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How lawyers win land conflicts for corporations: Legal Strategy and its influence on the Rule of Law in Indonesia

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Annex 1

Interview Guide

These interviews will be used to answer research questions 2 and 3:

2. Why do parties choose litigation?
3. What strategies do parties and their lawyers developed and follow in corporate litigation about land and what factors shape their choices?

Interviews will also make research data more reliable and representative.

Target Interviewee

Group 1: litigators, judges, bureaucrats.

Group 2: corporate lawyers, shareholders, directors, managers, bankers.

Methodology

The interview will be semi-structured. Structure will be established by providing a hypothetical proto-case, where all the elements of real life cases discussed in the research will be included. Known from my experience, the target interviewees are known for their vileness and agility, and this affects my position as a female researcher. Group 1, the lawyers and judges will mostly be befuddled about being interviewed by a Chinese-Indonesian woman about their practices. When they are comfortable, it could cause them to exaggerate about their achievements or winnings, or they could immediately look down on me. Group 2, the users of Group 1 will be more approachable, as they mostly will have western-oriented idea of professionalism. It is important for me as researcher to keep the balance of maintaining distance and appear trustworthy and unassuming.

Proto-case Outline

There is a complex series of litigation about land between two companies. This started by one party receiving loan from the other party.

The loan is secured by collateral in the form of land certificate and /or *Hak Tanggungan*.

The loan is a complex financial product involving banks and investment firms, with a series of contracts, agreements, facilities, transfer.

As a result, the amount of debt and receivable changes time-to-time, depending on capital market or foreign exchange rate.

The debtor went into default, or be made default.. (Expect a response about this)

There are three ways this interview will be directed depending on the interviewee's answer:

- Route 1: Financial planning.
This answer will be expected from Group 2.
The interview will be moved towards executing the collateral.
- Route 2: Restructuring (PKPU)
This answer will be expected from Group 1.
The next hypothetical facts would be:
The parties have difficulty on agreeing about the amount of debt. Restructuring is not approved by creditors.
- Route 3: Bankruptcy and/or Litigation
Group 1 will most likely move to this Route.

The next hypothetical facts would be:
 Lawyer will file for bankruptcy to South Jakarta District Court.
 Some of the loan agreements are made in Singapore or English law.
 The trade activity involving the loan is also complex so amount of debt is difficult to assess.
 Collateral is not in physical control of either party. There are squatters and farmers settlement at the location.
 The person in charge of the debtor company is personally enriched by the loan without doing his/her obligation.
 The series of litigation I mentioned before involves general court about the loan or validity of loan documents, Police report against the director and/or shareholder of the company for fraud and/or embezzlement, and in Administrative Court about the land certificate.
 One or more of the decisions are contradictory at the same level, or in different levels of appeal.
 The creditor company decided to auction off the asset.
 They try to go to Balai Lelang to prepare the auction.

Questions

The questions posed will be what would they do when they are faced with those facts and about their opinion /values on their strategy. I will also propose a strategy to assess how willing they are to use the strategy.
 Sample of the questions would be:
 What is your expected outcome from this investment? Why did you choose to be involved in this project? What made you decide to fund this project?
 Why do you think they cannot agree about price? How will you solve this?
 If you were the lawyer, what would you do?
 Do you think you can somewhat control the outcome of this? Would you mind if I ask how?
 What will you take into account in this approach? What is the potential caution/problem according to you?
 Why did you want to become a lawyer?
 What do you think about going to litigators? How do you select them?
 Do you think the creditor can execute *Hak Tanggungan*? If not, how hard would it be for them? What would you do?
 Do you think that the approach to go through Balai Lelang is good? Why don't you go straight to KPKNL? What if you cannot find a buyer?
 What is the case that define your career?/What is the biggest case you have handled?
 What is a good lawyer according to you?
 What do you do when you are not working?

Annex 2

Cases in Constitutional Court on Law 18/2003 about Lawyers

Case No.	Petitioner	Issue	Constitutional Court's opinion
019/PUU-I/2003	Bar association/ NGO (Civil Society) Private individual(s)/ Governmental institution	– Whether graduates from military and police school are allowed to be an advocate (independency (from the state)) – Whether minimum age requirement (25 years old) to be an advocate should be upheld. – Whether to add criminal sanction for hindrance of advocates' rights. – Whether or not to add APHI (a lawyers' association) in the eight associations mentioned in the law as the interim association to carry out duty and authority of a Bar Association.	– To be an advocate, everybody has to resign from civil service (<i>pegawai negeri</i>), therefore they will be independent even though they are graduates from military and police school. – Upheld. Practical and comparative age calculation. – Not every clause should immediately include its sanction. – APHI not added. The process was not discriminative and the law does not limit inclusion to only the eight associations.
006/PUU-II/2004	Private Individual(s) – university lecturers	– Whether individuals without an advocate license can act like an advocate. – Whether or not universities which give legal services (litigation and non-litigation) to public are still able to conduct the role.	– Article 31 limited access to justice which is a component for a <i>negara hukum</i> (rule of law). Requirement about who can represent someone in court should be regulated in Civil Procedure. – Article 31 was annulled by the court, allowing universities and NGO(s) to provide legal aid as a citizens' and human rights.
067/PUU-II/2004	Private Individual(s) – lawyers from legal aid organization	Which body (the supreme court, the government, or bar association) shall have the supervisory function towards advocates?	– Bar Association should have the supervisory function of advocates. Government and other institutions can still monitor advocates through the Bar Association.

Case No.	Petitioner	Issue	Constitutional Court's opinion
009/PUU-IV/2006	Private Individual(s) – lawyers and staff from a private law firm	Whether the rights and obligations of advocates and legal consultant should be the same.	Petitioner misinterpreted Article 32 and do not have legal standing.
015/PUU-IV/2006	Private Individual – law graduate from a private law firm	– Whether the eight bar associations mentioned in the law as the interim associations had expired in 2005, making any activity relating to their duties and power are not legally binding. – Whether the establishment of Bar Association (Peradi) in accordance with Advocate bills.	The applicant have no legal standing because any decision would not affect her/him.
014/PUU-IV/2006	Private Individual(s) – lawyers, members of a bar association (Ikadin)	– Whether single bar with the enactment of Peradi as Bar Association, a contrary to the principle of freedom of association. – Whether ‘multi bar’ (Bar Association) system more precise than ‘single’ bar to accommodate the principle of freedom of association.	– Eight organizations mentioned in the law that they still have authority, out of official authority of Peradi, to draft ethics code, examination, oversight and dismissing lawyers. – ‘Single Bar’ system is in line with Advocate bill because the bill give advocate equal position with other law enforcer as an independent state organ.
101/PUU-VII/2009	Private Individual(s) – law graduates	– Whether it is obligatory for advocates to be sworn in before carrying their profession. – Whether the oath taken by advocates from KAI is valid or not after the issuance of Supreme Court letter No. 052.	The obligation to be sworn in should not be an obstacle for advocates to do their profession, because laws should not hinder anyone's right to seek work and decent livelihood. Although it is irrational that the ceremony has to be performed in High Court, it is considered constitutional because advocates are formal law enforcer/profession, and it is to protect clients from abuse. High Court must perform the swearing in ceremony notwithstanding which bar association the advocates come from within 2 years since the decision is announced. If the dispute between bar associations is still not resolved, it shall be brought to General Court.

Case No.	Petitioner	Issue	Constitutional Court's opinion
66/PUU-VIII/2010	Private Individual(s) – lawyers, members of a bar association (PERADIN)	Plaintiff provided historical analysis claiming that single bar (IKADIN) was an idea to silence lawyers who actively challenged the government. – Whether with the implementation of single bar contravenes with the principle of pluralism and the principle of freedom of association. – Whether single bar system limit the right of person to choose bar association in accordance with their aspirations. – Whether bar association(s) formed after 2 years as mandated by Law on Lawyers should be recognized.	– The petition <i>nebis in idem</i> with Constitutional Court decision number 014/PUU-IV/2006 – It is possible there are other bar association(s) which do not implement the authorities of Peradi – The choice on Single Bar Association is not contrary with constitution.
71/PUU-VIII/2010	Private Individual(s) – lawyers	– Whether advocates who are members of KAI can perform its duties in courts. – De facto, there are 3 bar associations which consider themselves as valid Bar Association, i.e. Peradi, KAI, and Peradin. Whether the establishment of Peradi as Single Bar Association is legitimate according to the law. – Whether KAI and Peradi are legitimate bar associations according to the law. – Whether the refusal of request for swearing in ceremony by the head of Supreme Court submitted Peradi and KAI are illegal. – Whether 'single bar' system is more compatible than 'multi bar' to accommodate the interests of bar association(s).	The petition <i>nebis in idem</i> with Constitutional Court decision number 014/PUU-IV/2006

Case No.	Petitioner	Issue	Constitutional Court's opinion
26/PUU-XI/2013	Private Individual(s) – lawyers	Whether advocates who are performing their task in good faith can not be prosecuted in civil and criminal as mentioned in the Law on Lawyers and law on legal aid (Law No. 16/2011) also applies for advocates who are performing their duties outside of court.	A person giving legal services (advocate or not advocate) can not be prosecuted (either in civil or criminal law) when they are giving legal aid.
103/PUU-XI/2013	Private Individual(s) – lawyer, owner of a law firm	Whether special education as a prerequisite to be an advocate held by bar association can only conducted by Peradi or can also be conducted by other institutions with background in law.	Special education as a prerequisite to be an advocate is held by a bar association as an effort to improve the quality of the profession. There is a possibility for organizations other than Peradi to organize the special education as long as it is under the control of the bar association (as mandated by law).
40/PUU-XII/2014	Private Individual(s) – lawyers	– Whether advocates who passed bar examinations organized by KAI can do their duties in courts even though they are not sworn in by a High Court. – Whether the Supreme Court is discriminating by ordering High Court not to swear in advocates who are not from Peradi. – Whether Supreme Court is acting contrary to Constitutional Court Decision No. 01/PUU-VII/2009.	The petition expired because Plaintiff did not attend hearing.
140/PUU-XII/2014	Private Individual(s)/ Lawyer	Whether the Constitutional Court is authorized to determine time limitation for petition (45 days)	According to Constitutional Court Decision No. 27/PUU-VII/2009, 16 June 2010, the time limitation for petition is 45 days after being published in state gazette of the Republic of Indonesia.

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