LEGAL SECURITY IN INDONESIA, THE BIGGEST CHALLENGE OF MEA

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ABSTRACT

ASEAN Economic Community 2015 or *Masyarakat Ekonomi* ASEAN (MEA) will be established starting on December 31, 2015. The impact is that the opportunity in free trade of service and goods among ASEAN countries is widely open. In facing MEA, especially in Indonesia, supports from many different parties are needed, such as the business persons, government, community, and of course law becomes one of the props in running the economy in the country.

Several problems and challenges that Indonesia currently face in implementing MEA namely are: there is lack of legal security for the business owners to ensure them to keep investing their business, the lack of readiness of businessmen in making agreements between themselves, slow service of bureaucracy and government commitment, and also the need of judiciary institution that can provide justice to all parties. Legal security is created through effective rules support, good faiths of the businessman, and law enforcers that fully support MEA since legal security in MEA is an absolute requirement.

Key words: MEA, Law, Legal Security

INTRODUCTION

MEA is the establishment of ASEAN Economic Integration in the sense of free trade system among ASEAN countries. Indonesia, as well as the other nine countries has agreed to abide the *Masyarakat Ekonomi* ASEAN (MEA) treaty or ASEAN Economic Community (AEC). The ASEAN leaders at KTT Kuala Lumpur held in December 1977 decided to transform ASEAN to achieve the goal into a stable, prosperous, and highly competitive region through a dynamic economy growth, and to reduce poverty and socio-economic disparities (ASEAN Vision 2020). *Masyarakat Ekonomi ASEAN* or ASEAN Economic Community is a realization of the end goal of economic integration as espoused in the Vision 2020, which is based on a convergence of interests of ASEAN Member Countries through Vision 2020.

The implementation of *Masyarakat Ekonomi ASEAN or* ASEAN Economic Community 2015 requires maximum preparedness and effort from the members, and Indonesia is one them. One of important matters to be prepared especially by the government is through the law division, through the issuance of rules and policies.

The law shelter of MEA in Indonesia is *UU No 38 of 2008* concerning Charter Legalization of the The Association of Southeast Asian Nations (South East Asian Countries Charter). The main consideration of MEA is international relations which is based on free and active politics as a realization of the Recommunity of Indonesia Government aim, which is to protect all the Indonesian people and their entire motherland, to foster the community welfare, to develop the intellectual life of the nation, and to contribute towards the establishment of the world order based on freedom, peace, and social justice.

ASEAN Member Countries have agreed to establish ASEAN Community in 2015 which is based on three pillars, namely ASEAN Security Community, ASEAN Economic Community, and

ASEAN Socio-Cultural Community. In order to achieve that, ASEAN Member Countries feel the need of transforming ASEAN into an organization with clear rules.[1]

ASEAN Charter and the establishment of ASEAN Economic Community 2015 is not a threat as it is not opposed to 1945 Constitution, as long as it is interpreted with good faiths and is in accordance with the objectives and the aims of the ASEAN Charter which has to be read contextually with the opening of the Charter included, in accordance with the terms of Vienna Convention on the Law of the Treaties.[2]

Law plays a role in creating a community as a preventive effort and also acting on the community as a repressive effort. In MEA, legal security can facilitate movements of business persons to invest their business. Business persons require legal security in order to have a control of their business so that the investment security in economic growth can be predicted accurately.

THE PROBLEMS AND CHALLENGES THAT INDONESIA FACES

Several problems that Indonesia is facing in welcoming ASEAN Economic Community are as follows :

First, to ensure legal security for the business persons requires stable regulations and is not influenced by political issues. The government regime turnover from one head of state to another is expected not to result in making regulations interfered with the legal security and regulations that are made should strengthen the regulations that have existed previously.

The Chief of Advisory Council /*Dewan Pertimbangan KADIN DKI* Jakarta, Dhanis K Harjono at Industrial Trade Division (KADIN) DKI Jakarta on September 25th, 2014 stated that Micro, Small, and Medium Enterprises *Usaha Mikro, Kecil dan Menengah* (UMKM) are seeking law protection from the government in welcoming MEA. In order to be able to compete with entrepreneurs from other ASEAN countries, government policies in form or rules and regulations and legal protection are needed.

Moreover, there are several points that need to be explained in *Peraturan Pemerintah* (PP) and these points are concerning the requirements and procedures in business license proposal, development procedures, priorities, development period, partnership pattern, control of UMKM empowerment and procedures of administrative sanctions.

One of the challenges the government facing is making a stable employment regulations. MEA does not only increase the volume of goods and services but also increase the number of employment/labor. Today Indonesia has only two regulations concerning Foreign Labors namely *Permenakertrans* No 12 of 2013 and*Permenakertrans* No 20 of 2012. In MEA, employment exhange is widely open. On the other hand, each state is required to advance the community welfare in accordance with their constitutions so that opens a cross possibility on this regulation.

Several employment sectors in Indonesia will be flooded with mainly doctors, lawyers, and medical staffs. But, the trend of employing a foreign lawyer as stated by the Chief of Indonesian Advocates Association /*Ketua Perhimpunan Advokat Indonesia (Peradi*), Otto Hasibuan is degrading. He further states " Our advocates, the young ones especially, are quite preeminent enough. The only

[1]*Penjelasan UU No 38 Tahun 2008 Tentang Pengesahan* Charter Of The Association Of Southeast Asian Nations (*Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara*)

[2]*Penjelasan UU No 38 Tahun 2008 Tentang Pengesahan* Charter Of The Association Of Southeast Asian Nations (*Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara*)

problem we have is the language as barrier. But many of our members nowadays graduated from schools/universities abroad'.[3]

Second, the establishment of MEA has to be driven by the preparedness of the business persons in making agreement/treaties between themselves. As MEA establishment is civilly nuanced, then business persons need to make agreement/treaty which they have to abide with good faith. Agreement/Treaty as the Law for its makers have to be made strictly, clearly, and transparently to their makers. Business disputes often start from an agreement/treaty that is multi-interpreted by the parties.

Third, the court as the the spearhead of the business dispute resolution has to provide justice for all parties. In business, defaults and action that violate the law/*Perbuatan Melawan Hukum (PMH)* is inevitable causing the business persons to find the solution between themselves if they face the problems as mentioned above.

The agreement dispute can be resolved in arbitration tribunal or state court as agreed by both parties. But if the agreement between the business persons and one of the parties is from Indonesian, it often occurs that they will not seek for international arbitrary verdict and choose to resolve the dispute in Indonesian Court. Until this time, International tribunal is in doubt with the judicial system in Indonesia.

The problem of the judicial system in Indonesia, is that the challenge is getting bigger as the business persons – both national and international- are apathetic to the judicial process in Indonesia. This is due to the long and twist process, and high cost[4].

Supreme Court /*Mahkamah Agung* (MA) as the classifier to the judiciary is challenged to be consistent in making verdicts so that it will be pursed to constant jurisprudence. The brand verdict of Kopitiam brand dispute is the example of legal uncertainty, as the Supreme Court agreed that the use of brand KOPITIAM belongs to Abdul Alex Soelystio, while KOK TONG Kopitiam and Lau's Kopitiam are prohibited from using the brand Kopitiam.What made the verdict uncertain/unclear was that Abdul Alex Soelystio was only given the right to use KOPITIAM 'logo' KOPITIAM' and not the word Kopitiam.

KOPITIAM is a word that is generally used by Malays in referring to small shops that sell coffee so that every small shop that sells kopitiam has the right to use that word as their trademark so that in dominant a quo case, in determining whether there is a principal similarity or not in ‘Kopitiam Kok Tong’ that belongs to the applicant PK does not lie on the word ‘KOPITIAM’ but on the word ‘KOK TONG’. Therefore, ‘Kok Tong Kopitiam’ does not have principal similarity with the ‘’KOPITIAM” brand[5].

Constitutional Court/*Mahkamah Konstitusi* (MK) also plays a role in promoting the establishment of legal security through the verdicts that are petitioned to be made by them. As the verdict contemplated in 15/PUU/XII/2014, MK removed the description of Article 70 UU No 30 of 1999 concerning Arbitration and Dispute Resolution Alternative/*Arbitrase dan Alternatif Penyelesaian Sengketa (UU AAPS*). Before it was removed, the description stated, :

An application to annul an arbitration award can only be made to arbitration awards that have already been registered at the court. The reason of the application in this article has to be proved through court awards. Whether the award states that these reasons can proved or can not be

[3]Otto Hasibuan, interview on BBC Indonesia, August 27, 2014

[4]Joseph Weiller, Plenary on the Rule of Law in the ASEAN Community which was held on Sunday, August 25, 2013 in Singapura as quoted from www. www.pembaruanperadilan.net on August 26, 2013

[5]Dissenting opinion of Supreme Judge Syamsul Maarif in Kopitiam verdict Number 179 PK/PDT.SUS/2012.

proved, then this award will be used as basic consideration for the judge to grant or to reject the application.

Despite that Article no 70 and 71 are already clear which state

Article No 70

An application to annul an arbitration award may be made if any of the following conditions are alleged to exist

a. *Letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;*
b. *Documents are founded which are decisive in nature and which were deliberately concealed by the opposing party; or the award was rendered as a result of fraud; or*
c. *The award was rendered as a result of fraud committed by one of the parties to the dispute.*

Article71

An application for annulment of an arbitration award must be submitted in writing within not more than thirty (30) days from the date such arbitration award was submitted for registration to the Clerk to the District Court

According to the Constitutional Court, it is not possible that within 30 days, an award can be made, even if a request for appeal is made to the Constitutional Court. It means that the Description of Article can not be applied if the application for annulment has to be made through District Court decision concerning proving of fraud, concealment of particular document, and gimmickry.

The Court considers that Article no 70 UU AAPS is clear enough (expressis verbis), that it does not need to be interpreted differently. However, the description of Article no 70 might cause multi interpretations. It is because it can be interpreted whether the reason of application for annulment has to be proved by the court first as the requirement of application submission or if the reason of annulment has to be proved in court concerning annulment application. And should the applicant submit one of the reasons to the court to obtain an award. The reason that has been awarded by the court becomes the requirement of annulment submission. Or, if the reason requirement alleged by the applicant has to be proved in a application approval process in court where the annulment application takes place.[6]

Fourth, the state has to play an important role in every busines conflict. Two big cases occurred in Indonesia were Hotasi Nababan case and Chevron Pacific Indonesia (CPI) had to be treated or prosecuted as merely a criminal dispute, and should have not been viewed in political perspective.

Hotasi Nababan as the Executive Director of *Merpati* Airlines, coordinating with Thirdstone Aircraft Leasing Group (TALG) rented 2 Boeing planes, namely Boeing 737-500 and Boeing 737-400 with USD 1 million deposit in 2006. But TALG did a defaults as the two planes never came to Indonesia as stated in agreement between *Merpati* and TALG.

Merpati then sent a letter of summons to TALG and Hume and Associates which was appointed by TALG to receive the security deposits of 2 planes. Since the letter was ignored, *Merpati* took the case to local court. Then, *Merpati* filed a lawsuit against TALG to Federal Court Washington DC which then the case was tried at the Columbian District Court, Washington DC. The verdict stated that TALG was proven to have done defaults and had to return the money. [7]But in Indonesia, the court

[6]MK No 15/PUU/XII/2014

[7]General Manager Legal PT Merpati Nusantara Airlines, Ferdinan Kenedy, 'Saksi: Merpati Sudah Upayakan Pengembalian Security Deposit US$ 1 Juta' detikcom, September 13, 2012.

proved otherwise. Hotasi was charged with committing act of corruption becase the state suffered loss of USD 1 million. Hotasi then was sentenced up to four years in cassation level

PT CPI case started from bioremediacy projects in a number of region in Sumatera in a period between 2006-2012. Prosecutors investigated the case after the project was completed with accusation that the bioremediacy project had no permit although the permit is regulated in UU no 32/2009 concerning Protection and Environmental Management. This law also regulates the sanctions for those who violate the law, ranging from administrative sanction and penalty. Instead of indicting them with UU 32/2009, they were indicted with the law concerning corruption act.

Seven people were involved in this case, both from PT CPI and from the partner, PT Green Planet Indonesia. Many people regretted that this case went to court because PT CPI had fulfilled their whole obligations in a right way in accordance with the letter issued by Ministry of Environment. In this case, one of the ad hoc judges incassation*(kasasi)* level, Leopold Hutagalung, viewed this case as full of legal gaps. At the time, he was prosecuting one convicted person with the case number 2330K/Pid.Sus/2013 under the name of Ricksy Prematuri.

According to Leopold, the first level of court and repeal has done logical leaps that are strayed from civil legal principles as the guide in investigating the penal case which if it is justified, it might cause very broad implications that every act that violates the law in a contract implementation between a private instutition and another private institution will always be qualified as a form of corruption act if one of those private institutions incidentally has a contract with a state enterprise.

Our penal code only recognize teaching of direct accountability, not streak or diverging as applied by judex factie. Hotasi Case and PT CPI show that there is a cross dispute and there is overlapping interest between the law enforcer institution and business persons. The law enforcers still use penal perspective/view in processing and reviewing a legal event that starts from a civil law.

"There are many legal frameworks in Indonesia that are not consistent and lack of coordination between the government institution causing the low number of law enforcement in Indonesia," a research conducted by Center for International Law National (CIL) University of Singapore 2013 concludes.

Legal Security in MEA becomes an important and absolute requirement in achieving legal security because through legal security establishment, then, justice and expedience will follow. Five notes above are in accordance with Lon Fuller opinion in his book 'The Morality of Law'. Eight principles that have to be fulfilled to achieve legal security are “:

1. A legal system that are composed of rules, and are not based on wrong verdicts for certain matters;
2. The rules are to be announced/communicated to the public;
3. Avoiding retroactive, as it will destroy the integrated system;
4. Made in formulation that can be understood by the public;
5. The rules can not be contradictory to each other;
6. Can not demand an action exceeding what could be done;
7. Can not be changed/altered frequently;

There must be conformity between the rules and its application on a daily basis[8].

CONCLUSION

The conclusion withdrawn is that MEA aim which is to advance the prosperity of ASEAN community can not be achieved without healthy law. In order to establish healthy law, legal security

[8]Lon L Fuller, The Morality of Law, Indiana Law Journal, Volume 40, 1965, p. 274

is needed to encourage good investment climate. Without the existence of legal security, then the business will run very slowly. To establish legal security, then supports from effective law, business persons with good intentions, and law enforcers that support MEA are needed.

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