Development Planning Agency (“**Bappenas**”).<sup>10</sup>

An important development in PR 38/2015 is that the PPP scheme can be used to carry out the development of a project that is a combination of two or more types of the infrastructures and encouraging the development of a wide array of projects, pursuant to its Article 5(2) of PR 38/2015, allowing private sector partnership in the development of economic and social infrastructure for 19 types of projects.<sup>11</sup> Comparatively, in the previous regulations, only 8 types of infrastructure projects were available for the PPP scheme.<sup>12</sup> A key significant development under PR 38/2015 is regarding the schemes for the return on investment (“**ROI**”) for the Implementing Business Entity (“**IBE**”) in providing infrastructure via Availability Payment (“**AP**”). AP did not previously in past regulations as an ROI option, rather only tariffs. This writing is focused on the implementation of AP in the use of PPP scheme projects.

It must be noted that the AP ROI scheme is a new concept where a periodic payment is made to the IBE for providing infrastructure services according to the quality and/or criteria as specified in the Partnership Agreement (“**PA**”) after the infrastructure has been built and declared ready to operate, and fulfils the *service indicators* as set out in the PA.<sup>13</sup> The technical mechanism for the payment of the AP for the infrastructure service provided by the IBE

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<sup>10</sup> PRESIDENTIAL REGULATION NUMBER 2 YEAR 2015 ON MEDIUM-TERM NATIONAL DEVELOPMENT PLAN FOR YEARS 2015-2019 (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 3), (2015), <https://peraturan.bpk.go.id/Home/Details/41718/perpres-no-2-tahun-2015>.

<sup>11</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>12</sup> PRESIDENTIAL REGULATION NUMBER 67 YEAR 2005 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION, *supra* note.

<sup>13</sup> *Id.*

is regulated by the implementing regulation of PR 38/2015, specifically under the Minister of Finance Regulation Number 260 Year 2016 on Procedures for Availability Payment in Public-Private Partnership Projects in the Provision of Infrastructure (“**MFR 260/2016**”).<sup>14</sup> MFR 260/2016 stipulates that the AP scheme can be used if the PPP PA at least contains provisions concerning:<sup>15</sup>

- a. objective and measurable *output specifications* and *performance indicators* for services;
- b. the formula to calculate the AP (*agreed formula*) which is the basis for calculating the GCA’s obligations to the IBE; and
- c. an effective monitoring system against the *performance indicators*.

The first PPP project in Indonesia to make use of the AP ROI scheme is the Palapa Ring Western Package infrastructure project. The project involved the Ministry of Communication and Informatics of the Republic of Indonesia (“**Kominfo**”) as the Government Contracting Agency (**GCA**) and *PT Palapa Ring Barat* (“**PRB**”) as the Implementing Business Entity (**IBE**). A key principle of PPP projects is management of control and risk<sup>16</sup> and how risk is allocated to be shared by/among the respective parties of a PPP infrastructure project.<sup>17</sup> Given the financial cost, value and the strategic importance of the Palapa Ring Western Package project; it is important that aspects of PPP projects are sound in order to ensure continued infrastructure service to the public. As this is the first project to apply

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<sup>14</sup> MINISTER OF FINANCE REGULATION NUMBER 260 YEAR 2016 ON PROCEDURES FOR AVAILABILITY PAYMENT IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN THE PROVISION OF INFRASTRUCTURE (STATE GAZETTE OF INDONESIA YEAR 2017 NO. 11), (2016).

<sup>15</sup> *Id*

<sup>16</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>17</sup> *Id*.

the AP scheme, it can be considered as the pilot project for future uses of AP in PPP.

Under MFR 260/2016 the PPP PA may be drawn up together by the GCA and IBE to regulate a system of incentives and penalties for the GCA and/or the IBE, in order to maintain the level of service quality provided by the IBE to service users.<sup>18</sup> Thus, a wide array of possibilities can be regulated within the PA on what system would apply in a PPP AP scheme. Therefore, in light the project economic and strategic value, the AP scheme and risks involved, it must be considered then as to whether IBE's have a responsibility or obligation in the occurrence of damage caused by a third party that carry contingent cost liabilities outside the AP amount. It must also be explored as to whether, in response to the occurrence of damage caused by a third party that interrupt or shuts down infrastructure service, the GCA have the right to penalize the AP amount to the IBE.

The matter of IBE obligation of contingent cost liabilities in the occurrence of damage caused by a third party and GCA right to penalize AP amount to IBE is a current and relevant matter, especially apparent in the case of the Palapa Ring Western Package due to recent events in 2021. On January 21, 2021, the Palapa Ring Western Package Tanjung Bemban–Tarempa fiber optic cable broke because a foreign ship in the waters carelessly anchored due to experiencing bad weather conditions and engine failure.<sup>19</sup> Soon after, on February 2-3,

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<sup>18</sup> MINISTER OF FINANCE REGULATION NUMBER 260 YEAR 2016 ON PROCEDURES FOR AVAILABILITY PAYMENT IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN THE PROVISION OF INFRASTRUCTURE (STATE GAZETTE OF INDONESIA YEAR 2017 NO. 11), (2016), <https://peraturan.bpk.go.id/Home/Details/121416/pmk-no-260pmk082016>.

<sup>19</sup> Francisca Christy Rosana & Kodrat Setiawan, *Palapa Ring Barat Jelaskan Penyebab Blackout di Anambas dan Natuna*, February 11, 2021, <https://bisnis.tempo.co/read/1432005/palapa-ring-barat-jelaskan-penyebab-blackout-di-anambas-dan-natuna>.

2021, the Anambas Islands Regency and Natuna Regency lost all connection due to a double-FO-cut (double fiber optic cable cut), with initially the Tanjung Bemban–Anambas cable first experiencing problems, then shortly after the Singkawang–Natuna cable breaking due to third party ground excavation on land in Ranai, Natuna. Thus, the cables to and from the two regencies were disconnected from both sides.<sup>20</sup>

The aforementioned issues give rise to the following research questions that will discuss who is obligated for contingent cost liabilities outside of the determined Availability Payment amount in the Partnership Agreement in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. Further, it will also discuss whether the GCA have the right to penalize Availability Payment amount to the IBE in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. Keeping in mind that there is a huge potential for a wider application of the AP ROI scheme in future infrastructure development through PPP in Indonesia, this writing will identify the key legal determinants of the rights and responsibilities of the GCA and IBE of the Palapa Ring Western Package project in implementing AP. The examination and identification of these legal factors is expected to provide the right direction for better improvement in future PPP AP scheme implementation.

The specific objective is to explain whether the IBE has obligation for contingent cost liabilities outside of the determined AP amount in the PA in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. This writing also intends to elaborate whether the GCA has the right to

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<sup>20</sup> *Id.*

penalize Availability Payment amount to the IBE in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. The first part will cover the relationship of risk and obligation in general. The second part will detail the risks in PPP transactions in specific to the Palapa Ring Western Package and the allocation of such risks between the GCA and IBE. The third part will address the obligations of the IBE in relation to contingent risks by third parties. The fourth section will cover availability payment schemes in PPPs. The fifth section will discuss the contractual rights of the GCA. In continuing, the sixth part will detail the AP in the Palapa Ring Western Package PA. In conclusion, this writing will provide the findings of the research.

## RELATIONSHIP OF RISK & OBLIGATION

MANY COUNTRIES HAVE found that PPP schemes have become an inevitable part in realizing projects and such schemes provide several advantages for public and private partners respectively.<sup>21</sup> PPP schemes allow increased effectiveness for governments,<sup>22</sup> private finance access, importing of management expertise<sup>23</sup> or the making

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<sup>21</sup> Rianne Warsen et al., *What makes public-private partnerships work? Survey research into the outcomes and the quality of cooperation in PPPs*, 20 PUBLIC MANAGEMENT REVIEW (2018).

<sup>22</sup> Alexander Pinz, Nahid Roudyani & Julia Thaler, *Public-private partnerships as instruments to achieve sustainability-related objectives: the state of the art and a research agenda*, 20 PUBLIC MANAGEMENT REVIEW (2018).

<sup>23</sup> Derick W. Brinkerhoff & Jennifer M. Brinkerhoff, *Public-private partnerships: Perspectives on purposes, publicness, and good governance*, 31 PUBLIC ADMINISTRATION AND DEVELOPMENT (2011).

use of cost-saving mechanisms.<sup>24</sup> In return, private entities can either share or shift risks and gain opportunities to enter public projects they otherwise could not.<sup>25</sup> Nonetheless, the PPP scheme also has its drawbacks, such as that it might have more and a higher degree of risks.<sup>26</sup>

In Indonesia, the Palapa Ring Western Package PPP infrastructure project is the first of its kind, as it made use of the AP ROI scheme in its undertaking.<sup>27</sup> The Palapa Ring Western Package is part of the larger infrastructure development plan for the Palapa Ring Broadband project with the purpose to provide an equitable distribution and access to information technology services for national security as well as spurring economic growth through digital connectivity.<sup>28</sup>

A key principle of PPP projects is management of control and risk<sup>29</sup> and how risk is allocated to be shared by/among the respective parties of a PPP infrastructure project.<sup>30</sup> Given that risks in a PPP infrastructure project are to be shared by the parties of the

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<sup>24</sup> Young Hoon Kwak, Yingyi Chih & C. William Ibbs, *Towards a comprehensive understanding of public private partnerships for infrastructure development*, 51 CALIFORNIA MANAGEMENT REVIEW (2009).

<sup>25</sup> Brinkerhoff and Brinkerhoff, *supra* note.

<sup>26</sup> Darrin Grimsey & Mervyn K. Lewis, *Evaluating the risks of public private partnerships for infrastructure projects*, 20 INTERNATIONAL JOURNAL OF PROJECT MANAGEMENT (2002).

<sup>27</sup> Maman Suhendra, *The key success factors of availability payment scheme implementation in the palapa ring western package ppp project*, 9 INTERNATIONAL JOURNAL OF SCIENTIFIC AND TECHNOLOGY RESEARCH (2020).

<sup>28</sup> Vina Fadhrotul Mukaromah, *Perjalanan Palapa Ring, Dicituskan Sejak 2005 Hingga Diresmikan Jokowi* (2019), <https://www.kompas.com/tren/read/2019/10/14/191700465/perjalanan-palapa-ring-dicituskan-sejak-2005-hingga-diresmikan-jokowi?page=all>.

<sup>29</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>30</sup> *Id.*

development project through the Partnership Agreement, therefore there are also obligations that are based on those risks.<sup>31</sup> Under the Palapa Ring Western Package PA, risk is not explicitly defined by its own provision. However, risk is categorized/classified and allocated between the parties involved in the PPP transaction under provisions on Monitoring and Reporting Requirements.<sup>32</sup>

Risk is defined as ‘the uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp, the existence and extent of the possibility of harm’ or ‘liability for injury, damage, or loss if it occurs’.<sup>33</sup> In further exploring the second general legal definition of risk, there is a relation between such existent risk with liability if in the case such harm takes place causing in effect damage or loss. On the other hand, obligation is one such that is inseparable from rights, and in fact a burden given by law to legal subjects. Mertokusumo explains that rights give enjoyment and flexibility to individuals in carrying them out, while obligations restricts and burdens, so rights stand out as the active aspect of legal relationships, also they are not a collection of rules or principles, rather a balance of power in the form of individual rights for one person which are reflected as obligations to another.<sup>34</sup>

Therefore, if there are rights of one party, there are obligations for another; if there are obligations for one party, there are rights of another. A general legal definition of obligation in *Black’s Law Dictionary* defines obligation as such:

1. A legal or moral duty to do or not do something. The word has many wide and varied meanings. It may refer to anything that a

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<sup>31</sup> TIMOTHY IRWIN & TANYA MOKDAD, *MANAGING CONTINGENT LIABILITIES IN PUBLIC-PRIVATE PARTNERSHIPS* (2010).

<sup>32</sup> PALAPA RING WESTERN PACKAGE AGREEMENT 284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016.

<sup>33</sup> BRYAN A GARNER, *BLACK’S LAW DICTIONARY 10TH EDITION* (2014).

<sup>34</sup> SUDIKNO MERTOKUSUMO, *MENGENAL HUKUM: SUATU PENGANTAR* (4 ed. 2002).

person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality.

2. A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract.<sup>35</sup>

In this sense, when an obligation of contingent liability arises out of risk, such obligation is concurrently a legal responsibility towards another party as it is a right to be fulfilled or performed. Recalling the first definition of risk shortly above, there is an aspect of uncertainty and/or chance for injury, loss or harm, and as in the second definition of risk previously laid out, risk is related, by definition, to *liability*.<sup>36</sup> Therefore, it is a natural conclusion to surmise from risk that, in an instance of injury, harm, or loss that may possibly take place, arises an uncertain liability — a liability that is otherwise contingent.

*Black's Law Dictionary* defines contingent as that which is 'possible; uncertain; unpredictable'<sup>37</sup> and 'dependent on something else; conditional'.<sup>38</sup> The legal definition of *contingent liability* is set out as 'a liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event'.<sup>39</sup> *Contingent* being the operative word leads to the understanding that such liability will only take place in the instance that a possible uncertain risk materializes. Further, liability is legally defined to be understood as 'the quality or state of being *legally obligated* or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment'.<sup>40</sup> Additionally, in the

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<sup>35</sup> GARNER, *supra* note.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

context of fault, a legal definition of liability characterizes it 'as financial or pecuniary obligation'.<sup>41</sup> Therefore, through such analysis of legal terms, we can come to such a conclusion to which that an obligation may occur by contingent liability which arises out of risk. Moreover, if, in an event that, there is an element of fault, such obligation would be of a financial liability towards another party.

## RISKS IN PPP SCHEME

WHILE MANY infrastructure PPP infrastructure projects have been successful, many also have failed and there are a variety of risk related to them, including, but not limited to, financial and political risks, as well as a possible risk of a public rejection in the life cycle of a PPP project.<sup>42</sup> Furthermore, legal, political and cultural barriers frequently obstruct the implementation of PPP initiatives.<sup>43</sup> Risk identification, risk appraisal and risk allocation have been the focus of research on the risks associated with PPP projects, as well as the development of methodologies for identifying elements connected to the success or failure of projects created using PPP schemes.<sup>44</sup> Some studies have sought to identify risk factors associated to a specific PPP project or country in order to identify these risks, and have classified them, in

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<sup>41</sup> *Id.*

<sup>42</sup> Patrick X.W. Zou, Shouqing Wang & Dongping Fang, *A life-cycle risk management framework for PPP infrastructure projects*, 13 JOURNAL OF FINANCIAL MANAGEMENT OF PROPERTY AND CONSTRUCTION (2008).

<sup>43</sup> Ahmed M. Abdel Aziz, *Successful Delivery of Public-Private Partnerships for Infrastructure Development*, 133 JOURNAL OF CONSTRUCTION ENGINEERING AND MANAGEMENT (2007).

<sup>44</sup> Caiyun Cui et al., *Review of studies on the public-private partnerships (PPP) for infrastructure projects*, 36 INTERNATIONAL JOURNAL OF PROJECT MANAGEMENT (2018).

general, as either being shared equally between the two parties or being allocated in a larger part to the public or private partners.<sup>45</sup>

General identification and classification of risks in PPP schemes have been done in the past.<sup>46</sup> Hwang et al. identified 42 critical risk variables affecting PPP projects in Singapore, which were allocated to both the public and private sectors.<sup>47</sup> Tang and Shen associated 18 risk factors relating to stakeholders' needs in a Hong Kong PPP project.<sup>48</sup> Other studies have assigned risk factors into several categories to make practical analysis easier. Force majeure risks, according to Aziz and Shen, are a risk category that necessitates careful management because they might translate to massive losses especially for PPP private parties.<sup>49</sup> In further detail, Ameyaw and Chan organized 8 categories in their study, including political and regulatory risks, operational risks, market/revenue risks, financial risks, relationship

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<sup>45</sup> Sajani Jayasuriya, Guomin Zhang & Rebecca Jing Yang, *Challenges in public private partnerships in construction industry: A review and further research directions*, 9 BUILT ENVIRONMENT PROJECT AND ASSET MANAGEMENT (2019).

<sup>46</sup> Yan Wang et al., *Exploring the risk factors of infrastructure PPP projects for sustainable delivery: A social network perspective*, 12 SUSTAINABILITY (SWITZERLAND) (2020).

<sup>47</sup> Bon Gang Hwang, Xianbo Zhao & Mindy Jiang Shu Gay, *Public private partnership projects in Singapore: Factors, critical risks and preferred risk allocation from the perspective of contractors*, 31 INTERNATIONAL JOURNAL OF PROJECT MANAGEMENT (2013).

<sup>48</sup> Li Yaning Tang & Qiping Shen, *Factors affecting effectiveness and efficiency of analyzing stakeholders' needs at the briefing stage of public private partnership projects*, 31 INTERNATIONAL JOURNAL OF PROJECT MANAGEMENT (2013).

<sup>49</sup> Ahmed Abdel Aziz & Tai Ling Shen, *Management of Force Majeure Risks in Canadian PPP Transportation Projects*, in CONSTRUCTION RESEARCH CONGRESS 2016: OLD AND NEW CONSTRUCTION TECHNOLOGIES CONVERGE IN HISTORIC SAN JUAN - PROCEEDINGS OF THE 2016 CONSTRUCTION RESEARCH CONGRESS, CRC 2016 (2016).

risks, project and private party selection, social risks and third-party risks.<sup>50</sup>

The focus will be on the latter category of third-party risk as highlighted in recent events of damages and complete loss of Palapa Ring Western Package infrastructure availability as result of third-party action. In specific to the Palapa Ring Western Package PPP project, such occurrences are third-party risks that gives rise to liabilities for contingent costs of repair or restoration of said infrastructure availability which constitutes as contractual obligation of PRB as the IBE. Keeping in mind that, as previously iterated, Availability Payments are made on the condition that the infrastructure is available to the public, the IBE must be wary of that obligation to preserve revenue and mitigate financial losses. In any case of the application of PPP schemes, the public party, or rather the government, would typically bear some of the risks in the undertaking of the project — although such risks would not amount to the extent that it would have to bear it were to employ conventional public finance.<sup>51</sup>

## I. PRIMARY RISKS IN PALAPA RING WESTERN PACKAGE PARTNERSHIP AGREEMENT

In all PPP projects, as it is in any other infrastructure projects by other means, risk is inherently present, and especially apparent in PPP

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<sup>50</sup> Ernest Effah Ameyaw & Albert P.C. Chan, *Identifying public-private partnership (PPP) risks in managing water supply projects in Ghana*, 11 JOURNAL OF FACILITIES MANAGEMENT (2013).

<sup>51</sup> IRWIN AND MOKDAD, *supra* note 31.

infrastructure projects, the common main types of risks include namely:<sup>52</sup>

- 1) *Construction risk*: mainly delays in construction
- 2) *Technology risk*: arising when the technology is not a proven one
- 3) *Sponsor risk*: ability of the sponsor to deliver the project.
- 4) *Environmental risk*
- 5) *Commercial risk*: a lower-than-expected demand for services
- 6) produced by the project
- 7) *Operating risk*: operational inefficiency leading to higher operating
- 8) Costs
- 9) *Legal risk*: changes in law
- 10) *Regulatory risk*: changes in regulatory regimes
- 11) *Political risk*: changes in government policy
- 12) *Force majeure*: risks due to unpredictable natural and man-made events such as earthquake, flood, civil war, etc.

In Indonesia, the application of the PPP scheme for the provision of infrastructure development projects which are instigated by the government to be offered for partnership with private sector entities must be accompanied by a preliminary study at the stage of Identification and Appointment of PPP.<sup>53</sup> Such preliminary study must at the minimal contain PPP form plan; project financing scheme plans and sources of funds; and a cooperation offer plan that includes a schedule, process and method of assessment.<sup>54</sup> It is within said preliminary study document that an initial identification of risks is conducted. Before being publicly offered for bid proposals from

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<sup>52</sup> Abdul Quium, *Public-Private Partnerships In Infrastructure Development: A Primer*, UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC (2008).

<sup>53</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>54</sup> *Id.*

private sector parties, a feasibility study on the infrastructure which will be cooperated must be conducted must contain among other things the identification of risks and mitigation recommendations, as well as the allocation of those risks.<sup>55</sup>

In the process of the preparation stage for the Palapa Ring Western Package PPP infrastructure project, an interdepartmental report<sup>56</sup> based on the feasibility study of the project was presented before the relevant stakeholders involved in the project on the side of the public party or rather government related parties, before selecting a private sector partner from the bidders for the project.<sup>57</sup> The interdepartmental stakeholders from the government includes Kominfo as the GCA and composer of the report,<sup>58</sup> the Ministry of Finance of the Republic of Indonesia as the government ministry which organizes government affairs in finance and state assets,<sup>59</sup> Bappenas as the government ministry which carries out government affairs in the field of national development planning,<sup>60</sup> *PT Sarana Multi Infrastruktur (Persero)* as mandated by the Ministry of Finance to carry out project preparation facilities and transaction assistance to GCA,<sup>61</sup> and *PT Penjaminan Infrastruktur Indonesia (Persero)* as the

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> MINISTRY OF COMMUNICATION AND INFORMATICS OF THE REPUBLIC OF INDONESIA, PALAPA RING REPORT INTERDEPARTMENTAL PRESENTATION (2015).

<sup>58</sup> *Id.*

<sup>59</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>60</sup> *Id.*

<sup>61</sup> Ministry of Finance of the Republic of Indonesia, Proyek KPBU Palapa Ring Paket Barat Mencapai Tahap Perolehan Pembiayaan (Financial Close) (2016), <https://www.djppr.kemenkeu.go.id/page/load/1622>.

Indonesia infrastructure guarantee fund.<sup>62</sup> Referring to the Kominfo Interdepartmental Presentation on the feasibility study report, 7 Primary Risks are identified for the Palapa Ring Western Package PPP infrastructure development project, with 5 of those Primary Risks being common main types of identifiable risks (see *Table 1* below).<sup>63</sup>

**TABLE 1** Common Main Types of Risks vs. Primary Risks in Palapa Ring Western Package PA

No	Common Main Types of Risks	Primary Risks in Palapa Ring Western Package PA	Not Primary Risks in Palapa Ring Western Package PA
1	Construction	✓	
2	Technology		×
3	Sponsor		×
4	Environmental		×
5	Commercial		×
6	Operational	✓	
7	Legal	✓	
8	Regulatory	✓	
9	Political		×
10	Force Majeure	✓	

Source: Ministry of Communication and Informatics, Palapa Ring Report Interdepartmental Presentation (2015)

Furthermore, two of the Primary Risks in the Palapa Ring Western Package PA are not common main types of identifiable risks, namely, risk of government action/inaction and risk of the payment of Availability Payment.

<sup>62</sup> Sholahuddin Al Ayyubi, *PII Beri Penjaminan Proyek Palapa Ring* (2017), <https://teknologi.bisnis.com/read/20170331/105/641529/pii-beri-penjaminan-proyek-palapa-ring>.

<sup>63</sup> MINISTRY OF COMMUNICATION AND INFORMATICS OF THE REPUBLIC OF INDONESIA, *Supra* note 57.

## II. CONTRACTUAL ALLOCATION OF RISKS BETWEEN GCA AND IBE

Risk allocation is a key feature of Public-Private Partnerships for infrastructure development projects globally. In a PPP scheme for the provision of infrastructure, optimal risk allocation is one of the key determinants for a project's value for money.<sup>64</sup> As previously discussed, in PPP schemes allow the transfer of risks from a public party to a private party, which relieves it of the otherwise burdensome costs of risks that it may be unable to manage — such as construction cost overruns, delays in construction and the long-term maintenance of the asset.<sup>65</sup>

Project risk allocation in PPPs are more or less straightforward and direct with the concept that risks should be allocated accordingly to the party that has the best ability to manage such risks.<sup>66</sup> Simply put, the party that has a better suited grasp of the risk, the ability to control the possibility of the risk occurring and/or mitigate the impact of the risk, should be the party responsible to manage the risk.<sup>67</sup> Therefore, allocating risk on the basis of the above principles is assumed to result in optimal risk allocation.

Based on that understanding, in case of PPPs, comprehensive legal frameworks for the purpose of ensuring proper risk taking and allocation are common to be found in several national jurisdictions, such as Australia, Colombia, Greece, Ireland, Portugal, South Africa and the United Kingdom.<sup>68</sup> In light of the potential costs to be incurred

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<sup>64</sup> Jayasuriya, Zhang, and Jing Yang, *Supra* note 45.

<sup>65</sup> *Id.*

<sup>66</sup> Pauline Hovy, *Risk allocation in public-private partnerships: Maximizing value for money*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2015).

<sup>67</sup> *Id.*

<sup>68</sup> Cebotari, *supra* note.

related to PPPs for infrastructure development and that the transfer of risks may influence the balance sheet of a government, risk allocation under PPP schemes are often reviewed in legislation in which it is common to identify within such frameworks that projects must pass a cost-benefit analysis, provide value for money and include a stringent risk assessment in order for approval to be given or otherwise unacceptable.<sup>69</sup>

On the other hand, the United Nations Commission on International Trade Law (UNCITRAL), in their UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects published in 2001, have previously recommended to not include risk allocation into a PPP legislation, but rather to have it be left to be determined within contracts, as not all PPP projects are same, and each may require a different set of risk allocation. The UNCITRAL's recommendation is worded as such that 'no unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project'.<sup>70</sup>

Under PR 38/2015, PPP scheme infrastructure projects must initially go through a thorough planning process which includes identification and determination, budgeting and preparation.<sup>71</sup> Identification includes the analysis of benefit and social cost, analysis of value for money and a preliminary study which must contain the PPP form plan, project financing scheme plan and funding sources and the partnership bidding plan (including schedule, process and

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<sup>69</sup> *Id.*

<sup>70</sup> José Angelo ESTRELLA FARIA, *The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*, THE JOURNAL OF WORLD INVESTMENT & TRADE (2012).

<sup>71</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

assessment method).<sup>72</sup> If the project then passes budgeting, it must go through preparation which requires a feasibility study, as previously mentioned in brief.<sup>73</sup>

Within the feasibility study required in the preparation process, there must be concluding results on sources of PPP financing; identification of contractual, regulatory and institutional frameworks; draft technical aspects of PPP; proposed required Government Support and Guarantee; identification of risks and mitigation recommendations and the allocation of those risks; and the form of return on investment for the IBE.<sup>74</sup> Given as such, we can observe that Indonesia's PPP regulation reflects the framework of the first approach in its rigorous preparation process. Yet, moreover, PR 38/2015 also reflects the framework of the second approach as it leaves the determination of rights and obligations, including the allocation of risk, to be contained in the PPP contract between the GCA and the IBE.<sup>75</sup>

The Palapa Ring Western Package PA details the various risks allocated between Kominfo as the GCA and PRB as the IBE. From the PA, the allocation of risk can be identified into 3 categories, namely, risk allocated to GCA; risk allocated to IBE; and risk allocated jointly. For ease and practicality, the Primary Risks identified in the Palapa Ring Interdepartmental Presentation that had been previously discussed is visually shown here below in *Table 2* according to how each party is allocated risk.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

**TABLE 2** Primary Risks Allocated to GCA, IBE & Jointly

No	Primary Risk	Contract Article	Kominfo (GCA)	PRB (IBE)	Joint
1	Change of Law	Article 18	✓		
2	Government Action/Inaction	Article 17	✓		
3	Payment of AP	Article 11 Appendix 11	✓		
4	Force Majeure	Article 16			✓
5	Construction	Article 6.4	✓	✓	
6	Permits and Licenses	Article 4.4 Appendix 4	✓	✓	
7	Operation and Maintenance	Article 8		✓	

Source: Palapa Ring Western Package Partnership Agreement Contract (Kominfo - PT. PRB)

The Palapa Ring Western Package PA<sup>76</sup> and the Kominfo Interdepartmental Presentation<sup>77</sup> further elaborates the categories of risks and the specific risks as well as how they are allocated as visually shown for Operational Risks here below in *Table 3*.

**TABLE 3** Detailed Elaboration Palapa Ring Western Package GCA-IBE Risk Allocation

Operational Risk	Risk	Risk Allocation		
		GCA	IBE	Joint
1	Availability of Facility		✓	
2	Bad or Unavailable Service		✓	
3	Industrial Action		✓	
4	Project Control and Monitoring Failure	✓	✓	
5	Increase in Operational and Maintenance Costs		✓	
6	Life Cycle Cost Estimation Error		✓	
7	Traffic Accidents or Safety Issues		✓	

<sup>76</sup> *Id.*

<sup>77</sup> MINISTRY OF COMMUNICATION AND INFORMATICS OF THE REPUBLIC OF INDONESIA, *Supra* note 57.

## CONTRACTUAL OBLIGATION OF IBE

CONTRACTS ARE a legal institution that is fundamental in almost a majority of business relationships,<sup>78</sup> including the trade of goods and services, which of course includes a transaction the likes of the Palapa Ring Western Package PPP infrastructure development project. A definition of contract is ‘an enforceable set of mutual obligations for which the law provides a remedy, recognizes a duty, or provides for court enforcement’.<sup>79</sup> *Black’s Law Dictionary* provides a general legal definition of contract as ‘an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law’,<sup>80</sup> and another alternative looser definition as ‘an enforceable agreement between two or more parties to do or not to do a thing or set of things’.<sup>81</sup> A contract may be a promise or set of promises that is court enforceable.<sup>82</sup> Contracts may also be regarded as ‘a transaction involving two or more individuals whereby each becomes obligated to the other, with reciprocal rights to demand performance of what is promised by each respectively’.<sup>83</sup> William Anson writes that a ‘contract is a legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others’.<sup>84</sup>

From these understandings, several characteristics can be drawn that in a contract there are several elements, namely, promise;

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<sup>78</sup> F. WILLIAM MCCARTY & JOHN W. BAGBY, *THE LEGAL ENVIRONMENT OF BUSINESS: STUDY GUIDE* (2011).

<sup>79</sup> *Id.*

<sup>80</sup> GARNER, *supra* note.

<sup>81</sup> *Id.*

<sup>82</sup> J. DAVID REITZEL ET AL., *CONTEMPORARY BUSINESS LAW AND THE LEGAL ENVIRONMENT: PRINCIPLES AND CASES* (5th ed. 1994).

<sup>83</sup> STEVEN H. GIFIS, *LAW DICTIONARY* (7th ed. 2016).

<sup>84</sup> PAUL RICHARDS, *LAW OF CONTRACT* (4th ed. 1999).

agreement; reciprocal/mutual obligations; and that it is legally enforceable.<sup>85</sup> Further, one of the main premises reflected in the law of contracts is that parties should have a broad freedom to contract as they like to make economic decisions subject only to a few limitations imposed by law to prevent fraud and so on.<sup>86</sup> Such premise of broad freedom is reflected in the structure of the terms that the parties to the Palapa Ring Western Package PPP infrastructure development project are able to negotiate as per the mechanisms given by the PR 38/2015<sup>87</sup> and MFR 260/2016.<sup>88</sup> Given that through a contract arises rights and mutual obligations, therefore there must be performance of the contract. Under Indonesian law, such is known as *betaling* according to the Civil Code.<sup>89</sup> The contractual relationship will be ended once all obligations of the parties are performed.

## I. GENERAL OBLIGATIONS OF IBE

Under the Palapa Ring Western Package PA, 7 general obligations of the IBE for the project are listed, pursuant to the Kominfo Interdepartmental Presentation, as such:<sup>90</sup>

1. Financing the project
2. Design, build, install project system

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<sup>85</sup> AGUS SARDJONO ET AL., PENGANTAR HUKUM DAGANG (2018).

<sup>86</sup> J. DAVID REITZEL ET AL., *supra* note 82.

<sup>87</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 NO. 62), *supra* note.

<sup>88</sup> MINISTER OF FINANCE REGULATION NUMBER 260 YEAR 2016 ON PROCEDURES FOR AVAILABILITY PAYMENT IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN THE PROVISION OF INFRASTRUCTURE (STATE GAZETTE OF INDONESIA YEAR 2017 NO. 11), *supra* note.

<sup>89</sup> INDONESIAN CIVIL CODE, ARTICLE 1381.

<sup>90</sup> MINISTRY OF COMMUNICATION AND INFORMATICS OF THE REPUBLIC OF INDONESIA, *SUPRA* NOTE.

3. Operate and maintain the project
4. Provide services to customers, if requested by BP3TI
5. Acquiring project land
6. Obtain permits and approvals (with reasonable facilitation by BP3TI)
7. Transfer the project to BP3TI at the end of the cooperation period

BP3TI as referred here is Balai Penyedia dan Pengelola Pembiayaan Telekomunikasi dan Informatika (“BAKTI”) under Kominfo as the institution under the ministry which coordinates the Palapa Ring Broadband Project. Therefore, as such obligations are burdened upon PRB as the IBE, Kominfo as the GCA have rights to have these obligations to be performed under the PA. In specific context of the Availability Payment ROI scheme used in this project, PRB must fulfil its obligations of operation and maintenance<sup>91</sup> of the project. otherwise risking their right to receiving revenue via AP from Kominfo, which in turn is Kominfo’s obligation.<sup>92</sup> From the above list of the general obligations of the IBE in this project, the obligation to operate and maintain is one which has close ties close to the risks in *Table 3* which may arise due to third-party damage.

The IBE’s performance of its obligations for operation and maintenance and is dependent on the *service indicators* as set out within the PA. These *service indicators* are defined as the operational parameters intended to measure the performance of the Implementing Business Entity.<sup>93</sup> By this measurement, the AP will be adjusted as such according to the AP payment terms. Recalling the listed operational risks in *Table 3*, PRB as the IBE must take caution for the availability of facility, bad or unavailable service, industrial

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<sup>91</sup> PALAPA RING WESTERN PACKAGE AGREEMENT  
284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

action, project control and monitoring failure, increase in operational and maintenance costs, life cycle cost estimation error, traffic accidents or safety issues, in order to meet the *service indicators*.

## II. OBLIGATION FOR CONTINGENT COST LIABILITIES OUTSIDE OF AP DUE TO DAMAGE BY THIRD PARTY

As has been covered previously, in the allocation of risks in PPP infrastructure projects to the private sector, it is a key matter to comprehend the extent to which a private sector partner would be willing to take on risk.<sup>94</sup> The private sector capability to accept risk is limited by two main factors, namely, its structure and organization and the extent where risks—both ‘regular’ and ‘extraordinary’—are accepted in regular markets.<sup>95</sup> All other risks are regular in this transaction for infrastructure development via PPP scheme, while only force majeure being an extraordinary risk as something outside the control of either party to the contract.<sup>96</sup>

In a Public Private Partnerships, the private sector partner is typically structured as a specially created project vehicle or a special purpose vehicle (SPV) that has contractual agreements with a public agency, from which it receives revenue, and with subcontractors, from which it incurs expenses.<sup>97</sup> In the context of the Palapa Ring Western Package infrastructure development project, any potential damage by a third-party is included as a risk under the provisions to

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<sup>94</sup> Hovy, *supra* note.

<sup>95</sup> *Id.*

<sup>96</sup> PALAPA RING WESTERN PACKAGE AGREEMENT  
284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016.

<sup>97</sup> *Id.*

perform operational and maintenance obligations in order to fulfil *service indicators* for AP payment.

According to statement from BP3TI of Kominfo, the recovery/repair of a damage that arises due to the actions of a third party that causes the disconnection/disruption of the availability of service of the Palapa Ring Western Package remain the obligation of PRB as IBE, but BP3TI Kominfo also synergizes with the IBE to reduce the damage caused by the third party.<sup>98</sup> Therefore, any contingent cost liabilities would be harbored by PRB as the IBE as part of its fulfilment of operational and maintenance obligations to Kominfo as the GCA, from which it receives revenues.

As mentioned above, in a PPP infrastructure project, the IBE as an SPV not only has a contractual arrangement with the public agency/GCA, but also subcontractors in the undertaking and commercial operation of the infrastructure project. In the Palapa Ring Western Package, PRB as the IBE deploys a subcontractor to fulfil its obligations for operation and maintenance. During the interview for this research, Syarif Lumintarjo, President Director of PRB, explains that PRB as the IBE of the Palapa Ring Western Project retains a subcontractor, *PT. Ketrosden Triasmitra*, as a vendor for the maintenance and repairs of the Palapa Ring Western Project.<sup>99</sup> Therefore, such contingent cost liabilities outside of the AP amount which may arise due to damage caused by third-parties does not result in a direct reduction in AP revenue, as payment to the subcontractor, *PT Ketrosden Triasmitra*, is already accounted for as part of regular operational costs.<sup>100</sup>

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<sup>98</sup> ANDREW NATHANIEL, *Reply to Request for Information by Directorate of Infrastructure, BP3TI, Ministry of Communication & Informatics of the Republic of Indonesia* (2021).

<sup>99</sup> ANDREW NATHANIEL, *Interview of PT Palapa Ring Barat President Director Syarif Lumintarjo* (2021).

<sup>100</sup> *Id.*

## AVAILABILITY PAYMENT ROI SCHEME IN PUBLIC PRIVATE PARTNERSHIPS

IN PUBLIC PRIVATE Partnerships, the private party/implementing business entity undertakes the provision of a project with an expected return on investment (ROI) that they had have committed to the project. *Black's Law Dictionary* provides a definition of ROI as 'yield or profit'<sup>101</sup> or also 'revenue that represents the repayment of cost or capital and thus is not taxable as income'.<sup>102</sup> One mechanism of ROI in PPP is the use of Availability Payments. One practical glossary legal definition for Availability Payment is that it is as follows:<sup>103</sup>

A fee structure often used in public private partnerships in which the public agency makes payments under the relevant agreement to the private sector party once the project or facility is made available for use (subject to compliance with the agreed performance criteria and standards).

The private party partner would typically design, build and finance the construction of the project in Public Private Partnership schemes implementing the Availability Payment ROI.<sup>104</sup> Following completion of construction, the private party entity will operate and maintain the infrastructure for the duration of the project service contract, which is normally 30 years but could be longer in some circumstances.<sup>105</sup> In return, the government contracting party may

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<sup>101</sup> GARNER, *supra* note.

<sup>102</sup> *Id.*

<sup>103</sup> Availability Payment, THOMSON REUTERS, [https://uk.practicallaw.thomsonreuters.com/0-518-1769?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-518-1769?transitionType=Default&contextData=(sc.Default)).

<sup>104</sup> AVAILABILITY PAYMENTS IN PUBLIC PRIVATE PARTNERSHIPS: ISSUES AND IMPLICATIONS, (2018).

<sup>105</sup> *Id.*

provide incentive payments for achieving milestones and/or completion during the period of construction, and then later pay out regular availability payments to the private party partner once the infrastructure is in commercial operation.<sup>106</sup> Such Availability Payments may be either pre-determined or be made based of a pre-determined formula so long as they meet contractually specified performance standards.<sup>107</sup>

## I. PERFORMANCE BASED CONTRACTS

It should be clearly specified within a PPP contract of what is expected from the private party in relation to the quality and quantity of the infrastructure provision undertaken and the services to be provided.<sup>108</sup> Typically, the specifics of the performance indicators and targets are inserted into an Appendix to the main PPP agreement.<sup>109</sup> In Public Private Partnerships, there are several types of agreements which include concession agreements, leases and design-build-finance-operate-maintain agreements among others.<sup>110</sup> The specification of performance in any case possible in terms of required outputs (such as quality), rather in contrasting to inputs (such as design and materials) is a key feature of a PPP. As such, it thus enables the private party partner to responsively innovate to meet any

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<sup>106</sup> Elisabetta Iossa, Giancarlo Spagnolo & Mercedes Vellez, *The Risks and Tricks in Public-Private Partnerships*, SSRN ELECTRONIC JOURNAL (2014).

<sup>107</sup> Payment Mechanism, , PPP KNOWLEDGE LAB , <https://pppknowledgelab.org/guide/sections/63-payment-mechanism>.

<sup>108</sup> Junxiao Liu et al., *Performance Measurement Framework in PPP Projects*, 6 INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL SCIENCE (2015).

<sup>109</sup> Payment Mechanism, *supra* note.

<sup>110</sup> Marco Percoco, *Infrastructure Investment and Growth in Developing Countries: Does the Type of Contract Matter?*, 4 JOURNAL OF INFRASTRUCTURE DEVELOPMENT (2012).

requirements.<sup>111</sup> The performance-based nature of PPP schemes also incentivizes the private party to focus on how it will produce measurable outputs in the long-term course and count in key interdependent factors between design, construction, operation, maintenance and performance of the project.<sup>112</sup>

A PPP contract should set out clear performance targets or output requirements, how performance will be monitored and consequences for failure to reach the required performance targets, clearly specified and enforceable.<sup>113</sup> Such clear performance targets or output requirements should be specific, measurable, achievable, realistic and timely.<sup>114</sup> Additionally, it should be detailed what information must be gathered, who gathers it, to whom it is reported and the frequency of it in order to monitor performance.<sup>115</sup> Monitoring itself may have roles for various stakeholders such as the government contracting party's management team, the private party partner, external monitors, regulators and users.<sup>116</sup>

Furthermore, clearly specified and enforceable consequences for failing to achieve the contractually determined performance standards could include specifying penalty payments, payment deductions for poor performance (or perhaps even bonuses for good performance) and formal warning procedures among else.<sup>117</sup> In reference to MFR 260/2016, Indonesia's regulation sets out that AP is made if the PA at least contains provisions on objective and

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<sup>111</sup> EDWARD FARQUHARSON, CLEMENCIA TORRES DE MÄSTLE & E.R. YESCOMBE, HOW TO ENGAGE WITH THE PRIVATE SECTOR IN PUBLIC-PRIVATE PARTNERSHIPS IN EMERGING MARKETS (2011).

<sup>112</sup> *Id.*

<sup>113</sup> Payment Mechanism, *supra* note.

<sup>114</sup> FARQUHARSON, TORRES DE MÄSTLE, AND YESCOMBE, *supra* note.

<sup>115</sup> Liu et al., *supra* note.

<sup>116</sup> *Id.*

<sup>117</sup> Iossa, Spagnolo, and Vellez, *supra* note.

measurable output specifications and performance indicators, an agreed formula to base calculation of GCA obligations to the IBE and an effective performance monitoring system.<sup>118</sup> Moreover, the PA may regulate incentives and penalties to the GCA and IBE.<sup>119</sup>

## II. BUDGET ALLOCATION & PAYMENT MECHANISM

In recent years, countries have become more reliant on Public Private Partnerships to finance infrastructure provision and operation.<sup>120</sup> From time to time, the government may need to establish advance budgeting arrangements in order for the government contracting entity or other public bodies to satisfy financial commitments that span several budget cycles, such as long-term agreements to purchase the project's output.<sup>121</sup> Such budgeting is a critical part of the planning and selection process in the preparatory stage of Public Private Partnerships for infrastructure development. In Indonesia, in the context of the PPP infrastructure project taking on the AP ROI scheme, the GCA must budget for the payment for the infrastructure procurement that is undertaken by the IBE during the period of operational service as stipulated in the Partnership Agreement.<sup>122</sup>

In specific reference to Availability Payment budgeting for PPP infrastructure development projects, the GCA must calculate for the

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<sup>118</sup> MINISTER OF FINANCE REGULATION NUMBER 260 YEAR 2016 ON PROCEDURES FOR AVAILABILITY PAYMENT IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN THE PROVISION OF INFRASTRUCTURE (STATE GAZETTE OF INDONESIA YEAR 2017 NO. 11), *supra* note.

<sup>119</sup> *Id.*

<sup>120</sup> Paul L. Posner, Shin Kue Ryu & Ann Tkachenko, *Public-private partnerships: The relevance of budgeting*, 9 OECD JOURNAL ON BUDGETING (2009).

<sup>121</sup> ESTRELLA FARIA, *supra* note.

<sup>122</sup> *Id.*

capital cost of the project construction, the cost of the operation of the infrastructure and the profit for the Implementing Business Entity.<sup>123</sup> Pursuant to MFR 260/2016, in order to prepare and implement the GCA commitment to Availability Payment, the Directorate General of Financing and Risk Management through the Directorate of Government Support Management and Infrastructure Financing conducts three-party discussions with the Directorate General of Budget and the GCA or officials who are delegated authority from GCA to prepare a Work and Budget Plan and the budget allocation of the Availability Payment funds.<sup>124</sup>

The design of a PPP contract should have a consistent connection between the output specifications (service indicators), allocation of risks and incentives and the payment mechanism.<sup>125</sup> A pay-for-performance principle is used as the basis of the payment mechanism and such that is consistent with both the incentives which the public party would like to give to the private party partner and the risks it would take on itself.<sup>126</sup> Private party remuneration for having been willing to contact and undertake the provision of assets/services in a Public Private Partnership is defined through a payment mechanism.<sup>127</sup>

Payment adjustments made to reflect performance or risk factors are another key method to incentivize and allocate risk in a

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<sup>123</sup> *Id.*

<sup>124</sup> MINISTER OF FINANCE REGULATION NUMBER 260 YEAR 2016 ON PROCEDURES FOR AVAILABILITY PAYMENT IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN THE PROVISION OF INFRASTRUCTURE (STATE GAZETTE OF INDONESIA YEAR 2017 NO. 11), *supra* note.

<sup>125</sup> Iossa, Spagnolo, and Vellez, *supra* note.

<sup>126</sup> *Id.*

<sup>127</sup> EPEC, *The Guide to Guidance How to Prepare , Procure and Deliver PPP Projects*, EUROPEAN PPP EXPERTISE CENTRE (2012).

PPP contract.<sup>128</sup> A basic overview of the basic elements of PPP payment mechanisms can include among others:<sup>129</sup>

- 1) **'User charges**—directly collected payments from service users by the private party
- 2) **Government payment**—government payment to the private party for the provision of services or assets. Such could take the form of:
  - a. *Usage-based*—for instance, shadow tolls or output-based subsidies
  - b. *Based on availability*—conditional on an asset's or service's availability on a certain quality
  - c. *Upfront subsidies* based on having met specific milestones
- 3) **Bonuses and penalties, or fines**—payment deductions to the private party, or penalties/fines to be paid by the private party, due to failure to achieve certain specified outputs/standards; or oppositely, bonus payments given to the private party for meeting specified outputs.'

Starting with a basic or ideal funding structure is a useful method in approaching the design of the payment mechanism for a government contracting party.<sup>130</sup> Ideally, the public party will want to pay in instalments to the private party partner a fixed amount for, and only for, each point of service that has been delivered and have met contractually required service quality standards.<sup>131</sup> This would be in line with the key principle in PPP that any payment would only be made out only under the circumstance that service have been made available in accordance to the service standard that have been agreed

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<sup>128</sup> *Id.*

<sup>129</sup> Iossa, Spagnolo, and Vellez, *supra* note.

<sup>130</sup> Cui et al., *supra* note.

<sup>131</sup> EPEC, *supra* note.

and should not be simply based on the private party partner's real cost expenditures.<sup>132</sup>

Under the provision of Indonesia's primary regulation on Public Private Partnerships, PR 38/2015, there are three payment mechanisms for the private party to gain ROI in the project transaction. The GCA would determine the form of ROI covering the closing of capital cost, operational cost and profit of the IBE<sup>133</sup> between three payment mechanisms that are namely payment by user in the form of tariff, Availability Payment and other forms as long as they are not in conflict with the prevalent laws and regulations.<sup>134</sup> In using the AP ROI scheme, the payment scheme for the IBE will be paid starting from when the infrastructure is available for utilization or alternatively funds may also be allocated by the GCA to return investment costs if the IBE also acts as the operator of the infrastructure facility.<sup>135</sup> It is important to note that the AP ROI scheme can be used only if the infrastructure project is complete and ready to be operated and the GCA has the project has satisfied the applicable minimum service indicators agreed by the parties.<sup>136</sup>

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<sup>132</sup> Payment Mechanism, *supra* note.

<sup>133</sup> PRESIDENTIAL REGULATION NUMBER 38 YEAR 2015 ON COOPERATION BETWEEN GOVERNMENT AND BUSINESS ENTITIES IN INFRASTRUCTURE PROVISION (STATE GAZETTE OF INDONESIA YEAR 2015 No. 62), *supra* note.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

## CONTRACTUAL RIGHTS OF THE GCA IN THE PALAPA RING WESTERN PACKAGE

AS HAVE BEEN MENTIONED before, any rights that is fitted into a contract attached to one party would also conversely result in the creation of obligations to be fulfilled by another party to said contract as to perform the agreement.<sup>137</sup> In this case, Kominfo as the Government Contracting Agency in the Palapa Ring Western Package infrastructure development project have rights set out within the partnership agreement to ensure the provision of the public utility through the PPP scheme. The contractual rights that will be discussed in this section are those that are relevant to the focus of this chapter which is directly touching on the GCA's determination of Availability Payment to the IBE. In that sense, the GCA's right to monitor performance of service indicators and to receive and audit the IBE's report would be key to calculate the AP payment amount.

The management of PPP contracts are done differently from how traditional government contracts are managed.<sup>138</sup> The purpose of PPP contract management is to ensure that the project being provisions would be delivered consistently and at the expected standard, referred to in the contract, and any payments or penalties would be made based on such that;<sup>139</sup>

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<sup>137</sup> DAVID REITZEL ET AL., *supra* note.

<sup>138</sup> Managing PPP Contracts, , PPP KNOWLEDGE LAB ,  
<https://pppknowledgelab.org/guide/sections/73-managing-ppp-contracts>.

<sup>139</sup> *Id.*

- 1) 'Efficiency expectations of the contract are achieved and the handback provision in the contract are met
- 2) **Contractual responsibilities and risk allocations** are maintained in practice and the government's responsibilities and risks managed efficiently;
- 3) **Changes in the external environment**—both risks and opportunities—are spotted and acted on effectively; and
- 4) **The efficiency expectations** of the contract are achieved and the handback provision in the contract are met.'

PPPs are long-term and complicated, and contracts are inherently incomplete as the requirements and procedures for every single circumstance are not specified within the contract.<sup>140</sup> Consequently, PPP contract management must adapt and be flexible in terms of both the resources and capabilities available in order to satisfy the contract's long-term objectives.<sup>141</sup>

Performance monitoring becomes a key aspect to PPP contract management as previously it had been set out that the PPP scheme is built upon performance both during construction and for the term of the contract operation. Throughout the contract duration, the public party's implementing agency is usually in charge of contract management with responsibility frequently given to a designated PPP contract manager, that serves as the primary contact point for any PPP-related issues of the government.<sup>142</sup> Therefore, in order to achieve the value for money promised by a PPP in its contract lifetime, the public party must ensure that the planned transfer of responsibilities

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<sup>140</sup> Abdullahi Ahmed Umar, Noor Amila Wan Abdullah Zawawi & Abdul Rashid Abdul-Aziz, *Exploratory factor analysis of skills requirement for PPP contract governance*, 9 BUILT ENVIRONMENT PROJECT AND ASSET MANAGEMENT (2019).

<sup>141</sup> *Id.*

<sup>142</sup> *Managing PPP Contracts, supra note.*

and risks is implemented, monitored, recorded, reviewed and confirmed on a regular basis.<sup>143</sup>

Throughout the lifetime of the contract, the public party's contract manager needs to monitor the compliance and service performance (service indicators) of the private party to ensure if there should be any penalties or bonuses, monitor and ensure public party compliance in terms of contractual responsibilities, risk monitoring and mitigation and evaluating and allocating risks as contractually appropriate.<sup>144</sup> The public party needs to ensure the private party achieves its obligations by monitoring outputs or service and performance standards which in general does not entail a detailed monitoring of the construction phase, which is the private party's responsibility.<sup>145</sup> Thus, monitoring is done only against the performance/service indicators established in the contract.

In the PA for the Palapa Ring Western Package PPP project, the contractual right of the GCA to monitor performance is stipulated under Article 13. The GCA reserves the right to inspect, inspect, test and monitor the project and IBE's performance on the fulfilment of its obligations under this Agreement from the effective date until the date of termination.<sup>146</sup> Under the PA, the main objectives of monitoring are to determine whether the project has been designed, constructed, tested for functionality; check the construction progress and project testing and commissioning; and determine whether the project has been operated and maintained all in accordance with the PA.<sup>147</sup>

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<sup>143</sup> Umar, Zawawi, and Abdul-Aziz, *supra* note.

<sup>144</sup> Iossa, Spagnolo, and Vellez, *supra* note.

<sup>145</sup> Herbert S. Robinson & Jon Scott, *Service delivery and performance monitoring in PFI/PPP projects*, 27 CONSTRUCTION MANAGEMENT AND ECONOMICS (2009).

<sup>146</sup> PALAPA RING WESTERN PACKAGE AGREEMENT 284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016, p. 66.

<sup>147</sup> *Id.*, p. 66.

Under the PA, the GCA has the right to monitor performance of service indicators that are listed as Key Performance Indicators (“KPIs”) which is defined as the operational parameters intended to measure the performance of the IBE.<sup>148</sup> This is conducted to ensure that the IBE provides *reliable service* which is based on the average of the actual achievements of the KPIs in the last 3 (three) months of the project’s network services.<sup>149</sup> To that end, the IBE must provide a mirror server of their Network Management System (“NMS”) including software, to automatically generate performance reports on the fulfilment of KPIs, to be placed at BAKTI’s office so that information received on the IBE’s NMS server can be duplicated to BAKTI’s server.<sup>150</sup>

BAKTI Kominfo has also confirmed and explained that all service supervision has been integrated with active devices that provide output in the form of an NMS signal which is done through a dashboard which is monitored in real time.<sup>151</sup>

The GCA also has the right to form a team for the purposes of management and monitoring that is responsible to monitor, supervise, coordinate and evaluate of the full implementation of the project at each stage under the PA terms, assess the IBE’s obligation compliance, receive and review all IBE submitted reports.<sup>152</sup> Moreover, the team will provide a report on the project status and IBE performance including an assessment of the project main risk factors

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<sup>148</sup> *Id.*, at. 66.

<sup>149</sup> *Id.*, at. 13.

<sup>150</sup> *Id.*, at. 66.

<sup>151</sup> ANDREW NATHANIEL, TRANSCRIPT OF MINISTRY OF COMMUNICATION AND INFORMATICS OF THE REPUBLIC OF INDONESIA (BAKTI KOMINFO) RESPONSE TO INQUIRY (2021).

<sup>152</sup> PALAPA RING WESTERN PACKAGE AGREEMENT 284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016, p. 68.

and indicators to determine the extent to which these risk factors may affect the project and how it can be addressed.<sup>153</sup>

Additionally, within a period of 30 days after the PA signing date, the GCA and IBE also formed a joint monitoring team involving related agencies or bodies from the GCA or other elements of the GOI, including *PT Penjaminan Infrastruktur Indonesia*, as the project guarantor.<sup>154</sup> This joint monitoring team is responsible for monitoring the implementation of the project in order to identify and mitigate risks that will arise.<sup>155</sup> Further, the joint monitoring team has the same access rights to the project as the GCA's access rights as stipulated in the PA.<sup>156</sup> Thus, this allows an overall comprehensive monitoring of the project to further guaranteeing its progress, compliance, service and value-for-money. The direct ability to monitor via the mirrored NMS also aids the GCA to have the active awareness and determine whenever there may be a disruption or a disconnect of connectivity in real time which is important to have oversight on the infrastructure's availability to the public.

Although the GCA can monitor the KPIs through the mirror server of the NMS, they still have the right to receive reports from the IBE and to audit such reports. IBEs must prepare, maintain, and keep at the IBE's office their financial records and data in accordance with generally accepted accounting principles and applicable law.<sup>157</sup> The GCA or its authorized representative may audit IBE's books, records and data regarding all invoices to GCA under the PA.<sup>158</sup> This includes but is not limited to billing and payment of bills, deposited maintenance funds, indemnity claims, termination payments,

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<sup>153</sup> *Id.*, at. 69

<sup>154</sup> *Id.*, at. 69.

<sup>155</sup> *Id.*, at. 69.

<sup>156</sup> *Id.*, at. 69.

<sup>157</sup> *Id.*, at. 67.

<sup>158</sup> *Id.*, at. 67.

expense reimbursements and other expenses made to the GCA in accordance with the PA.<sup>159</sup> This right of the GCA to conduct an audit upon these information provides the ability for the GCA as the public party in the PPP to ensure the value-for-money of the infrastructure project and its continued reliable service to the public which it is means to serve.

The IBE is required to submit to the GCA a monthly report on the operation of the project within 15 days after the end of each month, including the level of service and compliance with the KPIs (*service indicators*), shutdowns (if any) and other matters deemed relevant by the IBE. or requested by the GCA regarding the project or PA.<sup>160</sup> Further, to meet the GCA's right to receive and audit reports, the IBE is also obligated to monitor and document the performance of the project and create and maintain accurate and up-to-date daily operation logs, inventory control reports, reports of failure to meet KPIs, maintenance reports, downtime reports and other documents as required by GCA from time to time.<sup>161</sup>

## AVAILABILITY PAYMENT IN THE PALAPA RING WESTERN PACKAGE PPP PARTNERSHIP AGREEMENT

THE SERVICE INDICATORS as set out in the Palapa Ring Western Package PPP PA are used as KPIs to calculate the payment formula to provide the Availability Payments to the IBE. Under the PPP PA, service indicators are defined as KPIs which are operational

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<sup>159</sup> *Id.*, at. 67.

<sup>160</sup> *Id.*, at. 67.

<sup>161</sup> *Id.*, at. 68.

parameters intended to measure the performance of the IBE.<sup>162</sup> As part of the IBE's obligation, the IBE is required to provide services and continuously operate and maintain the project in accordance with the KPIs.<sup>163</sup> The service indicators agreed in the PA between BAKTI Kominfo and PRB is a minimum level of service availability of 95% with a service reliability level of 100 milliseconds.<sup>164</sup> Availability here refers to the availability of services from the service city to the interconnected city and reliability refers to the reliability of the device in delivering data/services from the service city to the interconnected city.<sup>165</sup>

Syarif Lumintarjo, President Director of PRB, details that the five service cities, comprising of Bengkalis, Tebing Tinggi, Ranai, Tarempa and Daik Lingga, are the basis of the service indicators.<sup>166</sup> The KPIs are determined by the availability of services in these 5 cities.<sup>167</sup> Further, there are two actions to fulfil and achieve service indicators namely preventive maintenance, which is done through periodical service and corrective maintenance, which is repair and restoring connectivity.<sup>168</sup> As part of preventative maintenance, PRB assigns *PT Ketrosden Triasmitra* to patrol undersea fiber optic cables preventing cable damage, PRB tracks public works projects on land, maintain electricity supply and power generator checks and cooling or heat conditions at the NOCs.<sup>169</sup> In terms of corrective maintenance, repairs to restore normal connectivity availability are done by repair

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<sup>162</sup> PALAPA RING WESTERN PACKAGE AGREEMENT  
284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016.

<sup>163</sup> *Id.*

<sup>164</sup> ANDREW NATHANIEL, *supra* note.

<sup>165</sup> *Id.*

<sup>166</sup> ANDREW NATHANIEL, *supra* note.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

ships if occurring in the sea and by ground repair teams if occurring on land.<sup>170</sup> Both preventive and corrective maintenance are important, but the priority is to prevent as to keep service indicators within agreed SLA parameters and the PA.<sup>171</sup>

The IBE's performance in achieving the contractually agreed service indicators in each month in each regency/service city must be assessed with specifically laid out KPIs.<sup>172</sup> Since the Commercial Operational Date ("COD"), the GCA is required to make monthly Availability Payments to the IBE calculated according to the formula as set out in Appendix 11 on Availability Payment. Kominfo as the GCA assigns BAKTI, that is under it, to act on behalf of it to receive invoices from IBE, conduct checks on the accuracy of invoices from IBE and make Availability Payments to IBE in accordance with PA provisions and based on the specified components. These components are made up of the five Service Cities with each accounting for 20%. If in each month the invoice for the performance of the IBE in each Service Regency/City fails to meet or exceeds the Key Performance Indicators, the AP in the billing month for the Regency/City of the related service area is adjusted.<sup>173</sup>

There is no explicit stipulation on incentives or deductions within the PA or the Appendixes, but the basis of any AP paid out to the IBE by the GCA relies on the mathematical formula to avoid confusion and maintain clarity.<sup>174</sup> The weekly meeting between the GCA, IBE and other relevant stakeholders also ensures that any circumstance of note would be discussed and properly walked

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> PALAPA RING WESTERN PACKAGE AGREEMENT  
284/M.KOMINFO/HK.03.02/02/2016, 002/PRB/PD-DIR/II/2016, Appendix 12.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

through.<sup>175</sup> The contract formula allows so that short interruptions, disruptions, or disconnection of service connectivity, on part of the IBE or by a third-party, does not significantly impact the AP amount to the IBE.<sup>176</sup> The 95% availability minimum provides room so that slight problems in one specific Service Regency/City does not automatically translate to a deduction of AP to the IBE.<sup>177</sup> The formula is the basis of determining the payment amount, thus any deduction is not explicit, but in line with performance.

## CONCLUSION

THE IBE HAS the obligation for contingent cost liabilities outside of the determined Availability Payment amount in the Partnership Agreement in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. This is due to the fact that PR 38/2015 provides a new option of Availability Payment (“AP”) as an ROI scheme for private party partners for infrastructure development. Moreover, MFR 260/2016 stipulates that the AP scheme can be used if the PPP PA at least contains provisions on objective and measurable output specifications and performance indicators for services. Given that the Palapa Ring Western Package PPP PA is a contract dependent on consistent performance and availability on the part of the IBE for AP to be paid out, the IBE has the obligation to maintain connectivity and resolve all issues that would affect services in any way. This is a risk of operation and maintenance allocated to the IBE under the PA and becomes their obligation to perform to secure its interests. On the other hand, the

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

GCA has the right to penalize Availability Payment amount to the IBE in the occurrence of damage caused by a third party which interrupts or disrupts infrastructure service availability. This is because MFR 260/2016 sets out that for the AP ROI scheme to be implemented in a PPP project, there must be AP calculation formula (*agreed formula*) as the basis to determine the GCA's financial right and/or obligations to the IBE; and an effective monitoring system against the *performance indicators*. Additionally, Article 6 (2) of MFR 260/2016 allows for the PPP PA that is drawn up by the GCA and IBE to determine how they would regulate a system of incentives and penalties for the GCA and/or the IBE, in order to maintain the level of service quality provided by the IBE to service users, which provides large room for free contract negotiation.

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#### ABOUT AUTHORS

**Andrew William John Nathaniel** is a graduate of the Faculty of Law, Universitas Indonesia. He has previously assisted research at his faculty on various issues such as international investments, project financing, and helped in a large-scale project research commissioned by the Ministry of Transportation to advise on private sector investment for airports and services infrastructure development through Public-Private Partnership financing and contracting. During his studies, Andrew was selected to represent the Faculty of Law, Universitas Indonesia at the 21st International Maritime Law Arbitration Moot (IMLAM) Competition hosted by Singapore Management University School of Law. Andrew's scope of experiences outside of academic research includes working on public policy at the Executive Office of the President of the Republic of Indonesia, defence industry advisory, business development, and trade negotiation. Beyond law, he has strong interests in banking, market analysis, investments, trade, project financing, corporate strategy, and M&A. At the time of this publication, Andrew is working professionally as part of a global market research consultancy firm and will soon be joining an international bank.

**Yetty Komalasari Dewi** earned her Bachelor degree (SH) and Doctoral degree (Dr) from Faculty of Law, Universitas Indonesia (UI) in 1993 dan 2011; and her Master of Legal Institution (ML.I) from School of Law, University of Wisconsin-Madison, the United States of America in 2003. Currently, she is in charge for numbers of course namely Trade/Commercial Law, Corporate/Company Law, Investment Law, Arbitration (Commercial/Investment), International Trade Law (WTO Law), both in undergraduate and graduate levels. She was an Exchange Professor at Kumamoto University, Japan (2016). She is member of subject editors of *Asian Journal of Comparative Law* (2018-2021) published by the National University of Singapore, and member of Reviewer Boards in several law school in Indonesia. Yetty's area of research is corporate/company law, commercial/trade law and investment law. She is actively involved in research activities funded by Ministry of Higher Education, UI, and other institutions, such as the Indonesian Coast Guard, Bank of Indonesia, Indonesian Investment Coordinating Board, Ministry of Industrial Affairs, Corruption Eradication Commission, Regional Representative Council, Ministry of Trade, Ministry of Transportation, etc. Yetty's publications include books and articles. Her books among others are: *Indonesian Partnership Law: Theory and Cases*, *A New Paradigm on Commanditaire Vennotschap (CV): A Comparative Study with the Indonesian Commercial Code and the Netherland Commercial Code as well as Court Decisions in Indonesia and the Netherlands*, *Introduction to Commercial Law*, *Alternative Defense Mechanism in International Trade for Domestic Industries*, *The Development of Commercial Law in Indonesia: Limited Liability Partnership (LLP) and Civil Company/Partnership (Maatschap) as a Business Organization* (book-chapter). Some of her articles are: *The Need to Adopt a Limited Liability Partnership for the Legal Profession in the Partnership Law: A Critical Review From Indonesia's Perspective*; *Cost of Maritime Security Inspection to Merchant Ship Operator – The Indonesian Shipowners' Perspective*; *A Critique Towards Australian Work and Holiday Visa Subclass 462: Where Does It leave Indonesian Citizen?*; *Abuse of Rights by Majority Shareholders in Indonesian Family Owned- Company: Is It Likely?*; *Dispute Settlement Mechanism in Bilateral Investment Treaties*; *Readiness of Indonesia in Facing the ASEAN Economic Community (MEA) 2015*.

**Shatila Dhiyaannisaa Sani** earned her Bachelor of Laws (LL.B.) degree from The London School of Economics and Political Science (LSE) in 2015 and her Master of Laws (LL.M.) degree from University of California, Berkeley – School of Law (Berkeley Law) in 2022 with certificate of specialization in business law. Shatila is currently working as a corporate lawyer in a private practice and has worked on various domestic and cross-border corporate deals. Shatila's area of interest is corporate, company, finance, capital market and technology-related laws. During her time at LSE, she served as the committee member of the LSE Students' Union Law and Financial Markets Society. While at Berkeley Law, she actively attended events and discussions held by Berkeley Center for Law and Business. Shatila had written on (i) U.S. Securities and Exchange Commission's Proposed Amendments to Beneficial Ownership Reporting Obligations under Schedule 13D, (ii) Assessing the Potentials, Obstacles and Risks of Using DeFi to Fill the MSME Finance Gap in Indonesia and (iii) misappropriation of trade secrets under California Civil Code Section 3426.