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# CONTRACT OF WORK AS AN INTERNATIONALIZED CONTRACT: A SUI GENERIS RELATION OF FOREIGN INVESTMENT

## **ABSTRACT**

Contract of work is an agreement made between the government of the Republic of Indonesia with foreign companies, and or joint ventures between foreign companies with domestic legal entities to carry out exploration and exploitation in general mining or oil and gas out of the earth, in the time period agreed by both parties. One of the foreign companies in cooperation with the Indonesian government in this field is PT Newmont Nusa Tenggara which form the contract of work in the field of utilization and development of mining potential in Indonesia. However, Act No. 25 of 2007 on Investment, Chapter IV of Form and Position Enterprises in Article 5, paragraph 2 requires that the foreign investment shall be in the form of a limited liability company based on Indonesian law and domiciled in the territory of the Republic of Indonesia, unless specified otherwise by law. Therefore, a contract of work is often regarded as a national contract by many parties. Others suggested that such contract which involves foreign investment transaction is sui generis, or in other words a quasi-public international contract. This paper will discuss the foreign elements of the contract and conclude that the contract of work can be categorized as an international contract.

Keywords: contract of work, foreign elements, choice of law, jure gestionis,

## **I. INTRODUCTION**

To accomplish the aims of the Preamble of the 1945 Constitution, the government of the Republic of Indonesia has tried to implement development in all aspects of life. One aspect of

developments that is still being encouraged at this moment is the economic aspect with mining as one of it's main sector, because this sector is very reliable in contributing incomes in the form of foreign exchange to the state.

Mining sector is one of the business sectors mainly prioritized by the government, before or after the issuing of the Law of Investment, both for foreign and domestic parties. Thus, the government attempts to direct and manage natural resources including in mining business sector.

In managing natural resources which require enormous capital, sophisticated equipment, experts, and high risk, Indonesia cooperates with foreign investor. The private parties are in the form of national private enterprise or foreign private enterprise, which their foundings are based on the existing regulations and laws in Indonesia. Foreign investment agreement is an international agreement. This is because there is a foreign element in the agreement which makes it in the scope of international civil law (Gautama, 1983 : 68). One of the forms of such foreign investment cooperation is contract of work.

Contract of work is an agreement between the government of the Republic of Indonesia with foreign enterprise, and or joint project between foreign enterprise and domestic law entity to conduct exploration and exploitation in general mining sector or outside earth gas and oil, in long term which are agreed by both parties (Salim, 2004:129).

Based on such definition, contract of work does not only regulate the legal aspects of the parties, but also regulates the object of the contract. Thus, it can be argued that the elements inherent in a contract of work, are namely:

- a. The existence of contractual, ie contracts made by the parties.
- b. The existence of legal subjects, namely the Government of Indonesia with foreign parties and or combination of foreigners with Indonesia.
- c. The presence of the object, namely the management and utilization (exploration and exploitation) mining excluding oil and gas.
- d. The existence of a period in a contract.

The legal basis for cooperation of Indonesian government with foreign parties in contract of work was based on Article Law Number 1 Year 1967 on Foreign Investment which stated: "Foreign investment in mining sector is based on an agreement with the Government under a contract or other forms in accordance with the existing laws and regulations". This is also stressed in Article 35 Law Number 25 Year 2007 on Investment, which states "Bilateral, regional, and multilateral international agreement in investment which have been agreed by the Indonesian Government before this Law is effective, will remain until those agreements are expired." Moreover, in Law number 25 Year 2007 on Investment, Chapter IV on The Form and Position of Corporation, in Article 5 Verse 2 states: "Foreign investment must be in the form of limited business company based on Indonesian laws and positioned in the territory of the Republic of Indonesia, except it is decided otherwise by the law.

One of foreign corporations which cooperates with Indonesian government in this sector is

PT Newmont Nusa Tenggara which made a contract of work. Such contract of work can be categorized as an international contract, i.e.: national contract which includes foreign element (Gautama, 1976:7). In this case there are foreign elements, i.e.: subject of the parties, dispute settlement regulation, currency, and foreign language.

In principle, foreign investment agreement in Indonesia in the form of contract of work is conducted by using principle of freedom of contract in accordance with Article 1338 of Civil Code. The freedom in this case is the freedom for the parties to decide the contract substance or on which law is applicable on the agreement or contract and which forum (court) have the authority for a trial when a dispute arise. This is related to contracts with foreign elements which in the implementation can cause various problems, for example: if there is international trade dispute which is a trade dispute that occur from international trade relation based on contract or not (Wiyasa Putra, 2000:91). To answer this problem, international civic code can use the help of connecting dots or secondary link points, i.e.: choice of law, the place (country) where the contract signed (*lex loci contractus*), or place (country) where the contract is implemented (*lex loci solutionis*) (Khairandy<sup>2007:127</sup>).

Therefore, this paper discusses several issues related to the theories of private international law, namely the foreign elements contained in the contract of work between the Government of Indonesia and PT NNT; a public quasi of the contract in which one party is the State; choice of law and choice of forum which is used in the working contract between the Government of Indonesia and PT NNT, and also the implementation of foreign arbitral awards in Indonesia

## II. ANALYSIS

### A. International Contracts in Private International Law

As mentioned above, an international contract is a contract in which there are foreign elements. When does a contract have a foreign element, there has been yet the same opinion. Theoretically, the foreign element which can be an indicator of a contract is a national contract having foreign elements, namely:

1. Different nationality of the parties;
2. The Parties domicile in different countries;
3. The choice of law is a foreign law, including the rules or principles regulating such international contracts;
4. Dispute resolution held abroad;
5. The language of the contract is a foreign language;
6. The use of foreign currency in the contract.

According to the author if a contract has one of the above foreign element then such contract can be categorized as an international contract. Of course we have to start by looking at the subject

of the law or the contracting parties.

### 1. Subject of Law

The subject of law is the holder of the rights and obligations under the law which can be either individuals (persons) or legal entities (companies, organizations, institutions). It is also related to the personal status and the legal authority to carry out the international contract. There are two parties related to this contract, which are:

1. The Government of the Republic of Indonesia, which have the power of mining in Indonesia. In this contract the Government is represented by the Minister referred to as the government); and
2. PT. Newmont Nusa Tenggara (an Indonesian legal entity established by Deed No. 164 dated November 18, 1986, the Minister of Justice Decree No. 52-8155-HT-01-61-T11 86 dated November 27, 1986), hereinafter referred to as PT NNT, which all shares owned by the established time:
  - a. Newmont Indonesia Limited, a company incorporated in the State of Delaware, USA, with offices located at level 18 AMP tower 535 Bourke Street Melbourne, Victoria, Australia 30000.
  - b. PT. Pukuafu Indah, an Indonesian legal entity established by Deed No. 22 dated 25 September 1978, the Minister of Justice No. YA5 / 365/3 dated November 27, 1978, which is located at 14 Jalan Arthaloka Building Level Jendera Sudirman Jakarta Indonesia.

In the Indonesian national law, before the foreign investor could carry out their investment in Indonesia, they must first establish law entity. Such regulation meant and hoped to direct every investment to obey the existing regulation, i.e.: the corporation must be Indonesia law entity and positioned in Indonesian territory. Such reason is understandable since Indonesian Government want to stress that if the establishment of investing corporation is not in the form of Indonesian law entity, it will cause law uncertainty towards those foreign enterprises. In that case, when a dispute happen there will be uncertainty on which law is applicable towards those enterprises.

There are two reasons why each foreign investment must use Indonesian law entity: 1) enabling investor to easily implement requirements according to Indonesian law; 2) making jurisdiction easier if a dispute occur. By using legal entity, the investor can act as right and obligation supporter (*rechtperson*) who has his/her own private properties, whether it's in the form of corporation equipment capital and other properties that can be used as guarantee against negligence in fulfilling obligation. Law certainty can be implemented if there is effective regulation, therefore Indonesian Government through Minister of Judiciary of Republic of Indonesia Number J.A. 5/3/2 26 April 1967 on Affirmation towards Article 3 Law Number 1 Year 1967 states, that what meant in the article is foreign investment corporation must be in the form of Limited Company (PT).

Particularly for foreign investment in the mining sector outside of oil and gas and forestry, the investment procedure is regulated in Article 3 Presidential Decree Number 32 Year 1992. It is reaffirmed in Law Number 25 Year 2007 on Investment which states that foreign investment must be in the form of limited company based on Indonesian law and positioned in the territory of Republic of Indonesia.

In this work contract, PT NNT has already in the form of Indonesian law entity in accordance with the notarial deeds previously mentioned. This is of course related with the personal status of the law entity, which usually is in the form of incorporation theory, effective management theory, and remote control theory (Gautama, 1995:336). In this contract, it is likely that incorporation theory is used because the investor took shape in the form of limited corporation established in Indonesia. But it needs to be remembered, in the time of it's establishment, all shares owned by Newmont Indonesia Limited established in United States and PT Pukuafu with shares comparison 80% : 20% (Ambarwati, 2008). This is possible since foreign investment can take the form of joint venture between foreign company and law entity. For activities that are limited with 65% foreign investment or less, foreign investor is not allowed to have controll over the decision. Join stock in this case is PT NNT, between Newmont Indonesia Limited as foreign enterprise owning 80% shares and PT Pukuafu as domestic law entity which owns 20% shares. It means there is a monitoring by foreign parties towards company from such law entity, which relates to remote control theory. This is visible in Article 28 of the work contract on other requirement which stated all request, consensus, approval, announcement, and others related with contract will submitted as carbon copy to:

Newmont Indonesia Limited  
18th Floor, A.M.P. Tower  
535 Bourke St, Melbourne 3000  
Victoria, Australia  
Telex No. 32026

Hence, eventhough it is in the form of Limited Corporation but control (voting powers) or management control towards the company remains in the hands of foreign parties as the owner of majority shares, and some of the managements are effectively overseas, i.e.: Australia. Consequently, it can be concluded PT NTT is a foreign enterprise or Foreign Investment Company.

## 2. Foreign Language

The second foreign element is language. Related to the use of language, almost all international business contracts use English as the official language. Although there are translations into other languages, but in case of dispute, the officially recognized is the English text. In this contract, the text are made in Indonesian and English which both texts are legal. But in cases of differences in interpretation, the English text shall prevail and be considered as the official text. So that the language used in the contract is a foreign language.

### 3. Foreign Currency

The use of foreign currency in a contract is also a foreign element. In this contract, Article 1 (5) states that foreign currency is any currency other than dollars. Used in this contract is the US dollar (US \$) contained in articles such as exploration period (Article 6), report and deposit guarantees (Article 7), Marketing (Article 11) and taxes and other financial liabilities of companies (Article 13).

### 4. Regulations/ Foreign Rules In Dispute Resolution

In international arbitration centers there are standard forms that can be used by the parties in arbitration clauses such as UNCITRAL (Adolf, 1991:23). In this case, the *Conciliation Rules of the United Nations Commission on International Trade Law* and the *Arbitration Rules of the United Nations Commission on International Trade Law* is used as a procedural rules or procedural law in the event of a dispute between the parties in international arbitration. In the review of private International Law this form of selection uses the linkage point of law (choice of law). The provision is a rule or foreign elements.

From the description above we can see that the contract of work between Indonesia and PT NNT has some articles which contain foreign elements.

## B. Quasi Public International Contract

In contract of work, government is a public law entity which is a law entity established by common power. As law entity, government can conduct civil relations. In conducting civil relations, government can act as indifferent subject with personal law subject or civil law entities in general. Civil relations occurs from civil action. For example making contract with other law subjects. The state through the government is conducting civil relation (Manan, 1996:24). In this relation there are different arguments. According to Sunaryati Hartono, government relation with its contract partner (in joint venture) occassionally as partner and also as government. On the other side, according to Bagir Manan, the relation between government and its contract partner is an equality relation, while Mariam Darus Badruzaman argues that the government's position is higher (therefore unequal) with its contract partner. Thus, it impacts Foreign Investment where not only agreement law procedure that applies but also international law. Therefore contracts in foreign investment are often called transnational or quasi international agreement, *contract sui generis* atau *economic development contract* (Hartono, 1974:29). As a result, the relation is not given special treatment if a government agency make contract with citizen or law entity, since based on the principle in civil code the position of the two are considered as equal.

If we take a look at this contract of work, it will be visible for us to see the difference of position where Indonesian Government (state) in its role as a perfect law subject which are allowed to create and enforce law and revise it. In the other side, corporation or PT NNT is a law subject with limited capacity. Hence, there is separation of position or state's status as a sovereign state

(*jure imperii*) and state that conducting commercial activities (*jure gestiones*). In this case, Indonesian Government act in its capacities as a state which conducting commercial activities and considered has left its impunity and sovereignty in this business sector/contract. Therefore, Indonesian Government and PT NNT are equal or in balanced and have the same position in law (the principle of equality of the parties).

In the field, agreement law which is a sub-branch of civil law, a contract where one of the parties involved is the state, will be called as “Business Contract with Public Dimension (*Government Contract*)”. This terminology indicates that the nature of relation conducted is civil but because one of the parties is government then there is a public dimension. The formulation or examination on this kind of agreement must pay close attention to civil law and public law. One of the law consequences is if the agreement is harmed then the dispute can not be submitted to administrative court but to civil court that can be in the form of court or arbitration (depends on the agreement of all parties).

### **C. Choice of Law**

Based on the principle of freedom in making contract, all parties in contract, are also able to decide which law that will be applies to the contract. In this case all parties decide by themselves in contract on which law are applied to interpret the contract (Gautama, 1987:11). Choice of law from the related State have an intended aim by the related parties. This choice of law is provided to avoid the requirements from a State which considered less benefiting them.

Choice of law can be (Adolf, 2007:176):

- a. The implementation of firm choice where all parties firmly insert the choice of law clause in the contract and inside it asserted certain law system they have chosen.
- b. The implementation of silent choice, that is no specific clause on choice of law but there is an obedience towards certain law system.
- c. Handed over to the court, if all parties failed or facing difficulty to reach agreement on which law to choose.
- d. No choice of law, therefore the court or the arbitration agency will settle the dispute based on international civil law.

The implementation of contract of work between Indonesian Government and PT Newmont Nusa Tenggara is regulated, complies to, and interpreted by the law of Republic of Indonesia. It is possible based on several considerations or good factors in international law or national law. Eventhough the contract of work is made in Indonesian and English which both of them are valid and if there is interpretation difference, then the English document will be used but such thing will not reduce the agreement of all parties to use Indonesian law as choice of law (substantive law). This is clearly visible on Article 32 of the contract of work on the clause of choice of law.

Choice of law must be conducted genuinely and legal, it means in choosing a certain law



system, it is not intended to smuggle certain regulations and it is preferable that the chosen law is a law with certain relation with related contract. The same thing also applies if the choice of law have carefully negotiated by all parties but if the choosen law violated public policy from from judge national law, then the contract can not be implemented by the judge because it is invalid.

What is meant by public policy is basic principles from all law system and Indonesian society. The concept on public policy is different from one country and another and such concept can change depends on the social condition as the same thing happen to ideas on state, on religion, moral, and ethichs which undergoes modification. Therefore a contract can be considered violating law (illegal) or contradicts the state's public policy and can not be implemented, is depends on case by case.

In work contract between the government of Republic of Indonesia and this PT Newmont, the object is the utilization and development of mining potentials in Indonesia which started from general investigation, exploration, expansion, development, mining, processing, and selling which are agreed and in cooperation with mineral resource expansion especially gold and copper. The laws that regulates the contract of work are i.e.:

1. Law Number 1 Year 1967 on Foreign Investment, Law Number 11 Year 1970 on Change and Addition to Law Number 1 Year 1967 on Foreign Investment.
2. Law Number 11 Year 1967 on Mining Main Principles.
3. Law Number 25 Year 2007 on Investment.
4. Law Number 4 Year 2009 on Mineral and Coal Mining
5. Government Regulation Number 23 Year 2010 on Implementation of Mineral and Coal Mining Business Activity.

Based on such thing the author conclude that the contract of work between Indonesian Government and PT NNT shall not be stated to contradict public policy.

Tradition in several developing countries where the international business transaction between government in one side and foreign enterprise in the other side, the government always require the use of government national law. Faced by such condition, it implies that foreign parties only can choose "take it or leave it" since there is no negotiation and no bargaining position, therefore there is no place for choice of law. But if we observe carefully that one of the limitation to choice of law is law regulations which have the enforcer nature is unavoidable. This law regulation is fundamental and binding. The enforcing law regulation is acknowledged by national law in general, which issued by a State to protect various social and economic interests.

Mandatory rules will limit freedom of parties in international transactions. Reasoning that becomes the background of the implementation of mandatory rules is a consideration that these regulations are generally contains or reflects fundamental policy from the implementing State, and if such regulations can be put aside by the norm of private international law or by agreement among all parties, automatically those regulations lose their meaning as regulation that contains



the fundamental policy (Hardjowahono, 2006:132).

Related to choice of law, some argue that agreement principle and freedom of both parties (State and Corporation) are remains effective. But, generally, the effective law is national law where the contract is made and implemented. This is related to supremacy or sovereignty fundamental principle which requires national law to remain uninterrupted. Its binding power is absolute. Each law event, act, item, and subject, including trade transaction in the contract, that happen in the territory of State obey absolutely to the national law.

The other things is contract relocalization which is the choosing of national law from the State which will be the reason of all parties in the contract with other parties. There are three main reasons which supports this contract relocalization (which it's establishment is especially supported by developing countries), i.e.:

1. Contract made by State with foreign citizen obey to national law exclusively;
2. Dispute that occur from the contract must be settled by national court; and
3. States have sovereignty towards it's natural resources.

There is also economic development contract which is a contract between the state and foreign enterprise. Usually the contract object is operating not entirely driven for profit accumulation as high as possible, as happened in other contracts, but there is other purpose or public and social interest, for example the results are used for the interest of public just like the results from natural resources exploration. The contract object usually obeys to government monopoly considering the sector here is public interest. The effective and choosen law in the choice of law clause usually is national law from the hosting state.

In Indonesia, usually this contract is called as contract of work and beacuse of its importance or strategic situation as natural resources, it is generally regulated in it's law, such as in Indonesian Constitution.

In the author's opinion, as addition eventhough if there is no choice of law in this contract, then if this is related with real connection from the contract then we can analyze it by using theory or principles in private international law. For example, if based on principle of *lex loci contractus*, the proper law of the contract is the law from the place where the contract is made, i.e.: the place where the final act used to establish deal, or where it is made. Meanwhile, the principle of *lex loci solutionis* is law from the place where the agreement is conducted (Gautama, 2002:16). In this case the contract of work between the government of Republic of Indonesia with PT Newmont is made and implemented in Indonesia. Therefore it's not surprising that both parties agreed to use Indonesian law as choice of law because it has the closest relation with the contract.

#### **D. Choice of Forum**

The choice of forum means that the parties in the contract agree to choose forum or institution which will settle the dispute among the parties if it's occur in the future. The main function from the clase of choice of forum in international contract is to serve as law certainty.

In contract made between government of Republic of Indonesia and PT NNT, there is clause on dispute settlement which if there is dispute between two parties, then the chosen forum by both parties is conciliation or arbitration where the conciliation and arbitration working event will be held in Jakarta, Indonesia. Permanent Arbitration Agency or institution which has its own procedure to settle the dispute between two parties that possible to occur is not decided or mentioned in work contract. Therefore the author conclude that the arbitration is ad hoc or not permanent (eenmalig). It means, after the referee or arbitrator finished their duty, then the arbitrator tribunal that examined the dispute is dissolved. The arbitrators from the ad hoc arbitration was chosen by the disputing parties and the arbitrators settle the dispute based on the procedure set by the parties. Ad hoc arbitration is conducted based on regulation formed for arbitration aim, for example Article Number 30 Year 1999 on Arbitration and Dispute Settlement Alternative. Generally Ad-Hoc Arbitration determined based on agreement that states arbitral tribunal which are agreed by the parties. The use of ad hoc arbitration need to be mentioned in arbitration clause (Soemartono, 2006:3).

What can be determined here is that at the time of signing the contract the parties namely the Government of Indonesia and PT NNT have agreed to resolve any disputes that arise through the forum:

1. Conciliation, where the parties wish to ask a good settlement which will take place in accordance with the UNCITRAL Conciliation regulations in resolution 35/52 approved by the UN General Assembly on December 4, 1980, entitled "*Conciliation Rules of the United Nations Commission on International Trade Law*".
2. Arbitration, all disputes between the parties arising before and after the termination of this Agreement, including disputes in which one party is negligent in carrying out its obligations, in accordance with the rules of the Arbitration UNICITRAL loaded in 31/98, which approved the UN General Assembly on 15 December 1976, entitled "*Arbitration Rules of the United Nations Commission on International Trade Law*."

The choice of law in a contract may include several types of law. These laws can be applied against the principal dispute (applicable substantive law or the *lex causae*) and the law that will apply to the court (procedural law). In this case, the *Conciliation Rules of the United Nations Commission on International Trade Law* and the *Arbitration Rules of the United Nations Commission on International Trade Law* is not the substantive law but rather acts as a procedural law. Substantive law is still under Indonesian law in accordance with the legal agreement mentioned in the articles. At the time of a dispute, then by operation of the law, the parties are bound to resolve it through the forum.

The author concludes that the arbitration process has at least several basic rules that govern the process, namely:

1. Substantive Law: the material of the law on which the examination of the substance of the

arbitration process. As in the contract in this case stated that the contract is governed by the laws ... of the Republic of Indonesia .... This means that the examination process and compulsory arbitration decision of the arbitrator will use the laws of the Republic of Indonesia, as contained in Article 32 of the contract of work on choice of law..

2. Procedural Law: which can be regarded as rule of the game of an arbitration process. In this case the parties of the contract agree to use the work of UNCITRAL arbitration rules or Conciliation Rules. Then the arbitrator must use the rules held in the arbitration process.
3. Lex arbitri: which is the law of the country where the award was made. This law is binding on arbitrators in the arbitration verdict. Yet to be seen whether the applicable law in the country is imperatively or facultative. For example, if the arbitration is executed and the award was made in Indonesia, then the decision should state that "By Justice Based on God" which is imperative in the provisions of Law No. 30 of 1999 on arbitration. This doctrine is stated clearly in article V (e) of the 1958 New York Convention.

The reason why arbitration forum chosed is closely related to the critic to other dispute settlement forum, especially court, i.e.:

1. National court generally lack of competent judge or specialized in international commercial law.
2. Court verdict does not automatically end the dispute since the parties who are less satisfied with the verdict still have other channel to release their dissatisfaction by submitting the dispute to higher court and cause a protracted dispute.

The disputes that can use arbitration mechanism are limited to trade sector, i.e.: business, financials, investment, industry, and intlllectual rights. The verdict of the arbitration is binding and enforceable.

In this contract, the government is in equal position with corporation. If there is dispute between two parties then it entirely will be handed over to third party through arbitration. In Law of Investment also set that dispute between government and foreign investor settled through international arbitration.

In Indonesia, dispute settlement through arbitration is regulated in Law Number 30 Year 1999 on Arbitration and Dispute Settlement Alternative. The verdict from arbitration agency is final and binding. The verdict is based on Law Number 30 Year 1999 is included in International Arbitration Verdict i.e.: verdict from arbitration agency or individual arbitrator outside the jurisprudence of Republic of Indonesia, or verdict from arbitration agency or individual arbitrator which according to law requirements of Republic of Indonesia considered as international arbitration verdict.

Arbitration according to Article 1, Law Number 30 Year 1999 is a dispute settlement mechanism outside public court based on Arbitration Agreement which made in written by the disput-

ing parties. Meanwhile the arbitration based on Reglement Civil Code (*Reglement op de Burgerlijke Rechtsvordering*) or shorten as Rv. S 1847-52 jo 1849-63, arbitration is a form of court conducted by and based on the good will of the disputing parties in order that their dispute settled by the judge they appointed with understanding that the verdict is final (last level verdict) and bind both parties to implement it. Those judges also known as referee judge (according to Rv) or arbitrator. Rv elaborated: “everybody is allowed to be involved in a dispute on the rights that belong in his/her authority to release, or hand over the verdict to someone or several referee”.

Law number 30 Year 1999 on Arbitration above does not give explanation what is meant by International Arbitration. But in Article 1 Number 9 of the Law, there is a definition of International Arbitration Verdict, i.e.: “*International Arbitration Verdict is a verdict from arbitration agency or individual arbitrator which according the law requirement of Republic of Indonesia considered as international arbitration verdict.*”

Such formulation can be interpreted that arbitration verdict in the domain of Indonesian Law is not international arbitration verdict, or domestic arbitration verdict. This is a problem because the 1958 New York Convention related to the problems of acknowledgement and implementation of arbitration verdict implicates arbitration verdict in different country from the country where the approval and implementation on physical or law dispute requested.

Law Number 30 Year 1999 only regulates on the approval and implementation of International arbitration verdict in Indonesia but it does not regulate on how to perform international arbitration in Indonesia. People can easily interpret that each arbitration held and cut in Indonesian territory is a domestic arbitration (national). The implementation of arbitration verdict held in Indonesia and the implementation of foreign (international) arbitration verdict have difference in registration procedure and period.

Whereas UNCITRAL Model Law in Article 1 explicitly stressed that an arbitration is international if:

- a. The parties in arbitration agreement when they were in the time of related agreement, have business position in different countries;
- b. The place of the arbitration, the place of contract implementation or the place of disputed object is in different country from the business position place of the disputing parties or if the parties are firmly agreed that things related with arbitration agreement related with more than one country.

Based on such understanding then the arbitration verdict between government of Republic of Indonesia and PT NNT is still in unclear domain, whether it is in International Arbitration Verdict or not, considering the verdict is in Indonesia. Of course on this problem, it can not be handed over to the judge. But Indonesian law acknowledge private international law with all theories inside it therefore the author concluded that if viewing from the used rules i.e.: rules from UNCITRAL and the existence of foreign arbitrator, and majority of the shares owned by PT NTT

that conducts foreign investment in Indonesia, it shows there are foreign elements from this arbitration which cause the arbitration can be called as international arbitration.

In UNCITRAL arbitration rules, it stated that: “*The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate*”. It means that arbitration will use substantive law from law agreed or chosen by all parties, which in this case is Indonesian Law.

Of course before government or corporation take arbitration attempt under UNCITRAL Arbitration regulation on particular dispute, it ought to use all attempts to take necessary measures in finding possible administrative solutions on the dispute based on Laws of Indonesia. The case submission by a party to forum of a state actually implicitly contains the will to obey procedural rules from the related forum (Hardjowahono, 2006:97).

### **E. The Dispute Between Republic of Indonesia VS PT NNT**

Based on the agreed requirements by all parties, there is agreement clause which stresses on the obligation that need to be conducted by PT Newmont to divest it's shares to local government. But such obligation was not conducted by Newmont therefore the government feels violated of it's rights. Government of Republic of Indonesia filled a lawsuit towards NNT because of the violation towards Article 24 verse (3) and (4) and considered that NNT breach the contract because it failed to conduct it obligation of divestment in 2006 and 2007 based on the Contract signed by NNT dan Government of Republic of Indonesia on 2 December 1986. Referring to the existing agreement, each dispute occurred because of the agreement, then the related parties agree to settle it through international arbitration agency.

The settlement process need to follow procedure set by United Nation Commission on International Trade Law (UNCITRAL). Arbitration process begun in July 2008 through correspondent until closed court on 8 to 13 Decembre in Jakarta. Panel consisted of three members. Two are law experts who each is appointed by Indonesian Government: Msonnarajah from Singapore and Newmont appointed Stephen Schewebel from United States, and one independent expert who is also the panel chief: Robert Briner from Switzerland.

Based on arbitration process of PT Newmont Nusa Tenggara (PT NTT) divestment dispute settlement in Jakarta from 8 to 13 Decembre 2008 under the procedure of United Nation Commission on International Trade Law (UNCITRAL), Majelis Arbitrase (Arbitral Tribunal) on 31 March 2009 the final award issued which principally the Government of Republic of Indonesia won. The Arbitral Tribunal which consist of internationally known panel, states:

- a. Order PT NTT to implement the requirement of Article 24.3 of the Contract.
- b. State that PT NTT conducted default (contract breaching).
- c. Order PT NTT to divest 17% of it's shares which consist of 2006 divestment with the size of 3% and 2007 with the size of 7% to Government of Republic of Indonesia. All those obliga-

tions have to be implemented 180 days after the Arbitration verdict.

- d. The divestment must be “Clean and Clear” and the financial source for buying the shares is not the business of PT NNT.
- e. Order PT NTT to exchange the fee spend by Government for Arbitration in this case, and have to be paid in 30 days after the final verdict.

Indonesia through the issuing of Presidential Decree Number 34 Year 1981, become a member of New York 1958 Convention on Admission and Implementation of Foreign Arbitration, which based on article 3 of the convention Indonesia must accept and implement the verdict of foreign arbitration which will be implemented or executed in it's territory.

There are requirements for foreign/international arbitration verdict to be acknowledged and implemented in Indonesia:

1. *International Arbitration Verdict by arbitrator or arbitral tribunal in a country with Indonesia which related to agreement, bilaterally or multilaterally, on acknowledgement and implementation of International Arbitration Verdict.* Indonesia and United States binded in multilateral agreement i.e.: New York 1958 Convention, where US have ratified that convention in 1970 and Indonesia ratified it with accession through Presidential Decree Number 34 Year 1981 and Supreme Court Regulation Number 1 Year 1990.
2. *International Arbitration Verdict as in letter a limited to verdict in the corridor of Indonesian law including the corridor of trade law.* Arbitration verdict is a verdict on claim for damages by PT NNT in the investment sector which in the law classification in Indonesia belong to the scope of commercial law.
3. *International Arbitration Verdict as mentioned in letter a only can be implemented in Indonesia limited to verdicts which are not contradict public policy.* The problem of public order/public policy is something argued by the law experts in a very long time, especially in international civil law. The absence of rigid requirement on the boundaries of a public order always trigger protacted polemics. Article 4 verse (2) Supreme Court of Republic of Indonesia Number 1 Year 1990 on Procedure Foreign Arbitration Verdict Implementation is inderictly define public order in Indonesian as basic principles of entire law system and society in Indonesia. The verdict from arbitration that enforce PT NNT to pay divestment to Government of Republic Indonesia seemed to far to be said as a verdict that brings breakdown to basic principles in Indonesia.
4. *International Arbitration Verdict can be implemented in Indonesia after obtaining exequatur from Head of .* On 21 April 2009 Government of Republic Indonesia submitted request to implement arbitration verdict. The requested party is PT NNT. Observing the previous explanation which this arbitration can be said an internatiobal arbitration it need to obtain exequatur and Central Jakarta District Court.
5. *International Arbitration Verdict as meant in letter a related with Republic of Indonesia as one of the disputing parties, only implementable after obtaining exequatur from Supreme*



Court of Republic of Indonesia which will be handed over to Central Jakarta District Court. This case involved Republic of Indonesia directly. This arbitration case related with the divestment process of PT. NNT which directly faced Government of Republic of Indonesia.

By fulfilling the requirements in Article 66 of Law Number 30 Year 1999 and Article 3 Supreme Court of Republic of Indonesia Regulation Number 1 Year 1990, then the arbitration verdict in this case must be able to be implemented in law domain of Republic of Indonesia.

As elaborated above, arbitration process at least has several main principles which regulates the process proses tersebut, i.e.:

1. Substantive Law, which in this case use laws of Republic of Indonesia, as mentioned in the Contract.
2. Procedural Law, which in this case use UNCITRAL rules in arbitration. Therefore the arbitrator must use the rules in conducting arbitration process.
3. Lex Arbitri is law from state which the arbitration verdict which in this case is Indonesia.

From the principles that regulates that arbitration process, which has power to cancel arbitration verdict is *Lex arbitri* or law of from the country where the arbitration verdict made. In this case one of the competent party to cancel it is Central Jakarta District Court in Indonesia

If we see from the jurisdiction then there are two kinds of competency that can cancel arbitration verdict, i.e.:

1. *Primary Jurisdiction*. *Primary Jurisdiction* is jurisdiction to cancel a foreign arbitration exist in country where the arbitration verdict made or previously called as *Lex Arbitri*. Mentioned in article V (e) New York 1958 Convention. In this case the *Primary Jurisdiction* is Indonesia.
2. *Secondary Jurisdiction*. *Secondary Jurisdiction* is jurisdiction to cancel in country where the verdict implemented. In this case *Secondary Jurisdiction* is also Indonesia because the arbitration verdict implemented in Indonesia where the cancellation only applies in Indonesian territories. This is written also in work contract which stated that conciliation work event or arbitration will be implemented in Jakarta, Indonesia.

### III. CONCLUSION

Foreign investment in the form of contract between Government of Republic of Indonesia and PT NNT is one of the forms of international contracts because it contains foreign elements or factors. Eventhough it is in the form of Limited Corporation but 80% shares owned by foreign party which it's control management is also foreign party. The language and currency used are also foreign. On the choice of law, it is clearly mentioned using Indonesian law, in accordance with the clause of choice of law contained in Article 32. Whereas for dispute settlement mechanism between both parties will use conciliation or arbitration. Of course the nature of such arbitration is ad hoc and not institutional. Conciliation in that contract refers to UNCITRAL rules approved by United Nations by resolution 35/52. Meanwhile arbitration based on UNCITRAL approved



by UN through resolution 35/52 on 15 December 1976 under the title of Arbitration Laws of United Nations Commission on International Trade Law, in accordance with article 21 work contract. Therefore substantive law in this contract use Indonesian law, choice of forum use ad hoc arbitration, while procedural law use conciliation or arbitration rules from UNCITRAL.

Meanwhile for the implementation of foreign arbitration in Indonesia, according to the author, even though the definition of international arbitration verdict in Indonesia is still uncertain in Law Number 30 Year 1999 on Arbitration and Dispute Settlement Alternative, and arbitration can occur or conducted in Indonesian territory, this verdict belongs to international arbitration verdict considering one of the parties in the contract is foreign party in the form of foreign investment and in dispute settlement use the rules of UNCITRAL with foreign arbitrator as well.

There are still many shortages or inconsistency in international dispute settlement especially arbitration in Indonesia, whether from the point to substances or the existing law materials or from the point of implementing practice. Therefore, it is better to conduct further research to criticize the case in order to fix the situation. At least what we can do now is if we make a contract with foreign party, it needs to be firm and clearly agreed about the choice of law and choice of forum in the contract to make the dispute settlement easier if there is a dispute in the future. This is of course to avoid damage which can be suffered by one or both parties.

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