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This issue covers the following topics:

Indonesia

NOTABLE RULINGS ISSUED BY THE CONSTITUTIONAL COURT AT THE END OF 2021

2021 年末にインドネシアの憲法裁判所から 2 つの重要な判決が出された。1 つは 2020 年に制定され既に実務に広範な影響を及ぼしている雇用創出法（オムニバス法）を条件付きながら違憲とする判決であり、もう 1 つはインドネシアの再生型の倒産手続である支払猶予手続（PKPU）における商業裁判所の決定について、最高裁に再審理（cassation）を求めることができるというこれまでの実務を変更する判決である。いずれも実務上重要性の高い判決であることから本稿で紹介する。

Introduction

The Constitutional Court of the Republic of Indonesia issued two important decisions at the end of 2021. The first decision was issued on November 2021 regarding the enactment of Law No. 11 of 2020 on Job Creation ("**Omnibus Law**"). The Constitutional Court declared that the Omnibus Law is "conditionally unconstitutional" due to some errors in formality. Based on this decision, the Constitutional Court required the government to fix the errors within two years from the issuance date of the decision.

The second decision was issued in December 2021 with respect to the legal remedy for suspension of debt payment obligation ("**PKPU**") proceeding. Based on this decision, the relevant parties in PKPU proceeding are now allowed to submit a cassation to the Supreme Court as a legal remedy for PKPU decision handed down by the Commercial Court. Prior to the issuance of this decision, PKPU decision by the Commercial Court was a final and binding decision and therefore no legal remedy was available for the disputing parties if they were not satisfied with it.

These two decisions from the Constitutional Court are vital for Indonesian legal system, especially the one related to the Omnibus Law. As we have explained in our previous newsletter (*here*), arguably the Omnibus Law was hailed as the most significant legal reform in Indonesia as it amended 78 existing laws and since its enactment, the Government has issued more than 50 implementing regulations. The decision by the Constitutional Court which declared the Omnibus Law "conditionally unconstitutional" may have a huge impact on its implementation.

We have prepared our review and analysis of those two decisions below.

1. Constitutional Court Decision on Omnibus Law

On 25 November 2021, the Constitutional Court issued the decision No. 91/PUU-XVVII/2020 with respect to the

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review of the Omnibus Law brought by several petitioners from various backgrounds, including university students, non-governmental organizations, and academic scholars. The petitioners argued that the enactment of the Omnibus Law is contrary with the formality for making laws pursuant to the prevailing laws and regulations. In brief, the petitioners argued the following issues:

a. The drafting of Omnibus Law by using "Omnibus" method (i.e. one law can amend various laws) is vague and ambiguous. It is not clear whether the Omnibus Law is a new law, an amendment of a law, or a revocation of law;

b. The "Omnibus" method is not recognized under the Indonesian legal system. The petitioners argued there is no law or regulation which allows the government to draft a law in the "Omnibus" form, hence it should be declared invalid.

c. There are several versions of Omnibus Law available in the public domain as well as substantial last minute changes prior to the enactment.

Based on the above arguments, the petitioners requested the Constitutional Court to declare the Omnibus Law unconstitutional and therefore be null and void.

Having heard the explanation from the petitioners and the government, the Constitutional Court declared that the Omnibus Law is "conditionally unconstitutional" as it fails to meet the formality requirements for drafting and preparing the law pursuant to the prevailing laws and regulations. According to this decision, the Constitutional Court ordered the government to fix the formality errors within two years from the date of its decision. Unfortunately, it is no clear what such "fix" means and by what method or arrangement the government should "fix" it. If we take a look at the relevant laws and regulations regarding the drafting and preparing of laws, it would imply that the government should redo all necessary formality procedures including but not limited to conducting academic study and public discussion. The Constitutional Court in its decision clearly stipulated that there was a lack of public participation for the enactment of the Omnibus Law, hence we are of the view that the government will take necessary action to fulfill this requirement.

The phrase "conditionally unconstitutional" would mean that in the event the government fails to "fix" the errors within such two years period, i.e. by 25 November 2023, the Omnibus Law will be deemed unconstitutional and thus be null and void. This would mean that the laws in effect prior to its amendment by the Omnibus Law would then be reactivated as original. In addition to declare the Omnibus Law "conditionally unconstitutional", the Constitutional Court in its decision also restricted the government to (i) perform actions or policies that are strategic and have broad impact under the Omnibus Law, and (ii) issue new implementing regulations under the Omnibus Law.

It is not clear what kind of actions or policies are strategic and have broad impact under the Omnibus Law, hence it would give rise to numerous questions on how this order should be implemented in practice. From legal perspective, it is not the authority of Constitutional Court to restrict the government to perform certain acts or policies. Furthermore, with respect to the restriction of issuing new implementing regulations, it may cause legal uncertainty on the implementation of the Omnibus Law. Even though the government has issued numerous implementing regulations in various forms, we note that some technical regulations are yet to be issued. Due to this restriction, there may be a delay on the issuance of such technical regulations.

Upon the issuance of this decision, the government has responded that they respect the decision and will comply with the orders from the Constitutional Court. This two years period is critical for the government to "fix" some errors on the enactment of the Omnibus Law. The government expresses that they will strive to comply with the court orders and prevailing laws and regulations, and also guarantees public and investors that there will be no hindrance to business activities in Indonesia.

2. Constitutional Court Decision on PKPU Decision

On 15 December 2021, the Constitutional Court issued the decision No. 23/PUU-XIX/2021 with respect to the review to the Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligation ("**Law 37/2004**").

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The petitioner argued that Article 235 and Article 293 which state that there is no legal remedy for PKPU decision issued by the Commercial Court is contrary to the Constitution of 1945 and should be declared unconstitutional and thus be null and void.

The petitioner further argued that legal review should be available for any legal proceedings, including PKPU proceeding. Without any legal remedy available, the relevant party does not have any chance to submit an appeal to the higher-level court while there may be a possibility that the Commercial Court (as first-level court) is incorrect to examine the case or wrongly applies the laws. The petitioner argued that the original version of Law 37/2004 gives the impression that the Commercial Court is always correct in handing down the decision while judges may err sometimes. Based on this reason, the petitioner believed that there must be a legal remedy for PKPU decision mainly for checks and balance purposes.

Having read the explanation from the petitioner and the government, the Constitutional Court partly accepted the claim submitted by the petitioner and decided that Article 235 and Article 293 shall have no legal effect to the extent that it is not interpreted that it is allowed for the relevant party to submit a cassation to the Supreme Court for PKPU decision which is initiated by creditor and PKPU decision with respect to the rejection of settlement plan proposed by the debtor. In other words, the opportunity to submit a cassation is limited for two conditions, namely (i) PKPU decision where such PKPU is initiated by creditor, and (ii) PKPU decision which rejects the settlement plan proposed by the debtor.

In their consideration, the Constitutional Court explained that those two PKPU decisions may be contentious in nature, hence there may be a party who suffers losses due to the decision by the Commercial Court. Furthermore, the Constitutional Court also explained that the decision issued by the Commercial Court can potentially lead to partiality or at least there is a possibility of errors in the application of the laws by the judges. As such, the suffering party must have a legal remedy to protect its legal right.

Based on this decision, PKPU decision where such PKPU is initiated by creditor, and PKPU decision which rejects the settlement plan proposed by the debtor are now allowed to be appealed in the form of cassation to the Supreme Court. The cassation decision by the Supreme Court will be the final and binding decision, thus no legal review / *peninjauan kembali* is allowed against the cassation decision of the Supreme Court.

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Vietnam

DECREE 02/2022 ON IMPLEMENTATION OF LAW ON REAL ESTATE BUSINESS

2021 年 1 月に施行された新しい投資法では、不動産事業法や住宅法に基づく不動産開発に関連したライセンス手続の一部が改正された。かかる法律の改正を受け、不動産事業法の施行細則となる政令 02/2022/ND-CP 号が 2022 年 1 月 6 日付で成立した。本稿では、政令 02 号でなされた改正のうち、不動産開発実務において重要と思われる点についてご紹介する。

In an attempt to reform the licensing procedures for real estate ("RE") projects in Vietnam as part of the overall amendment of the conditions and procedures for investment in Vietnam, the National Assembly passed the new Law on Investment in 2020 ("LOI"), which also amends the Law on Residential Housing 2014 ("LRH") and the Law on Real Estate Business 2014 ("LREB"). The Vietnamese government has promulgated Decree 31/2021 on the implementation of the LOI, Decree 39/2021 amending Decree 99/2015 on the implementation of the LRH and this Decree 02/2022 dated 6 January 2022 to implement the LREB as amended ("Decree 02"). This Decree 02 will replace Decree 76/2015 on the implementation of the LREB ("Decree 76").

In this article, we will discuss the key changes in Decree 02 as compared to Decree 76.

Conditions for conducting RE business

According to Decree 02, to conduct RE business in Vietnam, an organization or individual must satisfy the following conditions:

i) Establish an enterprise having RE business as one of its registered business activities;

ii) Publicly disclose and update information on (A) the enterprise (including office address, legal representative and contact number) and (B) the RE (including information on mortgages and sold/on sale units) that the enterprise intends to sell or lease on the website of the enterprise, at the office of the project where the RE is located or at the trading floor (if applicable) where the RE is being traded; and

iii) Only trade in RE that fully meets the conditions for being sold or leased specified in the LREB.

As compared to Decree 76, additional conditions are added to Decree 02 to ensure strict compliance with the LREB. This reflects the Government's intention to restore order in the RE market, which has been in a state of disarray in the past few years as many developers/agents have unlawfully received a substantial amount of pre-payments from buyers or placed unqualified RE for sale in the market. Decree 02 also stipulates that the subject enterprises must meet these new conditions within 6 months from the date of this Decree 02 or otherwise must cease their RE business.

Apart from the aforesaid conditions, if the enterprise is a developer of an RE project, it must have owner's equity amounting to no less than 20% of the total investment capital of the RE project (for land area of less than 20 ha) or no less than 15% of the total investment capital (for land area of 20 ha or more). This requirement is not a novel one for RE developers as it is already stipulated under the land laws.

Decree 02 also abolishes the requirement to have charter capital of at least VND20 billion, which is applicable to enterprises conducting RE business, to reflect the amendments to the LREB made under the LOI.

Sample contracts and other forms

While Decree 76 has six sample contracts, Decree 02 introduces eight sample contracts, as below:

- Contract for sale and purchase (or lease and purchase) of apartment unit
- Contract for sale and purchase (or lease and purchase) of condotel/officetel

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- Contract for sale and purchase (or lease and purchase) of individual residential house
- Contract for sale and purchase (or lease and purchase) of house/construction works other than those specified above
- Contract for lease of a house/construction works
- Contract for transfer of land use rights
- Contract for lease/sublease of land use rights
- Contract for transfer of all or part of an RE project

Unlike Decree 76, Decree 02 does not differentiate between sale and purchase and lease and purchase, instead it distinguishes among apartment units, condotels / officetels, individual housing and other houses/construction works. Decree 02 also does not differentiate between existing housing and housing to be constructed in the future, rather it provides sample contracts to be used in both cases.

Like Decree 76, Decree 02 does not appear to require strict compliance with the content of the sample contracts. Therefore, it is arguable that the parties may amend these sample contracts to the extent that the basic fundamental terms/contents remain unchanged.

Decree 02 also includes other sample forms, such as those for the assignment of contracts (i.e., assignment documents) and transfer of RE projects (i.e., application, progress report and approval). Notably, if the transferee of an assignment contract relating to RE other than RE project (whole and part) is a company conducting RE business, it must notify such assignment to the central competent authority in Hanoi (i.e., Ministry of Construction) for monitoring purposes.

Procedure for transferring RE project

Under Decree 02, the transfer of all or part of an RE project must follow new procedures, as below.

- For RE projects that have been issued with an "approval of investor"[1] and/or an investment registration certificate ("IRC"), the parties shall comply with the procedure under the LOI.
- In respect of RE projects that have not been issued an "approval of investor" and/or IRC, the parties must follow the procedure under the LREB.

Although this provision seems to comply with the general rule set out in the LOI and the LREB, it will likely cause confusion among investors since the procedure under the LOI is different from the procedure under the LREB. Previously, the transfer of all or part of an RE project was subject to only the procedure under the LREB.

Under the LREB procedure, the parties must first obtain approval for project transfer from the provincial People's Committee ("PC") or the Prime Minister (as applicable) and then sign a project transfer agreement ("PTA") (using the sample contract discussed above) and close the transaction within 30 days from such approval. Thereafter, although not mentioned in the LREB and Decree 02, the parties will likely need to amend the investment policy approval ("IPA") and/or IRC to reflect the investor change in accordance with the LOI. As for the LOI procedure, the project company will amend the IPA and/or IRC without the need to obtain an approval for the project transfer.

As a notable change, Decree 02 regulates that in the case of following LREB procedure, the parties must submit a draft PTA together with other application documents required for issuance of the approval for project transfer to the competent authority. This requirement is not stipulated under Decree 76. In the case of following LOI

[1] The circumstances for receiving an "approval of investor" are prescribed under Articles 29.3 and 29.4 of the LOI. Under these articles, "approval of investor" may be issued in combination with IPA (as defined below) or separately.

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procedure, the LOI and its implementing decree also stipulate that a signed in-principle agreement or PTA (not draft PTA) must be filed together with other application documents for issuance of the amended IPA and/or IRC.

In the event the transferee is a foreign invested enterprise and the RE project is located in a border, coastal or island commune, ward or township, the competent authority must seek opinions from the Ministry of Defense or Ministry of Public Security before issuing the approval for project transfer and/or the amended IPA/IRC.

Conclusion

Decree 02 reflects the intention of the Vietnamese Government not only to reform the licensing procedures for RE projects as originally contemplated and regulated in detail under the LOI but also to tighten State management over RE business activities (including the transfer of RE projects) to restore order in the RE market and to strengthen national security.

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Philippines

DRAFT RULES ON THE DISQUALIFICATION AND REMOVAL OF DIRECTORS AND OFFICERS

2021 年 12 月、フィリピン証券取引委員会は、企業の取締役等の欠格事由及びその場合の解任手続きに関するメモランダム草案を公表し、パブリックコメントを求める手続に入った。取締役等の欠格事由については現行の会社法においても規定が置かれているが、今回のメモランダムはより良い企業統治を目指してその内容を改定するものである。

On 17 December 2021, the Philippine Securities and Exchange Commission ("**SEC**") released, for public comments, a draft memorandum circular on the disqualification of directors, trustees or officers of a corporation, and on the procedure to be observed for their removal (the "**Draft Rules**").

Grounds for disqualification

The Draft Rules enumerate the grounds for disqualification, which are principally based on Section 26 of the Revised Corporation Code (the "**RCC**").

A director, trustee or officer of a corporation may be disqualified if within five (5) years prior to his/her election or appointment or if within his/her tenure, the director, trustee or officer was:

1.) Convicted by final judgment: (i) of an offense punishable by imprisonment for a period exceeding six (6) years, (ii) for violating the RCC, or (iii) for violating the Securities Regulation Code.

2.) Found administratively liable, by final judgement, for any offense involving fraudulent acts punishable under the RCC, Securities Regulation Code and other laws, rules or regulations enforced or implemented by the SEC;

3.) Convicted or found administratively liable by a foreign court or equivalent foreign regulatory authority for acts, violations or misconduct similar to the above; or

4.) Found administratively liable, by final judgement, for refusal to allow the inspection and/or reproduction of corporate records.

It should be noted that Section 26 of the RCC originally provided that a director, trustee or officer may be disqualified if "found administratively liable for any offense involving fraudulent acts" in general, without qualifying or defining the term "fraudulent acts". However, the Draft Rules seem to limit the offenses involving fraudulent acts to those which are punishable under the RCC, Securities Regulation Code and other laws, rules or regulations enforced or implemented by the SEC only.

Further, paragraph 4 above appears to be a new ground for disqualification added through the Draft Rules. In any case, the addition of such ground may find basis on Section 26 of the RCC, which provided that the enumeration therein is without prejudice to other disqualifications, which the SEC or the Philippine Competition Commission may impose in its promotion of good corporate governance or as a sanction in its administrative proceedings.

Procedure for removal of directors, trustees or officers

Section 27 of the RCC generally provides that a director or trustee may be removed from office, with or without cause, by a vote of the shareholders representing at least two-thirds (2/3) of the outstanding capital stock. In addition, a director or trustee who was elected despite disqualification or whose disqualification was discovered subsequent to his/her election may also be removed upon action initiated by the SEC or upon verified complaint, after due notice and hearing.

The Draft Rules supplement the above provisions which only covered the general procedure for the removal of disqualified directors or trustees, but not for a disqualified officer.

a) Independent administrative action for removal

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The Draft Rules detail the requirements to initiate an independent administrative action for the removal of a disqualified director, trustee or officer, and identifies the department within the SEC with power and jurisdiction to hear and decide such cases.

Based on the Draft Rules, an independent administrative action may be instituted either through (a) a formal charge initiated by the SEC after determining there is sufficient ground to warrant such action, or (b) upon verified complaint filed by any real party in interest. To ensure that the complaint is not intended to harass and that the factual allegations have evidentiary support, an affidavit from the complainant to such effect is among the documents required to support the complaint filed.

After examination of the verified complaint, the SEC may outright dismiss the complaint for non-compliance with the Draft Rules, for lack of jurisdiction, for pendency of a complaint involving the same issues or subject matter before another court or agency, or for insufficiency of evidence to establish *prima facie* the truth of the factual allegations. Where the SEC issues a formal charge or will take cognizance of a verified complaint, it will proceed to issue summons, and require the filing of a verified answer by the respondent director, trustee or officer. The hearing officer may conduct a clarificatory hearing to ascertain facts or issues necessary to resolve the proceedings, or require further submission of pertinent documents.

A withdrawal of a verified complaint will not automatically result in the dismissal of the independent administrative action, and the SEC may take the place of the complainant as if it filed a formal charge, if the SEC finds that the continuation of the proceedings is warranted.

Decisions of the SEC on such independent administrative action may be subject to a motion reconsideration and appeal in accordance with 2016 SEC Rules of Procedure.

b) Removal as an administrative sanction

Where the SEC determines in administrative proceedings that the grounds for disqualification of a director, trustee or officer are present and established by substantial evidence, the SEC may remove such director, trustee or officer as an administrative sanction in such proceedings. Instead of a formal charge, the SEC will issue a show cause order and require the respondent director, trustee or officer to submit a verified response on why he/she should not be disqualified, removed or administratively sanctioned. Similarly, decisions of the SEC imposing removal as an administrative sanction may be subject to a motion reconsideration and appeal.

Other Administrative Sanctions

Although an administrative action for the removal of a disqualified director may be initiated by the SEC or any real party in interest, members of board of directors or trustees should be mindful that they may also be held accountable for their failure to act. In particular, the RCC provides that the removal of a disqualified director shall be without prejudice to other sanctions that the SEC may impose on the board of directors or trustees who, with knowledge of the disqualification, failed to remove such director or trustee.

As such, where an individual is disqualified to be a director, trustee or officer of a corporation, the Draft Rules provide that in addition to removal, the SEC may issue a permanent cease and desist order, and/or impose a fine ranging from Php10,000 to Php400,000 for each violation of the SEC's order or any provision of the RCC on the disqualification and removal of directors, trustees or officer, depending on the extent of participation, nature, effects, frequency and seriousness of the violation.

Conclusion

The Draft Rules is another measure through which the SEC aims to promote good corporate governance in privately held companies and ensure that elected directors and officers of a corporation have a record of integrity. Holding other directors accountable for their inaction in the instance above underscores the responsibility of directors in monitoring compliance with the RCC and the fiduciary duty which they owe to the corporation and its shareholders.

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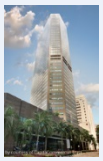

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