



Urgency in using Indonesia Language on Business Contracts and Potency of Investment Dispute: The Study of Supreme Court Decision Number 601 K/Pdt/2015

Johannes Ibrahim Kosasih¹^a and Yohanes Hermanto Sirait²^b

¹Faculty of Law, Universitas Warmadewa, Bali, Indonesia

²Faculty of Law, Universitas Kristen Maranatha, Bandung, Indonesia

Keywords: Business Contract, Indonesian Language, Investment Dispute.

Abstract: Supreme Court (MA) Decision Number: 601 K / Pdt / 2015 concerning lawsuit by PT. Bangun Karya Pratama Lestari against NINE AM LTD may induce a significant impact on the trust of foreign business actors to regulation and law enforcement. It is true that the use of the Indonesian language as required in Article 31 paragraph (1) of Law of the Republic of Indonesia Number: 24 of 2009 is mandatory in any agreement or memorandum of understanding involving State institutions, government agencies of the Republic of Indonesia, Indonesian private institutions, or Indonesian State individuals. However, the decision by the judiciary in Indonesia to cancel the agreement could hamper investment in Indonesia. Especially because the use of the Indonesian language is more formal than substance. This article is normative research, using primary, secondary, and tertiary legal material. The result shows that the urgency for judicial bodies in Indonesia to adopt decisions to the needs of the investment program initiated by the Government and consider the needs between two entities from different countries. The judges need to fairly measure good faith from both parties in an agreement and understand the differences between the substantial and formal requirements for a valid agreement.

1 INTRODUCTION

The Indonesian language has 2 main (two) purposes, firstly as an official language and lastly, as a unifying language. This recognition comes into binding when Law Number 24 of 2009 on National Flag, Language, Emblem, and National Anthem issued. Therefore, the use of the Indonesian language is mandatory in any activity whether carried out by state and government institutions or by the private institution and all citizens in Indonesia.

In business activity, this mandatory significantly affects any type of agreement as stated in Article 31 of Law Number 24 of 2009:


“Bahasa Indonesia wajib digunakan dalam nota kesepahaman atau perjanjian yang melibatkan lembaga Negara, instansi pemerintah Republik Indonesia, lembaga swasta Indonesia atau perseorangan waga Negara Indonesia”. (Indonesian language shall be used in any memorandum of


understanding or agreement which involved state institution, government institution, private institution, and individuals of Indonesian citizen).

As a sovereign state, Indonesia may obligate the use of official language. But the issues occurred when the development of business requires the use of a foreign language especially English. In some cases, there is something called a “standard agreement” which is drafted in English. Most of business actor use English as international language for contract.

An issue that interesting to be examined is the study case between PT. Bangun Karya Pratama Lestari, domiciled in Jakarta as plaintiff against NINE AM LTD, domiciled in Texas 77530 USA, as a defendant. This case registered as civil lawsuit No. 451/Pdt.G/2012/PN. Jkt. Bar, in District Court of West Jakarta.

Those cases above concern a legal relationship in terms of the loan agreement of April 23, 2010, made by both parties. In this agreement, the plaintiff obtains

^a <https://orcid.org/0000-0001-9073-8153>

^b <https://orcid.org/0000-0001-5678-3188>

a loan of US\$ 4,442,000. The clause of the agreement stated that the agreement subject to any prevailed law of Indonesia and the agreement drafted only in English.

The dispute then occurred; the plaintiff sues based on the mandatory to use the Indonesian Language in a contract made in Indonesia as stated in Article 31 (1) of Law Number 24 of 2009. The plaintiff wishes the court to nullify the agreement (to be null *and void* or *void ab initio, nietig*). Other legal standings used by the plaintiff are Article 1320, Article 1335, and Article 1337 of Indonesian Civil Code Number 23 of 1847. The district court then passes the decision to nullify the agreement. This decision was then strengthened by Supreme Court.

This research is normative by using statute and conceptual approach. Law Number 24 of 2009, Indonesian Civil Code Number 23 of 1847, and other related regulations used as legal basis in analysing all legal issues here.

From those backgrounds above, this article aims to examine whether the consideration made by the judge is exact and whether this decision may affect any foreign investment activity in Indonesia.

2 METHODS (AND MATERIALS)

This article aims to examine the legal impact of the decision of Supreme Court Decision Number 601 K/Pdt/2015 on investment and contracts in Indonesia. This article will also examine whether the Decision will bring into any dispute on investment matters. This article is normative research using a statute and case approach. The data is primary, secondary, and tertiary legal material. This article will analyze all legal material deductively.

3 RESEARCH AND DISCUSSION

3.1 Indonesian Language and Legal Language

Various languages are used by humans in all parts of the world, from simple language to more common languages that are used internationally. Language is one of the natural skills bestowed on mankind (Mukhlis, 2009) Language is the main tool for communication, and communication almost always plays an important role in a social context. Effective communication requires an understanding and

recognition of the connections between a language and the people who use it (Cochrane, 2012).

An important function of language is for humans to convey information to each other or request services of some kind in a variety of situations such as to inform others on direction, market, and other activities. (Armstrong & Ferguson, 2010) History shows that language has affected many facets of human culture: religious, political, social, and economic. Nowadays, language also affects law and regulation whether at the national, regional, or international level.

The role of language also resides in legal studies. Statement from J.J.H. Bruggink as translated by Arief Sidharta affirms that when the student learns the law, those students also learn how to think juridically. This activity to learn law also include the competency to master legal language because, in those legal languages, juridical thinking lives. (J J H Bruggink; Arief Sidharta, 1996). It means that law and language basically have a deep link. The link between both is the one that creates legal language.

Scope of legal language covers written legal products (legislation, jurisprudence, lawsuits (requisitor), defence (*pledooi*), letters in civil cases, etc.) as well as those in the form of product issued by legal professional drafts such as law drafter, judge, attorney, lawyer, notary, and others. All those products are arranged in the systemized language (standardized) by legal actors (especially in writing) which is a basic requirement for formulating a law (Said, 2012).

3.2 Mandatory in using Indonesian Language on Agreement and Memorandum of Understanding

The obligation to use Indonesian language as stated in Article 31 Law Number 24 of 2009 is mandatory to every government entity, state, and private institution as well as citizens who want to be bound by agreement. It means that both parties in agreement including foreign party must use Indonesian language in their written agreement. If they do so, then those agreement has fulfilled one of many requirements as a valid one. Indeed, this mandatory trying to protect all parties in an agreement. It is hoped that with the uniformity of using Indonesian language, it can minimize differences in interpretation of any terms in the contents of the contract. With the lack of multiple interpretations, it will minimize or even prevent legal disputes between the parties (Muhammad Syaifuddin, 2009).

In the agreement-making process, the freedom of contract principle is an essence. However, this principle is not automatically applicable if it is related to the language used in the agreement. The parties do not freely choose the language used in the agreement. The parties concerned are not allowed to choose a language other than Indonesian. If the choice of language can be made, the obligation to use the language stated in Law Number 24 of 2009 will be futile.

Basically, the freedom of contract principle is strictly regulated in Article 1338 paragraph (1) of the Civil Code. It is stated that "all agreements made legally are valid as laws for those who make them", meaning that both parties have obligation to comply with the agreement (*pacta sunt servanda*). This obligation has equal standing as comply to any statute issued in Indonesia. Hence, the role of the government in the realm of private law should be limited and refrain to intervene in the will and agreement of the parties.

3.3 Interpretation and Legal Reasoning in Interpreting Legal Norm in a Contract

There are various main problems in legal studies, such as determining what is the law in a certain concrete situation, mainly when determining what are the rights and specific obligations of the parties based on the law (Baro, 2017).

To solve these problems, a reasoning process known as legal reasoning is used, which is a juridical method of thinking to identify, based on the prevailing legal order, the rights, and specific juridical obligations of the parties (Baro, 2017). The reasoning is the activity higher level in the form of examining and understanding a proposition or several propositions. Then, based on those understanding and the relationship between those propositions, intelligence generates what is called a conclusion (J J H Bruggink; Arief Sidharta, 1996).

Legal reasoning in understanding statutory regulations, especially for Indonesia, a country that is based on the codification encourages the judge to rely on positive law, which is referred to as statute (Butarbutar, 2011). In a situation when a law is unclear or incomplete to decide any event or case, the judge is required to always find the law

(Butarbutar, 2011). In this part, the role of the judge gets stronger. Accordingly, a judge must be insightful. Especially, when the constitution gives freedom and authority to the judge according to Article 24, Constitution of 1945 (Indonesia Supreme

Source of Law). Law Number 48 of 2009 on Judicial Power strengthening this authority. Based on it, the judge may do the discovery of law method

(*Rechtsvinding*) (Butarbutar, 2011). This method is divided into three, namely interpretation, argumentation, and exposition (legal construction).

Interpretation by the judge must be able to explain the implementation of law in concrete events (Pitlo, 1993). Although, the result may be rejected by several parties until the decision legally binding (*inkracht van gewijsde*). The goal of explaining and interpreting these rules is to realize the function so that the positive law prevails. To simply put, interpretation is taken to clear the meaning of regulation to a certain real event (Bambang Sutiyo, 2015).

3.4 The Impact of Court Decision to Agreement That Does Not Use the Indonesian Language

The case of PT. Bangun Karya Pratama Lestari against NINE AM LTD was decided in West Jakarta District Court (first-degree court) Number: 451/Pdt/PN. JKT. BAR on 20 June 2013. The panel argued that the provisions in Article 1320 paragraph (4) of the Civil Code (KUHP) oblige (a) the existence of a lawful cause is an essential requirement, in case these conditions are not met then an agreement is null and void, (b) loan agreement between PT. Bangun Karya Pratama Lestari and NINE AM LTD that signed on 23 April 2010 has violated Article 31, Law Number 24 of 2009, Article 1335 KUHP jo Article 1337 KUHP, (c) based on point (a) and (b) before, an agreement without cause or that has been made due to a false or prohibited cause, has no legal force and a cause is prohibited if it is prohibited by law or if it is contrary to morals or public order.

Based on its considerations above, the panel decided to grant the Plaintiff's claim in its entirety; states that the Loan Agreement dated 23 April 2010 made by and between the Plaintiff and the

Defendant is null and void; stating that the Fiduciary Security Agreement Deed on Objects dated 27 April 2010 Number: 33 which is the accessory of the Loan Agreement dated 23 April 2010 is cancelled by law; order the Plaintiff to return the remaining loan which has not been returned to the Defendant in the amount of USD 115,540 (one hundred fifteen thousand five hundred and forty United States Dollars); sentenced the Defendant to pay expenses incurred in this case amounting to Rp. 316,000 (three hundred and sixteen thousand rupiah).

Those decisions were then upheld at the appeal level at the Jakarta High Court with the decision Number: 48 / PDT / 2014 / PT.DKI on May 7, 2014, at Supreme Court with the decision Number: 601 K/ Pdt/2015 on Agustus 31, 2015. The Supreme Court rejected the appeal and stated that the previous court's decision (*judex facti*) was correct. It means that there is no mistake in applying the law. The supreme court believes that the lawsuit is based on applicable law. on the other hand, Defendant failed to prove the truth of his argument. Therefore, the petition for cassation from the defendant, in this case, NINE AM LTD, is legally domiciled in Texas, the USA was rejected by the Supreme Court (MA).

3.5 Investments in Relation to Regulation and Law Enforcement Issues in Indonesia

This decision discussed here will draw attention from an investor. There are some points underlined here:

First, issues concerning the object of an agreement as required in Article 1320 (4) of Civil Code (KUHPerdata). Subekti stated that the object of an agreement is the content of the agreement.

Second, the usage of the Indonesian language as stated in the claim document against NINE AM Ltd, in this matter, this article will refer to Article

1320 KUHperdata, Article 1335 KUHPerdata, Article 1337 KUHPerdata and Article 31 (1) Law Number 24 of 2009.

Third, interpretation by the Judges in their decision. The judge equates “obligation” in Article 31 (1) 1337 KUHPerdata. This interpretation brings into a consequence of the annulment. The judges see any agreement made without the Indonesian language as “null and void”.

Fourth, the potency of fallacy in the decision made by the judges. This fallacy is categorized as *Irrelevant Conclusion / Ignorantio Elenchi* /. The judges wrongly generalize the terminology “obligation” from different regulations which brings into any harm to one party in an agreement or contract. It happened when the judge claim that an agreement made without the Indonesian language has violated Article 31 (1) Law Number 24 of 2009 and must be concluded as a substantially flawed agreement.

Fifth, the urgency in interpreting KUHPerdata appropriately to ensure the balance between all parties in any agreement. Investment agreements must be profitable to an investor and domestic business actor. It is only possible if regulation and law enforcer support the balance principle.

Based on the above analysis, it is interesting to examine the case between PT. Bangun Karya Pratama Lestari and NINE AM Ltd in the level of law enforcement / “*in Concreto*”.

3.6 Best Practice in the Cancellation of Agreement Which Solely based on Obligation to Use Indonesian Language in Any Contract

Nullification of an agreement solely based on the obligation to use the National Language is new in Indonesia. Supreme Court Decision number 601 K/ Pdt/2015 is the first and only decision that has been made thus far in Indonesia. Therefore, there is a lot of question about those decisions although it is mostly dominated by a practitioner (advocate). There is pro and contra to this decision between legal expert and practitioner, even between the executive and judicial body. But still, as a state that respects Trias Politica (policy on the distribution of power), all decision made by the court is just until there is a change of law whether through judicial review or any other procedure to amend the regulation.

There is an intriguing fact related to the case NINE AM Ltd. It is about any other agreement between both parties that made without Indonesia Language and there is not any objection to it. The defendant has stated this fact when answering the lawsuit although the judge ignores this fact.

The judge’s verdict that cancels the agreement between both parties has brought harm to NINE AM Ltd. Therefore, the defendant submits this case to appeal but still, the supreme court strengthens the decision made by the district court. The argument which is based on the principle of *pacta sunc servanda* made by the defendant keep ignored by the supreme court.

This article disagrees with the decision and analyses and research further accordingly. Comparative law is made in this article to observe best practices in other states concerning the issue of obligation to make the agreement in the national language. The use of national language is normal in making the contract in the United States of America (USA), especially in California. The USA obligates any contract or agreement made with the English version to protect the consumer. That is why all contracts made with foreign languages must be translated into English version before those agreements are signed. The agreement will be null and void if signed before translating into English because of the breaching of Civil Code section 1688.

The regulation above shows some protection by a state. For there is always a chance that business actors may neglect good faith, a state must intervene in any contract that potentially harms the consumer.

Although this type of agreement between the business actor and the consumer may differ from an investment contract. Most of the contracts that involved consumers place a business actor as superior to that consumer. It can be found in many standard agreements.

From regulation in the USA, this article sees that the good faith principle is essential to protect any parties that may be harmed by a more superior party. Depending on the exact setting, good faith may require an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent. While good faith is important to protect, the NINE AM Ltd case shows the opposite. The plaintiff (PT. Bangun Karya Pertama Lestari) sues the agreement for not making in Indonesia even though they are bound by a similar agreement before. The defendant claims that the suit occurred only because the plaintiff unable to fulfill their duty and responsibility as stated in the contract.

For the basic ground, we need to understand that the agreement between business actors and consumers is different from the agreement between investors and entities that obtain investment. In a standard agreement that places one party as a consumer, there is a chance of unbalance between rights and obligation. The business actor usually acts superior to the consumer. Sometimes, these types of standard agreement refer to take it or leave it agreement. If the consumer wish, then the agreement will continue. Meanwhile, in an investment agreement, the chance of unbalance position is slim. In fact, some cases show that the position of the foreign investor is inferior if the case is settled in a national court (Reinhold, 2013).

Basically, the good faith principle crystalizes in *pacta sunt servanda* principle, prohibition in abuse of rights and discretion, estoppel and acquiescence and negotiation (Reinhold, 2013). From all principles, negotiation has relevance to the NINE AM Ltd case.

When the court process a lawsuit, it should also see the implementation of the good faith principle from the plaintiff. The judge must ask first whether the plaintiff and defendant know and understand the existence of Law Number 24 of 2009, whether they know the obligation to make any contract in the Indonesian language. The judges also need to dig more information whether both parties have discussed drafting the Indonesian version for every

agreement that binds them. More importantly, the judges must check whether there is a legal issue other than the issue of “non-Indonesia language agreement”. The judges should not be mere mouthpieces of regulation but also the guardian of justice. Moreover, the judges must see that the need in protecting investment is important and in accordance with the national interest.

3.7 Explaining Potency in Dispute Settlement through Investor-state Dispute Settlement

To be qualified, an investment agreement, whether made by state investors, in this case, state institutions as well as business actors and individuals, must contain a minimum standard of protection to the parties. This is the obligation of the host country to ensure the implementation (Rachmi Hertanti, Rika Febriani, 2014)

When the usage of the Indonesian language becomes mandatory to any contract made by the subject of law in Indonesia, not a few protests or criticisms are delivered by the public, especially by academics and practitioners. Hikmahanto Juwana even criticized that the state has intervened too far in any agreement made by the private sector and individuals, especially to freedom of contract principle. Not to mention, the supreme court decision NINE AM Ltd case can be used as a reference to cancel contracts made without using the Indonesian language. He is concerned about the bad faith of the parties involved in an agreement made only in a foreign language if the agreement is not profitable in the future. Some practitioners from different law offices in Indonesia also expressed the same thing. They are even worried that the ease of investing program in Indonesia will be counterproductive due to the mandatory use of the Indonesian language (Hukumonline, 2017).

Furthermore, the resolution of the NINE AM Ltd case by the national court will be highlighted by an investor. The pro-investor policies that are being voiced in Indonesia will be questioned again. Although the NINE AMA LTD case is not between state and investor, its practice will affect investors, especially since the rules related to Investor-State Dispute Settlement (ISDS) have not been completed in Indonesia. When several countries are initiating ISDS which can be the best solution for investment disputes (Indonesian Global for Justice, 2019), Indonesia has provided a loophole that will become an obstacle to investment because the court may cancel agreements that are not made in Indonesian.

This article keeps reminding that there is a possibility of bad faith from any party that will sue for the cancellation of an agreement that was not made in Indonesian when the party unable to carry out any obligation on any agreement.

It is true that ISDS is not an agreement intended for the state and investors but is made between the state and the state so that in the future there will be no conflicts between states. However, the existence of ISDS will have an impact on the security guarantees of foreign investors in a country, including Indonesia. There are pros and cons regarding the better content of ISDS and this article agrees that the proper ISDS for Indonesia is one that encourages the use of the doctrine of local remedies (use of national courts) because state sovereignty (related to judicial power) still needs to be put forward. However, the judicial system in Indonesia also needs to improve on this matter, including strengthening the resources of its judges. Thus, when investment disputes are resolved by the national court, the verdict really refers to justice as well as the development of society. When the development of society in investing demands protection, the judge must become a mouthpiece of justice. For this reason, judges should not understand the written formality of a statute but also the philosophical formation of a rule. In other words, when investment involves relations between countries, it is inevitable that judges also need to understand developments in international law including investment law involving parties from different countries.

4 CONCLUSIONS

Article 31 (1) Law Number: 24 of 2009 concerning the Flag, Language, and State Emblem and the National Anthem which requires the use of Indonesian language in business contracts must be understood as an effort to support national language not to hinder investment. Decisions of judicial bodies in Indonesia that are detrimental to the position of foreign investors create potential lawsuits through international channels, namely ISDS. This matter deserves attention from the government in the ease of doing the business program is to conduct executive law reviews of regulations related to investment and law enforcement that can provide a sense of justice and legal certainty for investors.

REFERENCES

- Armstrong, E., & Ferguson, A. (2010). Language, meaning, context, and functional communication. *Aphasiology*, 24(4), 480–496. <https://doi.org/10.1080/02687030902775157>
- Bambang Sutiyo. (2015). *Metode penemuan hukum : upaya mewujudkan hukum yang pasti dan berkeadilan*. UII Press.
- Baro, R. (2017). *Penelitian Hukum Doktrinal*. Indonesia Prime.
- Butarbutar, E. N. (2011). Kebebasan Hakim Perdata dalam Penemuan Hukum dan Anatomi dalam Penerapannya. *MIMBAR HUKUM*, 23(1). <https://doi.org/10.22146/jmh.16196>
- Cochrane, L. (2012). Julie S. Amberg & Deborah J. Vause, American English: History, structure, and usage. Cambridge: Cambridge University Press, 2009. Pp. xix, 223. *Language in Society*, 41(1), 139–140. <https://doi.org/10.1017/S004740451100100X>
- Hukumonline. (2017). *Perpres Penggunaan Bahasa Indonesia Dinilai Hambat Investasi*. Hukumonline. <https://www.hukumonline.com/berita/baca/lt5dd5b821f2d5e/perpres-penggunaan-bahasaindonesia-dinilai-hambat-investasi/>
- J J H Bruggink; Arief Sidharta. (1996). *Refleksi tentang hukum : pengertian-pengertian dasar dalam teori hukum* (Cet. ke 1). Citra Aditya Bakti.
- Justice, I. for G. (2019). ISDS: Lawsuit: When Corporation Ignores State Sovereignty – the Compilation of ISDS Case Stories in Indonesia. In *IGJ*. IGJ.
- Muhammad Syaifuddin. (2009). *Desain Industri Perspektif Filsafat, Teori dan Hukum, Dogmatik* (Edisi 1). Tunjung Mandiri.
- Mukhlis, P. (2009). *Sejarah Kebudayaan Indonesia Arsitektur*.
- Pitlo, S. M. dan. (1993). *Bab-bab tentang penemuan hukum* (Cet.1). Citra Aditya Bakti.
- Rachmi Hertanti Rika Febriani. (2014). *Bilateral Investment treaty (BITs) Negara VS Korporasi*. Indonesian for Global Justice.
- Reinhold, S. (2013). Good Faith in International Law. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2269746>
- Said, I. M. (2012). *Kajian Semantik Terhadap Produk Hukum Tertulis Di Indonesia*. *Mimbar Hukum*. <https://doi.org/https://doi.org/10.22146/JMH.16131>