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COMMENTARY

Indonesian High Court Upholds Ruling that Contracts be Written in Indonesian

In August 2015, the Indonesian Supreme Court announced that it will uphold the ruling of the West Jakarta High Court in *PT Bangun Karya Pratama Lestari v. Nine AM Ltd.* ("BKPL" and "Nine AM"), which nullified and voided a loan agreement between the parties. Since the agreement was executed only in English, it violated Indonesian law requiring that contracts be drafted in Indonesian. Although Indonesian jurisprudence does not recognize the principle of *stare decisis*, the Indonesian Supreme Court's affirmance demonstrates the potentially wide application of the language requirement and may be persuasive in future disputes.

Background

The original loan agreement between BKPL—an Indonesian mining company—and Nine AM—an American lender—set forth the terms of a USD 4.4 million loan by Nine AM to BKPL. The choice-of-law and forum provisions invoked Indonesian law to be applied by the courts of West Jakarta. The parties executed the agreement in English, without an Indonesian translation. BKPL subsequently sued Nine AM and sought declaratory relief that the parties' loan agreement was null and void because it violated Indonesian law requiring an Indonesian-language counterpart.

Under Article 36 of the Indonesian constitution, the national language of the republic is Bahasa Indonesia. To effectuate Article 36, in 2009 the Indonesian Assembly passed Law 24/2009 on the "National Flag, Language, Seal, and Anthem," of which Article 31 (nicknamed the "Language Law") specifies that "[t]he Indonesian language must be used in memoranda of understanding or agreements involving state institutions, government agencies of the Republic of Indonesia, Indonesia's private institutions, or individual Indonesian citizens." The Language Law notes further that "[s]uch Memoranda and agreements … involving a foreign party may also be made in the national language of such foreign party and/or in English." Although the Language Law stipulated for an implementing regulation within two years of passage, we are not aware of any such regulation to date.

The Language Law did not specify penalties, sanctions, or remedies for noncompliance. Shortly after passage of the Language Law, Indonesia's Minister of Law and Human Rights issued an opinion letter (no. M.HH.UM.01.01-35) regarding the Law's interpretation. The letter affirmed the right of private parties to freedom of contract, with any choice of governing

language at their discretion. It explained that English-only agreements between private parties did not violate the Language Law, and that the absence of an Indonesian counterpart would not affect a contract's validity.

Decisions of the Indonesian Supreme Court, West Jakarta High Court, and West Jakarta District Court

On August 31, 2015, the Supreme Court of Indonesia affirmed the May 7, 2014 decision of the High Court of West Jakarta (No. 48/PDT/20/2014/PT.DKI). With this affirmance, the Supreme Court rejected Nine AM's appeal to recognize the validity of its loan agreement with BKPL. Although the Supreme Court has not yet issued a written opinion for its decision, affirmances by the Indonesian Supreme Court typically adopt the reasoning of the intermediate court without further elaboration. The High Court of West Jakarta in turn adopted the June 20, 2013 opinion of the District Court of West Jakarta (No. 451/Pdt.G/2012.PN.Jkt.Bar), which found the parties' loan agreement null and void.

The district court strictly interpreted the Language Law and noted its command that the "Indonesian language *must* be used." Although Nine AM offered the interpretive guidance of the Minister of Law and Human Rights, the court rejected this argument. Under Indonesian law, the court said, legislation is superior to the government's nonbinding interpretation, so it refused to rely on the Ministry's opinion letter.

Finding a violation of the Language Law, the district court also rejected Nine AM's argument that the Law proscribed no sanctions for noncompliance. The court turned to provisions of the Indonesian Civil Code setting forth elements for valid contracts. It pointed to Article 1320, which, along with requirements such as consent and capacity, mandates that a contract have a "legal cause," and to Articles 1335 and 1337, which define and nullify agreements with a "false or forbidden reason." Violation of the Language Law, the district court held, triggers each of these obligations.

Significance

The High Court affirmance and the lower court decisions demonstrate the potential reach of the Language Law. The language requirement is one of "lawful cause" going to the substance and legality of an agreement and not merely one of form. Failure by parties to execute an Indonesian-language counterpart provides grounds for nullification, notwithstanding the contrary opinion letter by an Indonesian Ministry, the lack of enacting regulation, and the lack of statutorily imposed sanctions for noncompliance.

Given the breadth of the courts' interpretation and its practical implications, practitioners should exercise extreme caution when contracting with Indonesian counterparties: Parties should execute agreements with an Indonesian translation, even if time- and cost-intensive. Since the Language Law is silent on the choice of governing language, in an attempt to avoid problems arising from competing interpretations, parties should specify which version will control.

Finally, even if the parties fully expect to settle contractual disputes by way of arbitration outside of Indonesia, any resulting award may require execution in Indonesia and, accordingly, may be vulnerable to collateral attack. Thus, provisions for resolving disputes outside of Indonesia will not necessarily inoculate parties against the language requirements.

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