Chapter 6 The Future of Indonesian Contract Law

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The previous chapters already explained, that Contract Law in Indonesia only contains (what in the common law system is usually called) commercial contract law, thereby excluding contracts concerning marriage, adoption and inheritance, as those matters are mainly regulated by separate laws on the basis of religious and (customary) Adat Law and Islamic Law principles. Apart from that a growing number of commercial contracts are separately regulated as "Special Contracts" (*Byzondere Overeenkomsten*), such as Sale of Goods, Hire Purchase, etc.

The developments since the Foreign Investment Law of 1967 and its numerous amendments by Presidential Decrees, Ministerial Decrees and Decisions of the (Foreign) Investment Board (BKPM), in addition to a number of new laws, such as the Anti Monopoly Law, the Law of Fair Competition and the like which were enacted in answer of the pressures of globalization and modernization, have in fact almost completely changed our legal environment. Therefore in reality the application of our Indonesian Contract Law is not anymore exactly the same as our Contract Law as it stood in the 1848 Civil Code, eventhough we do not have a new Act or Code on Contracts yet.

As the Civil Code was intended for non-indigenous (read "foreign") people only, living or doing business in Indonesia, suddenly, since 1967 (indigenous) Indonesians were made to abide by this part of the Code. Furthermore numerous new and changing policies, governmental – and presidential regulations, laws, judge-made law, international and commercial conventions and newly developed business practices also applied to indigenous Indonesians all at once in a time frame of some 30 (thirty) years, compared to their foreign domiciled business partner or representatives of transnational corporations for which those practices and laws, and especially contract law already applied at least some 150 years ago, if not longer.

Without given the time to adjust our values and norms from Adat Law and Islamic Law to the modern (read Western) way of thinking and feeling, at the same time Indonesians were put in a global transparent (and very critical) environment, where because of the existence of electronically well developed equipments, everything that happens in Indonesia is almost instantly known, evaluated and critized by the world, in particular by businessmen, television stations and mass media representing the strongest transnational corporations in the world.

Hence the law and the legal culture of Indonesia had to jump in a matter of 50 years or so from what Europe experienced in a time span of some 500 years, and Japan during the last 150 years or so, namely from the middle ages immediately to the 21st Century into the information era.

Therefore the legal culture of Indonesia cannot be otherwise but pluralistic, covering very different values and norms belonging to what is in economic theory known as an agrarian society, an industrial society, a post-industrial society (or a credit based economy), a service oriented society up to the computerized information age. No wonder that we now experience a clash of cultural values and norms bringing and causing legal uncertainty as a result of 50 years of accelerated development.

Accordingly the law applicable to contracts in Indonesia also depend upon the object or subject matter involved in the contract, the place where the contracts is concluded (i.e. whether the contract is concluded in the villages and with village people, or in the (big) cities), where the contracts is to be performed (in the cities or in the regions), with the government or government agencies or whether the contract is concluded between Indonesian companies, or with one or more transnational corporations, whether the contract is concluded with a bank (Indonesian or foreign) or through the internet, etc.

All these combinations of parties, places and facts may result in "different" contracts, applicable to different regimes or legal norms, although according to

foreign lawyers, they should be regarded as "similar" contracts, for which the same legal regulations and laws should apply.

The situation is very much like solving problems of conflict of laws, even it seems as if the relation is an "internal" Indonesian contract.

Hence Contract Law in Indonesia should more properly be called the law on contracts, rather than Contract Law as such.

The Resurrection of Adat Law and Conflict of Laws

Although it was always intended to create a harmonized unified Indonesian Legal System, unfortunately we have not succeeded in building such a unified legal system, except in the field of public law, such as constitutional and administrative law, criminal law and procedural law.

Even in those fields of law the Reformation Movement which started in 1998 raised new demands to modernize certain aspects of the Constitution, of our Criminal Law, and of our Criminal and Civil Procedural Law.

In addition, the latest policy for more autonomous regional governance might likely result in the need for (foreign) investors to abide by the local laws and customs concerning land, environment, waters, contracts, taxation and other regional/local regulation next to the "national" contracts and investment law as spelled out in the Civil Code and modified or amended by various special legislations, governmental decrees and regulations, or judge-made law.

The economic crisis, combined with the Reformation Movement and Decentralization Policy) therefore, has brought back two fields of law to be considered by any businessman or investor, namely (a) the rules of the local Adat law of the ***locus contractus*** and of the ***locus executionies*** of the

contracts, and (b) the field of Conflict of Laws between the "national" and the local/regional law, apart from the respective International Private Law rules.

The Importance of Public Law

Like in other developed countries since World War II Public law has grown in importance, reflecting the importance of public policy in welfare states.

Indonesia is no exception, and since our Independence, and more particular since 1967, the private sector has been very much regulated by administrative rules and institutions which for the benefit of foreign investors more often that not, made exceptions to the general (private law) rules. Even though the 1980s heralded the economic policy of liberalization and privatization, this did not diminish the importance of public law rules in the area of business and investments. On the contrary, those administrative laws very often made inroads in the private law system, making specific investments possible, which according to the strict private and business law rules would not have been possible.

Before somebody is to do business or invest in Indonesia, it would therefore be wise to study not only the relevant contracts and company laws, but also the rules on land and employment, apart from all the existing public laws, which at present are in a state of constant change.

More ever, it seems almost impossible for foreign lawyers to do business and make business contracts in Indonesia, without cooperation of local Indonesian lawyers.

The Emergence of e-Commerce

Practices of e-commerce have lately started in Indonesia, and at present many seminars and conferences are held discussing the applicable law in such e-contracts.

The provisional conclusion is that not all of the continental principles contained in our Civil Code concerning the conclusion of contracts can be applied to electronically made contracts.

The technology of computers and the internet is such that the common law principles on Contract law lends itself better for regulating the making and consequences of the e-contract.

Especially the concept if offer and acceptance which is unknown in the Indonesian Contract law, although it has been adopted in the Dutch Contract law, would need some time to be accepted and adjusted in Indonesia.

It is therefore not so easy for Indonesia, compared to. For instance, Singaporean law to apply the Model Law on Electronic Commerce of the United Nations Commission on International Trade Law to e-contracts, because no tradition of common law Contract Law exists in Indonesia.

Rather, I think that contracts made electronically should be regulated in a separate specific Act, making them **exceptional** to the general rules and principles of Indonesian Contract Law.

This would be the opposite as compared to Singapore, where, according to Andrew C.L. Ong and others in their book entitled "Your Guide to E-Commerce Law in Singapore"[1] :

"..... the Electronic Transaction Act 1988 is not intended to regulate activities on the Web or alter any existing legal rights or obligations between the parties",

and that

"the provisions of the ETA which relate to electronic contracts (Part IV) abd electronic records and signatures (Part II) will only operate in the absence of agreement between the contracting parties on such issues".

[1] Andrew C.L. Ong etc. : "Your Guide to E-Commerce Law in Singapore", Drew & Napier, 2000, p.2