

THE CHRONICLE OF INFORMAL SOURCES OF INDONESIA BUSINESS LAW : SET UP BUSINESS IN INDONESIA

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ABSTRACT

After 69 years of independence, Indonesia originally as a developing country is currently establishing itself to be one of the Asian Tiger economies. In fact, there have been major changes, increased economic and regulatory changes that are directed to the domestic law of a progressive and responsive to community needs. Investment activities, joint ventures, or the establishment of the company and other business activities began to flourish. Regulatory changes made to Indonesia, which has a strategic position, was able to compete in the international business arena. Domestic regulation also began harmonized with international conventions, which then need to be described so that business people can know the regulation in Indonesia as a provision in the conduct of investment business and set up business in Indonesia comfortably without causing disputes.

Key words: Indonesia, Business Law, Regulation.

Introduction

This article is an overview about Indonesia law that help the investor or foreign business to set up their business in Indonesia by know the regulation here. 2014 is the 69th year of independen and many regulations from the colonial Dutch was converted. The business man must understand what regulation that still using now, because in Indonesia always occur the converted law. This study shows a wide variety of regulations in Indonesia that should be known by businesses and investors to do business in Indonesia in order to avoid disputes in the future.

Geography

Indonesia is an archipelagic island country in Southeast Asia, lying between the Indian Ocean and the Pacific Ocean extending 5,120 kilometres (3,181 mi) from east to west and 1,760 kilometres (1,094 mi) from north to south. It encompasses an estimated 17, 508 islands, 33 provinces, only 6,000 of which are inhabited. It comprises five main islands : Sumatera, java, Kalimantan, Sulawesi and Papua, two major archipelagos that Nusa Tenggara and Maluku Islands and sixty smaller archipelagos. Four of the islands are shared with other nations : Kalimantan shared with Malaysia and Brunei, Sebatik, located eastern coast of Kalimantan, shared with Malaysia, Timor is shared with East Timor and the newly divided provinces of Papua and West Papua share the island of New Guinea with Papua New Guinea. Indonesia's total land area is 1,919,317 square kilometers (741,052 sq mi) included in Indonesia's total territory is another 93,000 square kilometres (35,908 sq mi) of inland seas (straits, bays and other bodies of water). With a population of over 250 million (estimated at 252,164,800 in 2014's), Indonesia ranks as the fourth most populous nation in the world and is the largest Muslim nation in the world. The population is concentrated in the six largest islands. Indonesia's largest cities - the capital Jakarta (population 12 million) and Surabaya - as well as most of its advanced industries are situated on the island of Java (http://en.wikipedia.org/wiki/Geography_of_Indonesia). The national language since independence has been Bahasa Indonesia, which is related to Malay. However there are many hundred distinct local languages. English is taught in many schools and its use is widespread among business people. Many of the older generation are still fluent in Dutch.

Political Institutions

The Republic of Indonesia traces its origins to the declaration of independence from the Dutch on 17 August 1945. 17 August 2014 is being celebrated as the 69th anniversary of the Republic of Indonesia. The Constitution of 1945 still forms the basis of the current form of government. It provides for four branches of government: the Presidency, the House of People's representatives ('DPR'), the Supreme Court and the National Audit Board. The highest authority is vested in the People's Consultative Assembly ('MPR') and meets every five years. Pancasila is a national philosophy, which is the basis of its national unity and the personal freedoms enjoyed by its people. It is a statement of, *inter alia*, One God (which individuals are free to worship in whatever form they choose - thus guaranteeing religious freedom in a nation), One Nation (necessary in a country so diverse), One Language (Bahasa Indonesia - see above).

Indonesia is a member of ASEAN, APEC and other regional economic groupings and has ratified the latest GATT Treaty and announced a policy of complying with its responsibilities under the GATT accord over a period of years by relaxing its current

restrictions in a manner consistent with national development objectives. Indonesia had been a member of World Bank, one of contracting state in International Centre for The Settlement of Investment Dispute (ICSID), all foreign investments and mining contracts of work are expressed to be subject to this Convention. Indonesia was ratified New York Convention 1958 about enforcement foreign arbitration award.

Economic Overview

Indonesia has a mixed economy in which both the private sector and government play significant roles, free-market economy, including state-owned enterprises as well as private enterprise. It combines a somewhat anarchic freedom in some areas. Prior to independence, Indonesia was principally a subsistence agricultural economy, with little or no industry. Growth in Gross Domestic Product (GDP) moderated to 5.8 % in 2013 from an average of 6.3 % over the previous 3 years, as investment decelerated sharply. Bank Indonesia, the Central bank, raised interest rates to restrain domestic demand at a time of rising inflation and a widening current account deficit. Growth in fixed investment slowed to 4.7 % in 2013 after strong increases of about 9% annually in 2010-2012. This largely reflected the impact higher interest rates and rupiah depreciation had on investment in machinery and equipment. Investment in building held up relatively well. The central government's capital spending moderated, though it still expanded by 18.4 %. Gross fixed investment as a share of GDP edged down to 31.7 %. Private consumption maintained robust in 2013, expanding by 5.3 % and contributing half of the growth in GDP on the expenditure slide. Government consumption grew by 4.9%, which signaled some improvement in budget execution. Higher net exports of goods and services made a significant contribution to GDP growth last year, despite weakness in major export markets. This improvement resulted from import restraint caused by the rupiah depreciation and slower investment, together with modest growth in export volumes. From production side, growth in services ebbed to 7.1%, but this sector still contributed 3.3 percentage points of total growth. Robust growth of at least 7.0% was recorded in transport, communications, finance, and hotels. Manufacturing expanded by 5.6 %, little changed from the previous year, and it added 1.4 percentage points to GDP growth. Bad weather and sagging global prices for palm oil and rubber slowed growth in agriculture to 3.5 %. Mining output grew by just 1.3 %, reflecting growth in coal and metals but contraction in oil and natural gas. Forecast assume that government follows through with the stabilization policies rolled out in the second half of 2013 and that parliamentary elections in April and presidential elections in July go smoothly. Projections also assume that steps are taken to improve the investment environment. GDP growth is forecast at 5.7 % in 2014 picking up to 6.0% in 2015 (<http://www.adb.org/countries/indonesia/economy>).

Business Entities

A business entity is a commercial, corporate and/or other institution that formed and administered as per commercial law in order to engage in business activities, usually for the sale of a product or a service (http://en.m.wikipedia.org/wiki/Types_of_business_entity). Indonesian law offers a limited number of choices to foreign businesses wanting to set up in Indonesia. The government regularly publishes a 'Negative List' of areas that are completely closed to foreign investment. All foreign investments or business activities by foreign businesses require one form or other of governmental approval, as indicated below. Except as noted below, foreign businesses are not entitled to carry on business in their own right in Indonesia.

Representative Office

A foreign company may establish a representative office in Indonesia for the purposes of acquiring information about Indonesia or publishing information about itself and its products or for the purchase of goods from Indonesian suppliers for export. The latter may include quality control of production. However, except as noted below, a representative office is not otherwise entitled to carry out any business activities. A representative office is established under licence of the Minister of Trade.

While a foreign company which is a construction company or a provider of construction consultancy services may open a representative office under licence of the Minister of Public Works, which is then entitled to engage in business activities in Indonesia, within the field of construction services. For investment, a regional representative office of a foreign company requires an approval through the Badan Koordinasi Penanaman Modal - the Co-ordination Board for Capital Investments, usually abbreviated BKPM and according to Investment Law No. 25 of 2007. Investment may with 100 per cent foreign owned or joint venture but foreign company is treated as Indonesian company for such purpose. Tax will be governed by the relevant double taxation treaty.

Limited Liability Companies

The Indonesian limited liability company is known as a Perseroan Terbatas ('PT'). A distinction must be made between three classes of PT company:

- (1) a company operating under the Foreign Capital Investment Law, usually referred to as a PMA company;
- (2) a company operating under the Domestic Capital Investment Law, usually referred to as a PMDN company; and
- (3) a company not operating under either Capital Investment Law, usually referred to as a domestic PT company.

There is no special class of publicly listed company and all three categories of company may have their shares listed on an Indonesian Stock Exchange, subject to compliance with listing requirements as Company Law No. 1 of 1995 that was converted by Company Law No. 40 of 2007. As Indonesian company law has been based on Dutch law, Indonesia has retained the concept of two boards of corporate governance, both appointed by the general meeting of shareholders of the company. A PT company

has a board of directors ('Direksi'), who are the executives responsible for the day to day management of the company under the supervision of the board of commissioners ('Komisaris'), who may be likened to non-executive directors in common law jurisdictions. The Articles of Association will detail the extent to which the discretion of the Direksi is subject to the prior approval of the Komisaris. Members of the Direksi should normally be resident in Indonesia. In the case of PMA companies, members of both boards may be foreign nationals as well as Indonesian citizens. In the case of PMDN and domestic PT companies, foreigners are usually not permitted to be members of either board. Under the company law, directors of PT companies can incur personal liability for indebtedness of the company if they have been negligent or otherwise acted improperly.

All PT companies are formed by way of a Deed of Establishment signed by the intended shareholders in the form of an Indonesian notarial deed, in Bahasa Indonesia, which contains the Articles of Association of the PT company. The PT company comes into existence when the Deed of Establishment is approved by the Minister of Justice (MoJ). This approval is not a formality and it is not uncommon for the MoJ to request amendments to the Articles of Association.

Local Business Versus Appointing An Agent

Foreigners have been permitted in certain circumstances to purchase all or part of the shares of any of the three classes of PT company since 1994. Previously, foreigners could only own shares in PMA companies. The most important restriction is that the field of business in which the company operates must be open for direct foreign investment.

Foreign Investment

Until mid-1994, almost all foreign investments were required to be made by way of a joint venture with an Indonesian person or entity in the form of a PMA company in which the foreign investor was only permitted to hold 80 per cent of the issued share capital. Under Government Regulation 20 of 1994 and the implementing Ministerial Regulation 15 of 1994 by the Chairman of BKPM:

- (1) a foreigner is now permitted to hold 100 per cent of the shares in a PMA company, unless the PMA company is to engage in certain strategic activities, such as telecommunications, among others, in which case there is still the requirement for an Indonesian participation of at least 20 per cent;
- (2) a foreigner is now permitted, in certain circumstances, for the first time, to hold shares in a PMDN company or a domestic PT company, provided that its field of activity is open for direct foreign investment;
- (3) the requirement of compulsory divestment to less than 50 per cent shareholding in a PMA company after 20 years was replaced by a requirement to divest an as yet unspecified number of shares (which may be as little as 1 per cent) to an Indonesian partner, after 15 years of commercial production;
- (4) there is no longer a specified minimum investment, although BKPM will consider the adequacy of an intended investment for its intended purpose.

The result has been a far more open and attractive foreign investment regime. In practice, most foreign investors will still choose to establish a PMA company due to the advantages given by the Indonesian Government in the form of undertakings to permit the remittance of dividends and repatriation of capital in foreign currency and assurance against nationalisation without compensation, as well as the concession for duty-free import of capital equipment and certain raw materials or components and the ability to appoint foreigners as directors or commissioners. All projects to be undertaken by a PMA or PMDN company require the prior approval of the President of Indonesia, following application to and vetting by the BKPM.

Finance

Bank Indonesia is the national central bank. It monitors monetary policy, sets exchange rates and supervises financial institutions. Bank Indonesia also plays a role in monitoring incoming foreign investment by PMA companies and on behalf of the government it approves certain foreign loans and monitors the total extent of all foreign loans, both by Indonesian private entities as well as state-controlled entities. All Indonesian companies or individuals who incur foreign indebtedness are required to report the same to Bank Indonesia and to make further periodic reports on the disbursement and repayment of such loans.

The creation of new banks is controlled by the Ministry of Finance, pursuant to the Banking Law no. 10 of 1998 to replace the morass of regulation and laws which previously applied. As elsewhere, minimum capital requirements apply and there are restrictions on persons who may be directors, and certain other matters. Foreign banks, unless they already have established branches in Indonesia, will have to establish a joint venture bank in partnership with an Indonesian bank. They will not be allowed to operate through a branch in Indonesia. There are however a number of foreign banks who have been 'grandfathered' in and are authorised to operate through branches in Indonesia.

All banks, domestic, foreign and joint venture require permission to open new branches. All are subject to controls on net open position, foreign-currency borrowings, solvency and liquidity ratios, capital adequacy and single-client exposure. Following two well-publicised failures of private banks and much speculation about the level of bad debts held by the state-owned banks, Bank Indonesia is becoming increasingly vigilant in its supervisory role.

Employment

Indonesia is generally regarded as a low-wage country and has built some at least of its new-found economic power

and attractiveness on that basis. Thus the labour market is relatively unsophisticated and unregulated compared to Western countries. Employment regulated by Law No. 13 of 2003.

Foreign nationals can only render services by way of employment in Indonesia if they hold a valid work permit issued by the Ministry of Manpower. Generally such a permit will only be granted if it can be shown that (1) there is a particular Indonesian employer with a demonstrable need for a particular skill (2) Indonesian persons holding such skills are not available for employment and (3) the foreign person who seeks to be employed does in fact have the required skill and experience. PMA companies, as part of their application to BKPM will receive permission to employ a specified number of foreigners. However, it is a requirement that such foreign employees will, as part of their duties and as an element of the transfer of technology which is one goal of the foreign investment programme, train Indonesian citizens up to the level where Indonesian citizens can perform the functions for which the foreigner was employed.

Insolvency And Competition

The Indonesian insolvency and bankruptcy rules are according to Insolvency law No. 37 of 2004 that rweplace the ancient colonial Dutch law. Indonesia at present has Competition Law No. 5 of 1999 which not permitted monopoli and unwell competition as not to jeopardise national economic development.

Land

Foreigners are not permitted to own land in Indonesia, except in very limited circumstances. Due to the nature of the Indonesian condominium law, this rule also extends to apartments. For the purposes of owning land, PMA companies are treated as Indonesian, even if 100 per cent foreign-owned according to Land Law No. 5 of 1960.

Companies, whether or not foreign-owned, cannot own the Indonesian equivalent of freehold land (Hak Milik), which may be held only by individual Indonesian citizens - this is at least in part because such title is perpetual whereas companies are established for a limited period. For most industrial purposes, companies will hold a title called Hak Guna Bangunan (title with right to build), which is granted for initial periods of 20 to 30 years and which may be extended.

Other forms of limited land title are applicable for mining, agricultural or plantation purposes. Foreigners are not permitted to own mineral rights in Indonesia. To exploit minerals, a foreign company must enter into a joint venture with an Indonesian company which holds the mineral rights. This joint venture company then enters into a contract of work with the Indonesian Government to exploit the minerals. Foreign investors in new industrial/manufacturing projects will usually be required to locate their factory in a designated Industrial Estate.

Contract Law

It is an overriding principle of Indonesian law that contractual rights and powers must be exercised in accordance with principles of good faith. This is similar to but distinct from certain principles of equity. An Indonesian judge has the discretion to prohibit the exercise of contractual rights in a manner considered unfair or in bad faith. Contract law still use the colonial law called "Kitab Undang-Undang Hukum Perdata" especially Article 1320 KUH Perdata as the basic to assess the contract.

Indonesia is a signatory to the Stockholm Act of 1967 (with reservations) and is a member of the Paris Convention on Patents. Although Indonesia has been criticised in the past for non-enforcement of intellectual property rights, its record in recent years has improved. A law on copyright according to Copyright Law No. 19 of 2002, A law on industrial patents according to Law No. 14 of 2001, A new law on trade marks was introduced in 1992 and was converted by Trade Mark law No. 15 of 2001, Trade Secret Law No. 30 of 2000, Industry Design Law No. 31 of 2000.

Settlement of Disputes

In Indonesia all prior disputes resolved by mediation and conciliation, if it can not be resolved then it will be forwarded to the court or by arbitration. Arbitration and Alternative Dispute Settlement regulated by Law No. 30 of 1999. Every a foreign arbitration award must have the recognition and enforcement by Supreme Court and will be required exequatur to Supreme Court by Jakarta Pusat District Court and Does not violate "public policy" in Indonesia as the Supreme Court issued its Regulation 1 of 1991. For privat and criminal commonly they settle by the court.

Decisions of lower courts in Indonesia may be appealed on any ground to the higher courts up to and including the Supreme Court - each appeal may take the form of a complete rehearing of the matter in which new arguments and new evidence may be presented.

Conclusion

By this overview, showing that Indonesia have many regulation that must be understand by foreign investor to set up their business in Indonesia because there are many regulation had converted by the new law, so now the business man know what regulation they must be read. With this study it is described in Indonesia existing regulations relating to business law and changes to the new regulations. For business activists, must always follow the rule change relating to business law because it will affect their business in the future.

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