Court Causes Unease by Striking Down Agreement on Language Grounds

In a disquieting ruling (the "Decision") that has been noted internationally, the West Jakarta District Court recently annulled a contract between an Indonesian borrower and a non-Indonesian lender on the ground that an Indonesian-language version of the agreement had not been executed, in contravention of Article 31(1) of the National Language, Flag, Coat of Arms and Anthem Act 2009 (the "Act").

While the Decision, handed down on 20 June 2013, is currently being appealed to the Jakarta High Court (and it could take two to three years before a final and conclusive ruling is handed down),[1] it should nevertheless serve as a wake-up call to practitioners and businesspeople alike that statutory injunctions that have often been seen as being nothing more than aspirational or mere "wish lists" can have very serious implications if not complied with.

Background

The facts of the case -- *PT Bangun Karya Pratama Lestari v Nine AM Ltd* (Decision Number 451/Pdt.G/2012/PN.Jkt Bar.) -- are as follows.

The plaintiff borrowed USD 4,422,000 from the defendant based on a loan agreement (the "Agreement") that was drafted solely in English and which the parties expressly agreed would be governed by Indonesian law. The Court accepted that the Agreement had been drafted in its entirety by the defendant, with the plaintiff's role being confined to its actual signing. In consideration of receiving the loan, the plaintiff pledged a number of units of heavy machinery as collateral, but subsequently repudiated the Agreement and sought to have it set aside by the Court on the ground, inter alia, that it was void ab initio[2] by virtue of Article 31(1) of the Act.

Substantive Issues

Article 31(1) of the Act reads as follows: "Bahasa Indonesia shall be used in a memorandum of understanding or agreement to which one of the parties is a state institution, Republic of Indonesia government institution, Indonesian private entity or Indonesian citizen." The Act contains no sanctions for breaches of Article 31(1).

Subsequently, Article 40 of the Act states that further provisions governing the application of Article 31(1) shall be established by Presidential Regulation.

However, no such regulation has been issued to date. Nonetheless, it needs to be remembered that under Indonesian law (i) a norm created by a statute is effective as of the time of the statute's enactment, and (ii) a lower level regulation cannot circumscribe or expand such norm. In this respect, the norm created by Article 31 is quite clear in imposing an obligation to also execute an Indonesian version of any agreement to which an Indonesian entity/person is a party. If issued, the Presidential Regulation cannot diminish the scope of the norm, but may only fill in the details as to how it is to be applied.

While some legal practitioners had argued that the language requirement would be inoperative until such time as a Presidential Regulation was issued (in which they were partly supported by a guidance issued by the Ministry of Law and Human Rights – see discussion below), our view was always that

the language requirement was operative from the outset. Consequently, we consistently advised compliance even though the Presidential Regulation had not been issued. Our concern was primarily that the courts, in the event of a dispute, would be inclined to take a literalist view and find that an agreement not executed in the Indonesian language would violate the Act and thereby fail to satisfy one of the key requirements for a valid agreement, namely, that the agreement is for a lawful cause. This is despite the fact that the "lawful cause" requirement has traditionally been applied solely to the subject matter of agreements (for example, a contract to procure a prostitute or pay a bribe would fall foul of the lawful cause requirement).

Our fears regarding the likely stance of the judiciary have proved to be justified, with the West Jakarta District Court taking the drastic step of setting aside the Agreement, ruling it to be void ab initio. The Court held that as the agreement had not been drafted in Indonesian, as required by Article 31(1), it therefore failed to satisfy the "lawful cause" requirement and was void from the outset, meaning that a valid and binding agreement had never existed. In a further dictum, the Court pointed out that even if a Presidential Regulation were to be issued, as mandated by Article 40 of the Act, this would not be sufficient to defeat the words "shall be used," as they appear in Article 31(1), as a Statute is superior in the hierarchy of laws to a Presidential Regulation

The Court concluded by stating that the only way in which the words "shall be used" could be removed from Article 31(1) would be through a challenge to their constitutionality in the Constitutional Court or the amendment of the Act by the House of Representatives (DPR).

Ministerial Guidance Disregarded

As already touched on above, despite the enactment of Article 31(1) many legal practitioners continued to accede to client requests that their agreements be drafted in English in circumstances where Article 31(1) would suggest they be drafted in Bahasa Indonesia. In doing so the lawyers frequently relied on the *Clarification to Law Firms* issued by the Minister of Law and Human Rights on 28 December 2009, in which the Minister stated his view that Article 31(1) did not apply to private commercial agreements, and that accordingly these could continue to be drafted in English in accordance with the wishes of the parties. The Minister was also of the opinion that the actual implementation of Article 31(1) would have to await the issuance of a Presidential Regulation, as mandated by Article 40, meaning that until such time as this regulation was issued, the language requirement would essentially be unenforceable.

The judgment of the West Jakarta District Court in *PT Bangun Karya Pratama Lestari v Nine AM Ltd* clearly shows that the Minister's confidence was misplaced, and should serve as a warning that ministerial or other official guidances, clarifications, explanations, etc., are of no more than persuasive value, at the very most, when adduced as evidence in court.

Conclusion

While the Decision is currently on appeal (and therefore not enforceable as yet), legal practitioners and those involved in cross-border transactions should attempt to mitigate all possible risks under Article 31 by ensuring that both Indonesian and non-Indonesian versions of their agreements are executed at the same time. Of course, in practice this will present many difficulties. Thus, while it would be preferable for the two versions to be executed simultaneously, it also needs to be stressed that nothing in the Act prohibits the parties from agreeing to execute the Indonesian version of their agreement at a later date, although it remains the case that the two versions should be executed as near to each other as possible. The need to execute an Indonesian language version could be incorporated into the agreement either as a condition precedent or condition subsequent (with a

condition precedent being preferable). This view is based not only on the fact that the Act has nothing to say as regards timing, but also the general principle of freedom of contract.

As regards governing language, the Act is also silent, so once again the parties should be free to agree on which language will govern interpretation and prevail should a dispute arise. However, it also needs to be acknowledged that in the absence of clear regulatory provisions, there is no way of knowing how the court will rule if there is a dispute. This applies equally to the timing of execution of the Indonesian language version and the question of governing language.

[1] It should be noted that a judicial decision that is appealed is not enforceable in Indonesia until such time as a final and conclusive judgment is entered. The appeal process is from the District Court to the High Court, and from the High Court to the Supreme Court.

[2] Void from the outset, meaning that no agreement ever existed. Should a contract be held to be void ab initio, the court will order the parties to be returned, in so far as possible, to their original positions.