

Arbitration Agreement to Non-Signatory Parties in Indonesia

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Abstract

International business transaction, especially in the exchange of goods and services nowadays, a contract is normally concluded to govern the entire relation between the parties. Ideally, the perfect contract probably should be able to give foresights to all possible scenarios and their solutions, regarding the beginning of the business relationship, its performance and finally its termination. In today's commercial transaction, the parties will draw up an arbitration agreement in their contract to submit all disputes arising from a contract to a neutral body. The presence of non-signatories party in arbitration agreement is apparent on a contract which involves an affiliated companies. This situation arises because it is becoming more acceptable nowadays for a company to establish subsidiary companies in order to make business transaction become more swift and sophisticated. The liability issue normally happened when there are two company that are affiliated to each other while only one of them signed the contract. On this ground, there have been some cases wherein the affiliation is considered as an equal liability between the parent company and subsidiary, especially when the parent company is also involved in the contract performance. Extending the scope of an arbitration agreement to a party who is initially not signed under the agreement would defeat the original purpose of having the agreement in the first place. It must be remembered that the starting point of arbitration agreement is its privity, that is, it will only bind the parties who signed it. From this perspective, a question arises on whether according to the regulations in Indonesia, an action of a company who has knowingly engage themselves in a contract concluded by their affiliates will make them bound to the contract and the arbitration agreement as well. This research is to give a better understanding on to what extent does a company, who only acts as a non-signatory, can be bound to an arbitration agreement if a dispute arises by seeing it from the Indonesian law perspective.

Keywords: Arbitration; Privity of Contract; Non-Signatory Parties.

Introduction

Nowadays people are often do a business transaction, not only in national scope but also spread widely to international level. Usually, a business transaction is ruled by a contract made by two or more parties. A contract is the law that governs and binding to those parties. In today's commercial transaction, the parties will draw up an arbitration agreement in their contract to submit all disputes arising from a contract to a neutral body.¹ This arbitration agreement will give rise to two effects.

¹ Gary Born, , *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009).[24].

First, they will grant the jurisdiction to the arbitral tribunal. Second, by submitting their dispute to arbitration, the parties have agreed to resolve their dispute outside of any judicial system. This consensual nature of arbitration leads to an issue where there is a non-signatory to the agreement, but intertwined to the dispute that it will be unjustified to resolve the issue without the presence of this party on the proceeding.²

The presence of non-signatories party in arbitration agreement is apparent on a contract which involves an affiliated companies. In Indonesia, affiliation between companies is defined and regulated under Law No. 20 of 1995 on Capital Market as “*a relationship between two Companies with one or more directors or commissioners in common*”.³ Their presence normally relates to the fact that while concluding a contract with a company, the other companies within the same affiliation will somehow be involved within the transaction.⁴ This situation arises because it is becoming more acceptable nowadays for a company to establish subsidiary companies in order to make business transaction become more swift and sophisticated. The liability issue normally happened when there are two company that are affiliated to each other while only one of them signed the contract. On this ground, there have been some cases wherein the affiliation is considered as an equal liability between the parent company and subsidiary, especially when the parent company is also involved in the contract performance.

From this point, it is inevitable that the chain of conduct in a contract which involves affiliated companies will create a complex system of transaction, which often leads to the confusion as to which party is actually bound by the contract. Due to this, it is sometimes hard for arbitral tribunals to give its judgment on declaring which party is liable once a claim for dispute is submitted to arbitration. The importance of this research is to give a better understanding on to what extent does a company, who

² Johanna Maxson, *Binding Non-Signatories to Arbitration Agreements: The Issue of Consent in International Commercial Arbitration*, 2013 available at: https://gupea.ub.gu.se/bitstream/2077/35239/1/gupea_2077_35239_1.pdf, (accessed: July 16. 2019).

³ Art. 1(c), *Capital Market Law*.

⁴ William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma in Multi Parties in International Arbitration*, (Oxford University Press, Oxford, 2009). [3-4].

only acts as a non-signatory, can be bound to an arbitration agreement if a dispute arises by seeing it from the Indonesian law perspective. Legal scholar William Park opines that the trend on joining non-signatories in arbitral proceedings is mainly based on the understanding of implied consent, which will reasonably bound the non-signatory to arbitrate when their agreement to arbitrate can be inferred from their behavior.⁵ Especially, when they took part on the negotiation and performance of the contract which give rise to the assumption that they are aware of the existence of the arbitration agreement.⁶ For arbitrators, this issue elicit a tension between two doctrines: consensual nature of arbitration and disregard of corporate personality.⁷ However, some scholars have agreed that corporate personality can be set-aside in exceptional situations that give rise to their liability.

Obviously, extending the scope of an arbitration agreement to a party who is initially not signed under the agreement would defeat the original purpose of having the agreement in the first place. It must be remembered that the starting point of arbitration agreement is its privity, that is, it will only bind the parties who signed it. Hence, the jurisdiction of the arbitral tribunal only extends to those who are privy to the arbitration agreement.⁸ Due to this, there have been many debates by tribunal, courts, and scholars over this matter on recent years.

Indonesia itself also applies privity of contract in the term of “personality principle” which is enforced in Art. 1315 and Art. 1340 of Indonesian Civil Code which declares that an agreement is only binding upon the party who is named and concluded therein. Art. 1340 also has specifically elaborates that no agreement shall bring disadvantage to any third parties, and no third parties shall benefit from the existence of an agreement unless for the cause sets forth in Art. 1317:

“An individual may also enter into an agreement on behalf of a third party, if such agreement, which the individual concludes on his own behalf, or

⁵ Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, (Delaware Journal of Corporate Law, Volume 15, 1990).[3-4].

⁶ *ibid.*[4].

⁷ *ibid.*[3].

⁸ Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International, The Hague, 2005).[9].

gift granted by him to another party, contains a provision in this regard. An individual, who has concluded an agreement, cannot revoke such, if the third party has declared his intent to exercise it”.

Basically, Art. 1317 will be an exception to the personality principle as it allows the possibility to execute a contract for third party benefit and for the third person to acquire enforceable rights under a contract even when they are not being a contracting party. This can be done by merely stipulating that the agreement will benefit a designated third party.

In regards to arbitration, the arbitration law in Indonesia is set forth in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (“Indonesian Arbitration Law”). This law under its Art. 1(3) has defined arbitration as an: *“agreement in a form of arbitration clause contained in a written agreement which is made by the parties before the dispute arises, or a separate arbitration clause which is made by the parties after the dispute arises”*. This means that arbitration law has specifically limit the application of arbitration agreement to the parties who is involved in the conclusion of the agreement. However, unlike Art. 1340 of Indonesian Civil Code, Art. 1(3) of Indonesian Arbitration Law does not elaborate further whether the particular parties also need to be mentioned in writing in the agreement in order to be bound by it.

Therefore, it is only the personality of contract that is applied by Art. 1340 which sets a clear grounds for extending an arbitration agreement to non-signatories which will not be allowed from a brief analysis. However, in a more general sense, one need to also take into account the requirement of consent in Art. 1320 of Indonesian Civil Code in order to fulfil the contract validity requirement. There are no express provision in the Indonesian Civil Code which stipulates on what form does this consent shall be made, which give rise to the possibility of consent that can be implied through the conduct of a party unless that conduct is a result of misconception or fraud which will render the consent to be invalid under Art. 1321. From this perspective, a question arises on whether according to the regulations in Indonesia, an action of a company who has knowingly engage themselves in a contract concluded by their affiliates will make them bound to the contract and the arbitration agreement as well.

For the purpose of assessing the possible problem arising out of the mentioned background, the following research question must be answered in order to provide a deep and thorough understanding towards the possibility and application of extension of arbitration agreement to non-signatory parties: Does the prevailing Indonesian Law allow and recognize extension of arbitration agreement to non-signatory?.

Indonesian Law Perspective on Extension of Arbitration Agreement to Non-Signatory Parties

Based on the principle, the parties involved in a contract given freedom to determine which laws apply and the forum which dispute resolution applies when a dispute later occurs. This is known as the party autonomy principle or freedom of contract. As a logical consequence of the application of the principle of freedom of contract (freedom of contract), then the parties to a contract can also determine for themselves things as following:

1. Choice of jurisdiction, para parties determine their own court or which forums are authorized to check disputes between parties to the contract;
2. Choice of law, the parties determine for yourself which law applies in the interpretation of the contract;
3. Choice of domicile, the parties appoint themselves the legal domicile of the parties

The concept of arbitration is formulated in Article 1 number 1 Law No. 30 of 1999, which states that “arbitrage is how to resolve a civil dispute outside general justice based on agreements arbitration made in writing by para disputing parties “Then arbitration born because of an agreement made in a manner written by the parties, containing the agreement to resolve a dispute in the field civil law outside the public court or through arbitration. If connected with provisions of Article 1233 of the Civil Code it determines there are 2 binding sources. This arbitration is an engagement that is born from agreement. Then in Article 1 number 3 of Law Number 30 of 1999, it is stated that what is meant by an arbitration agreement is “An agreement in the form of an arbitration clause stated

in a written agreement which made by the parties before the dispute arises, or a separate arbitration agreement is made the parties after the dispute arises.” From the Article 1 number 3, it can be concluded that an arbitration agreement arose because of an agreement in the form of a clause arbitration stated in an agreement written agreement between the parties before a dispute arises, or a separate arbitration agreement made by the parties after arising dispute.

As mentioned above, because Arbitration agreements can be made before or after a dispute arises by the parties, then the arbitration clause can be distinguished of two forms, namely the arbitration clause in the form of *pactum de compromittendo* and clauses arbitration in the form of *acta compromise*. Literally, the term *pactum de compromittendo* means the same as *acta compromise*. However, some legal literature Indonesia distinguishes the two. Form a *pactum de compromittendo* clause was made by the parties before the dispute or real disputes. The previous parties has agreed to submit a settlement disputes or disputes that may arise occur later on to the arbitral institution or *ad hoc* arbitration. Arbitration clauses like this can be contained in the principal agreement or in a separate agreement Arrangement of the *pactum de compromittendo* clause this can be found in Article 7 of the Arbitration Law, which states that the parties can agree on a dispute happened or what will happen between them to be settled through arbitration. Because election of arbitration before the dispute carried out in the form of an agreement, then provisions of general treaty law apply. Arbitration agreements must follow the principles the principle of general agreement law, where it is contained must not exceed or contradict with basic agreement. Clause or arbitration agreement does not delete or ends with delete or expires principal agreement.

As mentioned earlier, arbitration in Indonesia is governed under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (“Arbitration Law”). Here, Arbitration Law acts as the *lex specialis* that govern arbitration agreement and based on the *lex specialis derogat legi generali principle*, prevails over Book III on Contract on Indonesian Civil Code which regulates about general agreement. Art. 1 (3) of the Arbitration Law defines an arbitration agreement as:

“an agreement in the form of an arbitration clause set out in written agreement made by the parties before the dispute occurs, or a separate arbitration agreement made by the parties after the dispute occurs”.

According to Bagir Manan⁹, there are a few principles of law that must be taken into account in applying *lex specialis derogat legi generalis*, which is as follows:

- a. The provisions contained in the general law is still applicable, unless it is regulated specifically within the specific law;
- b. The provisions contained in the specific law is still in the same hierarchy with the provisions contained in the *lex generalis*;
- c. The provisions contained in the specific law runs within the same legal regime with the *lex generalis*.

The highlight should be made to first point which basically stipulates that it is still possible for the *lex generalis* to apply if there is no provision that regulate a certain matter specifically in the specific law. In regards to extension of arbitration agreement to non-signatory in arbitration agreement, Arbitration Law does have a specific provision pertaining to such matter. It is regulated in Art. 30, which declares that:

“Third parties outside the arbitration agreement may participate and join themselves into the arbitral process, if they have related interests and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal hearing the dispute.”

What must be noted is that, Art. 30 of Arbitration Law only allows extension of arbitration agreement to non-signatory party in arbitral proceeding if it is provided that the non-signatory has actually intended to be joined and such joinder is agreed by all parties to the arbitration agreement. It still does not answer the question on whether it is possible to extend the arbitration agreement to non-signatory party in the event that they have never agreed to arbitrate. Scholars have agreed that notwithstanding the fact that it has some very specific features, an arbitration agreement is still a contract and the determination being made is still be considered in accordance with the general rules governing contract formation under the relevant law. Therefore, since the Arbitration Law as the *lex specialis* is silence on the particular issue, we need to apply Book III of Indonesian Civil Code as the

⁹ Bagir Manan, *Hukum Positif Indonesia* (FH UII Press 2004).[56].

lex generalis in analyzing the problem of joining non-signatory party to arbitrate in absence of their agreement.

To answer this question, first thing that have to be done is to elaborate the view of Indonesian Civil Code in regards to the issue, especially by virtue of principle of personality of contract under Book III, which is followed by a thorough analysis on the relation between the writing and consent requirement of an arbitration agreement imposed by Indonesian Arbitration law with the present problem on extension to non-signatory party. The Author also believe that it is important to discuss the arbitral proceeding that has joined non-signatory, as any non-compliance might leads to the enforcement issue later on. Last, this writing discussed the enforcement issue by Indonesian Court when it comes to enforcing arbitral awards which granted extension of arbitration agreement to non-signatory party.

Indonesian Civil Code Perspective

Art. 1(1) of Arbitration Law defines arbitration as an agreement between the parties that are based on the freedom of contract principle. This definition is in accordance with Art. 1338 of Indonesian Civil Code which declares that what have been agreed by two parties in an agreement shall bound them as a law.¹⁰ According to Subekti, an agreement should be bilateral in nature.¹¹ This means that a party who obtain certain rights from an agreement, shall also receive an obligation arising therefrom which is the opposite of the rights it receives. On the contrary, a party who is imposed with a certain obligations, shall be entitled to certain rights as the opposite of the obligations to which they are bound. If a party who receives certain rights from an agreement but is not imposed with a certain obligation as the opposite of their rights, or if a party who receives some obligation is not given the rights that is entitled for, then the agreement would be deemed unilateral. While this notion has successfully attained the main idea of rights and obligations of a party under an agreement according to Indonesian Law perspective, he has not exactly

¹⁰ Gatot Soemartono, *Arbitrase dan Mediasi di Indonesia* (Gramedia Pustaka Utama 2006).[26].

¹¹ *ibid.*

elaborated how rights and obligation works under an agreement when there is a third party involved, seeing that Indonesia recognize personality principle in Book III of Indonesian Civil Code.

In general, personality principle is a principle which stipulates that a person can only execute or conclude a contract on behalf of their own self.¹² In its Book III, the Indonesian Civil Code recognizes that no one except the parties to a contract may be bound or benefitted by an obligation undertaken by them in their own names. In another words, a contract cannot impose any liability on a third person and similarly, a third person cannot acquire rights under a contract to which they are not a party, unless he has given a mandate to stipulate in their name. This principle is embodied in Art. 1315 and Art. 1340 of Indonesian Civil Code. Art. 1315 declares that: “In general, an individual can commit only himself or agree to something on his own behalf”

On the other hand, Art. 1340 reads as follows:

“Agreements shall only be enforceable between the parties involved. They shall not be detrimental to third parties; third parties shall not profit from them, except in the event stipulated in Art. 1317”

Therefore, the personality of contract principle acts as the starting point to the present problem: that no party shall be bound by an arbitration agreement that it has never signed and agreed to. However, the last sentence in Art. 1340 becomes the grounds of exception to the personality principle enforced in the Indonesian Civil Code, as Art. 1317 of the Indonesian Civil Code will allow any person to execute a contract for the benefit of a third party benefit and for the third person to acquire enforceable rights under a contract despite never signing it.

In regards to the application of Art. 1317, Subekti opined that this article embodied the idea of “*janji pihak ketiga*”¹³ (initially known as *derden-beding* in Dutch term). He mentioned that in *janji pihak ketiga*, a party will conclude an agreement, wherein that agreement he will promise the fulfillment of some rights to

¹² Subekti, *Hukum Perjanjian* (Intermasa 1987).[29].

¹³ Subekti, *Op.Cit.*[30]

another third party. As an illustration, A concludes an agreement with B, and within that agreement, A requested a certain rights to be given to C, without C's authority upon such request. Normally, the promise for the third party is expressed in a form of offer, which is conducted by the party who requested for the grant of rights.

What must be highlighted from Subekti's opinion in his book is that rather than seeing Art. 1317 as an exception to the personality principle which can bound another third-party to an agreement, he viewed Art. 1317 as a mere tool to give a promise of benefit to the third-party. Indeed, Art. 1340 explicitly stipulates that no agreement shall create a detrimental effect to third parties, and if seen in conjunction with Art. 1317, it is clear that the scope of exception to the personality principle that is allowed under Art. 1340 is only any agreement that creates benefit, rather than the one that gives detrimental effect to third parties right.

From a brief analysis, it is clear that extending arbitration agreement to non-signatory party to seek for their liability will violate the personality of contract principle recognized in Art. 1315 Indonesian Civil Code, as such extension will cause a detrimental effect to them. As they have never signed the contract containing the arbitration clause, any obligation to arbitrate will be unjustified as it does not fall within the ambit of extension on Art. 1317. Art. 1317 is only applicable provided that the signatory party, is proven to sign the relevant contract containing the arbitration clause on behalf of the non-signatory party for the non-signatory party benefit. One of the example of agreement for third-party that is compromised under Art. 1317 is known to be for insurance agreement. Therefore, even the exception to personality principle provided in Art. 1317 of Indonesian Civil Code cannot operate as a ground to extending arbitration agreement.

Based on those analysis, from different perspective, with reference to the dispute between PT. Royal Industries Indonesia with PT. Bursa Komoditi dan Derivatif Indonesia and PT. Indentrust Security international. PT. Indentrust Security International is a futures and derivative clearing house institution whose shares is PT. Bursa Komoditi dan Derivatif Indonesia's (BKDI). PT. Indentrust had an operating license issued by Badan Pengawas Perdagangan Berjangka

Komoditi (BAPPEBTI), for carry out its main function to clearing, guarantee, and settlement of all the futures and derivative exchange transaction. PT. Royal is one of the PT. Indentrust's member, therefore for all PT. Royal's futures and derivative transactions, PT. Indentrust had liability as a matter, including liquate bank guarantee when PT.Royal's had deficit margin equity issues. Disputes between those parties, occurred due to price changes on the market caused a price gap which mean the settlement price makes PT. Royal's margin equity deficit. Meanwhile, BKDI had the authority to sets up the daily final settlement price as closed price. PT. Royal accused BKDI had decided the daily settlement price too far from market situation. PT. Indentrust constantly liquated PT.Royal's bank guarantee. PT.Royal suing PT.Indentrust and BKDI, but apparently there were arbitration clause in agreement between PT. Royal with PT.Indentrust. These clause fundamentally bring out judges verdict, based on Art. 3 of The Arbitration Law, District Court had not any authority to adjudicated the parties whose bounds in arbitration agreement. Strengthened by Art. 1338 of Indonesian Civil Code which contains *Pacta Sunt Servanda* principle, wherein this principle means the agreement applies as a constitution for the parties whose made the agreement as long as the agreement fulfil legitimate requirements of agreement. Referring from Supreme Court verdict number 1715 K/Pdt/2001 on 12th December 2001, arbitration as an extra judicial has been born from arbitration clause in agreement, have a legal effect give an absolute authority for arbitration institution to resolved disputes which **arisen** from agreement with arbitration clause based on *pacta sunt servanda* principle. According to those jurisprudence may concluded, everything which arisen from the agreement with arbitration clause inside and caused a dispute resolve only in arbitration institution, inclusive the non-signatory parties like BKDI in this case.

Arbitration Law Perspective in Indonesia

Clearly, the issue of arbitration agreement in which the non-signatory party has demonstrated its consent in writing will give rise to no difficulty. However, in reality, non-signatory party technically never signed the arbitration agreement and

thus, become entitled for the term as a “non-signatory”. It is therefore important to address how the writing requirement is set in regards to the question of consent. The writing requirement is normally embodied in the requirement of signature.

In Indonesia, one of the legal requirements of an arbitration agreement under the Arbitration Law is to make the arbitration agreement in writing that is signed by the parties,¹⁴ or, in the absence of such signature, shall be made in the form of notarial deed.¹⁵ Based on Art. 11 of the Arbitration Law, the written agreement made by the parties will operate as the waiver for the court jurisdiction as the parties has shown their agreement to settle their dispute in arbitration.

Article 11:

1. *The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.*
2. *The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.”*

Basically, the court will have no jurisdiction to hear the dispute when the parties are already bound by an arbitration agreement.¹⁶ Due to the development of electronic use in contract, both of the Arbitration Law and new rules of BANI has recognized electronic communications as writings. The Arbitration Law basically provides that if an arbitration agreement is contained in an exchange of correspondence (including telefax or email), a record or receipt of such correspondence is also required to evidence such agreement. On the other hand, the new BANI rules provides that:

“„Writing”, whether capitalized or in lower case, shall include not only documents written or printed on paper but also electronically created and/or transmitted documentation; such writings to include not only agreements but also exchange of correspondence, minutes of meetings, telex, telefax, e-mail and other such communications; and no agreement, document,

¹⁴ Art. 4(2), Arbitration Law.

¹⁵ Art. 9(2), Arbitration Law.

¹⁶ Art. 11(1), Arbitration Law.

*correspondence, notice or other instrument which is required to be in writing shall be denied legal effect solely for the reason that it is contained in an electronically created or transmitted message”.*¹⁷

It has been an established practice by courts and tribunals to require arbitration agreement to be in writing in order to be valid. In 1958 when New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) was adapted, agreement in writing was accepted to be a general standard, and later, even validated in 1985 when UNCITRAL Model Law on International Commercial Arbitration was issued (“Model Law”).

Even though the BANI rules practically incorporate the intent of Model Law in imposing writing requirement, the Model Law itself is never adopted in Indonesia. Similarly to BANI, Model Law also has initially allow a “recorded agreement” to be considered as a written agreement in 2006 when the newest version of Model Law is released:

*“Recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties.”*¹⁸

This option will allow the parties to have arbitration agreement in another form other than writing as long as it is recorded. On the other hand, in regards to New York Convention, Indonesia is in fact a party to it. Therefore, since Indonesia is a party to the New York Convention 1958, an award rendered in any of the 117 states will be enforceable under Arbitration Law.

Indeed, these instruments did not further elaborate whether the lack of written agreement will lead to the ground for setting aside or refusal of the recognition of the award. However, the wording of such articles has led scholars to believe on such conclusion.¹⁹ Based on Article V(1)(d) of New York, recognition and enforcement

¹⁷ Art. 3, Bani Rules and Procedures.

¹⁸ UNCITRAL Secretariat, , *International Commercial Arbitration: UNCITRAL Secretariat Explanation of Model Law in UNCITRAL Yearbook Vol. XVI*, UNCITRAL, Vienna, 1985).[85].

¹⁹ *ibid*

of the award may be refused if:

*“The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”.*²⁰

In this case, the issue becomes whether the law governing the arbitration agreement requires the consent to the agreement to be made in writing. Therefore, if the *lex arbitri* requires the arbitration agreement to be made in writing, then failure to met such requirements might leads to the non-enforcement or non-recognition of the award. Indeed, New York Convention requires an agreement in writing that is “signed by the parties”.²¹ However, such requirements are subjected to the provisions of *lex arbitri*, and in the event that the *lex arbitri* is the Arbitration Law, the writing requirement is actually compromised under Art. 30.

As earlier mentioned, Art. 30 of Arbitration Law basically allows third party to be joined in the arbitral proceeding provided that the third party has agreed to be joined and such joinder is also agreed by all original parties in the arbitral proceeding. It has been confirmed during the interview with Karen Mills, the founder and co-chairs of Indonesian Chapter of Chartered Institute of Arbitrator (CI Arb) who also served as arbitrator in BANI, that by seeing the wording of the provision, the only thing that is required for joining third parties in arbitration is that particular third party’s as well as the other parties’ agreement, and also a prove that the third party does have interest for the proceeding. Before the enactment of Arbitration Law, this method of joining non-signatory party to a proceeding is in fact first acknowledged in *Burgelijke Reglement of de Rechtsvordering* (RV), which initially recognized arbitration in Indonesia back in the mid-19th century, under the term *tussenkomst*. Similar with Art. 30 of Arbitration Law, *tussenkomst*, is a method of joining third party based on that third party’s intention, however, that third party will not side with either claimant or respondent of the case, but rather, to defend their own interest.²²

²⁰ Art. V(1)(d), New York Convention.

²¹ Art. II, New York Convention.

²² Art. 282, RV.

The process for assessing the dispute through arbitral proceeding is regulated clearly under Chapter IV of Arbitration Law concerning Procedure Applicable Before the Arbitral Tribunal, starting from Art. 27 until Art. 51. Through Chapter IV, it is elaborated that the parties who settled their dispute through arbitration is granted the equal opportunity to submit their submission including to submit their request, answer to request, evidence through documents, witnesses and experts to strengthen their arguments pertaining to the dispute that is currently being assessed by the tribunals.

The Arbitration Law, however, does not clearly stipulates the arbitral proceeding process if it later turns out that there is a non-signatory party outside the arbitral proceeding who is joined based on their agreement and also the other parties' agreement. If we apply the concept of *tussenkomst* in RV, then the possible scenario would be that after the claimant, and respondent agreed for the non-signatory parties to be joined, then, the tribunals would decide whether this non-signatory can follow the arbitral proceeding by issuing an interim measure, and it is only after the issuance of the interim measure then the claim for the non-signatory party can be joined within the main dispute. In regards to this, Mills also stated during the interview that the joinder of the non-signatory can be conducted at any stage of the proceeding, so long as all parties agree, as well as the arbitrators. However, clearly the arbitral tribunal would have been appointed by then.

Upon the approval for joinder of the non-signatory party, then, all of the provisions mentioned in Chapter IV of the Arbitration Law concerning Procedure Applicable Before the Arbitral Tribunal, would be applicable upon them. The non-signatory party is entitled to equal treatment and submit any document, witnesses, and experts to defend its interest based on the principle of *audi alteram partem* which becomes the basis for legal proceeding in Indonesia, in particular the civil proceeding.

1. In the Arbitration Law, the *audi alteram partem* is recognized in several articles, among others The parties in dispute have the same right and opportunity to state their opinions (Art. 29(1));
2. The parties are given a final opportunity to explain in writing their arguments

and to submit evidence deemed necessary to uphold their arguments in a period determined by the arbitrator or arbitration panel. (Art. 46(2));

3. The arbitrator or arbitration panel has the authority to ask the parties to submit supplementary written explanations, documents or other evidence deemed necessary in a period determined by the arbitrator or arbitration panel. (Art. 46(3)).

Therefore, once all the parties, including the non-signatories, agreed for the joinder, then in order to make it enforceable then the proceeding and award must be made in accordance to the provisions of the Arbitration Law and ensure that it does not conflict with public morality and order.

Enforcement of Arbitral Award That Joined Non-Signatory Party

In determining whether a non-signatory should be joined to international proceedings, arbitrators usually look to theories related to implied consent and lack of corporate personality. Transnational norms, gleaned from published decisions in significant cases, increasingly take on the character of a type of arbitral precedent. When joinder is urged on the basis of implied consent, these norms reduce the circularity inherent in reliance on the law of the contract or the arbitral, neither of which may be relevant with respect to a stranger to the transaction. By contrast, when joinder rests principally on lack of corporate personality, arbitrators often begin with the place of incorporation, reducing the role played by transnational norms.²³

Arbitration is consensual by nature. Indeed, the arbitrators' jurisdiction derives exclusively from the parties' agreement to use arbitration as a means to resolve their disputes. As a corollary, the jurisdiction of the arbitrators only extends to those that are privy to the arbitration agreement. Determining whether jurisdiction extends to a party comes down to determining whether this party is privy to the arbitration agreement. While it has some very specific features, an arbitration agreement is a contract and this determination will usually be made in accordance with the general

²³ William W Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, Journal, Multiple Parties in International Arbitration, Oxford, 2009.

rules governing formation of contracts under the relevant law.²⁴

There is a different process of enforcement for domestic arbitral award and international arbitral award. To differentiate domestic and international arbitral award, Indonesia takes the territorial approach²⁵ which is stipulated in Art. 1(9) of the Arbitration Law:

“International arbitration award means an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitration award.”

From that particular article it can be seen that all arbitrations that is held within Indonesia territory is considered a domestic arbitral award, which is governed by the Arbitration Law. On the other hand, other awards which proceedings were held outside Indonesia are categorized as an international arbitrations,²⁶ regardless of the nationality of the parties, location of the subject of the dispute, and governing law.²⁷ However, enforcement of both type of award in Indonesia is still regulated under the Arbitration Law. In regards to the enforcement of award, Indonesia has ratified New York Convention through Presidential Decree Number 34 Year 1981. Indonesia made both the commerciality and reciprocity reservation in its accession to the New York Convention. In order to be enforced, both domestic and international arbitral award must be first registered to the court. According to Art. 59(1) of Arbitration Award, a domestic award must be registered within 30 days of rendering with the District Court which has the jurisdiction over the respondent. While on the other hand, international awards must be first registered with the Central Jakarta District Court. However there is no time limitation for registering international arbitral awards.²⁸

²⁴ Blaise Stucki, Schellenberg Wittmer, Geneva, *Extension of Arbitration Agreements to Non-Signatories*, ASA Below 40 – Conference of September 29, 2006.

²⁵ Karen Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* (International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur, 2003).[2].

²⁶ Gatot Soemartono, *Op.Cit.*[69].

²⁷ Art. 1(9), Arbitration Law.

²⁸ Art. 65, Arbitration Law.

It must be taken into account, however, that not all international arbitral awards can be registered to be enforced, as the Arbitration Law has set out five criteria for the enforcement of an international arbitral awards, namely:²⁹

- a. *The International Arbitration Award is rendered by an arbitrator or arbitration panel in a country which is bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards;*
- b. *The International Arbitration Awards contemplated in item (a) are limited to awards which are included within the scope of commercial law under Indonesian law;*
- c. *The International Arbitration Awards contemplated in item (a), which may only be enforced in Indonesia, are limited to those which do not conflict with public order;*
- d. *An International Arbitration Award may be enforced in Indonesia after obtaining a writ of execution from the Chairman of the Central Jakarta District Court; and*
- e. *The International Arbitration Awards contemplated in item (a), which involve the State of the Republic of Indonesia as one of the parties to the dispute, may only be enforced after obtaining an exequatur from the Supreme Court of the Republic of Indonesia, which will then delegate it to the Central Jakarta District Court.*

Aside from fulfilling the above requirements, Art. 67 of the Arbitration Law requires application to register International awards to attach the following documents:

- i. *the original or a certified copy of the award, together with an official translation thereof (to Indonesian, unless the original award is rendered in Indonesian);*
- ii. *the original or a certified copy of the document containing the agreement to arbitrate, together with an official translation thereof; and*
- iii. *a certification from the diplomatic representative of the Republic of Indonesia in the country in which the award was rendered, stating that such country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards.*

The second criteria that requires a copy of arbitration agreement to be attached to register for the enforcement might become a problem for an international arbitral award has joined the non-signatory to arbitrate. From its clear wording, Art. 67

²⁹ Art. 66, Arbitration Law

required the original copy of the agreement to be submitted for registering the international arbitral award. The requirement for submitting the original agreement make it seems that Indonesian court will only enforce international arbitration award that has joined non-signatory party provided that the non-signatory party has agreed to arbitrate and there is an evidence of such agreement.

It can be presumed that even if the non-signatory party has agreed to be joined and the disputing parties also has agreed for the joinder, such mere agreement will not suffice for registering the award according to Art. 67 of Arbitration Law. Indeed, Art. 67 (ii) does not explicitly requires such agreement to be made in writing, since arbitration law itself recognizes electronic communications as writing, as long as a record of receipt of such correspondence is provided. Still, this requirement has affirmed the written requirement of an arbitration agreement that is upheld by Arbitration Law.

In the interview, Mills mentioned that, if the winning party failed to provide the copy of the agreement evidencing that the non-signatory has in fact agreed to arbitrate, then it will be very unlikely for the awards to be proceeded in the enforcement process as the parties failed to provide all required documents for the registration for enforcement. It is clear that the deed of registration for enforcement, either for domestic award, or international arbitral award, can only be issued after all the required documents for registration is submitted. Mills mentioned that the only solution for the winning party to fulfill the registration of award requirement is for them to conclude an arbitration agreement with the non-signatory after the dispute arises as allowed under Art. 9 of Arbitration Law.

..“Should the parties choose resolution of the dispute by arbitration after the dispute occurs, their agreement to this must be given in a written agreement, signed by the parties.”

That way, the winning party will be able to provide the agreement evidencing the third party's agreement to arbitrate and fulfill the registration requirement under Art. 67 of Arbitration Law.

However, it must be taken into account that the requirement of attaching the agreement to arbitrate only exists for international arbitral award. To register for

domestic award enforcement, the winning party only needs to attach the original copy of the arbitration award to the relevant district court within 30 days after the issuance of the award.³⁰ This means that there should be no problem to enforce domestic award that has joined non-signatories to arbitrate as long as their joinder in the arbitral proceeding is based on their intention and is agreed by all the parties involved as required under Art. 30 of the Arbitration Law. No written documents or records is needed to evidence such agreement.

In another scenario, even if the winning party has succeeded to submit all required documents for registration, including the agreement of the third parties' to arbitrate for international arbitral award that has joined them, it does not necessarily mean that the court will automatically enforced the award and subsequently be able to issue a writ of execution (*exequatur*) to seize the respondent's asset in Indonesia.

Arbitration Law also sets several grounds which allow the courts to refuse the enforcement of arbitral award in Indonesia. For example, failure to meet the 30 days time limitation for registering the award to the district court can make a domestic arbitral award becomes unenforceable.³¹ As for the international arbitral award, before enforcing the award, the tribunal needs to make sure that the award falls under the scope of commercial law and does not contradicts to public order.

It must be taken into account that the Arbitration Law is silent in regards to the enforcement of arbitral award that has been set aside in foreign court. However, seeing that Indonesia is a party to New York Convention, the tribunal has the discretion to determine whether to enforce or to refuse the enforcement of the award that has been set aside as allowed under Art. V(1) of New York Convention.

Nevertheless, even when the court refuses to enforce the award, the party is provided with the possibility of cassation to the Supreme Court under Art. 68 of Arbitration Law:

³⁰ Art. 59(1), Arbitration Law.

³¹ Art. 59(4), Arbitration Law.

*“A cassation to the Supreme Court may be made against a decision of the Chairman of the District Court contemplated in Article 66, item (d), for refusing to recognise and enforce an International Arbitration Award“.*¹⁸⁶

However, the cassation is only available for refusal to enforcement or recognition. Issuance of enforcement or recognition is not subjected to appeal. Hence, even in the event that the relevant court decided not to enforce any award that has joined the non-signatory to arbitrate, it is still possible for the winning party to apply for cassation to the Supreme Court to seek for enforcement.

Conclusion

Indonesian Law allows and recognizes extension of arbitration agreement to non-signatory party. However, such allowance is limited to the circumstances provided under Art. 30 of Arbitration Law, that is, the joinder of the non-signatory party must be agreed by all of the parties involved, including the non-signatory party itself. Therefore, extension of arbitration agreement to non-signatory party in Indonesian Law is only allowed when it is based on the agreement of the non-signatory party. Even the exception of personality principle embodied in Art. 1317 of Indonesian Civil Code cannot operate as a ground to join non-signatories that never agreed to be joined, as the presence of that article is merely as a tool to give a benefit to third party under an agreement, and not otherwise deprive it of some by dragging them to arbitration in order to seek their liability.

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