

THE STATUS OF FOREIGN ARBITRATORS UNDER INDONESIAN LAWS

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ABSTRACT

Foreign arbitrators in Indonesia have never been questioned before with regard to their status or legality. The main aim of this article was to analyze the status of foreign arbitrators in the light of the recent Supreme Court of Indonesia's decision on the *PT. Timas Suplindo case* (2017). The method used in this article was descriptive-normative of the subject analyzed supported by the case-law, in particular the decision of the Supreme Court of the Republic of Indonesia concerning the issue of foreign arbitrator. This article concluded, while there is an absence of regulation concerning the status of foreign arbitrator in Indonesia, the parties should include and state the legality of the foreign arbitrator in their arbitration clause. This article also recommended, the Arbitration Law should be supplemented with the provision on the status of foreign arbitrator in the future amendment of the Law.

Keywords: foreign arbitrators; Indonesia; status.

INTRODUCTION

A question concerning the status of foreign arbitrators settling commercial dispute rarely happened in Indonesia. Their status has never been contested in Indonesian courts. Practice of arbitration whose chairman or member of the tribunal are foreign arbitrators has been long well recognized. However, in a recent dispute before a domestic court challenging the legality of the foreign arbitrators acting as arbitrators to hear the dispute under BANI's (Indonesian National Board of Arbitration) rules of procedure is truly an appealing case. *PT Timas Suplindo v. BANI & Leighton Offshore Pte Ltd* (2017) is the first case concerning the status of foreign arbitrators debated in Indonesian courts.¹

The case was appealing because it was the first troubling case where the status of foreign arbitrator was questioned under Indonesian court. The case raised a legal dispute: whether a foreign arbitrator under the present Indonesian law was allowed to act as arbitrator. This article was, as far as the status of arbitrator is concerned, has never been written or researched in Indonesia. The articles analyzing the status of foreign arbitrators published elsewhere has also been rarely written. The main reason for this lacks of analyzing mainly because the status of arbitrators have never been disputed under national law or international law, including international commercial law. The arbitrator has been chosen and acted as one mainly because he or she is chosen by both parties in dispute. It is the private agreement and the freedom of the parties including the autonomy of the parties to choose whomever person as they consider fit to act as the arbitrator in the dispute. There is however, one article published in a proceeding that the author found in the web. This included: Ivan Cisar, "Status of Arbitrator in Public International Law," *An article published in proceedings in*

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¹ Decision of the Supreme Court of the Republic of Indonesia No. 1238 B/Pdt.Sus-Arbit/2017, dated 27 November 2017. ("Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbit/2017"). chrome-

Czech Republic (2010).² This article however discussed the status of arbitrator sitting in an international arbitration court under international law. The present article discussed and argued the status of (foreign) arbitrator under Indonesian Arbitration Law.

The *PT Timas* case began when *Leighton Offshore Pte Ltd*, the claimant, a foreign company, filed a petition of arbitration to BANI in 2017 against *PT Timas Suplindo*, the respondent, an Indonesian company. The dispute arose out of a construction contract between the parties. The agreement contained an arbitration clause which referred the dispute to BANI. The location of arbitration is Jakarta. The language used in the arbitration is English. The arbitrators should be any nationality. Article 37.2 of contract reads:

“Any dispute which cannot be settled amicably by the Company and its Contractor within thirty (30) days of the reference to the Managing Director of the Company and the Contract under clause 37.2 (c), such dispute shall be finally settled by three (3) arbitrators appointed in accordance with the Rules of Arbitration of the Indonesian National Board of Arbitration (BANI). The arbitrators may be of nationality.”³

BANI registered the petition of arbitration in accordance with its Rules. Following this petition, the claimant appointed a foreign arbitrator listed under BANI list of arbitrators. He was a Singaporean lawyer, residing in Singapore. The respondent appointed an Indonesian arbitrator, residing in Jakarta, listed under BANI list of arbitrators. BANI appointed the chairman of the arbitration tribunal. He is an American lawyer, residing in Jakarta. BANI issued the decree on the composition of the arbitration tribunal accordingly.

The respondent however challenged the composition of the foreign arbitrators in the arbitration tribunal. He argued the appointment of foreign nationals acting as arbitrators was a violation of Indonesian labour law and immigration law. The respondent filed a letter of challenge to the chairman of BANI. But BANI rejected it. Failing to challenge the composition of the arbitrators in BANI, the respondent brought this issue to the domestic court of South Jakarta. The main legal issue arose from the *PT Timas Suplindo* case was primarily on the issue of legality of foreign arbitrator to hear the dispute in Indonesia. This short article tried to analyse the status or legality of foreign arbitrators in Indonesia: whether foreign arbitrators are allowed to practice as arbitrators under Indonesian laws.

METHODS

The present article employs the descriptive-normative approach as its primary methodological framework. This approach is harnessed to elucidate the standing of foreign arbitrators within the context of Indonesian jurisprudence. In order to elucidate the underlying objectives of this scholarly discourse, pertinent case law is likewise introduced, thereby affording readers a comprehensive understanding of the position of foreign arbitrators within the Indonesian legal framework.

² [Http:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Cisar_Ivan_\(4732\).pdf](http://chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Cisar_Ivan_(4732).pdf) (Access. 28 August 2023)

³ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 31.

DISCUSSION

The Concept of Arbitration

Arbitration has been in existence for a long time. The use of arbitration has been recorded in the Roman Empire.⁴ Lord Saville of Nowsdigate argued that arbitration was possibly the most ancient tools the people found to solve their dispute in addition to courts. Lord Saville stated:⁵

“Arbitration is one means for resolving disputes, perhaps the oldest form of acceptable alternative dispute resolution, *i.e.*, an alternative to the state court system.”

Arbitration has been widely used in the beginning of the 20th century where the commerce had been significantly growth and transnational in nature. The impetus of the use of arbitration worldwide reach its central development when the United Nations concluded the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958. The Convention was the first international agreement which was successful in terms of the number of States parties. More than 170 States have ratified the Convention in the beginning of 2023s⁶. Indonesia ratified the Convention in 1981.⁷

The Convention regulates two main issues: the status of arbitration agreement and the recognition and enforcement of foreign arbitration awards. The Resolution adopting the Convention however, recognized that the New York Convention would not be successful without the harmonisation of arbitration law in the world.⁸ The implementation of the provisions of the Convention was further laid down in the UNCITRAL Model Law on International Commercial Arbitration of 1985 (“UNCITRAL Model Law”). The UNCITRAL Model Law among others laid down the foundation of arbitration law to be adopted by the States. The adoption of the Model Law would be to create harmonization of arbitration law in the world. The harmonization would include all aspects of provisions concerning arbitration.

The harmonization of arbitration law in the world would establish what a prominent scholar, a leading author on arbitration, a “universality of arbitration” the term coined by Prof. Jerzy Jakubowski.⁹ This theory of universality indicates that arbitration has been achieving universal

⁴ The main reason for the rise of arbitration was due to its benefits arbitration has been giving, these include “confidentiality, fast process, cheap and its awards are enforced, as Susan Franck put it: “Arbitration has historically been extolled as a confidential, quick, and cost efficient method for resolving disputes, which creates an internationally enforceable award.” Susan D. Franck, “The Role of International Arbitrators,” 12 *ILSA Journal of International & Comparative Law* 500 (2006).

⁵ Lord Saville of Nowsdigate, “Introduction,” dalam: Ronald Bernstein (eds.), *Handbook of Arbitration Practice*, London: Sweet and Maxwell, 3rd.ed., 1998, hlm. 4.

⁶ <https://www.newyorkconvention.org/countries>. Access. 30 August 2023.

⁷ President Regulation No. 34 of 1981 on the Ratification of the New York Convention of 1958.

⁸ Under the Resolution No 40/73, the General Assembly of the United Nations used the term “*uniformity of the law*”, instead of the harmonization. The Resolution among others provided: “2. *Recommends* that all States give due consideration to the model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”

⁹ Perzy Jakubowski, “Reflections on the Philosophy of International Commercial Arbitration”, in: Jan C. Schultz and Albert J.V. den Berg, *The Art of Arbitration*, The Netherlands: Kluwer, 1982, p. 175-194, also quoted in Huala Adolf, *Dasar-dasar, Prinsip & Filosofi Arbitrase (Basics, Principles and Philosophy of Arbitration)*, Bandung: Keni Media, 2nd.ed., 2015, p. 49-69.

acceptance and similar law, even its rules, concerning their proceedings. Universality theory would also apply to all the arbitration proceedings including the choice of arbitrator by the parties. Another theory that seemed to be somewhat similar with the universality theory but a rather sophisticated theory is the Autonomous Legal Order as coined by Prof. Emmanuel Gaillard.¹⁰ Gaillard argued, international arbitration is not subject to the national legal order. It is transnational legal order in nature. The national law can not affect the international arbitration including the status of arbitrator. Gaillard further argued, the arbitrator acting its judicial function whose authority is granted by the parties, serves its role for the sake of the international community. As Gaillard put it:¹¹

“... the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labelled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that the place or places of enforcement.”

This theory seemed to be more plausible in this present article. The author would apply this theory as the “analyzing tools” for the present issue of the status of foreign arbitrators.

The Status and Regulation of Foreign Arbitrator

The status of foreign nationals acting as arbitrators to hear international arbitration disputes have never been an issue.¹² On the same vein, the status of foreign arbitrators and their nationality has never been challenged in many States. These include in jurisdictions of of the States in Asia-Pacific.¹³ The only exception where the foreign nationals are prevented to act as arbitrator is found in Japan. The Japanese Law requires only Japanese Lawyers (“bengoshi”) are qualified to act as arbitrators.¹⁴ Other countries such as North Korea, *Indonesia* or Taiwan do not mention the nationality requirement to sit as arbitrator in arbitration proceedings.¹⁵

The absence of disputes concerning the status of foreign arbitrators solely is because there has been a uniform acceptance among states. The states have been in common understanding that arbitration is a private matter. Arbitration is established only if the parties agree to it. The principle of party autonomy plays its decisive part. It is the autonomy of the parties in dispute to decide where their dispute to be heard and decided. This includes the choice of arbitration including the arbitration rules regulating the proceedings of the arbitration. Under the arbitration rules, one of the provisions regulating the proceedings is the choice of arbitrator. Indeed, it is also the autonomy of the parties to choose their arbitrator(s). The autonomy of the parties to choose the arbitrators should not

¹⁰ Emmanuel Gaillard, *Legal Theory of International Arbitration*, Leiden: Martinus Nijhoff, 2010, p. 35.

¹¹ *Ibid.*

¹² The issues surrounding the qualification of arbitrators are mainly the arbitrator’s experience in law and practice in arbitration, not the issue of nationality. See a.o.: Thomas Schultz & Robert Kovacs, “The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth,” 28: 2 *Arbitration International*, 170 (2012).

¹³ Simon Greenberg, et.al., *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge: Cambridge U.P., 2012, p. 256 *et seq.* (Greenberg et.al., also stated, the (foreign) arbitrators are not required to have legal competence or legal training to act as arbitrators, *Ibid.*)

¹⁴ Simon Greenberg, et.al., *Ibid.*, p. 257.

¹⁵ Simon Greenberg, et.al., *Ibid.*, pp. 257-258. (Simon Greenberg commentary on Indonesian law above is right. They quoted Article 12 of the Indonesian Arbitration Law where no nationality requirement is mentioned. The author argued, article 12 under the Arbitration Law is applicable to domestic arbitration. The only articles under Indonesian Arbitration Law regulating international arbitration are articles 66 to 69. Mainly these provisions lay down requirement for the enforcement of foreign arbitral awards).

prevent the autonomy of the parties to choose whomever arbitrator including their nationality in particular in international arbitration to act as arbitrator.

The main international legal instrument concerning the choice of arbitrator is found in the UNCITRAL Model Law on International Commercial Arbitration. Article 11 para 1 of the UNCITRAL Model Law provides: “No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.”¹⁶ Article 11 para. 1 UNCITRAL Model Law above provides that it is the agreement of the parties, as mentioned in the last sentence of this provision, to choose any person they deem right to act as arbitrator without due regard to their nationality. Since the UNCITRAL Model Law has reached its harmonization stage, it is plausible then to conclude that the nationality should no longer be a concern when the parties would like to appoint their arbitrators to settle their disputes at the place where arbitration is within a national jurisdiction.

The Proceedings before the Domestic Courts

The Claimant’s Position

PT Timas Suplindo, the claimant before the domestic court of Jakarta, argued, *Leighton Offshore Pte Ltd’s* choice of a foreign arbitrator and BANI’s decision to appoint an American lawyer acting as the chairman of arbitration was a violation of Indonesian labour law and immigration law. The claimant argued, according to Indonesian labour law, a foreign national acting as arbitrator in Indonesia, must have a working permit from the Indonesian ministry of manpower. He or she must also have a working visa from the Indonesian immigration office.¹⁷

The claimant further contended, according to Indonesian laws, every person working and get honorarium, must report it and pay the tax to the state’s treasury.¹⁸ To support his claim, the claimant quoted a recent report concerning a foreign national acting as expert witness before central Jakarta domestic court in a landmark criminal case in 2016.

In *Jessica Kumala Wongso case* (2016), the defendant’s lawyers, presented an Australian pathologist to act as an expert witness before the court. The prosecutor challenged this move. The expert when appeared before the court was flatly challenged and rejected by the prosecutor. The prosecutor argued, a foreign national coming to Indonesia to act as an expert, paid by a party, should

¹⁶ Italics added by the author.

¹⁷ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 5 and 23. The applicant quoted the Law No 13 of 2003 on Manpower and the Regulation of the Ministry of Manpower No. 16 of 2015 concerning the procedure for the employment of foreign workers. These law and regulation requires the foreign workers to obtain working permit from the Ministry of Manpower. The laws regulating immigration include Law No 6 of 2011 concerning Immigration and the Government Regulation No 31 of 2013 concerning the Implementing legislation of the Law No 6 of 2011 on Immigration. This law and government regulation requires BANI, as the employer of foreign nationals, to obtain the plan for the employment of foreign workers and its permit. The Law No 6 of 2011 also requires foreign workers to have temporary or limited stay visa issued by the government.

¹⁸ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 8.

have a working permit and working visa. The expert before giving his statement was apprehended and deported to his country and banned to enter Indonesia for six month.¹⁹

The Defendants' Position

1. BANI

There were three arguments BANI put forward to defend its position to appoint an American lawyer to be the chair of the tribunal. *First*, the claimant (*PT Timas Suplindo*) had failed to prove that there was a reasonable doubt about the arbitrators' independence or impartiality. These were the legitimate grounds for challenge of arbitrator according to BANI Rules and Procedure.²⁰

Second, arbitrator is a special profession, which is nationally and universally recognized. The status of arbitrator as a special profession is similar with arbitration or other alternative dispute resolution which are nationally and universally recognized. *Third*, the claimant had been notified about the composition of the arbitration tribunal. The claimant, according to the BANI Rules and Procedures was given 14 days to challenge the composition of the tribunal by providing sufficient documents or evidence to support it. The claimant however did not use this opportunity to challenge the appointed foreign arbitrators within the required time under the BANI Rules and Procedures.²¹

2. Leighton Offshore Pte Ltd

In his argument, Leighton Offshore Pte Ltd raised two main issues: the legal issue of the case and the competence of the domestic court to hear the dispute. First, he argued that immigration regulations did not prevent the appointment of an arbitrator not residing in Indonesia. Immigration issue did not have any relation with the issue of arbitration. Leighton Offshore Pte Ltd had the same position with BANI concerning the issue of the labour (working) permit with the Indonesian manpower for foreign arbitrators.

Second, he further stated, BANI has long experience and practice in appointing foreign arbitrators without any problem or challenge from any parties before. In addition, the appointment of foreign arbitrators had been an international practice found elsewhere.²² Third, with regard to the competence of the court, the defendant argued the (domestic) court did not have jurisdiction or competence to hear the dispute. He contended, since the

¹⁹ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 14.

²⁰ BANI's letter No. 16.3996/IX-BANI/HU-In, dated 23 September 2016 (Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 16). Article 12 BANI Rules and Procedures provides: "(1) Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to make such challenge shall so notify BANI in writing within 14 (fourteen) days from the time it is advised of the identity of such arbitrator, attaching documentation establishing the basis for such challenge. Or, if the information which forms the basis of the challenge becomes known to the challenging party thereafter, such challenge must be submitted within 14 (fourteen) days after such information becomes known to the challenging party." Cf., Article 12 UNCITRAL Model Law provides similar grounds for the challenge.under the title Grounds for challenge, namely the existence of "justifiable doubts as to his impartiality or independence".

²¹ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 16.

²² Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 9-10.

competence of the domestic court was questioned, according to Indonesian procedural law, the court should examine this issue first before considering the legal issue of the dispute.²³

He stated, the parties, the claimant and defendant, had agreed to refer their dispute to arbitration. This agreement was incorporated into an arbitration clause in the main contract. Arbitration institution to settle the dispute was BANI. The reference of the dispute to BANI would be also subject to BANI Rules and Procedures. Since the parties had specifically subject itself to the BANI Rules and Procedures, these rules (and procedures) should apply. On the other hand, the arbitration rules and procedures under Arbitration Law No 30 of 1999 did not apply to the present case. He contended, the objection of a party concerning the appointment of arbitrator should be addressed to BANI, not to the domestic court.²⁴

Decisions of the Courts

The Jakarta domestic court held, that it did not have any jurisdiction to hear and settle the dispute. There were several interesting arguments the court raised. *First*, the court opined before deciding to hear the dispute, the court needed to ensure itself that it had jurisdiction to hear the dispute.

Second, the court heavily relied upon the Arbitration Law No 30 of 1999 (on Arbitration and Alternative Dispute Resolution). Under the Arbitration Law, arbitration is a mechanism for the settlement of dispute outside the court based upon the arbitration agreement made in writing by the parties (Article 1).

The court referred to the arbitration clause agreed and signed by the parties, namely Article 37.2 (c) of the Contract. The court saw, this agreement had specifically mentioned BANI Arbitration as the means for the settlement of the dispute of the parties. The court therefore held, BANI was the proper forum to settle the dispute, not the court.²⁵ Against this decision, the applicant appealed. The Supreme Court did not see any mistake in the opinion of the domestic court. The Supreme Court agreed with the domestic court, that since the parties had agreed to settle the dispute to BANI, therefore BANI should be the forum to hear the challenge or objection of a party concerning the appointment of foreign arbitrators. The Supreme Court affirmed the domestic court's decision.²⁶

Some Remarks

Debate at the Courts

PT Timas Suplindo case (2017) is the first ever case where the status of arbitrators were disputed before the courts in Indonesia. This dispute, the challenge made by the applicant to court,

²³ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 30 (the defendant referred to article 125 (2) Indonesian (court) procedural law.

²⁴ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 30, 33.

²⁵ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 41.

²⁶ Decision of the Supreme Court No 1238 B/Pdt.Sus-Arbt/2017, *Ibid.*, p. 51.

surprised many. Since arbitration was practised and BANI the main arbitration institution was set up in 1977, there has never been a thought that the issue of nationality and immigration affecting foreign arbitrators might arise. Arbitration and arbitrators have been enjoying a full autonomy in Indonesia. The courts have been keeping its distance from arbitration.

The Indonesian Arbitration Law No 30 of 1999 is silent about the status of arbitrators in Indonesia, including foreign arbitrators chosen by the parties or appointed by the arbitration institution or arbitrators chosen on an *ad hoc* basis.²⁷ Indonesian Arbitration Law No 30 of 1999 only provides requirements for arbitrator. They include: a. Being authorised or competent to perform legal actions; b. Being at least 35 years of age; c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties; d. Having no financial or other interest in the arbitration award; and e. Having at least 15 years experience and active mastery in the field. (2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.²⁸

The international instrument on arbitration such as UNCITRAL Model Law on International Commercial Arbitration 1985 (2006) does not either see the significance of nationality of a foreign arbitrator in settling the dispute. It is the parties alone who decided and agreed who would become the arbitrator or arbitrators, foreign or local, to settle their dispute. Article 11 para. 1 of the UNCITRAL Model Law clearly provides: "*No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*"

What the UNCITRAL Model Law would like to stress is that the nationality should not become an issue in arbitration. The principle to be held is that it is the agreement of the parties or the autonomy of the parties to choose who would be their arbitrator to settle their dispute. This agreement includes the number of arbitrators, the seat and language of arbitration and the arbitrator's nationality.

The decision of the Indonesian courts above seemed to emphasize this point. The courts in reaching its decision relied on the agreement of the parties as embodied in their arbitration clause they have agreed. The arbitration clause had stated that the arbitrators can be any nationality to settle the dispute. The law of the country where the arbitration takes place should not hinder the arbitration or arbitrator, local or foreign arbitrators, to act as arbitrator to help the parties settle their dispute. Arbitrator is a noble profession ("*nobile officium*").²⁹ Arbitrators are also exercising "*quai judicial function*," similar with the judges (in national or international courts).³⁰

Unlike the judges of the courts, arbitrators are chosen by the parties primarily to help settle the traders in their dispute peacefully. The existence of the arbitration, including arbitrators, is to

²⁷ Indonesian Arbitration Law No 30 of 1999 only provides characteristic requirement of arbitrator. They include: a. Being authorised or competent to perform legal actions; b. Being at least 35 years of age; c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties; d. Having no financial or other interest in the arbitration award; and e. Having at least 15 years experience and active mastery in the field. (2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators. (Article 12).

²⁸ Article 12 Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution.

²⁹ Cf., Uga Draetta, *Behind the Scenes in International Arbitration*, New York: Juris, 2011, 115-116.

³⁰ Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, The Netherlands: Kluwer Law International, 2017, p. 109-110.

help solve the trade or commercial disputes in a peaceful manner. The peaceful settlement is essential to ensure that the trade or commerce could continue to grow. As many has stated it, the function of arbitration is to create peace in the trading world.

It is also interesting to see the characteristic of the arbitration clause. The main and the most important international instrument regulating the arbitration clause is the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958. The Convention honours the agreement of the parties. The Convention obliges the member states to recognize and enforce this agreement. Article II para. 3 of the Convention provides:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”³¹

The Indonesian Arbitration Law No 30 of 1999 has two (2) main provisions concerning the arbitration agreement and its relation with the courts. Article 3 of the Arbitration Law provides that “the District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement.”

The second important provision is article 11 para. 2. It provides that 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 the Arbitration Law. The imposition of the obligation upon the courts to stay away from arbitration is exceptionally important. It is important because the Arbitration Law sets aside the Law No 48 of 2009 on the Power of Judiciary. The later provides that the court shall not refuse to hear and try the dispute submitted to it (Article 10). It seems right to see that the agreement of the parties has blocked the power of judiciary (national court). The agreement of the parties to arbitrate has stopped the power of the courts to adjudicate or try a dispute.

A question might appear as follows. Can the arbitration agreement also set aside the other laws such as the immigration law or labour law? The issues of immigration and labour touch the public interest of a state. The issue of immigration concerns the power of a state to ensure that any person entering their country will not endanger its laws, security, health and other national interests. Immigration issue is therefore is too important that the other laws may set aside this law. In *PT Timas Suplindo* case above, the courts, domestic court and the Supreme Court, have not came to discuss the legal issue of the dispute, ie., the status or legality of foreign arbitrators in Indonesia, since the court has decided that it does not have jurisdiction to try the dispute.

Second, the issue of labour is also crucial. Labour issue concerns with the welfare of the the state’s citizen. This issue seems too sensitive that the certain law set aside this law. Similar with the

³¹ UNCITRAL Model Law follows suit as embodied in Article 8 para. 1: “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

issue of immigration above, *PT Timas Suplindo* case did not raise this issue before the courts. The decision of *PT Timas Suplindo* case did not either give any guidance concerning the status of foreigners. A preliminary conclusion of this article is, perhaps, the court will not see this issue when a party does not have a strong case to submit it before the court. As mentioned earlier, the claimant, *PT Timas Suplindo*, submitted a report as evidence concerning the deportation of an Australian pathologist who was asked by a party to give it expert witness before a criminal court in Indonesia. This evidence was weak to shed light on the status of foreign arbitrators in Indonesia.

The deportation of the foreign pathologist was made after the Indonesian prosecutors notified the immigration office about the presence of a foreigner entering Indonesia. The prosecutor contended, the pathologist entering Indonesia was against the law because he entered Indonesia without proper visa. He was also charged with violating Indonesian immigration law. He entered Indonesia for giving expert witness before Indonesian criminal court. What seemed to have been missing in the debate, especially on the part of the defendant's opinion or position that possibly might help to clear the picture are possible as follows.

1. *Immunity of Arbitrators*

A line of possible argument is the arbitrator's immunity. Indonesian Arbitration Law No 30 of 1999 provides that "The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was bad faith in the action."³² This argument may be put forward to explain the arbitrator's immunity from the prosecution of the law. But as shown in the *PT Timas Suplindo* case, the respondent did not raise this argument. The plausible explanation is because the chosen foreign arbitrators had not performed their duties. Besides, challenging arbitrators does not have any relation with the issue of immunity.

2. *Arbitration is a for Private Dispute*

Another possible argument was the nature of arbitration. arbitration law is a private mechanism of a dispute. Arbitration is for a private dispute, settling commercial dispute of a private nature set up by the parties. The proceedings are confidential. Arbitration is only for the parties (in dispute) alone.

3. *Binding Nature of Arbitration Clause*

The binding nature of arbitration clause might as well be used to support the position of the legality or status of arbitrators. As stated, the arbitration clause is the product of the parties' agreement. One point of the agreement is the nationality of arbitrators (under article 37.2 (c) of the contract). Since the parties had already agreed on this, it would not then appropriate for a party to argue or dispute the nationality of the arbitrators (sitting in the arbitration tribunal)!

Another possible argument that a defendant may raise is the binding nature of the arbitration agreement. The binding nature of the agreement might have a number of implications. *First*, as stated above, the existence of arbitration clause has prevented the

³² Article 21 Indonesian Arbitration law.

domestic courts to interfere with arbitration.³³ In many occasions, the Supreme Court has so far been affirming this position when the issue of the arbitration clause was raised before the courts where a party requests the courts to pronounce that the court does not have jurisdiction or competence to try the dispute where the parties are already bound by arbitration agreement.³⁴

Second, according to Indonesian law, the agreement of the parties is the law.³⁵ Applying the law agreed by the parties might as well possibly be best argument for the challenging of the status of the arbitrator. The parties, applicant and the respondent, had agreed and signed the arbitration clause. The arbitration clause among others contained the agreement of the parties about the nationality of arbitrators. Since this is the agreement of the parties, a party may not in the position to challenge other party's decision or choice of foreign arbitrator to sit in the arbitration tribunal.

The courts' decision in the *PT Timas Suplindo case* nevertheless was possibly a landmark and plausible decision. A landmark because it gives further assurance about the absolute competence of arbitration in settling commercial dispute where the parties are bound by an arbitration agreement. It is a plausible decision because the courts have given a clear direction as to their position with regard to the arbitration agreement. The courts' reliance on the agreement of the parties as the standard that the courts used seemed to affirm the triumph of the agreement of the parties.

Theoretical Basis

PT Timas Suplindo case is an international arbitration dispute according to the provisions of Arbitration Law No. 30 of 1999. The Arbitration Law adopts both territorial and private international law principles to determine whether an arbitration is international dispute.³⁶ The debate between the applicant, defendants and the courts above may reflect the theoretical basis for their justification. On this issue, the author would like to refer to Prof. Gaillard's legal theory of international arbitration.³⁷

³³ See articles 3 and 11 the Indonesian Arbitration Law (above).

³⁴ The decisions included, among others: *Christine Hartani Tjakra v. Syamsurizal Anis Cs.*, Ptsn PN Jakarta Pusat No. 197/PdVG/1991; *PT Maskapai Asuransi Ramayana v. Sohandi Kawilarang*, Ptsn MA No 455 Kisip/1982; *PT Asuransi Royal Indrapura v. Sohandi Kawilarang*, Ptsn MA. No 794 K/Sip/1982; *PT Arpeni Pratama Ocean Line v. PT Shorea*, Ptsn MA No 3179 KiPdt/1984; *Ahyu Dorestry Co Ltd v. Sutomo*, Ptsn MA No 2924 KiSip/1981; *Lioe Lian Tang v. Union Des Transports Aeriens IUTA*, Ptsn MA No. 117/1982; *PT Sanggar Mustika Indah v. PT Jaya Konstruksi Manggala Prama dan Mowlem International Limited*, Ptsn MA No. 3190 KIPd/1995; *PT Polyprima Karyareksa v. Daelim Corporation*, Ptsn MA. 1558 K/Pdt/2009.

³⁵ Article 1338 of the Indonesian Civil Code states: "All legally executed agreements shall bind the individuals who have concluded them by law. ..."

³⁶ See the decision of the Supreme Court in *PT Pertamina EP v. PT Lirik Petroleum case* (2009), decision No. 904/K/Pdt.Sus/2009; See also: Huala Adolf, "The Meaning of International Award under Indonesian Arbitration Law," 13: 6 *International Arbitration Law Review* 23-28 (2010).

³⁷ Emmanuel Gaillard, *Legal Theory of International Arbitration*, Leiden: Martinus Nijhoff, 2010, also discussed in: Huala Adolf, *Dasar-dasar, Prinsip & Filosofi Arbitrase*, (Transl: *Basics, Principles and Philosophy of Arbitration*), Bandung: Keni

The debate of the parties in *PT Timas Suplindo* mirror the three theories that may explain the position of the parties. The applicant stressing the national law affecting the status or the legality of arbitrator is the reflection of what Prof Gaillard's wording as the "*Single National Legal Order*" theory."³⁸ The position of Leighton Offshore Pte Ltd highlighting the autonomy of the parties in determining the status and legality of the foreign arbitrators is the reflection of what Prof. Gaillard's wording as "*the Plurality of National Legal Order*."³⁹ This position is also seen in the opinion of the courts (domestic court and the Supreme Court of Indonesia).

The position of BANI in defending its position is what Prof Gaillard's term as *the Arbitral Legal Order*. Gaillard also referred this position as the international arbitration as an *autonomous legal order*.⁴⁰ The position of BANI to justify its position to appoint third arbitrator, an American arbitrator, as the chair of the tribunal based on universality of arbitration gives a support to what Prof Gaillard's belief as the appropriate theory for international arbitration.

CLOSING

PT Timas Suplindo case appeared to have given the position of the Indonesian courts toward the arbitration clause rather than the status or the legality of the foreign arbitrators. The absence of the position of the courts concerning the status of the foreign arbitrators in Indonesia possibly seemed to give green light as to what the present and long practice of arbitration in Indonesia has been taking place so far. It is expected that *PT Timas Suplindo* case would be the first and hopefully the last case ever debated regarding the status of foreign arbitrators before the Indonesian courts. The parties have agreed and decided to have their dispute settled by foreign arbitrators. This agreement was included into an arbitration clause. A party who later would try to argue and question the legality or legal status of foreign arbitrator to settle their dispute seemed to have violated the arbitration clause he had previously agreed.

The status of foreign arbitrator would not appear to be a legal issue before the law should it had been regulated in the Law. This article recommended that the Indonesian Arbitration Law No. 30 of 1999 should be supplemented with the provision on the foreign arbitrators in the future amendment of the Law. The supplemented provision would be Article 12 of the Arbitration Law by adding a provision allowing foreign arbitrator to act as arbitrator under arbitration proceedings in Indonesia.

Media, 2014 (discussing a number of theories on arbitration including Prof Gaillard's theory on international arbitration (p. 44-48)).

³⁸ Emmanuel Gaillard, *Ibid*, p. 15

³⁹ Emmanuel Gaillard, *Ibid*, p. 24.

⁴⁰ Emmanuel Gaillard, *Ibid*, p. 35. The term autonomous legal order refers to the regulations of arbitration, including the arbitrators, the process, and the awards, as the self-regulated body of law. The growth of arbitration has been taking place within its own system. It does not develop under any national legal system although the States lay down their Arbitration Law (*Supra*, the theory of Gaillard on the autonomous legal order of arbitration, *Supra*).

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