



RATIO DECIDENDI, AGREEMENT, AGAINST THE DECISION OF MA NO. 601K/PDT/2015 IN THE CASE OF AGREEMENTS THAT DO NOT USE INDONESIAN

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ABSTRACT

The Supreme Court's decision in the case of an agreement between investors who enter into an agreement using English is contrary to the agreement of the parties. Changes to the agreement may be detrimental to investors in Indonesia, who must amend the agreement previously made in English. The research method based on the data needed in this research is secondary data obtained through literature study in the form of laws and descriptive analysis, namely analyzing the laws and regulations. The loan agreement between PT. BKP and Nine AM, Ltd. should not be null and void. The judge's interpretation of a lawful cause is wrong because a lawful cause refers the contents of the loan agreement. The government should be firm in determining a sanction if there is a violation of the law. This is intended so that judges are not wrong in applying regulations so that they do not produce decisions that can harm certain parties.

Keywords: ratio decidendi; judge's decision; agreement; investment

INTRODUCTION

Humans in living their lives need other humans to be able to fulfill their every need. Not all humans can fulfill their needs by themselves because each human has their own abilities/skills. On this basis, to be able to meet each other's needs, human started with the barter of goods to the occurrence of buying and selling between two parties. In order to do so, both parties must first enter into an agreement. Both parties promise to do/provide something that satisfies and fulfills each other's needs. All the fulfillment of these needs begins with the existence of an engagement or agreement.

As the impact of changing times, there are more needs that must be met. This was followed by an increasing number of agreements being entered into. The agreements made increasingly have strong legal considerations so that they are expected to anticipate if something happens that can hinder the implementation of the agreement. The most basic thing is to fulfill the conditions for the validity of an agreement contained in Article 1320 of the Civil Code (KUH Perdata). These conditions absolutely must be met by the parties who will enter into an agreement. In addition, Indonesia adheres to the principle of freedom of contract which means that the parties are given the

freedom to enter into agreements as long as they do not violate the laws and regulations.

The freedom given in entering into an agreement makes it easy for everyone who will make an agreement with another person. Agreements can be made in writing or unwritten. However, in general, agreements are made in writing which are stated in a deed. With this deed, it can confirm the agreement which is made and can be used as evidence if one day there is a dispute between the parties to the agreement. There are two types of deed of agreement, namely deed made by/before a notary or other public official (authentic deed) and deed made by the parties themselves without involving a notary or other public officials (private deed). The two deeds have the evidentiary force in the examination at the trial in the event of a dispute.

The law that applies in Indonesia, seen from the history of its development since the seventeenth century, has been influenced by modern law with the concept of civil law developed by the Dutch colonial government. The legal system has influenced by reducing the pre-existing law which at that time was known as the legal system that lives in society.¹

¹ Muhaimin, Penetapan Tersangka Tidak Ada Batas Waktu, Jurnal Penelitian Hukum De Jure, Volume 20

In the current era of globalization, the activities that occur between two citizens from different countries are quite easy to do. With the communication and transportation systems that are developing rapidly, there is almost no limit for two citizens of different countries to be able to carry out their activities with each other, including in entering into an agreement. In Indonesia itself, there are quite a number of Indonesian citizens (WNI) who enter into agreements with foreign nationals (WNA), both individuals and legal entities. As with investment, not only Indonesian citizens can invest, for foreigners it is quite easy to be able to invest in Indonesia. The investment agreements made can benefit both parties. Foreign investors will benefit from the invested capital, while the recipient country will get benefit in the form of economic growth and can help national development. As advantages, countries receiving capital are able to absorb more labor, able to utilize domestic products as raw materials, able to increase foreign exchange, increase state income from the tax sector, and enable the transfer of technology and knowledge (transfer of know-how).² On this basis, the state expects a large number of investors, both foreign and domestic, to invest their capital.

Before investing, investors generally consider the risks that may occur when investing first. Although investors also seek profit, it is not impossible that things can happen that can hinder investment. The main factor for investors to invest is a conducive investment climate. An important indicator that becomes a benchmark for a country to have a conducive investment climate is regulation.³ It means the existence of regulations regarding investment that can protect the rights of investors. With these regulations, investors can feel there is legal certainty in the country receiving the capital. In Indonesia, investment has been regulated in a separate law, namely Law No. 25 Year 2007 concerning Investment. This Investment Law already regulates Domestic Investors (PMDN) and Foreign Investors (PMA).

Agreement is one of the most important things in the occurrence of a business in the

economic system. Both domestic parties and foreign parties must make an agreement before taking a legal action that has a direct impact on domestic and foreign parties. There is one agreement between an Indonesian legal entity and a foreign legal entity which was annulled by the Supreme Court of the Republic of Indonesia. PT. Bangun Karya Pertama Lestari, an Indonesian legal entity having its address in West Jakarta, sued NINE AM LTD, having its address in Texas, United States of America. PT. Bangun Karya Pertama Lestari sued NINE AM LTD because the loan agreement between the two parties was made only in English so it was considered null and void. The plaintiff stated that based on Article 31 paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2009 concerning National Flag, Language, Emblem and Anthem, essentially it is stated that the Indonesian language must be used in a memorandum of understanding or agreement involving Indonesian legal entities or individuals. On this basis, the plaintiff deemed that the loan agreement between the two parties was null and void or can be said to have no binding legal force. After conducting the trial, the District Court Judge gave Decision No. 451/Pdt.G/2012/PN.Jkt.Bar. which essentially cancelled the loan agreement made on April 23, 2010 between PT. Bangun Karya Pertama Lestari and NINE AM LTD which was null and void on the grounds that the loan agreement deed did not use Indonesian language, but it was only made in English. In addition, the Deed of Fiduciary Agreement No. 33 of the object dated April 27, 2010 which was an accessory agreement to the loan agreement, was also null and void. NINE AM Ltd. filed an appeal up to a cassation to the Supreme Court. However, the Cassation Decision rejected the petition for cassation of Nine AM Ltd. and justified the legal logic that was considered by the judges in the West Jakarta District Court Decision which was upheld by the Jakarta High Court.

Seeing this case, the agreement between PT. BKP and Nine AM, Ltd. is an ordinary debt agreement as in general. However, if we look at Nine AM, Ltd. which is a foreign party, this is quite interesting because it proves that agreements between Indonesian parties and foreign parties can occur easily. NineAM, Ltd. have trust in Indonesian companies to lend funds. Of course, this is one of the positive things for the relationship between

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² Sentosa Sembiring, *Hukum Investasi*, (Bandung: Nuansa Aulia, 2018), hlm. 8

³ Siti Anisah & Lucky Suryo Wicaksono, *Hukum Investasi*, (Yogyakarta: FH UII Press, 2017), hlm. 54

the two countries, because there is a good direct relationship between an Indonesian company and US company. The agreement between PT. BKP and Nine AM, Ltd. is one example of the many agreements between Indonesian companies and foreign companies. Indonesia as a country that wants to move forward requires funds both from within the country and abroad to be able to continue to carry out development. On this basis, Indonesia must continue to maintain good relations with other countries. When looking at the case between PT. BKP and Nine AM, Ltd., the loan agreement which was canceled by the District Court and the Supreme Court could indirectly affect the investment climate in Indonesia. Agreements that are only made in a foreign language will raise concerns for foreign parties that the agreement will be null and void as well. Investment agreements that occur based on the agreement of the parties are considered to never exist because they are only made in a foreign language. Foreign parties who invest will certainly hesitate to invest in Indonesia because it is considered that there is no legal certainty in Indonesia.

Based on the description of the background above, the issues to be raised are “Is an agreement made only in a foreign language null and void? and What is the impact of canceling an agreement that is only made in a foreign language on foreign investment in Indonesia?”

RESEARCH METHOD

Based on the type and form, the data needed in this study is secondary data obtained through literature study in the form of laws and descriptive analysis, namely analyzing the laws and regulations. Secondary data is data obtained from a source that has been collected by other parties. In this case, the researcher conducted a search for library data consisting of:

- a. Primary legal materials. To find out the juridical study, the researcher used the laws and regulations;
- b. Secondary legal materials. In writing this paper, the researcher also used various scientific books, lecture materials and existing articles.
- c. Tertiary legal materials. The tertiary legal materials that the researcher used include a legal dictionary and a complete Indonesian dictionary.

The data analysis of this research is qualitative. This means that library data, documents and literature were analyzed in depth and comprehensively. The use of qualitative analysis method is based on considerations, namely, *first*, the data analyzed varies which have different basic characteristics from one data to another. *Second*, the basic nature of the data being analyzed is comprehensive and constitutes a unity. This is characterized by the diversity of data and it requires in-depth information.

DISCUSSION AND ANALYSIS

A. Agreements in Foreign Languages are Null and Void

An agreement is an event that occurs between two or more parties who promise to perform a certain action. Subekti provides the definition that an agreement is an event when one or more people promise to carry out an agreement or to carry out something with each other.⁴ In carrying out business activities, an agreement is one of the most fundamental things. Before entering into a transaction, the parties will enter into an agreement first. This agreement will regulate the rights and obligations of the parties, procedures for carrying out transactions, as well as procedures for settlement in the event of a dispute in the future. Over time, agreements develop to prevent bad things from happening. With this prevention, business activities can run smoothly and the parties can benefit from each other.

In making an agreement, the parties are free to determine the content and terms of the agreement in accordance with the principle of freedom of contract that applies in Indonesia. The parties are free to determine the rights and obligations as well as other things that are considered to be able to facilitate the activities in the agreement. The agreement made is valid and binding for the parties as long as it does not violate the provisions of the terms of the agreement contained in Article 1320 of the Civil Code. However, in the case between PT. BKP and Nine AM, Ltd., Decision Number 451/Pdt/PN.Jkt.Bar. in the judge's consideration it was stated that the Loan Agreement made only in English had violated because it was made with a prohibited cause. The judge saw from the violation

⁴ Subekti, *Hukum Perjanjian*, Cet. XIII, (Jakarta: Intermedia, 1991, hlm. 1)

of the provisions of Article 31 of Law No. 24 Year 2009 concerning National Flag, Language, Emblem and Anthem which reads:

- a. The Indonesian language must be used in memorandums of understanding or agreements involving state institutions, government agencies of the Republic of Indonesia, Indonesian private institutions or individual Indonesian citizens.
- b. The memorandums of understanding or agreements as referred to in paragraph (1) involving a foreign party shall also be written in the foreign party's national language and/or English.

In the article it is stated that an agreement made involving Indonesian citizens in it must use the Indonesian language. The Loan Agreement between PT. BKP and Nine AM, Ltd. which was made and signed on April 23, 2010 was only made in one language, namely English. On this basis, the Judge is of the opinion that the Loan Agreement is contrary to Article 31 of Law No. 24 Year 2009. The existence of the word "must" in the article further strengthens the reasons for the judge's consideration.

The word 'must' has the meaning of something that must be done; if it is not carried out there will be a consequence. The Loan Agreement has indeed violated the provisions of Article 31, but in Law No. 24 Year 2009 there are no specific sanctions if this provision is not met. It is not stated that agreements made only in foreign languages will be null and void. However, the judge was of the opinion that the loan agreement had violated the law, so it was deemed not to fulfill one of the terms of agreements, namely a lawful cause. The Civil Code does not directly mention the meaning of the lawful cause itself. Article 1337 of the Civil Code only mentions a prohibited cause. Prohibited causes are things that are contrary to the law, decency, and public order. With the violation of Law No. 24 Year 2009, the judge interpreted that the loan agreement was not a lawful cause so that it must result in null and void.

When looking at Article 1320 of the Civil Code, a lawful cause is an objective requirement because it involves the object of the agreement. In some literature it is said that the object of an agreement is the achievement (principal of the

agreement).⁵ According to Article 1234 of the Civil Code, achievements consist of (1) giving something, (2) doing something, and (3) not doing something. Seeing this, the terms of the agreement No. 3 and 4 refer to the content/purpose of an agreement. It must be seen whether the contents of the agreement regulate matters that violate the law, decency, and public order. If an agreement regulates things that are prohibited, then the agreement does not meet the condition of a lawful cause which results in null and void. The judge's interpretation of a lawful cause is quite wrong because a lawful cause refers to the contents of the loan agreement. The judge should examine the contents of the Loan Agreement whether it violates the law, decency, or public order. To be able to determine whether an agreement has a lawful cause, the judge must examine the motivations that move the parties to do or not do something.⁶ In the examination process, the judge only focused on not using the Indonesian language in the loan agreement. The judge mistakenly interpreted the lawful cause in the terms of the agreement, causing the loan agreement to be null and void.

The making of an agreement cannot be separated from a notary. The deed of agreement made by/before a notary is an authentic deed. In his consideration, the judge did not include the Notary Law as a legal consideration. In Article 43 of Law No. 2 Year 2014 concerning Amendments to Law No. 30 Year 2004 concerning Notary Position, it reads:

- a. The deed must be made in Indonesian.
- b. In the event that the person appearing does not understand the language used in the Deed, a Notary is obliged to translate or explain the contents of the Deed in a language understood by the person appearing.
- c. If the parties so desire, the Deed can be made in a foreign language.
- d. In the event that the Deed is made as referred to in paragraph (3), a Notary is obliged to translate it into the Indonesian language.

⁵ Salim H.S., *Hukum Kontrak (Teori dan Teknik Penyusunan Kontrak)*, Cet. XIV, (Jakarta: Sinar Grafika, 2019), hlm. 34

⁶ Herlien Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan*, Cet. III, (Bandung: Citra Aditya Bakti, 2011), hlm. 114

- e. If the Notary is unable to translate or explain it, the Deed shall be translated or explained by an official translator.
- f. In the event that there are differences in interpretation of the contents of the Deed as referred to in paragraph (2), the Deed made in the Indonesian language shall be used.

If we look at the article, in paragraph (1) it is stated that the deed must be made in the Indonesian language. However, if we look at paragraph (3), the deed can be made in a foreign language if the parties so desire. It can be seen that there is inconsistency in the regulations regarding the use of language in making deeds in the Law on Notary Position. In addition, the Law on Notary Position does not regulate sanctions if the notary does not carry out his obligations to make a deed in the Indonesian language. Both Law No. 24 Year 2009 concerning National Flag, Language, Emblem and Anthem and Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position do not regulate the consequences such as null and void or any sanctions caused by the deed which is not made in the Indonesian language.

B. The Impact of Cancellation of Agreements Made in Foreign Languages Only on Foreign Investments in Indonesia

If we look at the results of the decision made by the Supreme Court, it can be seen that the Ratio Decidendi which is the reference for the judges in this case is to first look at compiling, and making decisions based on current legal condition.

The philosophical foundation is part of a judge's consideration in making a decision, because the philosophy is usually related to the conscience and sense of justice contained in the judge, so that his decision can provide a sense of justice that does not only depend on formal justice (procedural), but also justice that is substantive, with still taking into account all aspects related to the subject matter of the disputed case by the parties, such as aspect of education, aspect of humanity, or aspect of benefit, law enforcement, legal certainty, and other legal aspects.

Then laws and regulations are the basis for a judge to determine the decision he makes, even though as explained earlier, that judges are not just mouthpieces of the law or apply the law alone (*la bouche de la loi*), but still laws and regulations are guidelines for a judge in making a decision.

Furthermore, in a decision, legal considerations must be stated, so that a judge reaches his decision as in the injunctions (*strachmaad*), where in these considerations a clear motivation can be read from the purpose of the decision being made, namely to enforce the law (legal certainty) and provide justice for the parties in the case.

Society in general pays less attention to the part of the decision in the form of legal considerations, including the consideration of the aspects aggravating and mitigating the sentence, which underlies the judge's thought, so that the judge reaches his decision. This public perception is because people have their own thoughts on the basis that the injunctions are the final result of the reflection or consideration of the judge. Therefore, if the decision is likened to a judge's crown, then the injunctions would be considered as the crown of the decision itself, because in this section the implementation of the judge's decision is determined.⁷

The consideration section is actually no less important than the injunction section and it is precisely the consideration section that becomes the spirit of the entire content materials of the decision, even a decision that does not contain sufficient considerations (*onvoeldoende gemootiveerd*) can be a reason for filing a legal action, be it an appeal or cassation, which can give rise to the potential for the decision to be cancelled by a higher court.⁸

A judge's decision in a case contains cursory considerations that are sometimes irrelevant, which are not directly related to the subject of the case being filed, where this is called an *obiter dictum*, and there are also judges' decisions that contain direct considerations regarding the subject matter of the case, which is called the *ratio decidendi*. Considerations or reasons that directly relate to the subject matter, namely the legal rule which is the basis of this decision, bind the disputing parties.⁹

Investment is one of the most important aspects of economic growth in Indonesia. Without

⁷ Edy Wibowo, *Mengapa Putusan Pemidanaan Hakim Cenderung Lebih Ringan daripada Tuntutan*, *Majalah Hukum Varia Peradilan* Edisi No. 257 Bulan April 2007, Ikahi, Jakarta, 2007, hlm. 38

⁸ *Ibid*, hlm. 38

⁹ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Yogyakarta: Liberty, 2001, hlm. 54

investment, it will be difficult for Indonesia to carry out state activities aimed at development and prosperity. In addition to domestic investors, Indonesia also opens the door for foreign investors who want to invest in Indonesia. Even foreign investors have a much larger amount of capital than domestic investors. It can be said that Indonesia really needs financial support from foreign investors. Such support cannot be obtained easily. Indonesia must be able to convince investors from other countries to grow their interest in investing in Indonesia. There are several factors that hinder foreign investment in Indonesia, namely: (1) Decentralized decision making; (2) legal certainty; (3) There are still strong internal interests, the requirements of the Indonesian government (both formal and informal) to partner between foreign companies and Indonesian companies; (4) Restrictions on imports and exports, pressure to make long-term investment commitments; (5) Bad government coordination; (6) The slow pace of land acquisition for infrastructure projects; and (7) Lack of transparency in the development of various legal regulations.¹⁰ Abundant natural wealth and a large population of Indonesian people who are quite consumptive create quite large and profitable economic opportunities. And if we look at the political situation in Indonesia, it can be said to be quite stable. However, legal certainty has always been a hot issue, especially for foreign investors who have plans to invest in Indonesia. In the absence of legal certainty, foreign investors discourage their intention to invest. Foreign investors will feel that their rights will not be protected and will actually cause huge losses from their business activities.

Civil law in Indonesia adheres to several principles and one of those that applies is the principle of freedom of contract. The parties are free to determine the content and terms of the agreement and are also free to bind themselves with anyone as long as they do not conflict with laws and regulations, public order, and decency. From the point of view of the public interest, freedom of contract is a totality which for some writers is seen as a separate human right.¹¹ In

the international world, the principle of freedom of contract is also known as free consent. The principle of free consent is rooted in civil contracts or agreements which is then adopted as a principle in international agreements.¹² The existence of the principle of free consent means that the convention emphasizes that every country has the freedom to make agreements in any form and with any country.¹³ The application of the principle of free consent indicates that countries in the world have hoped for foreign investors to invest in their country. The freedom to enter into a contract is one of the facilities provided for foreign investors to enter into a business or investment agreement. The parties can freely determine the content and terms of the agreement as long as they do not conflict with the laws of the country receiving the capital. Countries that implement free consent in their country are an attraction for foreign investors. In addition, Indonesia's foreign policy, namely free and active policy, has a role in foreign investment. Foreign policy is the basis of prudential policy and principle in obtaining foreign investment and loan aid from foreign parties.¹⁴ When combined with legal certainty, it will become an important pillar in bringing in foreign capital to Indonesia.

The Loan Agreement between PT. BKP and Nine AM, Ltd. is a loan agreement between an Indonesian legal entity and a United States legal entity. Although it is called a loan agreement, it can be said that Nine AM, Ltd. invested in Indonesia. In essence Nine AM, Ltd. lent their funds to PT. BKP hoping to get a return on the principal debt and interest that can be used as income. The cross-border agreement showed the seriousness and trust of Nine AM, Ltd. to invest in Indonesia. This is a positive indicator for investment activity in Indonesia. However, the cancellation of the loan agreement between PT. BKP and Nine AM, Ltd. will result in a loss of interest and trust not only for Nine AM, Ltd. but also for other foreign investors who have plans to invest in Indonesia. The Supreme Court's decision confirming the cancellation of the loan agreement by the West Jakarta District Court has a long-term impact on international business

¹⁰ Ary Zulfikar, *Hukum Penanaman Modal: Kebijakan Pembatasan Modal Asing Kajian Pemanfaatan Arus Moda Asing untuk Penguatan Struktur Ekonomi Kerakyatan*, (Bandung: Keni Media, 2019), hlm. 174

¹¹ Herlien Budiono, *Op. Cit.*, hlm. 32

¹² Kusnowibowo, *Hukum Investasi Internasional*, (Bandung: Pustaka Reka Cipta, 2018), hlm. 26

¹³ *Ibid*

¹⁴ Rahmi Jened. *Teori dan Kebijakan Hukum Investasi Langsung (Direct Investment)*, (Jakarta: Kencana, 2016), hlm. 85

trust in Indonesia because this case can serve as a reference as jurisprudence for other judges in deciding similar cases.¹⁵ Decisions that do not reflect justice will not only damage the reputation of law enforcers in the eyes of the public, but can also damage Indonesia's reputation in the eyes of the international community. Indonesia will be considered unable to protect the rights of both its citizens and foreign investors who invest in Indonesia.

CONCLUSION

Based on the description above, the conclusion that can be drawn is that the loan agreement between PT. BKP and Nine AM, Ltd. should not be null and void. The judge's interpretation of the lawful cause is wrong because the lawful cause refers to the contents of the loan agreement. The loan agreement was considered to have violated the laws and regulations because it was not made in the Indonesian language. However, both Law No. 24 Year 2009 concerning National Flag, Language, Emblem and Anthem and Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position do not regulate the consequences such as null and void or any sanctions from the deed which is not made in the Indonesian language. Investment is one of the most important aspects of economic growth in Indonesia. The application of freedom of contract in Indonesia is one of the facilities provided for foreign investors to enter into a business or investment agreement. Cancellation of the loan agreement between PT. BKP and Nine AM, Ltd. will result in a loss of interest and trust not only for Nine AM, Ltd. but also for other foreign investors who have plans to invest in Indonesia.

SUGGESTION

The suggestion that can be given is judges' legal consideration in making decisions in civil cases which according to the legal system of evidence are based on formal evidence, namely written evidence. However, judges' attitude does not have to be positivistic and legalistic. Instead, judges should not be rigid and shackled by formal

legality. If judges are too rigid, it will create law enforcement that tends to be unfair and will damage people's sense of justice. Public's trust in the ability of judges to decide a case will fade and doubts will arise about law enforcement in Indonesia. The government in creating laws and regulations must consider many things. Laws and regulations that are made inappropriately will result in the inappropriate application of the law as well. The judges' decisions which consider such law will result in a decision that does not reflect justice. The government should be firm in determining a sanction if there is a violation of the law. This is intended so that judges are not wrong in applying regulations so that they do not produce decisions that can harm certain parties. Improper application of the law can result in losses in various aspects, including the aspect of foreign investment in Indonesia. Judges' decisions should consider the long-term impact of the decisions.

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¹⁵ Johannes Ibrahim Kosasih, *Kausa yang Halal dan Kedudukan Bahasa Indonesia dalam Hukum Perjanjian*, (Jakarta: Sinar Grafika, 2019), hlm. 191

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