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# Impact of U.S. Law Propositions on Indonesian Commercial Law, The

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# THE IMPACT OF U.S. LAW PROPOSITIONS ON INDONESIAN COMMERCIAL LAW

*Henri Gunanto**

## I. INTRODUCTION**

This Essay will depict the impact of U.S. commercial law propositions[1] on Indonesian law and practice. By commercial law I mean laws affecting matters that are traditionally the subject of the Indonesian Commercial Code[2] and *lex generalis*[3] and/or their restatements. The law on corporations[4] is included. In order to give perspective to this Essay, some general remarks will be given regarding Indonesian law per se.

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** The Essay contains cites to Dutch and Indonesian sources which were not available in English. For these sources, the *Law Review* relied upon Mr. Gunanto's translation and interpretation. Mr. Gunanto is certified as an official translator for both languages. Copies of the sources are on file with the *Law Review*.

1. By propositions I mean concepts and ideas; I do not discuss *in toto* any part of the law.

2. Promulgated by Publication of April 30, 1847, S. No. 23 (1848) (Indon.), as part of the imposition of Dutch laws in Indonesia in the colonial period.

3. *See infra* part II.A.

4. The Commercial Code consists of two volumes. Volume I is entitled "the law merchant in general." Volume I contained the law on books of account, corporations law, which included the law on partnerships, partnerships with sleeping partners (en commandite), and the limited liability company. The limited liability company (Perseroan Terbatas or PT) has very recently been removed from the Commercial Code, reformed, and put in a separate statute—Act of Parliament, No. 1 (1995) (Indon.). It remains part of "commercial law," however. *Id.* art. 1, para. 1 (defining the limited liability company as a corporation created by contract, so that pertinent law remains *lex specialis* to the law of contract, and the law of obligations of the Civil Code as its *lex generalis*, therefore maintaining its traditional place in commercial law).

## II. SUMMARY OF SALIENT POINTS OF INDONESIAN LAW

### *A.* "Lex generalis" *and* "Lex specialis"

Indonesia is a Southeast Asian civil-law enclave directly surrounded by common-law countries like Australia, Malaysia, Singapore, Brunei, and the Philippines.[5] In the civil-law tradition, the laws governing the various types of contracts in the field of commerce are *lex specialis* to the law of obligations, which is the umbrella for both contract and tort law. The law of obligations is called the *lex generalis* to the two latter laws. The applicable Latin adage is *lex specialis derogat lex generalis*, which means that with respect to any matter in the *lex specialis*, the *lex generalis* shall also apply. However, in the event of conflict, the *lex specialis* shall prevail. Where the *lex specialis* is silent, the *lex generalis* alone shall govern.

Indonesian contract law consists of mandatory and supplementary laws. Mandatory laws are those that affect public order and morals. Such laws cannot be superseded by any contract. Supplementary laws are those that apply only where parties do not by contract deviate from mandatory laws. It is safe to say that currently ninety percent of *lex specialis* is of a supplementary nature.[6]

The Indonesian law of obligations is contained in the Civil Code while the law of contract is contained in both the Civil Code and the Commercial Code. These codes are of 1848 vintage. The Indonesian general law of contract is contained in the Civil Code. This Code also contains *lex specialis* of a number of named contracts of basically Roman origin, such as the contract of sale and purchase, rent, exchange and depository of goods, agency, guaranty, and settlement. The general law of contract is itself *lex generalis* to the *lex specialis* of "nominate" contracts. The Indonesian general contract law and the laws regarding nominate contracts of the Civil Code have their roots in the *corpus juris civilis* of the East Roman Emperor Justinian of the sixth century. A number of nominate contracts of later origin, for

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5. Philippine law contains remaining elements of the Spanish civil-law tradition.

6. In a legislative report drafted by the author of this Essay, the traditional rule that *lex specialis* is supplementary unless stated otherwise, is reversed. HENRI GUNANTO, NATIONAL LAW DEV. AGENCY, DEPT. OF JUSTICE OF THE REPUBLIC OF INDON., ACADEMIC DRAFT (REPORT) ON THE INSURANCE CONTRACT LAW (1994). In other words, *lex specialis* is mandatory unless stated otherwise. Such reversal may upset the present proportion of mandatory laws. *Id.*

example, those derived from customs of the trade of Venetian merchants of the fifteenth and later centuries, are contained in the Commercial Code, such as the contract of insurance, bills of exchange, carriage of goods by sea, ship's charter, and the older forms of corporations.[7] Any particular contract could be a combination of two or more nominate contracts. Contracts without their own *lex specialis* are "innominate." Innominate contracts containing elements of nominate contracts may be construed by means of the provisions of the relevant nominate contracts *par analogiam.* Where no analogy exists, innominate contracts are governed by the general law of contract and the law of obligations. Currently, a number of standard contracts of contemporary origin, which entered the Indonesian scene from foreign jurisdictions, such as the many contract formats used in banking and modern financial transactions—leasing, franchising, licensing, mergers and acquisitions—are innominate contracts. The Law Development Agency of the Department of Justice aims at partial codifications of such imports into new *lex specialis.*

### *B. "Pacta Sunt Servanda" Plus*

In the meantime, innominate contracts rely on the general law of contract and the underlying law of obligations. The most fundamental provisions of the general law of contract are as enumerated:

a. Contracts shall be subject to four prerequisites:[8]
    1. The parties give free consent to a contract. If there is any material mistake, duress, or fraud in regard to the consent given, the contract may be nullified.
    2. The parties must have the capacity to enter into the contract. Minors and lunatics do not have such capacity. Until 1963, married women also did not have an independent capacity to contract.
    3. There must be a specific subject matter.
    4. There must be a legitimate "causa" or end to which the contract is made. Contracts to commit a crime, are not legitimate and shall not be enforceable by law.

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7. The law on the limited liability company as contained in the Commercial Code has been superseded by new law—Act of Parliament, No. 1 (1995) (Indon.).

8. BÜRGERLIJK WETBOEK [BW] art. 1320 (Indon.).

b. "Pacta Sunt Servanda"—legitimate contracts shall bind the parties "like the law." The contracts may not be cancelled unilaterally.[9]
c. Customs of any particular trade and consistently recurring provisions in any particular contract *species* shall be implied in all such contracts in that particular trade.[10] These articles pave the way for foreign legal concepts and ideas to enter the Indonesian legal scene. Quite a few of such imported standard provisions stem from American shores.
d. Contracts must be performed not only strictly and precisely, but also with due regard to the utmost good faith[11]—fairly and reasonably. If any performance of any contract would be against such good faith, one must refrain from insisting on its rights.

### *C. The Court System and Administration of Justice*

The Indonesian judiciary is made up of three levels of courts all comprised of three-judge panels that make decisions without a jury and require unanimity. They are the district court, the court of appeal, and the supreme court. The district court and the court of appeal, called *judex facti*, examine evidence and determine the facts of the case. The court of appeal examines the case *de novo*. The supreme court does not review the facts of the case or weigh the evidence. Rather, the court is only concerned with the proper interpretation, construction, and application of the law to the facts that the *judex facti* have established. This is called the *cassation* procedure. The supreme court is a watchdog over the laws made by the legislative branch of government. It makes no laws of its own, except in rare instances by way of repetitive decisions.

### *D. The American "Writ of Certiorari"*

Under the present civil procedural law, any party in controversy is allowed to enter all levels of the judiciary as of right at nominal cost. Furthermore, each party must pay his or her own attorneys' fees so that costs do not serve as any barrier to the swelling flow of litigation. As a consequence, the supreme court is inundated with *cassation* suits and civil action is protracted. It may be more than

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9. *Id.* art. 1338, paras. 1, 2.
10. *Id.* art. 1347 (conjunctive to art. 1339).
11. *Id.* art. 1338, para. 3.

three years from the first hearing at the originating court before any judgment is ready for execution. Some cases have lasted eight or more years. After such a long period, monetary values of judgments may have changed considerably. In his address at the recent Law Seminar in Commemoration of Fifty Years' Law Development,[12] the new Chief Justice of the Indonesian Supreme Court, Suerjono, disclosed that thoughts have been given to the introduction of the writ of certiorari, whereby appeals are subject to prior consent by the court, and to the introduction of judicial arbitration, or the establishment of a small claims court system. Undeniably, such thoughts are derived from American law. Thoughts are also said to be given to the reintroduction of the "prerogation" action, whereby parties may skip one of the existing levels of civil procedure. It may take some time, however, before anything can be implemented into law.

### *E. No "Binding Precedents"*

In the civil-law tradition, single decisions of the courts are binding only upon the parties and not upon others in future cases. The doctrine of binding precedents does not apply. Previous decisions, which have been repeated more than once, however, have persuasive authority. In any particular case, a court will decide with due regard to such established decisions. Only established decisions may be called "case law." There are only a handful of such case laws. Common opinions of writers of stature—*communis opinio doctorum*—also have authoritative value. Some of their books are labelled books of law.

## III. Inroads of U.S. Commercial Law Propositions in Indonesian Law

After the passage of the Act of Parliament, No. 1 in 1967, Indonesia opened up its gates to foreign investment. Upon entering the global economy, Indonesian commerce has been exposed to foreign legal concepts brought in by foreign investors and imposed upon their Indonesian counterparts. Concepts and notions, which are discernible as being of American origin and impacting Indonesian positive law include those discussed hereunder.

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12. The Seminar was held at the Sahid Jaya Hotel in Jakarta, Indonesia, July 18-21, 1995.

### A. *Credit Security Devices and Deposit Insurance*

The first area of Indonesian law and practice that underwent the impact of American legal concepts and formats was that of banking credit security devices. Previously, banks only utilized security devices from the 1848 Civil Code such as the "hypothec" on real property,[13] pledge of movables,[14] personal guaranty,[15] and one security device which was derived from case law of the Supreme Court of the Netherlands—the nonpossessory transfer of movables by way of security for debts, called "fiduciary transfer of ownership."[16] Presently, a fuller array of security devices is utilized, including, but not limited to the hitherto uncommon put option, stand-by letter of credit, pledge of promissory notes, bills of lading, policies of insurance, warehouse receipts, and delivery orders. Banks also utilize loan participation arrangements—the selling or transferring of credit lines given to other banks. The desirability of establishing an institution to insure bank deposits after the American FDIC model has also been voiced.[17]

### B. *Long Forms of Promissory Notes*

Promissory notes are now worded more extensively than before and as necessary under the Commercial Code. Under Article 174 of the Code, the note could simply state the unconditional promise to

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13. BÜRGERLIJK WETBOEK [BW] art. 1162 (1848) (Indon.).

14. *Id.* art. 1150.

15. *Id.* art. 1820.

16. The fiduciary transfer of ownership was established in a case by the Hoge Raad der Nederlanden, the highest court in the Netherlands. Judgment of January 25, 1929 (Heinekens Brewery v. Club Harmony), HR, 1929 NJ 616 (Ned.). Under the Civil Code, the pledge of inventories and other movable properties could only be allowed if the property were put in the possession of the creditor. In *Heinekens Brewery*, the Hoge Raad allowed the pledge of inventories and other movable properties for security of indebtedness while the transfer of the goods may be made by so-called *constitutum posessorium.* The pledged property may remain in the possession of the debtor but henceforth as a bailee of the creditor. In the Netherlands, this case law has been superseded by their new Civil Code.

*Heinekens Brewery* was one of the few decisions of the Dutch Supreme Court that the Supreme Court of the Republic of Indonesia adopted and applied on a constant basis so that it became law by usage under the relevant provisions in respect thereof of the Civil Code. *Cf.* CAL. COM. CODE § 9203 (West 1990) (dealing with inventory and equipment financing provisions).

17. One problem encountered in establishing this type of institution was the matter of funding.

pay a certain sum to a named payee on a certain date or after a certain period and at a certain place. Notes could be in five or six lines in a single page document. No conditions pertaining to the underlying transaction have ever before been incorporated in the promissory note, such as provisions regarding interest, costs, and expenses. These matters were embodied in the underlying agreement and only came into play in the event of any denial of indebtedness. We now encounter promissory notes in long form embodying installment terms, currency matters, taxes, costs and expenses, interest formulae, references to security instruments, and default clauses. Thus far, the Indonesian courts have not had an opportunity to decide on any conflict between terms of the extended promissory note and those of its underlying agreement.

### C. *Subordination Agreements*

Under the Civil Code, claims are either concurrent or priority claims. Priority claims and their ranking are strictly determined by the law. Banks now impose subordination agreements, whereby claims of the bank shall be paid in full before any payment may be made to another creditor. Such agreements potentially alter current statutory rankings. Until this time, all indebtedness shall, under the provisions of Article 1132 of the Civil Code, be *pari passu* unless any priority is accorded by the law. The law provided that only "hypothec" pledge of goods, and statutory priority claims are to be satisfied before any other claim. The Civil Code contains a number of such priority claims, such as court costs, funeral expenses, medical costs of the last illness of any deceased, and wages for the last year of any worker. Apart from the Civil Code, a number of separate statutes also provide priority claims.[18]

### D. *The "Piercing of the Corporate Veil"*

The fundamental principle of Indonesian corporation law has until this time been that the corporation is separate from its owners and that the natural persons constituting the organs of the corporation shall not, as long as they do not act *ultra vires*, be personally liable for the corporation's obligations. Bankruptcy of the corporation would

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18. *See, e.g.*, Act of Parliament, No. 2 (1992) (Indon.) (declaring certain payables with respect to insurance contracts to be priority claims, although omitting to determine their rank).

not affect its owners or directors. Naturally, they shall remain liable personally for torts, but such liability would be liability in tort, not corporate law. A new Act of Parliament, No. 1 of 1995 on the limited liability company has now pierced the veil of the corporation.

The American criteria for the piercing of the corporate veil seem to include, but are not limited to the following: (1) absence of formalities for corporate existence; (2) inadequate capitalization; (3) personal use of corporate funds; and, (4) perpetration of fraud by means of the corporate vehicle.[19]

The Indonesian statutory criteria for piercing the corporate veil are strikingly similar to the American criteria. As a matter of fact, Article 3, paragraph 2 of Act of Parliament, No. 1 of 1995, states that the shareholder is not personally liable for any obligation made on behalf of the company, nor shall any shareholder be liable for losses of the company beyond his or her share in the company's capital. Paragraph 2 states, however, that paragraph 1 shall not apply in the following events: (1) absence of formalities for corporate existence; (2) use of the corporation as an instrumentality of private ends; (3) involvement of the shareholder in a corporate tort; (4) personal use of corporate funds in contravention with the law, and thus causing inadequate capitalization of the company.

The Indonesian veil piercing also shows some variation from the American concept. Under the new Indonesian law on the limited liability company, veil piercing may not only impose liability on the shareholders, but in some defined cases, also on the directors.

Under Article 39 of the old Commercial Code, directors were personally liable if transacting business in the name of the company before they had registered the articles of association of the company and obtained the consent of the Minister of Justice in pertinent registers of the court of competent jurisdiction. Under Article 45 of the same code, directors were also personally liable for *ultra vires* transactions. In addition, the Article implied that directors are under the duty to exercise due care in managing the company. Their duty is one of trust. The old Code did not provide special penalties for any breach of duty, however. Absent any special penalty, the general law of tort shall apply. Neglect of fiduciary duty as a director as provided in Article 45 would come under the vigor of Article 1365 of the Civil Code on tort as extensively interpreted by the Dutch

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19. ROBERT CHARLES CLARK, CORPORATE LAW 71-74 (1986).

Supreme Court in *Lindebaum v. Cohen*,[20] one of the decisions of the Dutch Supreme Court to which the Indonesian Supreme Court voluntarily and consistently adheres. According to *Lindebaum*, a tort is any act or omission condemnable by law or morals.

Act of Parliament, No. 1 of 1995 is more specific with respect to directors' liability than the old Code. It has in respect thereof drawn from the so-called *l'extension de passif* laws of France and the "third abuse law" of the Netherlands. French law states that in the event of bankruptcy of the corporation, the directors shall ipso facto be jointly and severally liable for any deficit, except where no fault is proven. The burden of proof is on the defendant.[21] Remarks have been made that the reversed burden of proof of fault provided therein is contrary to the universally acknowledged principle of "presumption of innocence" in criminal law. The Dutch third abuse law states that directors shall be personally liable in the event the bankruptcy is caused by an "apparent gross mismanagement." No statutory definition is given as to what amounts to such apparent gross mismanagement.

Following the French and Dutch laws, Article 90 paragraphs 2 and 3 of Act of Parliament, No. 1 of 1995 state that in case the assets of any bankruptcy estate are not enough to cover its liabilities, directors shall be jointly and severally liable for the deficit, unless they could prove they were not at fault.

### *E. Mergers and Acquisitions*

Another area where the new Act on limited liability companies draws ideas from American law—state or federal—is the regulation of mergers and acquisitions. Until this time, Indonesian law did not provide for statutory transfers of assets and liabilities therein so that, in order to be valid, assets and liabilities of the target company had to be individually transferred to the surviving company. Such transfers required individual notices served through the court, or alternatively, the tacit consent of the original rightful party, which may not be promptly given in all cases. Transfer of real property must be individually done before land conveyance officers and involve

20. Judgment of Jan. 31, 1919, HR, 1919 NJ 161 (Ned.).

21. *Contra Principles of Corporate Governance: Analyses and Recommendations*, 1 A.L.I. PUBLICATION § 4.01(d), at 139 (1994) (recommending that a person challenging the conduct of a director should have the burden of proving breach of the duty of care and that such breach is the cause of the damage suffered by the corporation).

a time consuming recording procedure at the land office. The new Act now provides short cuts for such transfers.

Article 102 of the new Act provides stringent rules of mandatory law for mergers and acquisitions. Compliance therewith gives rise to the transfer by operation of law of all assets and liabilities in bulk and to statutory conversion of shares of the target company into shares in the surviving company. It would also give dissenting shareholders the right to demand that their shares be purchased by the company at fair value. Article 104 further provides that no merger and acquisition may impair fair competition in the market place. The Act appoints the Minister of Justice as the controlling authority. Although no mention is made in the Act and parliamentary rules of construction, the relevant chapter was without a doubt drafted after the U.S. model.

## IV. CONCLUSION

Indonesia is a civil-law country. The Indonesian law of contract is contained in its Civil and Commercial Codes of 1848. After Indonesia opened its gates for foreign investment in 1967 and in the era of global economy thereafter, U.S. contract formats and legal concepts have impacted the Indonesian legal scene. The introduction of such new formats and concepts from a common law country in Indonesian civil law is made possible by the general principle of freedom of contract of the Civil Code and the particular provision of the Code which pronounces that consistent contractual provisions are by force of custom implied in all contracts of its kind—where there is no conflict with mandatory provisions of Indonesian law. The National Law Development Agency of the Department of Justice of the Republic of Indonesia is giving thought to the codification of recurrent provisions of foreign standard formats in such fields as agency, distributorship, patent licensing, leasing, franchising, security agreements and instruments of credit support, promissory notes, and subordination agreements. If and when enacted, these statutes would become *lex specialis* of new nominate contracts.

Apart from inroads of American law propositions through Articles 1338, 1339, and 1347 of the Civil Code, Indonesian statute law, Act of Parliament, No. 1 of 1995, has recently undergone the direct impact of American law propositions. One of the American concepts entering the new Act is the piercing of the corporate veil. While the corporation is separated from its shareholders, in a number of situations enumerated in Act of Parliament, No. 1 of 1995—

situations resembling those of U.S. law—the veil of the limited liability company may be pierced. The new Act also contains provisions with respect to mergers and acquisitions, which apparently draw from U.S. law. This is enough to show that the Indonesian civil law enclave in Southeast Asia is undergoing a silent transition in the direction of U.S. law.[22]

22. Admittedly, however, civil law from Europe also continues to exert its influence on Indonesian lawmaking. One example given was the imposition of personal liability on directors, not shareholders. The format chosen by the lawmaker in respect thereof was that of the Dutch third abuse of the corporate body legislation and the French *l'extension de passif.*