Choice of Law, Forum, and Language in International Investment Contracts of Aceh, Indonesia

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ABSTRACT
This study aimed to explain the different degree of needs for specific rules and application of choice of law, choice of forum, and choice of language in international investment contracts, as specific types of international contracts. The method used in this study is doctrinal legal research by studying primary, secondary, and tertiary legal authorities. The result of the study shows that international investment contracts need the mandatory rule of the choice of house country law and language. Whereas, regarding choice of the forum, the need for such a mandatory rule is lessening. In practice, however, the specific rules and needs have not been yet fully applied in clauses of international contracts of Aceh, Indonesia. This study implied that in the future, legislator and drafters of international investment contracts need to be more aware of this importance of the specific rules and application of the choice of law, choice of forum, and choice of language.
***Keywords**: investor-state contracts, international contracts, public contracts*

1. INTRODUCTION

Each country may have its own rules and application on the choice of law, forum, and language in international investment contracts. This article, however, will only focus on rules and practice of choice of law, choice of forum, and choice of language in Indonesia, with special emphasis in Aceh Province. This article explains that, even in different degree, mandatory rules and application on the choice of law, forum, and language are needed in international investment contracts, as specific types of international contracts. In practice, owever, the specific rules and needs have not yet been applied in drafting of international investment contracts.

As a part of their development programs for achieving better welfare of peoples, developing countries need investments, including domestic and foreign direct investments (FDI). Through FDI, developing countries can obtain more capital and technological resources needed to be able to utilize and commercialize their wealth of natural and quantity of human resources. The growth of FDI can also increase the competitive economic power of the countries. However, Indonesia has the policy that the role and the development of FDI should always be consistent to Indonesian national policy and interests, among others, for supporting economic democracy involving small and medium enterprises (SMEs) and cooperative. It is nationally provided in the Consideration and the Explanatory Notes of the Act Number 25 of 2007 on Investment (AI).

FDI is important because domestic investment alone will be inadequate for the acceleration of its economic development and for better competitive power of the country. In fact, Indonesia has to compete with its neighbouring and other developing countries, inviting more FDI to the country. These neighbouring and foreign countries includes Singapore, Malaysia, Thailand, Vietnam, India, and China.

For this purpose, Indonesia in one hand has to reform or harmonize its economic and investment related laws, such as international contracts, including international investments contracts to facilitate the growth of FDI in the country. On the other hand, Indonesia has to equip the law which can guarantee that the final results of any investment is at achieving better welfare of its peoples. Therefore, investment is not only for the purpose of economic growth or for accommodating the interest of FDI companies. In other words, Indonesia has to ensure that through the growth of FDI in the country, the welfare of its peoples will be significantly increase.

To achieve this purpose, the development of international investment contract laws should be directed to achieve better balance. The efforts to balance this purposes can be performed through developing statutes and contract drafting practices. In this regards, one of the most important aspects of the international investment contract law is regarding the choice of law, forum, and language.

International investment contracts are specific types of contracts. The most important character of international investment contracts as a type of government contracts is the involvement of a higher degree of public interests (Bordukh, 2008, 255). This is because the party of the contract is a state/sub state. In other word, the differences in purely international commercial contracts, in which

only private entities, as parties to the international contracts, in international investment contracts the parties are a state/sub states and foreign investors. This specific character should also be reflected in the rules and practice of the choice of law, forum, and language.

This paper first explains the definition and the general rules on choice of law, forum, and language in international contracts. Then, it discusses the needs for specific rules on choice of law, forum, and language in international investment contracts. Later, it describes the application of choice of law, forum, and language rules in the clauses of international investment contracts of Aceh Province, Indonesia.

2. METHOD

This study employed doctrinal legal research. It relied on primary, secondary, and tertiary legal authorities. The primary legal authorities includes statutes, contracts, and case law. The legal authorities used were in form of printed and electronic legal information sources. The main focus of its analysis was the clauses of international investment contracts of Aceh Province, Indonesia. The analysis was conducted through legal reasoning process.

3. Discussion And Result

3.1. Understanding Choice of Law, Forum, and Language in International Contracts

The concept of choice of law has been widely used in the field of international contracts. Other terms which have similar meaning are governing law and applicable law (Latief, 2002, 19). International contract law is generally domestic or national contract law. Whereas contract law is a part of private law. The nature of contract law is based on the freedom of the parties to regulate or not to regulate certain clauses in the contracts. Whereas to the nature of public law, such as administrative law and criminal law, have no such freedom or autonomy.

In theory, choice of law means a doctrine of providing autonomy to parties to international contracts to freely choose the law applicable to their contractual relationship, with a few exceptions. Whereas in practice, choice of law means clauses in the international contracts regulating the applicable law to the contracts. As far as consistent to mandatory rules of the international contract and principles and rules of international private law, the law chosen is applicable.

Choice of forum has difference meaning to choice of law (Adolf, 2014). Choice of forum is synonymous to choice of jurisdiction. Choice of forum is a doctrine providing parties to international contract to choose the forum applicable for settling their contractual disputes. The subject matter of the choice is not the law, but the body or method of dispute settlement. The body or method chosen includes courts. This is called choice of courts. Beside the court, parties can also choice arbitration. This is called choice of arbitration. Therefore, the choice of forum include both choice of court or jurisdiction and choice of forum.

In line with the choice of law and the choice of forum is the choice of language. The choice of language opens opportunity for the parties to international contract to choose the language of the contracts. Similar to the choice of law and the choice of forum, it is subjected to mandatory requirements under domestic public laws.

In general, the applicability of the choice of law, forum, and language can be traced in the principle of freedom of contracts. However, the degree of its applicability vary from one country to another and from one type of contracts to another, both in theories and practices. It depends on the mandatory law of the country.

3.2. Why Do Specific Rules and Application on Choice of Law, Forum, and Language in International Investment Contracts Needed?

International investment contracts are specific types of international contracts. It is not a pure international contracts. As international contracts, it should be cross border or international in character. This means the parties or the transactions involved are more than one country, therefore, more than one law may be applicable to the international contracts. The parties to international contracts may be nationals or corporations or legal entities with difference municipality or domicile. The transaction may be performed in another country of the parties involved.

The parties to international contracts may be private to private, private to government, or to a lesser extent government to government. Generally the parties to international contracts are private to private or business to business. Fewer parties to international contracts are private to government. The fewest international contracts are government to government. Generally, government to government activities subject to international treaties or the law of international treaties, as part of international law, not the law of international contracts.

The specification of international investment contracts is mainly based on the parties or the subject to the contract. One party to international contract should be government or state/sub state. Therefore, it is also called as state contracts or investor-state contracts. Similar to other government contracts or public contracts, international investment contracts have a hybrid nature of both private and public law.

On one hand, the private law nature of international investment contract embeds in the private law character of the contracts. The contract is fall under contract law regimes where all contract law principles and rules are applicable. On the other hand, the public law character of international investment contract roots in the state/sub state party. The state/sub state represents public interests which should be fulfilled. Therefore, it is also subject to administrative and constitutional laws. The mixed

character of private and public law in international investment contract cannot be avoid.

As a consequence, the broad freedom gain by private parties, may not be enjoyed by state/sub state party in international investment contracts. The state/sub state party is also subject to or guided by public law principle and rules, as part of its task in fulfilling public interest.

To fulfil this public interest, more restriction of choice of law, forum, and language are needed. This is true, mainly regarding the exploitation of its natural resources or extractive industries. Here, specific rules of choice of law, forum, and language is required.

The justification of this specific rules can be traced back to the traditional doctrine of good faith and fair dealing or the modern principle of good governance or the principle open government. One aspect of the principles is the application of government transparency and accountability.

In Indonesia, the mandatory choice of national law rules is regulated, among others, in Government Regulation Number 23 of 2015, concerning Joint Management of Oil and Gas Natural Resources in Aceh (GR JMOGNRA). GR JMOGNRA is one the implementing regulations of the Act Number 11 of 2006 on Governing of Aceh (AGOA). Therefore, it is only applicable in Aceh Province, as part of the status of special autonomous region in Indonesia. AGOA is the legal basis on Aceh Special Autonomous Region. Therefore, AGOA is a special law *(lex specialis)*.

Article 54 GR JMOGNRA paragraph (3) states that "the cooperation contract is governed by Indonesian law." This means the parties to international oil and gas contracts have no freedom to choose other laws than the Indonesian law. The choice of Indonesian law as the applicable law in international oil and gas contract is mandatory.

Regarding the choice of language, GR JMOGNRA stipulates "(1) Cooperation contract is made in Bahasa and English. (2) Whenever there difference interpretation of the cooperation contract occurs, the one used is the interpretation in Bahasa."

More general rule on mandatory choice of language is regulated in Act Number 24 of 2009 concerning National Flag, Language, Coat of Arm, and National Anthem (ANFLCANA). Article 31 paragraph (1) ANFLCANA mentions that "Indonesian language must be used in memorandum of understanding or contract involving state institution of the Republic of Indonesia, private institution of Indonesia or individual citizen of Indonesia." Whereas Article 31 paragraph (2) states that memorandum of understanding or contract as set forth in paragraph (1) involving foreigners is also written in national language of the foreigners and/or in English."

Different from the choice of law and language, however, there is no mandatory choice of forum rules available in GR JMOGNRA or other related laws Indonesia so far.

3.3. Application of Choice of Law, Forum, and Language in International Investment Contracts of Aceh, Indonesia

Regarding the choice of law, international investment contracts of Aceh, Indonesia, can be classified as the following. First, international investment contracts which have no choice of law clause. No implicit formulation on the governing or applicable law in this category of contracts. The drafter of the contracts may not be aware of the important of the inclusion of such clause for achieving better legal certainty (Adolf, 2014, 162). This contract allows the possibility for the court or arbitration tribunal to choice, its own choice of law (Bintang, 2005, 269). The choice may not be desirable for the parties to the contracts.

Second, international investment contracts which have the choice of law clause of the home country, the foreign law. "This agreement shall be governed by and construed in accordance with Malaysian law." From the perspective of legal certainty, this kind of contract is better. It provides a better legal certainty for the parties to contract on the governing or applicable law. The parties to this contracts are legal entities from Indonesia and Malaysia. Whereas the location of the project is Indonesia.

Third, international investment contracts which have the choice of law clause of home country law, Indonesia. The formulation of the clause, among others, are as follows: "this agreement shall be governed and construed in accordance with the laws of the Republic of Indonesia."

The choice of forum is as follows. First, international investment contracts have no such choice. Therefore, it creates legal uncertainty when the dispute arises. However, the parties may choose the forum after the dispute arises. Second, international investment contracts choose the foreign arbitration institution and/or rules of procedure of foreign arbitration institution. An example of the clause is that "Any dispute arising out or in connection with this Agreement, including any question regarding its existence, validity or termination thereof, by the parties, shall be referred to and finally resolved by the arbitration in Singapore in English and in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") in force, which rules are deemed to be incorporated by the reference into this clause. This arbitration tribunal shall consist of one arbitrator and issue a reasoned written award not exceeding ten ordinary pages in length, excluding any attachment."

Third, the international investment contracts choose arbitration institution in Indonesia as a forum for dispute settlement. In fact, many of the international investment contracts of Aceh Province have choose Indonesian National Arbitration Board, as the forum. For example, "If the deliberation and consensus does not achieve, then the PARTIES will solve them through Indonesian National Board of Arbitration (BANI), with the procedures of each party appointed Arbitrator." There is no mandatory rules of choosing the arbitration rules of Indonesian arbitration procedure for international investment contracts so far.

Regarding the choice of language, first, there are many international investment contracts that has no clause of the choice of language. The contract may be written in Bahasa, English, other languages or some combination of those. Second, international investment contracts have the choice of English as the governing language. For example, "This agreement is executed in a text using English, which shall be the governing language, despite translation into any other language (s)." Third, international investment contracts have the choice of Bahasa or some combinations of other languages. For example, "This agreement is made in three languages, Bahasa as the foundation for the implementation, Korean, and English as international language…In case of contradictory among the languages existed, English will be used."

There is a court case regarding the implementation of ANFLCANA. The case is regarding international loan agreement which was not made in Bahasa. The judges of the Supreme Court of the Republic of Indonesia in the Decision Number 601 K.PDT/2015 ruled that international contracts which are not made in Indonesian language is null and void (Nine AM v. *PT Bangun Karya Pratama (BKP))*. Therefore, since 2009, each international contract made with the Indonesian party in Indonesia must be written in Bahasa and also the national language of the foreigners and/or in English.

4. CONCLUSION

There is a greater need for mandatory choice of law and language rules for the international investment contracts, as specific types of international contracts. The reason is because the mixed character of private-public law embedded in this public contracts need to accommodate the public interest. Different from that in the choice of law and language, however, there is a less need for a mandatory choice of forum. Mandatory choice of forum of the home country may create unconducive environment for the growth of FDI in the home country. However, because of the specific character of the contract, whenever possible, it is recommended to negotiate of choosing the arbitration institution of the home country or the one from neighbouring jurisdictions for efficiency reasons.

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