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Surprise Court Ruling: Jokowi's Omnibus Law Hits Snag

By Richard Borsuk

SYNOPSIS

November's decision by an Indonesian court to declare President Joko Widodo's Omnibus Law "conditionally unconstitutional" due to procedural flaws has put an unexpected twist to his agenda for 2022. Amendments needed by 2023 should be passed by parliament, but there is no guarantee the path will be smooth.

COMMENTARY

FOR 2022, President Joko Widodo has a full plate of topics to work on, including one he enthusiastically welcomes and one that he did not expect or want. The welcome one is Indonesia's chairmanship of the G-20 group of 19 of the world's largest economies, plus the European Union. This gives Jokowi, as the president is known, a chance to showcase Indonesia's achievements and promote the interests of developing nations. Jokowi hopes to host both US President Joe Biden and Chinese President Xi Jinping at the G-20 Summit in Bali in October.

The unwelcome agenda item, from Jokowi's point of view, is amending his flagship Job Creation Law, his most ambitious piece of legislation. The need to revisit what has been dubbed the Omnibus Law was prompted by November's unprecedented Indonesian Constitutional Court decision declaring the law "conditionally unconstitutional" because of procedural flaws when it was passed by parliament in 2020.

Not Certain to be Smooth

The ruling on a petition filed by opponents of the wide-ranging law was a setback for Jokowi, though it could have been worse. The court – created after President

Suharto's 1998 fall and whose decisions cannot be appealed – let the landmark legislation remain in force for two years.

Jokowi was given until November 2023 to get parliament to rectify the law's flaws, failing which the entire act – which covers more than 1,000 pages and includes creation of Indonesia's version of a sovereign wealth fund – will be tossed out. Thanks to support from most parliamentarians, Jokowi should be able to get what he needs in the legislature, but there is no guarantee the path will be smooth.

Scrapping the entire law would be a big embarrassment for the president, who initiated it, and a disaster for the investment climate. It would wipe out the biggest piece of regulatory reform done in decades, while setting back Indonesia's efforts to get badly needed investment – both foreign and domestic – that would create higher-skilled jobs.

Cancellation would mean restoration of all the parts of nearly 80 laws that the Omnibus Law amended in one sweep. If that happened, the red tape that the law aimed to slash and the obstacles it seeks to remove would be back, including a "Negative Investment List" of business areas closed to foreigners that had frustrated investors for decades. Under the Omnibus Law, almost everything is open.

Court Ruling a Surprise

When the surprise court ruling came out, the president said he accepted it and tried to reassure investors their projects in Indonesia "remain safe and secure".

While the court let the law remain in effect, its decision carried a price. Until the flaws are rectified the court said, government ministries cannot issue any new regulations explaining how the sections of law are to be implemented. This could mean that not all parts of the Omnibus Law can take effect.

Ironically, there is now some uncertainty about the future of a landmark law that simplifies business licensing rules and aims at reducing regulatory uncertainty. For some investors, the Omnibus Law was not quite the game-changer Indonesia aimed for, though they welcomed moves to address complaints about the difficulties in navigating Indonesia's daunting bureaucracy.

"Every country has a degree of regulatory uncertainty, but the problem is seen as so much more serious in Indonesia than elsewhere," says Bill Sullivan, senior foreign legal counsel to Jakarta-based Christian Teo & Partners and senior adviser to London-based Stephenson Harwood.

Jokowi promoted the omnibus idea even before the COVID-19 epidemic started, frustrated by how Vietnam was attracting more investment than Indonesia.

Sluggish Parliamentary Pace Ahead?

There was never any doubt parliament would pass the Omnibus bill, with political parties supporting Jokowi holding around 80% of the seats, but it still took more than six months to get through. Passage was not a good advertisement for the legislature

or government. A vote was abruptly moved up days ahead of schedule, to get done before a protest by labour unions and others unhappy with the bill.

There was deep confusion in parliament over different drafts circulating at the last minute and beyond, and the bill signed by the president differed slightly from what parliament finally passed.

Given strong support for Jokowi in parliament, a revised version of the law should be easily passed, but it is not a certainty. And while the revision does not have to be completed this year, Jokowi will want to at least achieve much progress, as in 2023 many members of parliament likely will be preoccupied with presidential and parliamentary elections the following year.

The government needs to move expeditiously – yet not hastily, to avoid repeating the mistakes that brought the court decision.

One reason the amendment process may not be quick is that parliament probably needs to amend two laws, not just the Omnibus Law, but also a 2011 law on law-making in Indonesia that does not mention an omnibus approach. The Constitutional Court ordered the government to “create a legal ground” for the Omnibus Law, as none is given in the 2011 legislation.

Election Politics Coming Up?

Government officials have indicated they see amendments as a technical matter, but it might not be so smooth if labour unions and others can reopen a debate on the law’s substance and on the unprecedented nature of “omnibus” law in Indonesia.

In its decision, the Constitutional Court said there were insufficient public inputs during the bill’s deliberation, which could be a lever for opponents to try to promote substantive amending. Jokowi will want to avoid street protests like those seen in 2020, led by unions unhappy with measures cutting generous severance payments and other changes.

Another potentially troublesome factor is that parliamentary consideration could get tangled up with electoral politics. Indonesia is due to elect a new president in February 2024, and in some ways it is already like election time with speculation on who the candidates will be.

Jokowi cannot run again due to post-Suharto constitutional changes that limited the president to serving a maximum of two five-year terms.

Widodo risks being regarded as a lame duck well before the election and there is no guarantee that some of the parties that backed him on the Omnibus bill in 2020 will, given the horse-trading between parties as they jockey for prime position in the upcoming election.

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