CLIENT NEWSFLASH

Court Nullifies English Language Contract

On June 20, 2013, the District Court of Jakarta Barat nullified a Loan Agreement executed only in English, concluding that contracts involving Indonesian parties must be written in Bahasa Indonesia, under Decision No. 451/Pdt.G/2012/PNJkt.Bar.

The District Court based its decision on Law No. 24 of 2009 on Flag, Language and Coat of Arms and National Anthem ("**Law 24/2009**"). Under Law 24/2009, Indonesian language is required in any MOU or agreement involving Indonesian parties. The District Court interpreted that provision to mean that an agreement not using Bahasa Indonesia is void as a matter of law.

The District Court decision was affirmed on May 7, 2014, by the Jakarta High Court in Appellate Decision No. 48/Pdt/2014/PT.DKI. In its considerations, the High Court opined that the lower court decision was legally sound, and because there were no new contrary facts submitted by the appellant, the High Court affirmed the decision entirely.

The appellate decision was notified to the parties on September 1, 2014, and the appellant filed for appeal with the Supreme Court on September 11, 2014. As of the time of writing, the case is ongoing at the Supreme Court.

❖ BACKGROUND OF THE CASE

In the District Court case, the court nullified a loan agreement between PT Bangun Karya Pratama Lestari ("**BKPL**") and NINE AM Ltd ("**NINE**"). Under the loan agreement, NINE provided a loan to BKPL in the amount of US$4,422,000. The choice of law provision designated Indonesian law to govern the agreement, which was written only in English. A deed of fiduciary security executed in Bahasa Indonesia was concluded to secure the loan.

Starting from December 2011, BKPL discontinued repayment, resulting in BKPL defaulting on the loan. According to the District Court decision, up until that date, BKPL had repaid US$4,306,460.

After issuing a demand letter (*somasi*), and receiving no response, NINE petitioned the court seeking payment of the overdue principal plus interest, to which BKPL responded with a tortious act claim challenging the loan agreement under Law No. 24/2009, because it was made only in English language.

❖ LEGAL BASIS

<u>Laws and Regulations on Language</u>

Article 30 of Law No. 24/2009 provides that Indonesian language must be used in any MOU or agreement involving the State agencies, Indonesian government institutions, Indonesian private entities, or individuals of Indonesian nationality. Any MOU or agreement involving foreign parties may also be

written in the national language of the foreign party and/or English. Indonesian does not have to be selected as the governing language, but Indonesian text is required if the agreement includes an Indonesian party, including Indonesian legal entities that are foreign-owned, such as PMA companies.

Article 40 of Law 24/2009 stipulates that further provisions on the use of Indonesian language shall be governed by a Presidential Decree, and Article 73 states that any regulations required to implement the law shall be promulgated within two years after enactment of the law (July 9, 2009).

We note that the Minister of Law and Human Rights ("**MOLHR**") issued an informal guidance letter in 2009, which principally expressed that the use of English language in an agreement does not violate the formal requirement provided under Law 24/2009, at least until such time that a Presidential Decree is issued on the subject. To date, no Presidential Decree has been issued. Nevertheless, the MOLHR's informal guidance was not binding on the District Court, and it should not be relied upon to justify execution of English-only agreements.

Recently, Government Regulation No. 57 of 2014 on Development, Guidance, and Protection of Language and Literature, as well as Improvement of Indonesian Language Function ("**GR 57/2014**") was issued to implement certain provisions of Law 24/2009. As provided under Article 5(2) point (e) of GR 57/2014, one of the functions of Bahasa Indonesia as the state language is to facilitate transactions and commercial documentation. Although there is no provision in GR 57/2014 that explicitly requires Indonesian language in a contract, this provision can be perceived as affirming the District Court's position that Indonesian language should be used in agreements involving an Indonesian party.

Indonesian Civil Code ("ICC")

Under Article 1320 of the ICC, an agreement must satisfy the following conditions in order to be valid:

1. consent of the parties to be bound;
2. legal capacity to enter into an obligation;
3. specific subject matter; and
4. permitted cause.

Article 1335 provides that any agreement without a permitted cause, or concluded pursuant to a fraudulent or prohibited cause, shall not be enforceable. A prohibited cause is any cause prohibited by law or that violates the moral or public order, as provided under Article 1337. We commonly understand a prohibited cause to mean that the object of the agreement itself is illegal, such as gambling. A more appropriate basis would have been Article 1338 of the ICC, which provides that an agreement not executed in accordance with the law (such as Law No. 24/2009) cannot bind the individuals concerned.

❖ DISTRICT COURT JUDGMENT

In the District Court decision, the court granted the request of BKPL; hence, the Loan Agreement entered between BKPL and NINE was declared null and void, with considerations as follows.

a. Under the ICC, non-fulfillment of the conditions of consent and legal capacity (items 1 and 2 of Article 1320) causes an agreement to be *voidable*, while non-fulfillment of a specific subject and a permitted cause (conditions 3 and 4) causes an agreement to be *void by law*;
b. Pursuant to Articles 1335 and 1337 of the ICC, an agreement that constitutes a prohibited cause or a violation of law causes an agreement to be declared void by law;
c. As provided under Law 24/2009, Indonesian language must be used in any MOU or agreement involving Indonesian parties; therefore, an English-only agreement involving Indonesian parties executed after the date the law was enacted is in violation of Law 24/2009;
d. Neither the absence of an implementing regulation Presidential Regulation, nor the issuance of informal guidance by MOLHR, can exempt Article 31 of Law 24/2009, which requires the use of Bahasa Indonesia for any agreement involving Indonesian parties, because within the hierarchy of Indonesian laws and regulations, a Law (*undang-undang*) is of higher authority than any Presidential Regulation or subsequent implementing regulation;
e. As a consequence, the Loan Agreement violates Law 24/2009, causing non-fulfillment of the conditions for a valid agreement, i.e., the condition of a permitted cause under the ICC; therefore, the Loan Agreement shall be declared null and void; and
f. As the Loan Agreement is void and cannot be enforced, the deed of fiduciary guaranty as the derivative agreement (*accesoir*) of the Loan Agreement shall also be declared null and void.

In the District Court decision, the court ordered BKPL to repay the remaining loan principal in the amount of US$115,540, as the consequence of voiding the agreement, i.e., had the agreement never been entered, the principal amount never would have been loaned.

While we may have a different view about the legal basis for revoking the loan agreement, we note that the court was at least consistent in its decision, insofar as it required the borrower to repay the principal amount. Having nullified the agreement, the court did not address any interest owed or lost profit that the lender may have suffered during the loan term.

❖ CONCLUSION

Although the decision is not yet final and binding (pending the decision on appeal), in the meantime, any party contracting with an Indonesian counter-party, be it in a cross-border or domestic transaction, needs to anticipate the applicability of Law 24/2009 in this regard. A bilingual agreement (or separate versions in each language) is preferable. For any English-only agreement involving Indonesian parties concluded after the enactment of Law 24/2009 (July 9, 2009), it is advised to re-execute the agreement in Indonesian (or bilingual) version so as not to leave it vulnerable to challenge. It is also advised to state the effective date expressly in the English version of the agreement, so that re-execution of the Indonesian (or bilingual) will follow the effective date of the initial English version.

Note also that although Law 24/2009 requires the use of Indonesian language, the law does not require Bahasa Indonesia to be the governing language. Accordingly, English can prevail as the governing

language, so long as an Indonesian language version is also executed and the execution of the contract is not subject to any other particular formalities required under the regulations.

(updated) June 16, 2015

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