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APPLICATION OF CHOICE OF LAW IN JOINT VENTURE AGREEMENT DISPUTES BASED ON POSITIVE LAW IN INDONESIA

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Abstract

A joint venture is one type of cooperation that is currently often carried out by companies. This term has been quite popular in recent years, along with the emergence of more startups and the scope as well. The agreement that forms the basis for the formation of a joint venture company is the joint venture agreement and articles of association. A joint venture agreement is an agreement between prospective shareholders of a joint venture company that is subject to the law of contract. Joint ventures are not only limited to the joint efforts of small companies, there are also joint ventures whose members are large-scale companies even from abroad, and the formation of a contract is based on applicable law. In the context of an international scale, an international contract is needed which is a contract in which there is a foreign element. What makes international contracts unique is the emergence of the main element called the element of freedom of the parties to make a choice of law. The choice of law against a national law of a particular country does not mean that the judicial body of that country is automatically authorized to resolve the dispute, but the implication of the choice of law on the resolution of disputes between international joint ventures is based on this choice, it is known which institutions and laws are used and have the authority to examine and adjudicate disputes arising from an international business contract to provide legal certainty.

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A. Introduction

Foreign investment is one of the main forms of international business transactions. In the context of foreign investment, many countries require that foreign investors must form joint ventures with local companies to carry out their desired economic activities. The goal is not only to obtain capital, expertise and new technology but also to prevent foreign domination in important business sectors. Even in some countries, joint ventures may be the only legal vehicles for foreign investment, but this

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requirement is no longer strictly adhered to by Indonesia because there are many business sectors in Indonesia that can be fully (100%) owned by foreign investors.

Business actors generally sign what is called a shareholder agreement before formally establishing a legal entity related to the investment they intend to make. This shareholder agreement is a common law legal concept that was introduced into the Indonesian business world through the foreign investment mechanism and in Indonesia is better known as a joint venture agreement, related to joint ventures between foreign investors and their local partners. The development of international economic cooperation today has resulted in an increase in international business activities or transactions. The main international business transactions can be classified into three forms, namely cross-border trading of goods, licensing of products abroad and foreign direct investment. FDI itself is a foreign direct investment in terms of foreign investment where one investor is interested in planting a model in the economic scope of another country (Online Pajak, 2019). International business transactions when associated with international civil law are categorized as businesses that contain foreign elements, because they involve parties that are subject to more than one legal system.

Foreign investment activities in Indonesia must be carried out in the form of a limited liability company based on Indonesian law and domiciled in Indonesia, as stipulated in Law Number 25 of 2007 concerning Investment (hereinafter referred to as "UUPM"). In this regard, Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as "UUPT") states that a limited liability company is a legal entity that is a capital association, established based on an agreement. Thus, there are two agreements that form the basis for the establishment of a joint venture foreign investment company (PT PMA), namely the joint venture agreement and the articles of association (statutes).

The two agreements generally do not conflict with each other, if the provisions of both are first synchronized by the parties. However, this is not always the case. The existence of the two agreements can also give rise to several related legal issues. The two agreements regulate the rights and obligations of the joint venture partners/shareholders, which of course are also full of conflicts of interest between the joint venture partners. In fact, there are many provisions stipulated in the joint venture agreement that are not in line with or contradict the provisions of the articles of association. This generally occurs in joint ventures with limited shareholders whose ownership and management are not separated, and foreign shareholders are the majority shareholders who control the company's management. Here, the foreign partner as the majority shareholder is very interested in ensuring from the start that the investment he intends to make is well protected by fully controlling the company's management, and sees minority shareholders/local partners as a threat whose presence may not really be desired by the foreign shareholders, but because they are required by law to partner with local shareholders.

Joint ventures are considered as property rights that must be protected regardless of the challenges, and it is common for shareholders to be considered as the owners of the company whose shares they own. This is understandable because if the joint venture suffers a loss, the foreign partner as the majority shareholder will certainly experience a greater loss. Here, the joint venture agreement is seen as an instrument to further protect property rights and to reduce potential threats from minority shareholders. On the other hand, local partners (minority shareholders) consider their position as shareholders to be equal to that of foreign partners (controlling shareholders), and want a more active role in managing the company to ensure that their interests are not harmed by unilateral decisions taken by management, such as the decision not to distribute dividends; conflicts generally start from here.

The competing interests stated in the joint venture agreement have the potential to cause conflict, not only with the provisions of the articles of association of a joint venture company, but also with national laws and regulations, as well as agreements with third parties. The problem is, as a controlling shareholder (foreign investor) has a high bargaining position in determining the contents of the joint venture agreement and even includes a "supremacy clause" that places the joint venture agreement higher than the company's articles of association, so that if there are differences in the provisions in the joint venture agreement and the articles of association of a joint venture company (PT PMA), then the question will arise regarding which provisions apply (Legal Information Institute).

Then, there are potential risks in joint ventures, namely lack of trust between the parties can limit joint ventures; Incompatibility or differences in strategy can cause losses and failure to achieve overall business goals; Operational problems, the cause of which can be strategic differences, production problems, management control or otherwise, can limit the effectiveness of the joint venture (Mudiparwoto, 2019).

In terms of establishing a joint venture or what can also be called a Joint Venture Agreement, there are several things that need to be considered by the parties, namely policy aspects, choice of business field, company establishment, and realization of the agreement (Purwaningsih, 2016).

It is expected that with the existence of Joint Venture, Indonesian Entrepreneurs can learn how to work faster, especially about the technology utilized by foreign partners and also company management (Mulyadi, 2015), facilitating aspects of financing, capitalization, product marketing and facilitating projects (Suryana, 2020). In order for these benefits to be achieved, there needs to be an effort to provide guarantees in terms of foreign investment activities in Indonesia as a form of protection obtained by foreign investors, from which it is expected to increase the flow of foreign investment to Indonesia (Winata, 2018). For this reason, this study is intended to find out about the position of the Joint Venture Agreement in Positive Law in Indonesia and the implications of the application of Choice of Law in Joint Venture Disputes.

B. Method

This study uses a normative legal research method, namely library legal research conducted by examining library materials or secondary data alone (Sunggono, 2003). In this study, the scope of this study will be conducted by drawing legal principles, which are carried out on written and unwritten positive laws (Soekanto, 1996). The approach used in this study is the statute approach, namely an approach carried out by analyzing the rules and regulations relating to the legal issue (Marzuki, 2011). The type of data used is secondary data. Secondary data in this study is in the form of evidence, records or reports that have been compiled in archives (document data) that are published (Mohammad, 2012). The data collection technique used in this study is by means of library research. The data collection technique itself is a way of collecting data according to the source, method and instrument of data collection (Faisal, 2007).

C. Result & Discussion

1. Position of Joint Venture Agreement in Indonesian Positive Law

Joint venture agreement between foreign and national investors aims to form a joint venture company and carry out its economic activities as a legal entity. The legal entity stipulated by UUPM for foreign-capitalized joint venture companies is a limited liability company (PT), which is regulated in Law Number 40 of 2007 concerning Limited Liability Companies.

Limited Liability Company as a legal entity has its own assets that are separate from the assets of its founders and shareholders or from its parent company. The joint venture agreement that has been agreed upon then becomes a deed of agreement as a requirement in applying for a permit to BKPM and for the establishment of a Limited Liability Company Legal Entity. Chapter II Article 7 paragraph 1 of Law Number 40 of 2007 concerning limited liability companies, explains that:

"*The company is established by 2 or more people with a notarial deed made in Indonesian*".

Not all provisions agreed upon in the joint venture agreement can be included in the company's deed of establishment. The company's deed of establishment made by a notary usually has a standard format that has been set, the determination of this standard aims to facilitate the process of clarifying the completeness of the documents to be submitted to the Ministry of Law and Human Rights (Prasetya, 2001).

The parties cannot freely determine the articles of association, usually when making a joint venture agreement the parties also make a draft for the company's articles of association, so that the provisions in the articles of association are not much different from the joint venture agreement.

The deed of establishment and articles of association that have been made by a notary must then obtain a Ministerial Decree to be ratified as a Limited Liability

Company. The application to obtain ratification from the minister must be submitted no later than 60 (sixty) days, calculated from the date the deed of establishment is signed by the founders. The application must be accompanied by supporting documents. The Minister, based on consideration of the completeness of the application documents submitted through electronic facilities, will provide a no objection answer through electronic facilities, and also if there is an objection, based on Article 10 paragraph 3 and 4 of the PT Law.

After the founders receive a notification of no objection from the minister, then no later than 30 (thirty) days from the date of the statement of no objection, the applicants must physically submit a letter of application accompanied by supporting documents. After being completely fulfilled, no later than 14 (fourteen) days, the minister issues a decision on the ratification of the legal entity of the company signed electronically, based on Article 10 paragraph 6 of the PT Law.

2. Application of Choice of Law in Joint Venture Disputes

Choice of law or can be interpreted as Choice of Law, is one of the clauses that is almost always required to be included in contracts that form the legal basis for international commercial transactions. Choice of law is the freedom given to the parties, with certain limitations, to choose the law to be used and this freedom is based on the principle of freedom of contract. Several important things to note regarding the freedom of the parties to choose the law applicable to the international contract they agree to, namely (Fortuna, 2017):

a. The law chosen must not violate public order/public policy as known in International Civil Law;
b. The law chosen only applies to the consequences and implementation of the contract, not to the conditions for the birth or creation of the contract;
c. The law chosen to apply in the international contract is only regarding material law, not formal law or procedural law.

When a dispute occurs related to the international contract, the formal law or procedural law for resolving the contract dispute is still the procedural law of the country where the dispute is resolved. This is known as the term judge's law or lex fori. However, the substantive law for resolving contract disputes is the law chosen by the parties in the contract.

Settlement of joint venture disputes through the courts often causes dissatisfaction for the losing party because the judge in court must first determine the lex cause (the law that should apply) and sometimes the lex cause is not so familiar to the judge or to one of the parties, not to mention the existence of non-juridical factors that greatly influence the judicial process so that these conditions can result in less than satisfactory decisions. To overcome this, the parties can make a choice of law so that it is hoped that they can obtain a satisfactory decision in resolving disputes arising in joint ventures.

In its application, the choice of law in a joint venture dispute can be done in various ways, namely (Adolf, 2007):

a. Express choice of law, which occurs when the parties expressly include a choice of law clause in the contract and therein affirm a certain legal system that they choose.
b. Tacit choice of law, which occurs when the parties do not specifically make a choice of law clause in the contract. To find out if there is a certain choice of law that is stated tacitly, it can be concluded from the intent, or provisions and facts contained in a contract.
c. The choice of law is left to the court, where this alternative can be taken when the parties fail or have difficulty in reaching an agreement on the law to be chosen.
d. There is no choice of law, although it will not affect the status or validity of a contract. However, the absence of a choice of law in the contract indicates that the contract is incomplete.

The competence of Indonesian judges in trying civil cases that have foreign elements is not specifically regulated by the HIR, which is the procedural law currently applicable to Indonesia. However, the HIR regulates the basis for determining the relative competence of the court referring to the principles stipulated in Article 118 HIR in conjunction with 142 RBg in conjunction with 99 Rv. Starting from Article 100 Rv, the scope of the authority of the Indonesian court is not limited to Indonesian citizens alone but includes foreigners or foreign citizens who are residents of Indonesia and even those who do not reside in Indonesia (not Indonesian residents). They can be brought as defendants before an Indonesian court or judge on the condition that the dispute arises from an agreement or contract made or made in Indonesia, or an agreement made anywhere with an Indonesian citizen. However, this is if the contract does not include a choice of forum for dispute resolution. Generally, the jurisdiction of a country is recognized as covering territorially all people and objects within the borders of its territory. In the case of legal facts in an international business contract that does not include a choice of forum indicating stronger connectivity factors to Indonesia, then the Indonesian court has the authority to try the international business contract (Fortuna, 2017). Thus, the legal process will be carried out based on positive law in Indonesia.

In essence, the choice of law is important in resolving international business contract disputes, which in this case is a joint venture agreement. The freedom for the contract actors to choose the law used as a settlement, while still being limited by applicable provisions and norms, will provide more satisfactory results for both parties.

D. Conclusion

Joint venture agreement between foreign and national investors aims to form a joint venture company and carry out its economic activities as a legal entity and can be used as a reference and basis for the parties to take other legal actions. The legal entity stipulated by UUPM for foreign-capitalized joint venture companies is a limited liability company (PT), which is regulated in Law Number 40 of 2007 concerning Limited

Liability Companies. The joint venture agreement causes the parties to have an obligation to provide benefits to the other party and vice versa. The joint venture agreement also regulates the form of the cooperation agreement and the parties make a deed of establishment and articles of association based on the Limited Liability Company Law.

In a joint venture dispute, the choice of law, which is the law chosen by the parties in the contract as a tool to interpret the contract and to resolve if a dispute occurs, is implemented because it meets the principles of freedom of contract, practical, legal certainty and determines the certainty of lex cause. Where in its application the choice of law in a joint venture dispute can be done explicitly, secretly, submitted to the court and there is no choice of law.

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