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Judicial Review of The Binding Force of Foreign Companies Shares Transfer Upon Control of The Assets in Indonesia

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Abstract—In the digital industry era, it is very easy for business actors to choose the law of a country where a company will be registered upon various considerations such as the efficiency factor and a range of benefits derived from the chosen law. If a contract involves two legal subjects with different citizenships, then there will be two different legal systems, namely a foreign law and the national law of a particular country. This can certainly lead to international civil law issues, because the parties bring their respective legal systems into the contract. They can choose their national law or a foreign law as long as it does not conflict with public order or the compulsory rules. For agreements with transnational aspects, this choice of law issue becomes important. Not every foreign party feels comfortable if the agreement is construed according to the Indonesian law. A foreign legal forum for an agreement involving Indonesia is valid and binding if it has been agreed upon by the parties and covered in a clause in the agreement. Some business actors prefer and agree to choose the country of Bermuda as the legal home of their company for certain reasons. The research questions investigated in this study are: (i) What is the regulation of transfers of shares of foreign companies incorporated in Bermuda? (ii) Are transfers of shares of foreign companies incorporated in Bermuda legally binding upon the assets of companies domiciled in Indonesia? This study employs the normative legal research method. Normative legal research is guided by the characteristics of the object of the research, yet remains limited by the expected outcome of the norms initially established. The approaches used in this study are (i) the analytical and conceptual approach and (ii) the comparative approach, whereby a comparison is made between the application of the corporate law of Bermuda and the Law of the Republic of Indonesia No. 40 of 2007 on Limited Liability Company. Sources of legal materials used in this study include related literature, journals, articles and theses that are relevant to the subject matter. The theories applied in investigating the problems in this research are the transnational theory and economic-legal theory. Through this research, it will be possible to determine the regulation of transfers of shares of foreign companies incorporated in foreign countries (in this case Bermuda) and the binding force of such transfers upon the assets of companies domiciled in Indonesia.

Keywords: Share transfer; company's asset; arbitration dispute

Introduction

Upon the execution of a cooperation contract, a commitment is created between the parties to the contract in which their rights and obligations are established in accordance with the applicable laws and regulations of a country where the company or legal entity is registered.

In business practice, the sources of law for contracts include two main aspects: (i) the contract (agreement) itself, which serves as the main source of law, by which each party is bound to submit to the contract that has been mutually agreed upon, and (ii) freedom of contract, by which the parties are free to create and determine the contents of the contract they agree upon.

The essential things of a contract are the existence of an agreement and rights and obligations to perform something (contractual rights and obligations). There are certain business actors who have agreed to choose Bermuda as their company's legal home for a certain reason. The country of Bermuda is a British overseas territory in the north Atlantic Ocean. It is located about 933 km from the coast of North Carolina, the United States of America. There must be an agreement to choose a particular country as a legal home for the company to be registered in. The choice of law that has been agreed upon in a business contract serves as the law for the parties (pacta sunt servanda). Therefore, every transaction, business activity, and right and obligation of the parties must be based on the agreed business contract. The same applies to share transfer transactions, with provisions that are different from the provisions concerning share transfers applicable in Indonesia pursuant to the Law of the Republic of Indonesia No. 40 of 2007 on Limited Liability Company (hereinafter referred to as "Law on LLC").

The dynamics of the fast-growing business and economy is one of the factors causing disputes between the parties involved. Disputes occur due to differences in the interests of each party, where one party believes that their interests are not the same as the interests of the other party. Every dispute that arises always demands that a quick resolution and settlement be achieved, otherwise, as a result, there will be inefficient economic development, decreased productivity, downturn in the business world, and increased production costs. Sometimes, a sale and purchase transaction or a share transfer transaction is carried out in accordance with the will of the shareholders, and at other times there are things that happen not in accordance with the will of the parties with respect to a transfer of shares in a foreign company.

Method

This study employs the normative legal research method, that is examining the law from an internal perspective with the object of research being a legal norm (I Made Pasek Diantha, 2016). Legal research is a process to identify legal regulations, legal principles, and legal doctrines in order to address the legal issues at hand. Normative legal research functions to present legal arguments when there is void, obscurity, and conflicts of norms.

The approaches used in this research are (i) the analytical and conceptual approach, whereby all problems are investigated based on concepts, theories, principles, and the applicable laws and regulations, (ii) the comparative approach, whereby a comparison is made between the application of the corporate law of Bermuda and the Law of the Republic of Indonesia No. 40 of 2007 on Limited Liability Company.

Discussion

The Regulation of Transfers of Shares of Foreign Companies Incorporated in Bermuda

The researchers will discuss the comparison between the procedures for transferring shares from a limited liability company in Indonesia, and that there are differences between the two processes of share

transfer. Article 1 paragraph 1 of the Law on LLC reads as follows: "A limited liability company, hereinafter referred to as the Company, is a legal entity which is a capital alliance, is established based on an agreement, conducts business activities with authorized capital which is entirely divided into shares, and fulfills the requirements set forth in this law and its implementing regulations." A limited liability company is a form of cooperation of several people that is established based on an agreement in which they have agreed to establish a limited liability company and jointly carry out the cooperation in accordance with the agreement. The company as a legal entity has authorized capital, which is the amount of capital mentioned or stated in the company's Deed of Establishment and Bye-Laws.

The General Meeting of Shareholders (GMS) is an organ of the company that has exclusive authority not given to the company's directors and commissioners. The authority of the GMS is regulated in the Law on LLC and the company's Bye-Laws. In concrete form, the GMS is a forum where shareholders have the right to receive reports/statements about the company, both from the directors and the commissioners. These reports/statements serve as the basis for the GMS to determine the company's policies and strategies in making decisions as a legal entity. In the GMS forum, the mechanism for presenting reports/statements and making decisions is arranged in an organized and systematic fashion according to the meeting agenda. In the GMS forum, participants cannot deliver reports/statements and make decisions outside the meeting agenda unless the GMS is attended by 100% of shareholders and they agree to the addition of the agenda item unanimously.

In principle, the GMS must be held in Indonesia, that is at the company's legal domicile or the company's main place of business. In addition, the GMS can also be held through electronic media, such as teleconferences, if the shareholders cannot be present at the same place at the same time. For each GMS, minutes of meeting must be prepared and signed by all meeting participants.

Shares represent the amount of money invested by investors in a company. On this investment, shareholders will generally receive returns from the Company in the form of dividends in proportion to the amount of money they have invested. Every share issued by the company has at least one voting right. However, the company can also determine if the voting right should be greater or smaller, as long as it is provided for in its Bye-Laws. Although each share has at least one voting right, voting rights do not apply to the following shares:

Shares that are controlled entirely by the company;

The shares of the holding company that are controlled by its subsidiary, either directly or indirectly;

The shares of the company that are controlled by another whose shares are directly or indirectly owned by the company.

In the 2007 Law on LLC it is stipulated that the GMS can only be held if more than half (½) of all shares with voting rights are present, unless the Bye-Laws requires a greater quorum. If the quorum is not reached, the board of directors may make a notice of a second GMS. The resolution of a GMS is adopted by means of deliberation to reach consensus. In the event that the deliberation fails to reach consensus, then the resolution is valid if more than half (½) of the total number of votes cast are in favor of it. A GMS to amend the Bye-Laws can be held if at least 2/3 of the total number of shares are present at the meeting, unless the company's Bye-Laws requires a greater quorum.

The regulation of transfers of shares of limited liability companies is set forth in Article 56 of the Law on LLC, as follows:

"Transfers of rights to shares shall be carried out by a deed of transfer of rights."

"Deed of transfer of rights as referred to in paragraph (1) or a copy thereof shall be submitted in writing to the Company."

"The Director must record the transfer of rights to shares, the date and day of the transfer of rights in the register of shareholders or a special register as referred to in Article 50 paragraph (1) and paragraph (2), and notify the changes in the composition of shareholders to the Minister to be recorded in the Register of Companies no later than 30 (thirty) days from the date of the transfer of rights is recorded in the register of shareholders."

Article 57:

"In the company's Bye-Laws, the requirements for transferring rights to shares can be set forth, namely:

The requirement to offer the shares first to the existing shareholders with certain classifications or other shareholders;

The requirement to obtain prior approval from the Company's Organs; and/or

The requirement to obtain prior approval from the authorized agency in accordance with the laws and regulations."

"The requirements referred to in paragraph (1) shall not apply in the case that the transfer of rights to shares is caused by a transfer of rights by law, except for the requirement referred to in paragraph (1) item c with regard to inheritance."

A transfer of shares of a company in Indonesia must be preceded by making an offer of the shares to be transferred to the other shareholders in writing within a period of 30 days after the written offer is served by registered mail. If within this period there is no response from the other shareholders, then the process continues with making a request to hold a General Meeting of Shareholders (GMS) to obtain its approval for the transfer of shares to a third party. After the letter of approval for the transfer of rights has been completely signed by all shareholders, a deed of transfer of rights can be executed for the transfer of the shares.

The instrument of transfer of foreign companies' shares is regulated in the company's Bye-Laws, which constitutes the rules or laws created between organizations or communities, or in their cooperation agreements, to set forth provisions between themselves. Following is an example of clauses governing transfers of shares found in a Bye-Laws between parties to an agreement, which are taken from the Bye-Laws of a foreign company incorporated in the country of Bermuda.

Instrument of Transfer:

"An instrument of transfer shall be in the form or as near thereto as circumstances admit of Form "C" in the Schedule hereto or in such other common form as the Board may accept. Such instrument of transfer shall be signed by or on behalf of the transferor and transferee provided that, in the case of a fully paid share, the Board may accept the instrument signed by or on behalf of the transferor alone. The transferor shall be deemed to remain the holder of such share until the same has been transferred to the transferee in the Register of Members."

"The Board may refuse to recognize any instrument of transfer unless it is accompanied by the certificate in respect of the shares to which it relates and by such other evidence as the Board may reasonably require to show the right of the transferor to make the transfer."

Following is an example of clauses containing restrictions on transfers of shares in a Bye-Laws:

"The Board may in its absolute discretion and without assigning any reason therefore refuse to register the transfer of a share. The Board shall refuse to register a transfer unless all applicable consents, authorizations and permissions of any governmental body or agency in Bermuda have been obtained."

"If the Board refuses to register a transfer of any share the Secretary shall, within three months after the date on which the transfer was lodged with the Company, send to the transferor and transferee notice of the refusal."

Transfers by joint holders:

"The joint holders of any share or shares may transfer such share or shares to one or more of such joint holders, and the surviving holder or holders of any share or shares previously held by them jointly with a deceased Member may transfer any such share to the executors or administrators of such deceased Member.

The regulation of transfers of shares in a Bye-Laws can be made by filling out a form referred to as Form C in the Article as attached to the Bye-Laws for approval by the Board, which refers to the Board of Directors.

Upon comparison between the regulation of transfers of shares contained in Bye-Laws and the procedure for transfers of shares of a PT (Limited Liability Company) in Indonesia according to the Law on LLC, both have been found to have differences. In Article 57 of the Law on LLC it is stated that transfers of shares must be conducted with the approval of the company's organs, which in this case is the General Meeting of Shareholders (GMS), the Board of Directors and the Board of Commissioners. It is also outlined in Article 56 a set of procedures for applying for amendments to the company's Bye-Laws with the Minister, followed by a ratification of the deed of transfer of rights to shares. Meanwhile, the sample Bye-Laws which is made according to the law of Bermuda have fundamental differences with respect to the procedure for transferring shares, and it seems that transfers of shares according to Bermuda law are more practical and simpler. The procedure for share transfers as laid out in the Law on LLC, in the opinion of the researchers, is more systematic and takes into account the rights of each of the Directors and Shareholders in the process of transfer of company's shares because it involves all parties. However, it is not as efficient and quick compared to the regulation of share transfers in accordance with the provisions of the country of Bermuda.

Richard A. Posner in his book Economic Analysis of Law presents a legal analysis with the support of the economic science to broaden the legal dimension. He has been said to also rehabilitate Bentham's axiom, albeit in a form that is more modified and made parallel as a normative principle that is comparable to a legal. Posner has also been said to be a driving force of law and economics since his book Economic Analysis of Law, which was published for the first time in 1973. Not much different from other law and economic experts, he developed post-Coasian teachings and economics. Posner's ideas focused more on the economic efficiency to explain law (common law). He argued that if law was better known it would be easier to analyze the implications of its development. To defend his stance, Posner developed law and economics through his book The Economics of Justice (1981) (Fajar Sugianto, 2014:26). Literally, the concept of efficiency is always associated with the notion of thrift in relation to the economic valuation of goods and services (Fajar Sugianto, 2014:52). When the legal regulation is able to expedite interactions and transactions, the legal regulation is considered efficient. Posner's idea of efficiency is reflected in the characteristics of the litigation process through the share transfer procedure by Bermuda law, which is often considered to be more efficient compared to the share transfer procedure in Indonesia.

Binding Force on the Assets of Foreign Companies Domiclied in Indonesia

An arbitral award is binding on the parties in accordance with the arbitration agreement that has been agreed upon before the dispute arises or the agreement made between the parties after the dispute. A decision, either an arbitral award or a court decision, can only be executed after it becomes final. However, due to certain or urgent matters or circumstances, sometimes an award or decision can be executed

immediately after it is passed, for example a propositional decision. If the parties have agreed to settle their dispute with an international arbitration institution, then they must submit to the arbitral award.

In many countries, however, the same principle is recognized only with an important reserve: the arbitration clause will be denied effect if it is regarded as a normal thing that the contracting party should have been unware that it was in the general conditions or rules. An arbitration clause must be understood by each party so that there will be no confusion in the future if a dispute occurs. A foreign arbitral award will be denied recognition and execution if the foreign arbitral award applied for is not yet final and binding upon the parties. An arbitral award may not yet be final and binding upon the parties due to continued legal actions such as an appeal or cassation.

There are several principles known in the enforcement of foreign arbitral awards, including: (i) the Principle of Executorial Kracht, namely that an arbitral award has executorial power, as expressed in Article 2 of the Regulation of the Supreme Court No. 1 of 1990. According to this article, foreign arbitral awards are equal to court decisions that are final and binding; (ii) the Principle of Reciprocity, which is a basic principle laid out in the 1958 New York Convention that every state that is a signatory to the 1958 New York Convention has the right to declare in the ratification the recognition and execution of foreign arbitral awards based on this principle; (iii) the Principle of Restrictions, which is a principle laid out in the Regulation of the Supreme Court No. 1 of 1990 concerning restrictions on foreign arbitral awards, by which foreign arbitral awards are restricted only to disputes within the scope of businesses; and (iv) the Principle of Public Order, which is laid out in the Regulation of the Supreme Court No. 1 of 1990, by which the enforcement of a foreign arbitral award is allowed only if it does not conflict with public order.

There are a number of very popular international arbitration institutions, one of which is the Singapore International Arbitration Center (SIAC), which the world society has approved as an institution that tries and resolves international trade disputes related to investment issues. Each of these institutions has different dispute resolution mechanisms, but they have similar characteristics, in that they apply the same principles of international trade, and prioritize the achievement of the quickest possible settlement with due consideration towards the implications of the dispute for the international trade. The dispute resolution mechanisms, as well as the application of the international trade principles in resolving cases, are some of the main guidelines for successfully defending one's rights when disputing with other parties.

Arbitration as a stand-alone dispute resolution agency has been known for quite a long time by legal experts all over the world. One of them is Emmanuel Gaillard who is a well-known professor of law in the field of arbitration in France. The transnational theory is also often associated with the International Law, in that today private international relations and public national law are very difficult to distinguish, as private international relations are often found in public international relations. A country (or other public legal entities) sometimes engages in civil relations, whereas individuals under the modern international law are sometimes deemed to have rights and obligations under the international law.

This theory looks at the states as a whole, not separately or individually. According to this theory, states generally recognize the validity of arbitration and are willing to recognize an arbitral award if it fulfills the requirements for the validity of an arbitration agreement, which fulfillment serves as the basis for determining the validity of an arbitral award. Adherents of this theory hold that in a heterogeneous world, the nationalities of the parties, the place of arbitration, the nationality of the arbitrator and the applicable law are different. Therefore, there is good reason to give each state, including the state where an arbitration process takes place, its own authority to regulate the arbitration process.

This theory recognizes the freedom of arbitration to apply transnational procedural rules. In this way, each party to the dispute must recognize and implement the resulting international arbitral award, considering that this award is not only valid in the place where the arbitration process is carried out but also binds each party no matter which country they are from.

Jakubowski, a Polish scholar, holds a very important position in the field of arbitration. He has served

as the chairman of the Polish arbitration body, and also as a member of the world's leading international arbitration institutions, the Permanent Court of Arbitration and the International Council for Commercial Arbitration. Jerzy Jakubowski views arbitration as a dispute resolution institution used by the nations and in many cultures worldwide. That is why the arbitration institution is seen as an artificial institution and man-made creation that is universal.

In his exposition, Jakubowski also stated that the arbitration rules existing in all countries were not uniform, but they showed harmony and legal certainty. Arbitration is also a human product to meet the needs and desires of humans to resolve disputes between parties by a neutral third party to whom trust and authority are given by the parties.

The development of harmonization efforts in the field of arbitration is also apparent with the birth of the 1958 New York Convention, which is a legal product that creates uniformity and removes obstacles for the countries in terms of recognition and implementation of foreign arbitral awards. The intent of the government when accessing the 1958 New York Convention was very clear, which is, among others, to be bound by the provisions of the Convention and to reciprocally honour the awards made in foreign countries.

Based on the foregoing, it can be known that the principle of autonomy of the parties in contract law, especially in making a choice of law, has been universally recognized. Although there are differences in the approach taken in the method of choice of law, in principle the law that applies to the parties in a contract is the law they have chosen. For example, if the parties have determined in a clause that the law applicable to the contract is to resolve disputes through SIAC, then the choice of law must be obeyed by the parties.

The arbitration body will function if the parties agree to submit their dispute to it. Each country has sovereignty in recognizing and enforcing every international arbitral award, as contained in the theory of State Sovereignty by Hegel. Hegel argues that a state is unique, because it has a logic, reason and system of thinking and behaving that are different from any other political organ. Hegel adheres to the principle that independence is nothing but the recognition and adoption of universal substantive objects such as rights and laws and the production of reality that corresponds to them which is the State. An arbitral award is binding on each party to the dispute and can be enforced in the country where the object of the dispute or assets of the company are located and bears legal certainty due to its final and binding nature.

Conclusion

According to the Bye-Laws that has been agreed upon by the parties in accordance with Bermuda law, a format that has been mutually agreed is used as an instrument of transfer of shares, which must be signed by or on behalf of the transferor and the transferee, with the provision that in the event that the transferred shares have been fully paid for, the directors and commissioners can accept only the instrument signed by or on behalf of the transferor. The transferror continues to be considered as the holder of the shares until the shares transferred to the transferee have been registered in the register of shareholders.

The principle of the parties' autonomy in the practice of contract law, in particular in making a choice of law, has been universally recognized, and the same applies to foreign companies incorporated in Bermuda. Although there are differences in the approach taken in the method of choice of law, in principle the law applicable to the parties in a contract is the law that they have chosen, in this case an arbitration agreement. Arbitral awards are binding upon each party to the dispute and can be enforced in the country where the object of the dispute is domiciled and bears legal certainty because of its final and binding nature.

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Reference

Batubara, S., & Purba, O. (2013). *Arbitrase internasional penyelesaian sengketa investasi asing melalui ICSID, UNCITRAL dan SIAC*. Raih Asa Sukses.

David, R. (1985). *Arbitration in international trade*. Kluwer.

Diantha, I. M. P. (2016). *Metodologi penelitian hukum normatif dalam justifikasi teori hukum*. Kencana.

Hardjowahono, B. S. (2013). *Dasar dasar hukum perdata internasional*. Citra Aditya Bakti.

Huala, A. (2012). *Hukum penyelesaian sengketa internasional*. Sinar Grafika.

Huala, A. (2014). *Dasar-dasar, prinsip & filosofi arbitrase*. Keni Media.

Law of the Republic of Indonesia No. 40 of 2007 on Limited Liability Company

Marzuki, P. M. (2005). *Penelitian hukum*. Fajar Inter Pratama Offset.

Saliman, A. R. (2005). *Hukum bisnis untuk perusahaan: Teori dan contoh kasus*. Kencana.

Soekanto, S. (2008). *Faktor-faktor yang mempengaruhi penegakan hukum*. Raja Grafindo Persada.

Suhelmi, A. (2001). *Pemikiran politik barat: Konsep negara integralistik menurut Hegel*. Gramedia.

Suriasumantri, J. S. (2015). *Ilmu dalam perspektif*. Yayasan Pustaka Obor Indonesia.

Sugianto, F. (2014). *Economic analysis of law*. Kencana.

Winarta, F. H. (2012). *Hukum penyelesaian sengketa arbitrase nasional Indonesia dan internasional*. Pena Grafika.

Yahya, H. (2011). *Hukum perseroan terbatas* (3rd ed.). Sinar Grafika.