

## RECENT LEGAL DEVELOPMENTS IN INDONESIA

This report gives an outline of the more important recent legal developments in Indonesia, covering primarily the period from August 1991 to December 1991. The topics covered are bilateral agreements and international conventions, regulations issued by the Indonesian Government, special regulations on offshore commercial loans, energy conservation, trade matters, capital market taxation, case law, seminars and workshops and publications.

### I. BILATERAL AGREEMENTS AND INTERNATIONAL CONVENTIONS

#### 1. *Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore for the Development of Water Resources in Riau Province and the Supply of Water from Indonesia to Singapore, with the Annex thereof*

On 28 August 1990, the Government of the Republic of Indonesia and the Government of Singapore signed the Agreement on Economic Cooperation in the Framework of the Implementation of the Development of the Riau Province. To further implement this Agreement, the two Governments then entered into an Agreement for the Development of Water Resources in Riau Province and the Supply of Water from Indonesia to Singapore on 28 June 1991. This Agreement was ratified by Presidential Decree No 32 of 1991 dated 18 July 1991.

On 28 June 1991, the Government of Indonesia (GOI) and the Government of Singapore signed an agreement which has been ratified by Presidential Decree No 32 of 1991 (State Gazette 1991 No 55). This Agreement came about as the result of discussions between the delegations of the two countries. This Agreement provides that the two Governments shall cooperate in the sourcing, supply and distribution of water to Singapore. Mutual guarantees are given by the respective governments for the due performance of all terms, provisions and conditions as stipulated in this Agreement and Annexes.

Both governments agree that joint venture companies shall be incorporated in accordance with the Indonesian Foreign Investment Law 1967 No 1. The GOI agrees to sell to the Singapore Government or its appointed agent up to 1,000 million gallons per day of raw water from sources in Indonesia as specified in the Annexes. The water shall be obtained from sources in the Province of Riau, initially from Bintan island.

The GOI will grant to the respective joint venture companies the licence to impound, draw-off and use water. The Singapore Government will have a majority interest in the joint venture company incorporated for developing the water resources and supplying raw water. The Indonesian Government would have a majority interest in the joint venture companies for treating and distributing water in Indonesia. Both Governments agree to provide all necessary support to ensure the successful implementation of this Agreement. Special terms and conditions for the development of water resources and the supply of raw water from Pulau Bintan to Singapore are set out in Annex I of the Agreement.

Any dispute or differences between the two Governments arising out of this Agreement shall be settled amicably through consultation or negotiation.

## *2. International Agreement on Jute and Jute Products*

The aforesaid International Agreement, entered into by the Indonesian Government on 27 December 1990, was ratified on 29 January 1991, by Presidential Decree No 5 of 1991. The objective of this Agreement is, *inter alia*, to provide an effective framework for cooperation and consultation between exporting and importing members with regard to the development of the jute market.

## *3. Convention on Wetlands of International Importance Especially as Waterfowl Habitat*

On 19 October 1991, by Presidential Decree No 48 of 1991, the Indonesian Government ratified the aforesaid Convention.

### *Double Tax Treaties*

#### *1. Presidential Decree No 33 of 1991 dated 18 July 1991*

*Re: The Ratification of the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Bulgaria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*

The aforesaid Agreement was signed in Sofia, Bulgaria on 11 January 1991 and ratified by the Indonesian Government on 18 July 1991 by Presidential Decree No 33.

2. *Presidential Decree No 57 of 1991 dated 20 November 1991*  
*Re: The Ratification of the Agreement between the Republic of Indonesia and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income and Capital*

The aforesaid Agreement was entered into by the Government of the two countries on 30 October 1990 and ratified by the Indonesian Government by the aforesaid Presidential Decree.

### *Non-Fiscal Incentives*

1. *Investment Guarantee Agreement*

Indonesia signed 16 bilateral agreements for protecting investment in Indonesia, *inter alia*, with Japan, France and the USA. In February 1992, Indonesia and Finland signed an investment guarantee agreement. The agreement was signed by the Indonesian Interim Foreign Minister and the Finnish Trade and Industry Minister. The agreement seeks to, *inter alia*, protect investment from being nationalised as a result of non-commercial risk, *eg*, because of social chaos or transfer of power.

2. *Singapore Declaration adopted at the 4th ASEAN Heads of Government Summit*

The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the Asean Free Trade Area (AFTA), dated 28 January 1992, sets down the underlying principles for AFTA and the Common Effective Preferential Tariffs (CEPT) Scheme, detailing part of the modalities for achieving AFTA.

## II. SOME RECENT REGULATIONS

1. *Presidential Decree No 23 of 1991 dated 3 June 1991*  
*Re: Field of Enterprises Closed for Capital Investment*

This Decree replaces Presidential decree No 12 of 1989.

It is the established present policy of the Indonesian Government to issue lists of activities in the field of foreign and domestic investments which are closed. No longer is followed the previous policy of issuing priority lists of projects (*Daftar Skala Prioritas*) which are still open for investments (foreign as well as domestic). The present system is to issue lists of activities which are closed to foreign as well as domestic investments.

Among the list of items totally closed for capital investments are *inter alia*, milk powder, condensed milk except if it is channelled through the cooperative development for small farmers plan or are produced at least 65 per cent for export purposes, finished rattan goods, ethyl alcohol, nitrogens fertilizer, *etc.* In the field of services are, *ie*, totally closed transportation, such as taxi rental, scheduled or chartered flights, transportation, detail trade, radio broadcast, cinemas, *etc.*

2. *Presidential Decree No 25 of 1991 dated 2 July 1991*

*Re: The Status, Duties, Functions and Organizational Structure of the Capital Investment Coordinating Board*

With the rapid development of capital investments and the increase of work load handled by the Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal/BKPM*), it is deemed necessary to improve the organization of *BKPM* which was previously regulated under Presidential Decree No 35 of 1985 as amended by Presidential Decree No 29 of 1987.

Pursuant to this Decree No 25 of 1991, *BKPM's* status is a non-departmental government institution under and directly responsible to the President of the Republic of Indonesia.

Its main duty is to assist the President in formulating and granting approval of and permits for capital investments and supervising their implementation.

3. *Presidential Decree No 47 of 1991 dated 8 October 1991*

*Re: The Agency for the Study And Application of Technology*

Presidential Decree No 47, issued on October 1991, to replace Presidential Decree No 31 of 1982, provides for the stipulation on the Agency for the Study and Application of Technology (known as *BPP Teknologi*). *BPP Teknologi* is a non-departmental government institution under and directly responsible to the President of the Republic of Indonesia (President).

The main duties of the *BPP Teknologi* are:

- (a) To prepare the formulation of general policy for the programme of technological study and application of materials for the consideration of the President in determining the basic items in the national policy pertaining to the development and application of technology for the promotion of industries and development;
- (b) To coordinate the implementation of the programme of technological study and application in a comprehensive and integrated manner;

- (c) To provide services to government offices as well as private offices in the application of technology;
- (d) To conduct activities in the study and application of technology to support the policy of the government in the development and application of technology for the promotion of industries and development.

4. *Decree of the Minister of Finance No 1169/KMK 01/1991 dated 27 November 1991*

*Re: The Leasing Business*

The Decree of the Minister of Finance (MOF) No 1251/KMK 013/1988 dated 20 December 1988 as amended by the Decree of the MOF No 1256/KMK 00/1989 dated 18 November 1989 provides for the underlying basis to undertake the leasing business. To further guarantee legal certainty, in particular, with regard to the tax treatment of the leasing business, the MOF issued Decree No 1169/1991 which re-stipulate provisions concerning the leasing business.

5. *Government Regulation No 70 of 1991 dated 28 December 1991*

*Re: Implementation of Law No 4/1990 Concerning the Depositing of Printed Works and Recorded Works*

Pursuant to this Government Regulation, any publisher, recording industrialist, Indonesian citizen whose work is published or recorded abroad and a person or commercial entity importing printed works or recorded works on Indonesia is obligated to hand over the printed works or recorded works to the National Library, regional library or an agency provided for in this Government Regulation.

Printed works are defined to be all kinds of publication of every intellectual and artistic work printed and reproduced in the form of books, magazines, daily papers, maps, brochures and the like intended for the public.

Recorded works are all kinds of recordings of every intellectual and artistic work recorded and reproduced in the form of tapes, phonograph recorder and other forms in keeping with the progress of technology and intended for the public.

### III. SPECIAL REGULATIONS ON OFFSHORE COMMERCIAL LOANS

The Government has issued several regulations concerning the obtaining of commercial loans from offshore sources.

The relevant regulations relating to this matter are as follows:

- (a) Presidential Decree No 39 of 1991 dated 4 September 1991 relating to the coordination of commercial offshore loan management.
- (b) Decree of the Chairman of the Commercial Offshore Loans Management Coordinating Team No KEP-05/K TIM-PKLN/1991 dated 14 November 1991 regarding commercial offshore loans excluded from the Presidential Decree No 39/1991 (Seventh Article).
- (c) Decree of the Chairman of the Commercial Offshore Loans Management Coordinating Team No KEP-06/K TIM-PKLN/1991 dated 14 November 1991 relating to the receipt of offshore commercial loans by banks.
- (d) Regulations concerning the guidelines for the receipt of commercial offshore loans:
  - (i) Decree of “*Direksi*” Bank Indonesia No 24/52/KEP/DIR dated 20 November 1991.
  - (ii) Circular Letter of “*Direksi*” Bank Indonesia No 24/38/ULN dated 20 November 1991.
- (e) Regulations regarding bank’s net open position are as follows:
  - (i) Decree of “*Direksi*” Bank Indonesia No 24/50/KEP/DIR dated 20 November 1991.
  - (ii) Circular Letter of “*Direksi*” Bank Indonesia No 24/11/UD dated 20 November 1991.
- (f) Regulations regarding liquidity swap and investment swap are as follows:
  - (i) Decree of “*Direksi*” Bank Indonesia No 24/51/KEP/DIR dated 20 November 1991.

- (ii) Circular Letter of “*Direksi*” Bank Indonesia No 24/12/UD dated 20 November 1991.
- (g) Regulations regarding the granting of credit in foreign currency are as follows:
  - (i) Decree of “*Direksi*” Bank Indonesia No 24/53/KEP/DIR dated 20 November 1991.
  - (ii) Circular Letter of “*Direksi*” Bank Indonesia No 24/3/UKU dated 20 November 1991.

On 4 September 1991, the Indonesian Government promulgated Presidential Decree No 39 of 1991 regarding the coordination of offshore commercial loan management.

Pursuant to this Decree, the inflow of offshore commercial loans accrued by both state and private companies shall be coordinated by a team specially established under this Decree, known as “*Tim Pinjaman Komersial Luar Negeri*”, *ie.* (Offshore Commercial Loan Team (Team)). The Team is chaired by the Coordinating Minister for Economic, Financial and Industrial Affairs with ten members consisting of nine Ministers and the Governor of Bank Indonesia (The Central Bank).

It could be concluded from points two and six of this Decree that the team shall coordinate the management of all commercial offshore loans covering:

- (a) All offshore loans, other than loans under the Inter-Governmental Group in Indonesia scheme;
- (b) All offshore loans, other than official borrowings for the Government, state-owned companies (including state-owned banks and Pertamina) as well as private companies (including banks and non-bank financial institutions);
- (c) Offshore loans relating to construction projects financed under the “non-recourse”, “limited recourse”, “advanced payment”, “trustee borrowing”, “leasing” and others;
- (d) Offshore loans relating to construction projects financed under the “build-operate-transfer”, *BOT*, “build-and-transfer” and others.

The types of loan which are exempted and, as such, not categorised as loans coordinated by the Team are specified in point seven of the Decree. These are:

- (a) Offshore short term commercial loans for trade purpose;
- (b) Offshore commercial loans by private companies for the financing of development projects having no relation to the Government or state-owned companies (including state-owned banks and Pertamina) in the form of government capital participation, guarantee to supply raw materials, assurance for purchasing final products or whatever form;
- (c) Other offshore commercial loans determined by the Team.

Further details on the type, amount and tenor of the loans specified in point seven of the Decree will be determined by the Team.

Loans to be coordinated by the Team require the Team's prior approval while those excluded from the Team's coordination are merely required to be reported periodically to the Team.

Additional guidelines and rulings were further issued in the following months to enlighten the business world of the Government's policy regarding offshore commercial borrowings.

There are five forms of Government intervention or involvement in offshore commercial borrowings, *viz*, permits from the Team; application of Net Foreign Exchange Position (especially for banks and non-banks financial institutions); establishment of a tentative ceiling; obligatory reporting to Bank Indonesia/the Team; and borrowing schedules (queuing) set by Bank Indonesia.

#### IV. ENERGY CONSERVATION

##### 1. *Presidential Decree No 43 of 1991 dated 25 September 1991*

On 25 September 1991, the Indonesian Government promulgated Presidential Decree No 43 of 1991 relating to energy conservation. This Decree is issued to ensure the efficient conservation and utilisation of natural resources and, therefore, shall effectively and efficiently achieve an equilibrium or balance between development, equalisation and environmental conservation.

The objective of this energy conservation is to maintain the natural resources conservation; an efficient and rational energy utilisation; and to realize an energy supply capability; and an efficient and equal energy usage and conservation of energy resources.



The above objective shall be achieved through the following activities: (a) wiser utilisation of energy resources; (b) increasing the national energy efficiency, among others, by reducing the energy intensity in all sectors; and (c) increasing the national value added for each energy unit used.

## V. TRADE MATTERS

### 1. *Decree of the Minister of Trade No 213/Kp/IX/91 dated 6 September 1991*

On 6 September 1991, the Ministry of Trade of the Republic of Indonesia issued Decree No 213/Kp/IX/91 relating to the establishment of a Permanent Team for Settlement of International Disputes (the "Team").

The Team has been established with the following duties:

- (a) To study and scrutinize GATT provisions, especially those concerning settlement of international trade disputes.
- (b) To monitor Indonesian trade development and violations of GATT provisions detrimental to Indonesia, with the aim of protecting the interest of Indonesian exports using the mechanism for the settlement of disputes.
- (c) To assist Indonesian businessmen file charges of violations of GATT provisions.
- (d) To provide information to businessmen.
- (e) To carry out studies on the system of safeguarding policies on Indonesian foreign trade and trade partners.

## VI. CAPITAL MARKET

### 1. *Decree of the Minister of Finance No 1190/KMK/010/1991 dated 30 November 1991*

Thirty six articles in the Decree of the Minister of Finance No 1548/KMK 013/1990 were amended on 30 November 1991 with the issuance of Decree No 1190/KMK/010/1991.

## VII. TAXATION

### 1. *Law No 7 of 1991 dated 30 December 1991*

*Re: The Amendment to Law No 7 of 1983 Regarding Income Tax*

To accommodate the national economic development in general and the business world in particular, it is deemed necessary to make amendments to several provisions of Law No 7 of 1983 regarding income tax.

Certain provisions, which are not suitable to the spirit of equal business opportunities are now amended by this new law. The establishment of new business forms, such as investment fund companies and venture capital companies, can be utilized to support investment activities, which will, in turn, assist the national economic development. In this regard, it is deemed necessary to provide taxation incentives. Tax incentives are now also granted for remunerations in kind and certain facilities which will induce people to undertake business at remote places.

### 2. *Government Regulation No 75 of 1991 dated 31 December 1991*

*Re: The Imposition of Value Added Tax (VAT) on the Delivery of Taxable Goods by Large Scale Retail Traders*

Initially, the coverage of imposition of VAT on taxable companies was up to the level of manufacturers and main distributors. By Government Regulation No 28 of 1988, the coverage of VAT imposition was expanded up to the level of distributors and wholesalers. To increase tax revenues and to equitably spread tax burdens, the scope of imposition of VAT is now broadened up to the level of large scale retail traders.

Pursuant to this Government Regulation No 75 of 1991, large scale retail traders shall be businessmen or companies whose corporate or working activities in trade register a gross turnover of Rp 1,000,000,000 (one billion rupiahs) or more in 1991 for taxable goods as well as non-taxable goods.

It is further regulated that VAT imposed on large scale retail traders shall be that on the delivery of taxable goods.

## VIII. CASE LAW

An important decision in the field of recognition and enforcement of foreign arbitral awards in the frame of the 1958 New York Convention has been handed down by the Supreme Court on 4 December 1991 (Case Reg No 1205 K/Pdt/1990). The parties were ED & F MAN (SUGAR) LTD, of London, represented by Winita E Kusnandar, SH and Yani Haryanto, Jakarta, represented by the law firm of S Gautama.

The case related to the validity of an arbitration clause and the en-

forcement of a foreign court decision and arbitral award. It is of interest as it was the first time that in practice a London arbitration award has been declared "enforceable" ("*fiat executie*") based on the Supreme Court Circular 1991 No 1 implementing Presidential Decree No 34 of 1981 by which Indonesia has adhered to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (see our previous Report in [1992] SJLS 289-290).

The Indonesian entrepreneur, Haryanto, had concluded contracts for the purchase of 300,000 and 100,000 metric tons of white sugar No 7458 and No 7527 on 12 February 1982. The seller was ED & F Man Sugar Ltd and the Indonesian buyer was domiciled in Jakarta. Based on article 100 of the Regulation on Civil Procedure (*Burgerlijke Rechtsvordering*), the foreign party who concluded a contract with an Indonesian national, could be correctly sued as defendant before the Jakarta Central State Court (*Pengadilan Negeri Jakarta Pusat*), the place of domicile of the Indonesian plaintiff.

Article 14 of the contract for white sugar No 7458 and No 7527 contained an arbitration clause referring disputes to the Council of the Refined Sugar Association, London to be settled according to the rules of the Refined Sugar Association relating to arbitration. The Indonesian party claimed that the import of sugar into Indonesia was prohibited for any other party other than BULOG (the Bureau Logistics of the Indonesian Government).

This is based on (i) Presidential Decree No 43 of 1971, dated 14 July 1971 regarding the Government's policy in the field of provisions on rice, sugar and other basic necessities to be exclusively entrusted to BULOG and (ii) Presidential Decree No 39/1978 regarding the competency of BULOG to regulate the prices of rice, sugar, *etc.*

Based on these two regulations, the Indonesian party requested the court to annul the respective sugar contracts Nos 7458 and 7527. On the other hand, the English sugar exporter claimed damages from the buyer because of non-fulfillment of the contracts.

The foreign courts dealing with the matter were the English High Court and Court of Appeal in London. The courts referred the matter to the Council of Refined Sugar Association in London for arbitration.

The claim submitted by the Indonesian party to the Jakarta Central State Court was based on the fact that by the abovementioned Presidential Decrees, the respective contracts for import into Indonesia of white sugar were prohibited, so that the respective contracts were against the Government regulations and, thus, had an unlawful cause, which in accordance with article 1320 paragraph 4 to article 1337 of the Civil Code made the contracts legally null and void.

The Jakarta Central State Court at first instance decided the matter in favour of the plaintiff, whose arguments were accepted. It was decided in

decision, No 499/Pdt/G/1988 dated 29 June 1989 that the white sugar contracts Nos 7458 and 7527 incorporating the arbitration clause were null and void *ab initio*. They were contrary to Government regulations as contained in *Keppres* No 43/1971 and *Keppres* No 39/1978. Only BULOG was authorised to import sugar into Indonesia. Therefore, according to articles 1320 paragraph 4 and 1337 of the Civil Code, the contracts were declared as legally null and void.

The defendant's contention based on the arbitration clause in article 14 of the respective contracts that the Jakarta Central State Court was not competent to sit in the matter was not accepted.

On appeal, the Jakarta High Court confirmed the Jakarta Central District Court's decision (Case No 486/Pdt/1989). The High Court also referred to the fact that decisions of foreign courts cannot be enforced within the territory of the Republic of Indonesia in conformity with article 456 of the Regulation on Civil Procedure, and in accordance with the Supreme Court Decision No 2944K/Pdt/1983 of 29 November 1984, *ie*, that foreign courts' decisions cannot be enforced in Indonesia unless there is an execution treaty regarding civil and commercial judgments between the Republic of Indonesia and the respective State.

The Supreme Court in cassation also confirmed the decisions of the lower courts, *ie*, the Jakarta Central District Court and Jakarta High Court. Man's argument that the Indonesian court was bound by the arbitration clause agreed upon by the parties was not followed. According to the Supreme Court, the lower courts did not err in their decision which was explicitly confirmed as being correct by the Supreme Court. Man's cassation request accordingly failed. (Supreme Court decision No 1205K/Pdt/1990 of 14 December 1991.)

It is noteworthy that in the course of this case, Man had succeeded in obtaining an "*exequatur*" (*fiat executie*) from the Supreme Court on 1 March 1991, No 1/Pen Ex'r/Arb Int/Pdt/1991, based on the Supreme Court's Regulation 1991 No 1 (PERMA 1991 No 1).

The Supreme Court rendered *exequatur* (*fiat executie*) of the Queen's Council of the English Bar decision on arbitration dated 17 November 1989. However, according to the Supreme Court in its decision 1205K/Pdt/1990 of 19 December 1991, such an "*exequatur*" is only of a "*prima facie*" nature and has no effect whatsoever concerning the contents of the agreements made. Such a declaratory *exequatur* only concerns the rendering of an enforceable title (*titel eksekutorial*) to a foreign arbitral award, of which the enforcement should be effected according to Indonesian law. Because of the Supreme Court's decision in this case annulling the respective contracts, the declaration of enforceability rendered by the Supreme Court dated 1 March 1991, No 1/Pen Ex'r/Arb Int/Pdt 1991, became irrelevant with regard to its enforceability.

Although the Supreme Court's consideration is only to *be* regarded as obiter dictum, it turned out to have practical effect, as the lower Jakarta Central State Court, through which all foreign arbitral awards should be enforced, subsequently declared the respective London Queen's Counsel arbitral award to be no longer enforceable.

#### IX. SEMINARS AND WORKSHOPS

On 3 June 1991, the Centre for Legal Studies in Jakarta held a seminar on protection of consumers with regard to banking services.

The following papers were presented:

- (a) Priasmoro Prawiroardjo, "Economic Globalisation and Its Influence on Banking".
- (b) Setiawan, "Banks and Client: Between Law and Trust".
- (c) D Gandaprawiro, "Some Aspects of Legal Protection Rendered to Clients' Depositors in Banks".
- (d) Widagdo Sukarman, "Responsibility of Banks and Clients".
- (e) Hartoyo Wignyowijoto, "Legal Protection of Bank Customers in Indonesia".

On 24 July 1991, a workshop was held by the Centre for Legal Studies on the steps to be taken towards having a sound banking practice and the creation of good relationship between banks and customers. The following papers were presented: (a) "Towards a Sound Banking Practice and a New Banking Law" and (b) "The Legal Relationship Between Bank and Customer".

#### X. PUBLICATIONS

- (a) Sudargo Gautama, *Essays in Indonesian Law* (1991) Citra Aditya Bakti, 468 pp.
- (b) Contoh-contoh, Kontrak, Rekes dan Surat-surat Resmi Sehari-hari (Forms of Agreements, Requests and Official Daily Letters), Citra Aditya Bakti, Book V, 208 pp, Book VI, 228 pp, Book VII, 282 pp, Book VIII, 248 pp.

- (c) Sudargo Gautama *et al*, *Ichtisar Hukum Perseroan Berbagai Negara Yang Penting Bagi Indonesia* (Outline of Corporation Law in Several Countries Important to Indonesia), Citra Aditya Bakti, 252 pp.
- (d) Sudargo Gautama, *Hukum Dagang dan Arbitrase Internasional* (Commercial Law and International Arbitration) Citra Aditya Bakti, 508 pp.

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