

Legal Consequences of a Contract Made by The Parties There out Arbiral Award

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Abstract: *As a top-10 gold mining countries, Indonesia becomes the most attractive investors destination in mining sector. Those foreign investors shall be a Joint Venture Company with a domestic company. That joint venture company later must be making an agreement with Indonesia's government in form contract of work. Conflict of interests are often happen within holding companies with joint venture company's measure performing contract of work. In this case discussed in this writing, the holding companies are making an agreement of which the object of that agreement turns out being an object which is must be executed based on the case verdict between the joint venture company and the government of Indonesia. The losing party may apply for agreement revocation or derdenverzet over the verdict.*

Keywords: *mining, contract of work, joint venture, contract, arbitration.*

Introduction

In mining sector, Indonesia has a wide range of mineral deposits and production. This makes Indonesia ranked as a top 10 mining producers country and therefore makes this country becomes a promising country to invest in.² In other hand, as a developing country, Indonesia tends to require a large investment as by foreign investors or any private firms for state building. Therefore, on January 10 1967, Indonesia launched a legal framework for foreign investment named the Law No. 1 of 1967 regarding Foreign Investment (known as Foreign Investment Law). The law was aimed at restoring the confidence of other nations and as a realization of Indonesia's sincere intention to encourage foreign private investment in some sectors. Moreover, it is well settled in international law that as a host state, Indonesia has the right to control the capital movement into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the condition for the exercise of economic activity by natural or legal persons, and to control the entry and activity of aliens.³ As time goes by, Indonesia also facilitating the legal procedures used for domestic investors by Law No. 6 of 1968 regarding Domestic Investment (known as Domestic Investment Law).

According to Foreign Investment Law, all foreign companies may invest and operate in Indonesia either independently or as a joint venture with Indonesian partner. According to article 8 Foreign Investment Law, foreign investment in mining sector is based on a partnership with the government on a contract of work basis or anything else in accordance with the prevailing regulations. In this case, the government acted as the mining authorization giver and cooperate with foreign investor performing its work on mining sector under Indonesia's jurisdiction. In conclusion, according to Foreign Investment Law, the company whose business field is in mining sector must be a joint venture between foreign investors and Indonesian company. Moreover, any companies engaged in the mining industry that wish to do an investment in Indonesia are obligated to have a Contract of Work with the government. Contract of Work is an individual contract between the state and the company.

Basically, the partnership between foreign investor and domestic company is in joint venture form because it is considered to be more effective and more prosperous for the foreign company. Indonesia as a host country can possibly supervise foreign capital flows into Indonesia. In Indonesia, one of the joint venture company on mining sector in Indonesia is PT. Newmont Nusa Tenggara.¹

In 2007, GOVERNMENT of Indonesia passed the Law No. 25 of 2007 regarding Investment (known as Investment Law) replacing the old Investment Law regime that differentiate domestic and foreign law separately. Article 1 point 3 Investment Law opens the probability for any foreign investors to invest without any obligation to be in such joint venture form by the words “whether using all foreign capital or in partnership with a domestic Jeswald W. Salacuse, Host Country Regulation of Joint Ventures and Foreign Investment, p.103 PT Newmont Nusa Tenggara obligated to divest its shares to Indonesian participant for 51%, by 20% have been owned by Merukh Enterprise according to Contract of Work investor.”. Looking back to Keputusan Ketua BPKM No. 12/SK/1986 dated June 4 1986 regarding Persyaratan Pemilikan Saham Nasional, it is stated that the foreign company must be in the form of joint venture. Foreign company does not allowed to own a whole 100% shares while doing an investment in Indonesia. Based on this regulation, the government requires foreign investors to divest their shareholding to at least 51% by the tenth year of production.

In Government Regulation No. 77 of 2014 regarding Third Reform of Government Regulation No. 23 of 2010, according to Article 97, any business entities and IUP/IUPK holders whose shares are held by foreigners, have to divest their shares gradually after five years of production. Moreover, according to Article 7C Government Regulation No. 77 of 2014, the foreign shares of any investors who changed their status from domestic investor to foreign investor will be limited, so that the percentage of the remaining shares become the property of the Indonesian participants. Indonesian participants that are offered gradually to the shares is stated in Article 97 par. (2) Government Regulation No. 77 of 2014, they are: the government, local government, state owned enterprises (BUMN), local owned enterprises (BUMD), or national private enterprises.

Under the new mining regulatory regime, Law No. 4 of 2009 regarding Mineral and Coal Mining Law (known as Mining Law), the divestment policy becomes a problem. Divestment according to Black's Law Dictionary is the complete or partial loss of an interest in an asset, such as land or stock.⁵ So we can conclude that divestment is a reduction of partially or wholly company shareholding to domestic entities or public, so that within the certain period based on the contract, the certain number of share have to be released to Indonesia participant.

This provision is an implementation of Article 33 The 1945 Constitution which stated that soil, water, and natural wealth contained therein shall be controlled by the state and used for the welfare of the people to the utmost. The divestment done by foreign company is such a way to increase national ownership. Provision regarding the foreign company divestment was first set out in Government Regulation No. 17 of 1992. On Article 2 Government Regulation No. 17 of 1992, the foreign investment company must be in a joint venture form with Indonesian company with Indonesian participants share capital ownership at least of 20%

¹ PT Newmont Nusa Tenggara obligated to divest its shares to Indonesian participant for 51%, by 20% have been owned by Merukh Enterprise according to Contract of Work.

which then increased to 51% by the twentieth year of production. The divestment provision can also be found on Mining Law Article 112 Which stated that after five years of production, business entities and IUPK/IUP holders whose shares are owned by foreigners are obligated to divest its shares in the government, local government, state owned enterprises, local owned enterprises, or national private enterprises. The provision ruled the divestment is now as governed in Article 97 Government Regulation No. 77 of 2014.

Divestment can also be arranged on Contract of Work with the example is Article 24 par. 4 Contract of Work between Newmont Nusa Tenggara and Indonesia. PT. Newmont Nusa Tenggara is a joint venture company which is formed by PT. Pukuaifu Indah and Newmont Indonesia Ltd. For 20% of PT. Nusa Tenggara shareholdings already owned by PT. Pukuaifu Indah. PT. Pukuaifu Indah is a limited liability corporation formed based on Indonesia's Company Law engaged in the mining industry, so that we can conclude that PT. Pukuaifu Indah is one of Indonesian Participant sesuai dengan Article 120 Mining Law for national private enterprise. As for that, the amount of shares that have to be divested by PT. Newmont Nusa Tenggara is for 31%.⁶

Next, according to Article 24 par. 3 Contract of Work between PT. Newmont Nusa Tenggara and Government of Indonesia, PT. Newmont Nusa Tenggara shall ensure that its shares owned by Foreign Investor(s) are offered either for sale or issue firstly, to the government. It can be concluded that the shares which have to be divested is a subscribed capital as stated in Article 33 par. 1 jo. Article 32 Law No. 40 of 2007 concerning Limited Liability Company (known as Company Law). Subscribed capital is the capital which is at least 25% (twenty five per cent) of the authorised capital.

Furthermore, referring to Article 24 par. 3 Contract of Work, the offered shares are the ones which owned by the Foreign Investors (in this case is Newmont Indonesia Ltd). Parties consist in this Work of Contract PT. Newmont Nusa Tenggara and The Government of Indonesia. According to Privity of Contract principle contained in Article 1340 par. 1 BW, no one may be entitled to or bound by the terms of a contract to which he is not an original party. Only the parties who have created the contract, that is, Newmont Nusa Tenggara and Government of Indonesia, are the parties to the contract.⁷ So we can say that Newmont Indonesia Ltd. does not bound by the rights and obligations of Contract of Work. The implementation of Article 23 of Contract of Work means that PT. Newmont Nusa Tenggara transfers its shares which is owned by Newmont Indonesia Ltd. shareholders. In this case, PT. Newmont Nusa Tenggara has violated *nemo plus* principle, that nobody can transfer a right that he has not got himself.⁸ Even so, as a foreign investment company and PT. Newmont Nusa Tenggara founder, Newmont Indonesia Ltd. still obligated to divest its shares to Indonesian participant as stipulated in Article 97 GR No. 77 of 2014, which stated that IUP/IUPK holders whose shares are owned by foreign investors are obligated to divest their shares gradually after five years of production.

One of the problem related to divestment policy charged by Government of Indonesia to the foreign investors occurred in this following case: In 2005, the joint venture parties:

PT. Pukuaifu Indah and Newmont Indonesia Ltd. agreed to make an agreement whose content that if Government of Indonesia rejected the divestment shares offering within

30 (thirty) days, Newmont Indonesia Ltd. will sell its divestment shares by 31% to PT. Pukuaifu Indah. This agreement is in line with Article 24 par. 3 Contract of Work between Newmont Nusa Tenggara and Government of Indonesia. As noted before, for 20% of PT. Newmont Nusa Tenggara shares has been owned by PT. Pukuaifu Indah. Consecutively,

Menteri Keuangan (in 2006) and Menteri ESDM (in 2007) sent a bid rejection letter to PT. Newmont Nusa Tenggara. Therefore, based on the agreement, 3% of shares in 2006 and 7% of shares in 2007 have to be sold to PT. Pukuafu Indah. So the total shares that have to be sold to PT. Pukuafu Indah is 17%.²

However, in 2008, PT. Newmont Nusa Tenggara was sued by the government represented by Menteri ESDM through International Arbitration and by 31st March 2009 there is this arbitral award which declares to order PT. Newmont Nusa Tenggara to divest 17% of its shares consisting of 3% of 2006 and 7% of 2007 shares to the Regional Government, while 7% of 2008 shares shall be divested to the Government of Indonesia.

Analysis

Ridwan Khairandy differs joint venture in two forms: joint venture agreement and joint venture company. Joint venture agreement is a contract between two or more parties to combine their knowledge and resources for the purpose of running a business, while joint venture company is an actualization of joint venture agreement.¹⁰ So, joint venture begins from an agreement, so it must be qualify the validity of agreement as stated in Article 1320 BW.

In brief, in order for a joint venture agreement to exist there must be acceptance of a offer. A consensus between foreign investor and the domestic partner can be seen as a complete meeting of the minds of the two contracting parties. The joint venture agreement should also be made by a person who is bevoegd orbekwaam. Bevoegd means that the natural person who makes the agreement, according to Article 47 and 50 Law No. 1 of 1974 regarding Marriage Law, must be over 18 years old¹¹. However, bekwaam, intended for legal entities, means that the person represent their company must be an authorized person based on the article of association. The object of joint venture agreement is the agreement to cooperate and join resources between foreign investor and domestic partner in the form of joint venture.

Joint venture company have to be in the form of incorporated company. In a joint venture company, the shareholders may not be an individual, but rather a legal subject which is the organization of the company. After both foreign and Indonesian prospective investors negotiate the terms and conditions of the joint venture agreement, these are the following steps they have to take in order to establish joint venture company: First, filing an application regarding foreign investment to BKPM to get assessed. Next, BKPM recommend the application to President to get his approval. Once approved by President, both of parties meet the notary to formalize and authenticate the joint venture agreement. After that, the joint venture agreement submitted to the Ministry of Justice and Human Right to be passed as an incorporated company.³

A joint venture company discussed in this writing is PT. Newmont Nusa Tenggara. PT. Newmont Nusa Tenggara is a joint venture company between PT. Pukuafu Indah, a private company whose business field is in gold and copper mining, and Newmont Nusa Tenggara Ltd., a joint venture company between Newmont Mining Corporation and Sumitomo Corp.

² Based on evidence submitted by PT. Pukuafu Indah.

³ Amirizal, *Hukum Bisnis Deregulasi dan Joint Venture di Indonesia Teori dan Praktik*, Jakarta: Penerbit Djambatan, p.114.

PT. Newmont Nusa Tenggara further made a contract with Indonesia's government which is named Contract of Work.

Contract of Work formerly regulated in Article 8 Law No. 1 of 1967 which stated that foreign investment in mining sector is based on a partnership with the government on a contract of work basis or else in accordance with the prevailing regulations. Contract of Work, according to the new provision regarding mining law, is still remains in place. Nowadays, Mining Law only use the term known as mining permit. In other words, when the contract time period expired, that corporation has to obey with mining permit named IUP. Contract of Work parties are the government of Indonesia and a contractor which can be either private corporation or a joint venture company. Contract of Work signed by Ministry of Pertambangan and the company, which also have to mendapatpersetujuan from President and DPR.¹³ According to Article 169 point b Mining Law, the provisions contained in the contract of works have to be adjusted with provisions contained in this regulation at the latest one year since this regulation enacted. This means Contract of Work must contain some new provisions including to process and refine the results of mining within the country and divestment.

The correlation between Joint Venture and Contract of Work could be described in this illustration: in 1985, PT. Pukuaifu Indah made a joint venture agreement with Newmont Indonesia Ltd. Once signed, PT. Newmont Nusa Tenggara created. In 1986, PT. Newmont Nusa Tenggara made a Contract of Work with the government of Indonesia as a contract in field of mineral and copper mining whose application was filed to Departemen Pertambangan dan Energi (ESDM) by joint venture parties, PT. Pukuaifu and Newmont Indonesia Ltd. After receiving DPR approval, Contract of Work had created and validated by Indonesia's government by December 2, 1986.

In order to be legally binding, Contract of Work must comply four requirements set forth in Article 1320 BW. Briefly, the parties to the agreement must make a consensus and agreed on the key points of the agreement. Thus, in the Contract of Work, a consensus between the government and the company should be achieved. The deal has not occurred while the parties are still in the stage of negotiations. In the Contract of Work, the parties who is capable or authorized to represent the government is the Minister of Energy and Mineral Resources (formerly the Minister of Mines and Energy) and the appropriate authorities to represent the company is directors as indicated in the articles of association. According to Dr. Nanik in her book, the object of the Contract of Work is mineral resources, beyond oil, gas, geothermal, and radioactive.

The principle of freedom of contract is not unconditional, but also has limitations:

1. Restrictions through State Power

a. Limitations in BW

It is as contained in Article 1320 BW which regulate the subjective and objective legitimacy terms of a contract made by the parties. In brief, the agreement made by the parties have to: based on a good faith, the deal was meet the condition in Article 1321 BW, and must not contrary to laws, morals and public order.

b. Restrictions in Other Legislation

Restrictions to the freedom of contract principle comes from the legislation maker can be found in certain legislation. Given if we are about to make an employment contract, so we must pay attention to the Law No. 13 of 2003 regarding Labor Law which contains the terms and conditions regarding minimum wages, maximum hours of work,

working conditions, and other matters specified limits by legislation.

c. Limitations of the Court

There are also restrictions comes from the court. Limitation to the freedom of contract principle comes from the court could be as an implication of subjective terms listed in Article 1320 par. (1) and (2) BW. An agreement that does not correspond to the subjective requirements listed in Article 1320 par. (1) and (2), can be terminated by revocations submitted by either party through the courts. Moreover, the judge has the power to deviate the agreement contents on the grounds of public order, morality, decency, and good faith. Intervention to the contract by the court can be seen in German judicial practice. Some opinions agreed with intervention against the contractual relationship has several reasons, mainly because of the need for risks sharing between the parties and to provide solutions when the injured party can not bear a heavy consequences for economic reasons. This kind of intervention is not a form of interference with the principle of *pacta sunt servanda*, but as a measure to ensure the natural consequences that can befall a contract. The intervention does not mean that the legal order will or should intervene in all contractual relationships which feature some kind of inequality in the parties. Intervention for the sake of socially just or fair results must be balanced with legal certainty.⁴

In this case, on March 31 2009, there was an International Arbitration Award regarding divestation dispute between Departemen Energi dan Sumber Daya Mineral Republik Indonesia and PT. Newmont Nusa Tenggara which states that:

Based on the arbitration process of PT. NEWMONT NUSA TENGGARA's divestiture dispute settlement that has been held in Jakarta on 8 thru 13 December 2008 under the United Nation Commission on International Trade Law (UNCITRAL) arbitration, the Arbitral Tribunal has issued a final award on 31 March 2009, which basically favors the Government of Indonesia.

The Arbitral Tribunal which comprises internationally well-known panel declares the followings:

1. Order PT. NEWMONT NUSA TENGGARA to perform provisions of Article 24.3 of the Contract of Work.
2. Declare that PT NEWMONT NUSA TENGGARA has been in default (breach of agreement).
3. Order PT. NEWMONT NUSA TENGGARA to divest 17% of its shares consisting of 3% of 2006 and 7% of 2007 shares to the Regional Government, while 7% of 2008 shares shall be divested to the Government of Indonesia. All the said obligations shall have been accomplished within 180 days as of the issuance of the ruling.
4. The divested shares shall be free of pledge ("Clean and Clear") and the source of fund for the purchase of the divested shares shall not be PTNTN's concern.
5. Order PT. NEWMONT NUSA TENGGARA to compensate all costs spent by the Government in this Arbitration case, which shall be paid within 30 days as of the date of the arbitration ruling.

That Arbitration Award turns out be an impact on the agreements made by third parties outside the case. As what have stated previously, PT. Pukuafu has been buying PT. Newmont Nusa Tenggara shares based on agreement between PT. Pukuafu and Newmont Indonesia Ltd. as PT. Newmont Nusa Tenggara holding companies. Based on Article 1917 BW, a

⁴ B. Markesinis, H. Unberath, and Angus, *The German Law of Contract: A Comparative Treatise*, p.3.

verdict is only has binding force to litigant and not to third party.

Even though the share purchase agreement that were conducted by PT. Pukuafu Indah and Newmont Indonesia Ltd. can not even be performed because of the arbitral award which stated that 17% of PT. Newmont Nusa Tenggara shares shall be divested to Government of Indonesia, it is not immediately terminated. To that agreement, both parties may apply for agreement revocation so it becomes void.¹⁶ Agreement revocation can

1. Active revocation, that is those who feel aggrieved may file the cancellation of the agreement to the trial judge, or;
2. Passive revocation, that isthose who feel aggrieved wait until there were lawsuit before the judge or court to meet the verdict thenasking about the deficienciesand validity of the agreement.

The losing party, PT. Pukuafu Indah, may file a lawsuit regarding agreement revocation to the competent court as an attempt of active revocation based on a violation of Article 1320 (4) BW. It is because the function of a judge as a judicial power shall base his decisions with what has been established by the legislation, the judge only apply provided law on a concrete events to make a decision. This is called as a judge as the mouthpiece of the law.⁵

But it have to be put in mind that in accordance with Article 1917 BW, a verdict (in this case arbitral award) is only binding to the litigant and not to third parties. Although the arbitration award makes an agreement made by an outside third party can not be implemented because the objects that are being ordered in the arbitral award was the object of an agreement between PT. Pukuafu Indah and Newmont Indonesia Ltd., does not mean that third parties are bound by the arbitration award.

What I find interesting related to Article 1917 BW is Article 378-379 Rv and Article 195 par. (6) HIR which states that if third party rights are harmed by a verdict, then they may file an opposition to the verdict. This provision can be implemented considering Article 69 par. 3 Arbitration Law which stated that the procedure for the attachment and enforcement of the award must follow the procedure set out in the Civil Procedural Law. In this case, PT. Pukuafu Indah as the third party who wants to take the fight against an arbitral award may submit *derdenverzet*. *Derdenverzet*, a third party opposition, is a measure on an attachment of an object or goods of a verdict that already have binding legal force. *Derdenverzet* set forth in Article 195 par. (6) and (7) HIR and Article 208 HIR. *Derdenverzet* application must be submitted to the judge who passed the verdict that is willing to be countered by suing the parties concerned the same way as filing a lawsuit.¹⁹ PT. Pukuafu Indah as the injured party may file *derdenverzet* to the court who gives *exequatur* power to the arbitration award, which is Pengadilan Negeri Jakarta Pusat, in accordance with Article 66 letter d Arbitration Law. According to Article 382 Rv, if *derdenverzet* is granted, then the part of verdict that brings harm to third parties will be revised.⁶

Conclusion

According to Article 1917 BW, a verdict (in this case: an arbitral award) only has binding force towards the litigant and not to third party. The problem talked in this journal,

⁵ Darji Darmodihardjo dan Shidarta, *Pokok-pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*, Gramedia Pustaka Utama, Jakarta, 2006, p. 286.

⁶ Sudikno Mertokusumo. *Hukum Acara Perdata Indonesia*, Yogyakarta, Liberty, 1998, p.246.

the award turns out gives an impact to the agreement made by third party. International Arbitration which handles disputes between the Government and the divestment shares of PT. Newmont Nusa Tenggara issued an award dated March 31st 2009 which led to a contract made by PT. Pukuafu Indah and Newmont Indonesia Ltd. it can not be implemented. Measures can be taken by PT. Pukuafu Indah are:

1. Contract revocation through the competent court that has been agreed in the contract
2. File derdenverzet in accordance with the applicable civil procedural law.

So that no party other than the litigants are harmed, it would be better if the arbitrators play an active role in accordance with the UNCITRAL Model Law 2006 amendments which stated that:

Article 17 F (1): the arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

Article 27: The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Those two articles give authority to the arbitration to call or make a third party as a party to the arbitration even though third parties are not bound by the arbitration agreement in order to find the evidence needed in case examination in arbitration.

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