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NEW KPPU REGULATION ON CASE HANDLING PROCEDURE

インドネシアの競争法を主管する事業競争監視委員会は、独占及び不公正な事業競争を解決するための手続規則を9年ぶりに改正した。手続の透明性と法的確実性を高めると同時に、予備審査の段階で審査対象企業が事業態度の変更を受け入れることでそれ以上の手続を回避できるといった新たな制度も導入されたことから、本稿ではかかる制度の概要について紹介する。

Background

The Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* / "**KPPU**") has issued Regulation No. 1 of 2019 on Procedures for the Settlement of Monopoly Practice and Unfair Business Competition Cases ("**KPPU Regulation 1/2019**") which revokes the KPPU Regulation No. 1 of 2010 on Procedures for the Settlement of Cases ("**KPPU Regulation 1/2010**").

The introduction of KPPU Regulation 1/2019 aims to improve transparency and legal certainty during the investigation and settlement of anti-competition cases, and also provide a guideline to the relevant parties. The KPPU spokesperson mentioned in an article that the KPPU Regulation 1/2019 regulates the procedures of settlement of anti-competition cases in more detail compared to what have been previously regulated under KPPU Regulation 1/2010.

Key Provisions

Based on our review, there are 5 (five) material changes that must be taken into consideration, namely:

1. **Alteration of Behavior**

   The KPPU Regulation 1/2019 introduces a new concept of alteration of behavior during the preliminary examination stage. In this, the KPPU provides an opportunity to the defendant to alter its behavior after the alleged violation report is made against it. This opportunity will only be given if all defendants in a case have agreed to alter their behavior. This new concept is the most important change under the KPPU Regulation

1/2019.

While this new concept is a positive breakthrough, not all defendants are able to enjoy the benefit. According to KPPU Regulation 1/2019, the KPPU will determine the eligibility of the defendant based on the (i) type of violation, (ii) duration of violation, and (iii) losses caused from such violation. Based on some articles, the opportunity may be given to the defendants whose violation does not have significant impact to the market. Should the KPPU grant the defendant the opportunity to alter their behavior, such defendant does not need to be involved in the anti-competition proceeding. Obviously, through this concept the defendants may save significant time and costs.

Upon the KPPU issuing a decision allowing the parties to alter their behavior, a commitment will be made between the parties. The implementation of such commitment will be supervised regularly by the KPPU for 60 days. After the lapse of such period, the KPPU will discontinue the supervision and issue a determination that the defendants have successfully changed their conduct. On the other hand, if after such 60 days the defendants do not change their business conduct or violate the commitments that have been made, the KPPU will then continue the case to advance examination stage.

2. Elimination of Market Share as a Criteria to Continue Investigation

Both KPPU Regulation 1/2010 and KPPU Regulation 1/2019 prescribe that the investigation of anti-competition cases is based on (i) public report to KPPU; or (ii) self-initiative from KPPU.

In terms of self-initiative from KPPU, the KPPU Regulation 1/2010 stated that it could continue the supervision of a business entrepreneur, if according to the investigation report prepared by KPPU officers it is found that:

a. There is 1 (one) business entrepreneur or 1 (one) group of business entrepreneurs which control more than 50% market share;

b. There are 2 (two) or 3 (three) business entrepreneurs or group of business entrepreneurs which control more than 75% market share; and/or

c. There is a business entrepreneur who potentially violates the prevailing laws and regulation.

Under the KPPU Regulation 1/2019 market share conditions as set out in (a) and (b) are eliminated. Hence, the case may only be continued if there is potential violation of the prevailing laws and regulations.

The change in KPPU Regulation 1/2019 aims to create legal certainty for the investigation of anti-competition cases. Prior to the enactment of this new regulation, the KPPU could continue the investigation on the basis that a business entrepreneur controls the market. In such case, KPPU would summon or inquire into the affairs of such company to determine whether or not it violates the regulations. During such inquiry process, a company would end up spending substantial time and costs in preparing the response to KPPU. Pursuant to the new regulation, the KPPU has to be certain that the company's conduct allegedly violates the prevailing regulations before commencing any investigation.

3. KPPU is Entitled to Hand Down a Decision for an Absent Defendant

Under KPPU Regulation 1/2010, if a defendant was not present in the preliminary examination after it was issued three consecutive summons, the KPPU could continue the case to the advance examination stage. On the other hand, KPPU Regulation 1/2019 allows the KPPU to immediately hand down the decision to an absent defendant. It may be noted that although the defendant is absent, the decision would not necessarily be less favorable to the defendant. There is a possibility that the KPPU hands down the decision declaring that the defendant does not violate the prevailing laws and regulation, or the KPPU rejects the alleged violation report prepared by the investigator due to the lack of evidence or other administrative requirements.

Through the new regulation the KPPU aims to settle the case in an efficient manner, so that the case may or may not be continued to the advance examination stage if the defendant is absent during the preliminary examination stage.

4. Advance Examination Stage may not be Required

To make the hearing procedure more effective and efficient, KPPU Regulation 1/2019 regulates that in the event the defendant acknowledges and accepts the alleged violation report in the preliminary examination, and it decides not to submit any evidence to deny such allegation, then the KPPU may hand down the decision without continuing the case to advance examination stage. There was no similar provision under the old regulation, and therefore the KPPU was required to continue the case to advance examination stage even though the defendants did not object the allegation or acknowledged their violation of the prevailing laws and regulations.

5. Enforcement of KPPU's Decision

KPPU is trying to strengthen their position enforcement powers. Under KPPU Regulation 1/2019, KPPU may take legal action if a defendant does not perform its obligation based on KPPU's decision. The legal action includes (i) confiscation of defendant's assets; and/or (ii) collection through third parties. With respect to confiscation of assets, the prevailing civil and criminal procedure laws prescribe that confiscation may only be done through a court order. As such, we are of the view that amendments may be required for KPPU to implement this action. We will continue to monitor this matter.

Conclusion

The KPPU Regulation 2019 is a development in the right direction. It grants an opportunity to parties to alter their behavior which could likely bring long term change in the business attitude of companies and has introduced several measures for expeditious disposal of cases.

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Malaysia

CAN COMPANIES SHIELD THEMSELVES BEHIND ABSOLUTE EXCLUSION CLAUSES IN CONTRACTUAL AGREEMENTS? A RECENT FEDERAL COURT JUDGMENT SAYS, "THINK AGAIN"

契約自由の原則に基づき、当事者間の自由な意思に基づく合意にはその通りの法的拘束力が生じるのが原則であるが、必ずしもそれが無制限に認められるものではない。本稿では、2018 年末マレーシアにおいて、ローン契約上の借主による法的手続を通した契約上の権利行使を完全に制限する条項が契約法に反して無効であると判示した連邦裁判所の判決を紹介する。

On December 17, 2018, the Federal Court, which is the apex court in Malaysia, held in *CIMB Bank Berhad v Antony Lawrence Bourke* [2019] 2 CLJ that an exclusion clause in a loan agreement was void and unenforceable as it was an agreement in restraint of legal proceedings and as such, it contravenes Section 29 of the Contracts Act (the "**Act**") and that it was also contrary to public policy.

In summary, the Federal Court held, among others:

(1) Clauses which absolutely restrict the right of customers to enforce a contract via legal proceedings are void pursuant to the Act; and

(2) Contracts with clauses to absolutely exclude liability were patently unfair and unjust to bank customers, and merited the application of principles of public policy as well as interference by the courts.

Brief Background

The Plaintiffs, Anthony Lawrence Bourke and Alison Deborah Essex Bourke, a married couple, entered into a loan agreement dated 22 April 2008 with CIMB Bank Berhad (the "**Bank**") to finance the purchase of a property that was still under construction ("**Property**") ("**Loan Agreement**"). Under the Loan Agreement, the Bank was supposed to make progressive payments directly to the developer of the Property whenever such payments became due. An invoice was issued to the Bank requesting for such payment. However, the Bank needed to first conduct a site visit before the payment is made to the developer.

In March 2014, the developer had sent notice for a progressive payment that was due at the end of the month. Eight days after the receipt of the invoice, the disbursement department of the Bank sent an email requesting its branch to conduct a site visit inspection on the Property. Three months after the due date, there was no confirmation of any site visit inspection and there was no response to internal emails requesting for it. The Bank had not notified the developer or the Plaintiffs on the need of a site visit as an additional condition to disbursement of invoice and no request was made to the developer to extend the due date of the invoice. After about a year, the sum still remained unpaid and a notice of termination was sent by the developer to the Plaintiffs and the sale and purchase agreement in respect of the Property was terminated.

The Plaintiffs then proceeded to file a claim against the Bank, on the premise that the Bank has been negligent and breached the terms of the Loan Agreement. The Bank relied on Clause 12 of the Loan Agreement i.e. the exclusion clause to absolve themselves from any liabilities even in the event they have been negligent and breached the terms of the Loan Agreement.

The High Court of Malaya dismissed the Plaintiffs' claim. However, it was subsequently overturned in the Court of Appeal and the Federal Court upheld the decision of the Court of Appeal.

Clause 12 of the Loan Agreement and Section 29 of the Act, which are central to the law suit, are reproduced below:

Clause 12 of the Loan Agreement: *"Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amount for loss of income or profit or savings, or any indirect, incidental consequential*

exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed."

Section 29 of the Act: "*Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.*"

Basis of the Federal Court's Decision

In the Federal Court, the question of law to be decided was whether Section 29 of the Act may be invoked to strike down and invalidate an exclusion clause which exonerates or negates a defaulting party from breach of contract or liability to pay compensation for non-performance of the contract.

While affirming the decision of the Court of Appeal, the Federal Court stated that while parties are bound by the terms of the contract which they entered into, it is the court's duty to give effect to the clear and plain meaning of the clause. The law recognizes the principle of the freedom of contract. However, the law also places restriction on absolute freedom. Clause 12 of the Loan Agreement negates the rights of the Plaintiffs to sue for damages and the damages mentioned in the clause "encompasses and covers all forms of damages" for a breach of contract or negligence. The court emphasized that this is considered as an absolute restriction and as such prohibited by Section 29 of the Act.

The Federal Court was of the view that the facts of the case merit the application of the principle of public policy. There is obvious unfairness and injustice to the Plaintiffs if Clause 12 of the Loan Agreement had been allowed as it will deny their claim/rights against the Bank. "It is unconscionable on the part of the Bank to seek refuge behind the clause and an abuse of the freedom of contract". The court referred to *Suisse Atlantique Societe D'armement Maritime S.A. v N.V Rotterdamsche Kolen Centrale* [1996] 2 All ER 61, where the House of Lords observed that freedom of contract "must surely imply some choice or room for bargaining". The court must be vigilant and not shrink from properly applying the principle in deserving cases as public policy is not static.

Comments

Although the decision is made in respect of a particular provision in a loan agreement, it may have wider ramifications on the validity of limitation of liability clauses in Malaysia. The principles laid down by the Federal Court in this case can be applied equally to exclusion clauses in other types of agreements. In each case, it will be for the court to determine whether an exclusion clause in effect operates as an absolute restriction to a party's right to claim damages.

It also follows that exclusion clauses that do not contravene Section 29 of the Act will continue to be upheld. Therefore, exclusion clauses that merely restrict or limit the kind of damages or extent of liability and which do not absolutely absolve a party from any liability or any form of damages would not offend Section 29 of the Act and will continue to be upheld by the courts.

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Myanmar

NEW CONSUMER PROTECTION LAW

ミャンマーにおいて、2019 年 3 月 15 日に新たな消費者保護法が制定され、一部の規定を除いて即日施行された。同法は、2014 年制定の旧消費者保護法に取って替わるものであり、旧法の不明確又は曖昧であった点を明確化するとともに、特に瑕疵ある商品やサービスを受領した消費者の権利保護をより手厚く規定している点に特徴がある。

Background

Myanmar's new Consumer Protection Law ("**CPL 2019**") (Pyihtaunghsu Hluttaw Law No.9/2019) was recently enacted on 15 March 2019, replacing the previous Consumer Protection Law which was in force since 2014. In accordance with Section 1(b), CPL 2019 comes into force on its issuing date with the exception of the provisions relating to labelling requirements (Chapter 18) which will only become effective one year (14 March 2020) after the date of enactment. The notification on the labelling requirements issued under the Consumer Protection Law of 2014 would continue to be in effect until then. Further, there have been no other notifications or rules issued under the CPL 2019 as yet and the previous notifications issued under the Consumer Protection Law 2014 have been preserved under the CPL 2019.

Key Provisions

1. Definition of Consumer and Entrepreneurs

A "Consumer" under the CPL 2019 is a person who buys, uses, acquires, loans or receives goods for the purpose of consumption for self or for others but not for trading or livelihood. Meanwhile, an "Entrepreneur" under the CPL 2019 is defined as an individual person or an organization that is engaged in production, distribution, storage, transportation, sale, advertising, refining, export, import, resale, supply of goods or provision of services.

2. Formation of the Consumer Protection Commission

The CPL 2019 forms the Myanmar Consumer Protection Commission ("**Commission**") which is charged with formulating the policies on consumer protection, formation of state and regional consumer affair committees or, when required, working committees on consumer affairs, and with the overall implementation of the CPL 2019. To facilitate the functions of the Commission, the Department of Consumer Affairs of the Ministry of Commerce ("**DOCA**") is designated as the secretariat office of the Commission, and its regional offices as the offices of the relevant state and regional Consumer Affair Committees. The regional DOCA offices are responsible for investigating complaints into breaches of the provisions under the CPL 2019, and the regional DOCA offices and the regional Consumer Affair Committees are responsible for administering the penalties prescribed under the CPL 2019.

3. The Rights of the Consumers

Consumers would have the right to be compensated for damages caused by the use of the goods or services as provided under Section 19 of the CPL 2019.

Besides damages, the other rights that are conferred under Section 19 of the CPL 2019 to consumers include the following:

(a) Right to use the goods or service safely; and

(b) Right to file a complaint with the relevant authority in case of loss and damage.

4. Withdrawal of Dangerous Goods from the Market

Section 31 of the CPL 2019 provides that DOCA can instruct recall of dangerous goods from the market based on the monitoring reports issued by the inspection officers, relevant government departments or working committees for consumer affairs, and section 33 of the CPL 2019 requires DOCA to issue the procedures for recall of goods or services. An Entrepreneur, who seeks of its own initiative, to recall dangerous goods is required to

submit to the relevant DOCA office of its plan for the recall under Section 32 of the CPL 2019. Section 34 of the CPL 2019 stipulates that DOCA is also required to announce to the public, information of the recall or prevention of the sale of dangerous goods.

5. Labelling Requirements on Goods

Section 41, Chapter 18 of the CPL 2019 requires the Entrepreneur to comply with the labelling prescription and to mention the following clearly on each type of goods:

1. Trademark;
2. Name of goods, size, net weight, quantity, storage instructions, and directions for use;
3. Manufacturing date, expiration date, and batch number;
4. If the goods are imported, name and address of the importer and manufacturer;
5. Place of production, and place of repackaging for imported goods;
6. Name, type, and quantity of raw materials and ratio of the ingredients;
7. Side effects, allergy alert and/or warning; and
8. Any other facts required by relevant government departments.

Items (2) and (7) must be mentioned in Myanmar language and can be mentioned in one or more than one language.

As mentioned above, Entrepreneurs will have a one-year grace period to comply with this provision.

6. Breach of CPL 2019 and Consequences of Breach

Under Section 21 (g) and (j) of the CPL 2019, the duties of an Entrepreneur include “avoiding directly or indirectly selling goods or services which would cause loss and/or damage to consumers” and “notifying when the Entrepreneur knows that the goods produced or services provided are dangerous, by itself or by any other means, through mass media or other means to DOCA and the consumers, in time”.

If there is a failure to comply with Section 21 of the CPL 2019, the relevant office of DOCA may take one or more of the following administrative actions pursuant to Section 52 of the CPL 2019:

(i) Issue a warning;

(ii) Require repairs to be undertaken;

(iii) Require replacements to be made; and

(iv) Refund the amount equivalent to the value of loss.

Further, Section 65(b) prohibits an Entrepreneur from misleading by incorrectly representing that goods are in compliance with prescribed standards and quality. Any Entrepreneur who violates the said Section 65 shall on conviction, be punished with imprisonment for a term not exceeding six months or with a fine not exceeding 5,000,000 Kyats.

Additionally, Section 66 (b) of the CPL 2019 prohibits an Entrepreneur from misleading by hiding defects or faults in goods or services. Any entrepreneur who violates Section 66 shall, on conviction, be punished with imprisonment for a term not exceeding one year or with a fine not exceeding 10,000,000 kyats.

Conclusion

The CPL 2019 has been enacted to provide more protection to consumers and it has clarified some uncertainties and ambiguities under the previous law, especially regarding guarantees and claimable rights of the consumers in relation to defective goods and services.

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