Analysis of the Application of Prevailing Law Principle and Nailed Down Principle in Mining Contract of Work (Comparison Between Act Number 4 of 2009 and 3 of 2020)

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Abstract. After the mining converted into the law number 4 2009, provisions on contract of work is not applied return except for existing before this act is promulgated. One of the reasons, not to apply the work of contract is implementation of nailed down and prevailing law principles. As a function of time, law number 4 2009 changed into law number 3 2020 including article is to apply the principle of both. Methods used in research is a qualitative methodology by approach juridical normative. The technique of data collection is done through the library research. Furthermore, the data will be analyzed deductive through method. The result of this research shows that there is the transition the base used in law number 4 2009 and law number 3 2020, about state income. The nailed down principle in law number 4 2009 was change to prevailing law principles in the law 3 2020.

Keywords: contract of work, nailed down, prevailing law

1. Introduction

Indonesia is a country with a lot of natural resources. According to US Geological Survey, by 2014, Indonesia became one of the countries with the biggest production and mineral reserves in the world. In terms of production, Indonesia is the third largest nickel producer in the world, the second largest bauxite producer, the ninth largest gas producer, the sixth in coal, and the first crude paint oil producer in te world. As for mineral reserves, Indonesia has the second largest mineral reserves in the world, the sixth largest gold reserves in the world, and the first country to have geothermal energy reserves in the world. Those natural resources must be managed in a way that meet the greatest benefit of the people in Indonesia.

The regulation on natural resources management was accommodated in Article 33 the 1945 Constitution of the Republic of Indonesia. Basically, this article emphasizes that sectors of production which are important for the country and affect the life of the people shall be under the power of the States and be used to the greatest benefit of the people [1]. Furthermore, the implementation of those various natural resources are regulated in law. In relation to the natural resources in the form of mineral and coal mining, the regulation is specifically accommodated in Act number 4 of 2009 on Mineral and Coal mining.

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Before the enactment of Act number 4 of 2009, the first regulation of mining in Indonesian independence era is Indonesische Mijnwet in 1907. Furthermore, in 1960, Act number 37 Government Regulation in Lieu of Law of 1960 on Mining Law was published which replaced the Indonesische Mijnwet. In further development, this regulation was considered unable to meet the demands of the public to give the private sector chances in mining, so that in 1967 Act number 11 of 1967 on Basic Mining Regulations was published [2]. In further development, this regulation with sentralistic material content was not fit to the development. The mining development should adjust to strategic environment changes, national and international. Hence, in 2009, Act number 4 of 2009 on Mineral and Coal Mining was published [3].

Act number 4 of 2009 introduced the concept of "approval" in mineral and coal mining management. Before this act existed, mineral and coal management used a contract of work of mining. For the mining that has existed before the enforcement of Act number 4 of 2009, the mining was allowed to use contract of work of mining in accordance with this act. Therefore, the article about contract of work of mining was in transitional provisions chapter that is Article 167-171 Act number 4 of 2009. More specifically, this research will discuss about regulation on contract of work of mining in Act number 4 of 2009. As a function of time, article containing both the principle of this revised by making changes to the law number 4 of 2009 into law number 3 of 2020 concerning mineral and coal mining. More specifically, this research will talk about nailed down principles and prevailing principles where following of this law.

2. Methods

This research uses qualitative method with normative juridical research type oriented to library research. The main object of this reseach is norm or principle in Act number 4 of 2009 on Mineral and Coal Mining and Act Number 3 of 2020 on Mineral and Coal Mining.This research is a descriptive research explains clearly about work of conract of mining as regulated in that regulation.

This research uses statutory approach and comparison approach. These approaches are chosen to learn abot the implementation of norm or principle of the regulation [4]. Data type and sources of this research are from normative provisions of laws and regulations related to the research's object directly or indirectly that is contract of work of mineral and coal mining. Primary, secondary, and tertiary data were collected through the observation of laws, books, journals, and even websites that are accountable. After that, the data was analyzed with description to answer the research problems.

3. Result and Discussion

3.1 Contract of work of Mining in Indonesia

Basically, problems related to contract of work belong to civil law section so that all the regulations are complied to Indonesian Civil Code, especially in Article 1233-186. Contract is

defined as cooperation between parties who agree to bind an agreement on an object of cooperation with a commitment based on good intention. This is in accordance with the formulation of Article 1313 and 1338 of Indonesian Civil Code. Contract management system in Indonesia is an open system, means that every person has the freedom to organize agreements both those that have been regulated and those that have not been regulated in the law [5]. This is known as freedom of contract [6].

There are four requirements of making contract according to Article 1320 Indonesian Civil Code, those are agrrement from the person who bound themselves in the contract, proficient on making an engagement, a certain subject matter, and a cause that is not prohibited [7]. Every agreement made acts as a law to those who biund themselves in the contract. This is known as pacta sun servanda principle. The agreement cannot be withdrawn except for the agreement of both parties or for certain reasons determined by law.

Regarding the naming of contract of works in the mining business, this is a form or special designation for contracts know in general mining. In Australian law, the term used to address work of conract is indenture, franchise agreement, state agreement or government agreement [5]. According to Eman rajagukguk, contract of work is a foreign capital cooperation in the form of a contract of work occurs when foreign investor establishes an Indonesian legal person and this legal person enters into a cooperation with a legal person who is using national capital [8].

In the juridical term, the definition of contract of work could be found in Article 1 Ministerial Decree of Mines and Energy Number 14/9.K/201/M.PE/1996 on Procedure for Submission of Processing Provision of Mining Authorization, Principle License, Contract of Work and Coal Mining Concession Work Agreement and Article 1 number 1 Ministerial Decree of Energy and Mineral Resources Number 1614 of 2004 on Guidelines for the Processing of Application for Contracts of Work and Coal Mining Concession Work Agreements in the context of Foreign Investment. Article 1 Ministerial Decree of Mines and Energy Number 14/9.K/201/M.PE/1996 defines contract of work as an agreement between the government of the Republic of Indonesia and foreign private company or joint venture between foreign and national (in the context of foreign investment) for undertaking mineral with the guidance to Act number 1 of 1967 on Foreign Invesment as well as Act number 11 of 1967 on General Mining Regulations [9].

Furthermore, Article 1 number 1 Ministerial Decree of Wnergy and Mineral Resources Number 1614 of 2004 defines contract of work as an agreement between the government of the Republic of Indonesia and Indonesian law company in the context of foreign investment to carry out mining business of excavated materials excluding petroleum, natural gas, geothermal, radioactive and coal [8].

The subject of contract of work is Indonesian government and foreign private company or a jount venture between foreign compay and national company. Government's position in a contract of work is to be the principal while businessman acts as the contractor. The goverment as the representative of the state in conducting cooperation contract of work is carried out by granting concession rights in the form of Mining Authorization (MA) or Mining Permit (MP) to Indonesian cizitens or legal entities, those are state-owned enterprises, national private or private companies, cooperation companies with the government, individuals, or in the form of community mining areas [10]. Because of the relation between government and the contractor in an agreement, so the relation is a contractual relation, by placing the parties in equal positions in the civil sphere, regardless of government function as an authorized party to issue policies [11].

A contract of work has a disinctive characteristic that differenciate it with a contract in general, namely the existence of special enforcement (lex specialis) given by government to the contract of work of mining holders. That special enforcement is that all written provisions in the contract will never change because of the changes in laws and regulations that apply generally. If changes would happen, a renegotiation should be held until both parties meet an agreement [11]. If the agreement couldn't be made, the renegoniation has not succeed, and the parties could not change the provisions in the contract of work.

The background to the presence of a work contract as written in Law Number 11 of 1967 is to attract investors in order to support the national development acceleration program. Hence, the regulations on contract of work are closely related to the regulation on investment both Law Number 1 of 1967 on Foreign Investment and Law Number 6 of 1968 on Domestic Investment [9].

The first mining company that signed the contract of work with gvernment is PT Freepot Indonesia to conduct copper mining in West Irian. Because the vision of government in this forst contract of work is to increase investment, therefore the contract of work was designed for companies and foreign contractors [12].

The equal relation between government and contractors is certainly not in accordance with the function of the government representing the state to control natural resources to thebenefit of the people. In the real application, in some multinational companies, the share owned by government and local private parties was considered very small, therefore, government could not influence the company's policies. Hence, Act Number 4 of 2009 was issued, which aimed to change the system of contract of work that put the government in line with contractor, who in practice did not benefit the state [12]. Next, this law changed along with the times and the needs, to be law number 3 of the year 2020. In this Act, contract of work turned into mining business permit. This change surely affected the position of the government too which was not in line anymore with the contractors. The change put the government in a higher position as the licensor [12].

3.2 Analysis of Prevailing Law Principle and Nailed Down Principle in Contract of Work of Mineral and Coal Mining

Contract of work of mining can still be found in Law of Mining namely Law Number 4 of 2009. However, the article concerning contract of work has been placed in the transitional provisions which means that the new contract of work will not be agreed upon anymore. The contracts of work that has existed before this regulation are still valid only until the completiion of the contract, and be nescessary to adjust to this law as soon as possible. The transitional articles which specifically regulate the contract of work are asrticle 167-172, Law number 4 of 2009, namely as follow:

Article 169

Upon effectiveness of this Law:

a. Contracts of works and coal contracts of works that already exist prior to the effectiveness of this Law shall remain valid until the contracts/agreements expire.
b. The terms that are stated by articles of Contracts of works and coal contracts of works as intended by point (a) shall be adjusted at the latest 1 (one) year of the promulgation of this Law, with the exception of state revenues.
c. Exception of state revenues as intended by point (b) shall be an effort to increase state revenues.

Article 170

Holders of contracts of works as intended by Article 169 that have made production must conduct refining/smelting as intended by Article 103 section (1) at the latest 5 (five) years of the promulgation of this Law.

Article 171

a. Holders of contracts of works and coal contracts of works as intended by Article 169 that have undertaken stages of explorations, feasibility studies, construction, or production operations at the latest 1 (one) year of the effectiveness of this Law must submit activity plans of all contract/agreement areas until the contracts/agreements expire for government approval.
b. Failure to meet the provisions as intended by section (1) shall cause the size of mining areas having been authorized to the holders of contracts of works and coal contracts of works to be adjusted to this Law.

Article 172

Applications for contracts of works and coal contracts of works that have been filed with the Minister within at most 1 (one) year prior to the effectiveness of this Law and already obtain principle approvals or preliminary survey permits shall remain upheld, and their permits therefor may be processed without bids under this Law.

From the four Articles in transitional privisons concerning contract of work that have been mentioned above, Article 169 letter b is the most interseting to have a further discussion, and the reason is because this article demands an adjustment with the exception of state revenues. Therefore, the article has applied the prevailing law principle as well as the nailed down principle. Prevailing law principle is defined as the applicable law. prevailing law principle is a principle which states that an agreement made is subject to apllicable law, and must adjust according to the amended law. This principle is a principle that is generally applied in a contract.

In relation to Article 169 letter b, the sentence “shall be adjusted at the latest 1 (one) year of the promulgation of this Law” is one of applications of prevailing law principle. This adjustment is then re-spelled out in Article 170 Law Number 4 of 2009 that contract of work holders as referred to Article 169 which is already in production must refine no later than 5 years from the enactmment of this law. The refinementas referred to Article 170 refers to Article 130 section (1) that contract of work holders are obliged to process and refine domestic mining products. Processing and Refinement are mining business activities to improve the quality pf minerals and/or coal as well as to utilize and to obtain associated minerals. The obligation to process and refine domestic mining products is intended to increase and optimize the mining value of the product, the availability of industrial raw materials, employment, and increased state revenue [3].

As explained above , besides prevailing law principle, Article 169 also applies nailed down principle. Nailed down means standardized, nailed down principle means an agreement made is not subject to changes in law and only refers to the standard provisions that have been mentioned in the contract of work. This provision can be found in Article 169 section (2) which states that contract of work is required to conform to this law except for state revenues. It means that the issue about state revenues still refers to the provisions contained in the contract of work. This unchanging state revenue are such as:

a. Fixed fees for mining areas
b. Exploitation/production fees (royalties)
c. Corporate Income Tax
d. Employee Tax Income
e. Obligation to deduct Income Tax for payment of dividends, interest, including compensation due to guarantees of debt repayment, rent, royalties and other income in relation to the use of assets, compensation for technical and management services and other sevices
f. Value Added Tax (VAT) and Sals Tax on Luxury Goods (PPn BM) on imports and delivery of taxable goods and or taxable services
g. Stamp duty on documents
h. Import duties on goods imported into Indonesia
i. Property Tax
j. Levies, taxes, fees and charges imposed by the Regional Government with the approval of the Central Government
k. General administrative fees and charges for facilities for services and special rights provided by the government as long as they are approved by the central government
l. Transfer of Ownership Fees for Registration and Transfer of Ownership Rights of motorized vehicles and ships in Indonesia.

But, 10 june 2020, government passed the amendments to the law number 4 of 2009 to law number 3 of 2020 on changes on the law number 4 of 2009 concerning minerals and coal mining. In the broad , rules changing this law was based on yet the law number 4 of2009 to resolve the problem and the need for the law in the minerals and coal mining in order to become more effective, efficient, and comprehensive. In addition , the principle used in law number 3 of 2020 is as follows:

a. Benefit, that the management of mineral and coal resources must be able to provide benefits for the welfare of society in general. This principle by Jeremy Bentham is termed the concept of utility (happiness or well-being).
b. Fair and equitable, that the management and utilization of mineral and coal natural resources must provide equal and equal rights for the community. The community is given the right to manage and utilize minerals and coal to maintain their survival, because so far the government has always been considered to give special rights to large companies.
c. Sustainable and environmentally friendly
d. Legal certainty, that in implementing mineral and coal management, strict rules are needed as a basis as well as a guideline so as to create legal certainty in the management of mineral and coal mining.
e. Siding with the interests of the nation, that in the implementation of mineral and coal mining, the government must side with the interests of the nation which are bigger than the interests of investors in a structured manner.

f. Participation
g. Transparency
h. Accountability, that every administration and management of minerals and coal must be accountable to the people by taking into account the sense of justice and propriety.

Based on the above considerations, Law Number 3 of 2020 was passed. In relation to state revenue, the principle that was originally nailed down becomes the prevailing law, which is subject to the applicable law. This is reflected in the following sound:

Article 169A

(1) KK and PKP2B as referred to in Article 169 are guaranteed to be extended to become IUPK as a Continuation of Contract / Agreement Operations after fulfilling the requirements provided that:
    a. Contracts / agreements that have not received an extension are guaranteed to get 2 (two) extensions in the form of IUPK as a Continuation of Contract / Agreement Operations, each for a maximum period of 10 (ten) years as a continuation of operations after the end of the KK or PKP2B by considering efforts to increase revenue country.
    b. a contract / agreement that has obtained the first extension is guaranteed to be granted a second extension in the form of IUPK as a Continuation of Contract / Agreement Operation for a maximum period of 10 (ten) years as a continuation of operations after the end of the first extension of the KK or PKP2B by considering efforts to increase state revenue.
(2) Efforts to increase state revenue as referred to in paragraph (1) letter a and letter b are carried out through:
    a. rearrangement of the imposition of tax revenue and non-tax state revenue; and or;
    b. the area of the IUPK as a Continuation of Contract / Agreement Operation in accordance with the development plan of the entire contract area or agreement approved by the Minister.

From the article above, it can be seen that in relation to state revenue a re-arrangement is made. This indicates that state revenues are not subject to the principles that are 'standardized' in the work contract agreement and are nailed down. However, this law does not remove the provisions of Article 169 letter b which also regulates state revenue. Therefore, the two laws regarding Mineral and Coal Mining still use the principles of nailed down and the prevailing law. Although it seems contradictory to each other, the use of the prevailing law principle in Article 169A paragraph (1) and paragraph (2) as mentioned above is intended for work contracts and coal mining exploitation work agreements that are guaranteed an extension to an IUPK. Meanwhile, state revenue that is nailed down as stated in Article 169 letter b is an exception to the adjustment of the coal mining exploitation work contract and work agreement to the statutory regulations.

4. Conclusion

From the explanations above, several things can be concluded: first, both principle those are prevailing principle and nailed down principle are still recognized and enforced in Act Number 4 of 2009 on Mineral and Coal Mining. Prevailing law principle can be found in Article 169 letter b that is the sentence “shall be adjusted at the latest 1 (one) year of the promulgation of this Law.” Whereas nailed down principle can be found in the sama Article, that is the sentence “with the exception of state revenues.”Regarding the principle of nailed down, it is also found in the same Article, namely the phrase "except for state revenue". Whereas in Law Number 3 of 2020 in relation to state revenue, the principle that was originally nailed down becomes the prevailing law, which is subject to the applicable law as regulated in Article 169A. Second, to the application of these two principles, the prevailing law principle is a general principle that applies in an agreement because it requires an adjustment to the changing laws and regulations. This provision is of course for the sake of prioritizing the interests of the state. Meanwhile, the provisions that still apply the nailed down principle are actually the principle that does not require changes to the contract following the amendments to laws and regulations, which has the potential to cause state losses. Therefore it is appropriate for the government to change the provisions of this principle to become the prevailing law as stated in Law number 3 of 2020.

The change of work of contract regime into a mining business permit certainly has a very different impact. In contract of work, the position of government and mining company as contractor is equal, whereas in mining business permit regime, the government certainly has a higher position because the government acst as the licensor. So if a business is deemed detrimental to the state, the government can immediately impose penalties by not extending the business license. It is different with contract of work where if one of the parties wants a change, then arenegotiation is needed before conducting the changes. If one of the parties is not agree, the contract will not be changed. If one of the parties violates, then the resolutiion of the matter will be submitted to internationa arbitration.

References

[1] GOVERNMENT, *No Title UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA*, vol. 4, no. 1. 1945, pp. 1–12.

[2] GOVERNMENT, *THE ACT NO. 11 1967*, no. 11. 1967, pp. 1–9.

[3] GOVERNMENT, *THE ACT NO. 4 2009*. 2009.

[4] M. S. SUMARJONO, *Bahan Kuliah Metodologi Penelitian Ilmu Hukum*. 2011.

[5] A. Nefi, I. Malebra, and D. P. Ayuningtyas, “IMPLIKASI KEBERLAKUAN KONTRAK KARYA PT FREEPORT INDONESIA PASCA UNDANG-UNDANG NO 4 TAHUN 2009 TENTANG PERTAMBANGAN MINERAL DAN BATUBARA Arman Nefi*, Irawan Malebra**, Dyah Puspitasari Ayuningtyas**,” vol. 48, no. 1, pp. 137–163, 2018.

[6] I. Rahadiyan and K. A. Savira, “Menimbang Posisi Indonesia dalam Kontrak Karya Freeport (Problematika Hukum-Sosial Serta Kemungkinan Solusinya),” vol. 3, pp. 41–55, 2017.

[7] GOVERNMENT, *Kitab Undang-Undang Hukum Perdata*. .

[8] S. Awaliyah, “KONTRAK KARYA DAN PERJANJIAN KARYA PENGUSAHAAN PERTAMBANGAN BATUBARA (KK / PKP2B),” no. 5, 1997.

[9] R. F. Abidin, “KONTRAK KARYA DI INDONESIA (Studi Kontrak Karya antara Pemerintah Republik Indonesia dengan PT . Freeport Indonesia),” pp. 19–42.

[10] A. W. Hertanto, “(SUATU KAJIAN HUKUM KEPERDATAAN) I,” 2004.

[11] M. Pardede, “IMPLIKASI HUKUM KONTRAK KARYA PERTAMBANGAN TERHADAP KEDAULATAN NEGARA,” vol. 18, no. 740, pp. 1–21, 2018.

[12] A. Ridwan, “Perubahan Rezim Kontrak Karya Menuju Izin Usaha Pertambangan dalam Undang-Undang Nomor 4 Tahun 2009,” no. April, 2019.