



Choice of Law Clause in Foreign Investment Contracts for the Development of the Nusantara Capital City

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Abstract

This research analyses foreign investment within the context of the Nusantara Capital City (Ibu Kota Nusantara, IKN) development projects, focusing specifically on the application of choice of law clauses in resolving disputes arising from foreign investment contracts. Employing both statutory and conceptual approaches, the study explores how the IKN's green forest city concept aligns with national investment policies, making it conducive to foreign investment provided that projects adhere to legislative requirements and procedural guidelines. The findings underscore the critical importance of carefully crafted dispute resolution clauses, particularly those specifying the choice of applicable law, given the inherent complexity of contracts involving multiple parties subject to diverse legal systems. Effective dispute resolution mechanisms are essential for ensuring clarity and consistency in addressing potential legal conflicts that may arise in the course of international investment activities within the IKN development framework.

Keywords: *Contract, Foreign Investment, Choice of Law.*

A. INTRODUCTION

Since 2019, the Indonesian government has embarked on a significant initiative to relocate the country's capital from Jakarta to East Kalimantan, known as the Archipelago Capital development project (referred to as IKN). This initiative gained legislative backing with the enactment of Law Number 3 of 2022 concerning IKN (hereinafter the IKN Law), marking a crucial step towards realizing the ambitious plan.

The government has outlined a structured timeline for IKN, spanning five development stages from 2022 to 2045 (Prianggodo, 2023).

The decision to move the capital underscores the pressing challenges faced by Jakarta, particularly its status as an overpopulated hub for business and administration. According to Visual Capitalist, Jakarta ranks second globally, after Tokyo, in terms of urban area population, with approximately 33.8 million residents (Banerjee, 2023). This demographic strain has highlighted the urgency of decentralizing administrative functions and alleviating the burden on Jakarta's infrastructure and resources.

The IKN project represents a proactive strategy aimed at addressing these issues by establishing a new administrative center designed to foster sustainable development and regional balance across Indonesia. As the government progresses through the implementation stages outlined in the IKN Law, the relocation of the capital holds promise for reshaping national governance and urban dynamics in the coming decades.

The reasons for moving the capital city cannot be separated from economic, geographical, environmental, social and political considerations (Hutasoit, 2018). The population, which continues to increase from year to year, has significant implications for the environment and people's quality of life. Bearing in mind that an increase in population goes hand in hand with an increase in housing needs, resulting in the conversion of green land into built land (Pratama et al., 2016). This has a domino effect in the form of a clean water crisis, increasing air pollution, and even flood disasters as can be seen from the current conditions in Jakarta (Tempo.co, 2023). Seeing these problems, it is important to immediately create equality in society, economy and

development. This is the background for the government to immediately move the capital from Jakarta.

The choice of East Kalimantan as the new capital was based on several factors. Jokowi assesses East Kalimantan as a developing and strategic region with minimal threat of natural disasters such as floods, earthquakes, volcanoes and tsunamis (Indonesia, 2019). Apart from that, East Kalimantan's defense system is considered strong because it can be supported by the Tri Dimensions of Land, Sea and Air. Apart from aiming to eliminate the Javanese centrist view, the relocation of the capital city in East Kalimantan is based on adequate infrastructure in East Kalimantan, such as the Balikpapan - Samarinda and Trans - Kalimantan toll roads, airports in Balikpapan and Samarinda, Kariangau Container Port in Balikpapan, and Semayang Harbor in Samarinda (Nurdifa, 2023).

However, moving the capital to East Kalimantan certainly requires a lot of money. Moreover, in developing this IKN, the government is promoting the concept of a green forest city. Simply put, the pattern of the forest city is to bring forests into the city and the city is located in the forest, so that it can improve the quality of the urban environment (Li et al., 2005). The green forest city concept can be found in the mandate of Article 2 letter a of the IKN Law which states that one of IKN's visions is to become a sustainable city in the world. Based on the explanation of the article, the concept of a green forest city in question is managing resources effectively and providing effective services with a minimum of 75% of the environment consisting of green areas, so that a balance of natural ecology, built-up areas and a harmonious social system is realized. Therefore, in order to realize the government's ideals, it is necessary to inject funds, one of which can be in the form of investment from investors.

Based on Article 1 number 1 of Law Number 25 of 2007 concerning Investment (which will hereinafter be referred to as the Investment Law), Indonesia accepts investment activities in the form of domestic investment and foreign investment. As the name suggests, domestic investment means the activities of domestic investors in investing capital to do business in Indonesia with domestic capital as regulated in Article 1 number 2 of the Investment Law. This is different from foreign investment, which means the activities of foreign investors to do business in Indonesia using foreign capital entirely or jointly with domestic investors as regulated in Article 1 number 3 of the Investment Law.

It cannot be denied that foreign direct investment is an aspect needed by developing countries to support the economic growth of the country receiving the capital (host country). Foreign investment can provide many benefits for the host country, such as creating jobs; increasing income, quality and standard of living; expanding relations and cooperation between foreign and local companies; improving technology; increasing exports; to increase the country's foreign exchange (Suardhana, 2019). On the other hand, investors' considerations for investing capital are based on several factors, for example related to aspects of natural resources, human resources, government policies, political and economic stability to ensure business certainty, and licensing (Sari & Jayantiari, 2015).

In fact, the green forest city concept promoted by the government has succeeded in attracting foreign investors. The concept of building buildings in large numbers separated by forests and green open spaces has attracted the interest of potential foreign investors from Kazakhstan and Finland to find out more about the concept of IKN development before deciding to invest in it (Wicaksono, 2023). If investors agree to invest foreign

capital in IKN development, this needs to be stated in the foreign investment contract. In this case, several parties will be involved, such as legal consultants, lawyers and notaries to help prepare foreign investment contracts according to the wishes of the parties (Anindita & Parwata, 2019).

The parties have the freedom to determine the contents of foreign investment contracts in accordance with the implementation of the principle of freedom of contract as regulated in Article 1338 BW. This principle is the most important principle in contracts in the field of foreign investment. Considering that the contract will involve 2 (two) or more different countries, the contract must be universal and adhere to the contract law in the parties' countries (Anand, 2012). However, this foreign investment contract must still fulfill the legal requirements of the agreement as regulated in Article 1320 BW, including the existence of an agreement, competent parties, on certain issues, and lawful reasons. The meaning of the word *halal cause* is that the contract does not conflict with law, morality and public order as determined in Article 1337 BW.

In order to continue to realize a green forest city, foreign investment contracts in IKN development need to be planned clearly and in detail. Especially aspects related to the rights and obligations of the parties, the interests of third parties, and environmental aspects. The aim is to provide legal certainty regarding legal relationships and actions that arise (Salim, 2019). Thus, everything that is done in the future is in accordance with what has been promised.

However, it cannot be denied that there is the potential for default by one of the parties to the contract. Considering that the parties to this contract come from different countries with different laws, it is necessary to anticipate the existence of a choice of law.

Moreover, this foreign investment contract is related to the construction of IKN which will become the country's capital, so all aspects of the contract must be studied in detail. Based on the description above, this research will focus on the concept of foreign investment in IKN development projects and resolving disputes over foreign investment contracts in IKN development projects based on choice of law.

There are several previous studies that discuss the application of international private law in relation to investment law. First, research entitled "Regulation of Foreign Investment in the Form of Joint Venture Companies in Indonesia" which discusses the terms and limits of foreign capital ownership in Indonesia (Sukananda & Mudiparwanto, 2020). Second, research entitled "The Principle of Good Faith in the Choice of Law of Foreign Direct Investment Contracts in Indonesia" which discusses the application of the principle of good faith of the parties to a contract regarding justice in determining the choice of law (Amalia et al., 2018). Third, research entitled "Harmonization of Contract Law Principles through Choice of Law" which only discusses the inclusion of choice of law clauses in international contracts (Nurjannah, 2013).

This research is legal research, namely the process of discovering laws whose existence exists in society (Cohen & Olson, 2010). This is in line with Peter Mahmud Marzuki's view that legal research is not just about implementing existing rules, but also creating laws (Marzuki, 2013). Legal research is used to solve problems by analyzing legal materials (Marzuki, 2013). This research uses 2 (two) types of approaches, namely the statutory approach and the conceptual approach.

The statutory approach is an approach that examines relevant statutory regulations, so as to gain an understanding of the principles and norms in these regulations

(Marzuki, 2013). This approach is used to examine laws and regulations related to foreign investment schemes and the implementation of choice of law in IKN development projects. The conceptual approach is an approach that studies views and doctrines in legal science, so as to obtain legal understanding, legal concepts and legal principles that are relevant to the issue being studied (Marzuki, 2013). This approach is used to find views and doctrines that are developing in legal science regarding the application of choice of law in foreign investment contracts in IKN development projects.

B. RESULT AND DISCUSSION

The Concept of Foreign Investment in the IKN Development Project

Referring to the Investment Law, foreign investment is the activity of carrying out business in Indonesia in full or in part by individual foreign citizens, foreign business entities, and/or foreign governments. The implementation of foreign investment is specifically regulated in Law Number 1 of 1967 concerning Foreign Investment (which will hereinafter be referred to as the Foreign Investment Law). However, the Foreign Investment Law is considered to be no longer in accordance with current economic developments and national laws. The legal regime for foreign investment in this law is considered liberal and actually harms national economic interests because it encourages multinational companies to invest their capital in Indonesia (Arie, 2022). Apart from that, the legal basis for implementing foreign investment still overlaps with one another. For example, when revising the Mineral and Coal Mining Law, flow was hampered due to the Law on Environmental Protection and Management and the Law on Agrarian Principles. This is one of the backgrounds for harmonizing regulations related to the implementation of their respective embeddings in the Job Creation Law through the omnibus law method.

Because this case involves foreign parties, the scope of investment legal regulations is also different. The foreign element in investment can be determined based on 2 (two) categories, namely based on nationality and place of business (residence) (Rahmah, 2020). Apart from that, the implementation of this capital investment certainly uses foreign capital, namely that company activities in Indonesia will use foreign currency, equipment, materials and expertise (Arie, 2022). Article 2 of the Foreign Investment Law clarifies the meaning of foreign capital as a means of payment abroad in addition to national foreign exchange assets, equipment for companies and materials from foreign citizens, and part of company proceeds used to finance companies in Indonesia. However, to be able to invest in foreign capital in Indonesia, foreign investors must be in the form of a Limited Liability Company (PT), based on Indonesian law, and domiciled in Indonesia as regulated in Article 5 paragraph (2) of the Investment Law.

IKN development is a business sector that can be supported by foreign investment because in this case it is not a closed sector or type of business, such as drinking water; public railway; harbor; cruise; flight; atomic power plants; mass media; production, transmission and distribution of electric power for the public; or telecommunications as intended in Article 6 paragraph (1) of the Foreign Investment Law. Apart from that, based on Article 6 paragraph (2) of the Foreign Investment Law, foreign investment is also prohibited in fields related to national defense. On the other hand, the government in Article 12 paragraph (5) of the Investment Law jo. Article 11 of Presidential Regulation Number 76 of 2007 concerning Criteria and Requirements for Preparing Closed Business Fields and Open Business Fields with Requirements in the Investment Sector has determined several business fields that can be given foreign capital injections. Some of the business sectors referred to are business entities that protect natural resources, protect

MSMEs, supervise production and distribution, increase technological capacity, involve domestic participation, and collaborate with business entities that have been appointed by the Government. Linked to the development of IKN, of course this project is included in an open business sector because it still involves domestic capital and cooperation remains based on decisions and under government supervision.

Apart from that, the construction of IKN which carries the green forest city concept is also in line with one of the investment policy directions regulated in Article 2 letter d of Presidential Regulation Number 16 of 2012 concerning General Investment Plans. To be precise, in the fourth point, it is stated that the direction of investment policy can be in the form of environmentally sound investment (Green Investment), including:

1. Synergy of policies with environmental development programs, such as aspects of energy, industry, biodiversity, waste, reduction of greenhouse gas emissions and transportation;
2. Development of priority sectors and environmentally friendly technology, as well as utilization of potential new energy sources;
3. Development of a green economy;
4. Providing incentives and/or facilities for investors in order to preserve the environment, prevent and reduce environmental pollution, and encourage carbon trade (carbon trade);
5. Increase the use of technology and production processes that are integrated and environmentally friendly; and
6. Regional development that remains oriented towards spatial planning and environmental carrying capacity.

Broadly speaking, there are two types of capital investment, which can be done directly (direct investment) or indirectly (indirect investment) (Rokhmatussa'diyah & Suratman, 2018). Direct investment is a long-term capital investment that can be carried out by means of a joint venture or establishing a company with a local company, a joint operation scheme or joint operation without giving birth to a new company, granting a license, majority participation in a local company through loans, technical and management assistance or technical assistance. and managerial, or others (I. Sari, 2020). This is different from indirect investment which is oriented towards the short term through buying and selling shares and/or currency (I. Sari, 2020). In relation to IKN development, it is more appropriate to use direct investment. Remembering that this development is a long-term project that must continue to be evaluated and developed to create maximum development.

In order to encourage foreign investment, the government needs to apply the principles of fair and equitable and the principle of state responsibility, so that it can produce contracts as the basis for comprehensive investment regulations (Arie, 2022). This principle is important to apply in IKN development projects. These legal regulations related to foreign investment are useful for providing convenience, legal certainty and legal protection for foreign investors. Apart from that, it will also realize the same treatment (most favorable nation) among foreign investors (Arie, 2022). This is in line with the mandate of Article 4 of the Investment Law regarding the government's obligation to be fair, provide legal certainty, business certainty and security to foreign investors. Thus, foreign investors will be interested in investing capital in Indonesia and not diverting their capital to other countries.

If the parties agree to make foreign investment, the next step is to put it into the contract. The birth of this foreign investment cooperation contract is also proof of the birth of legal relations and legal actions between the parties. Although the parties are given the freedom to determine the contents of the contract, this freedom is limited by several foreign investment requirements. Regarding the procedures and procedures for foreign investment, it has been stated specifically and in detail in Article 2 of Presidential Decree Number 33 of 1992 concerning Investment Procedures. However, currently the implementation or procedures for foreign investment must also pay attention to the provisions in the Job Creation Law.

Apart from that, the contract must also contain the rights and obligations of the parties involved in foreign investment in IKN. Based on Article 14 of the Investment Law, investors have the right to obtain certainty of rights, law and protection; transparency of information related to its business; service; and convenience facilities. These rights are also accompanied by the obligations of investors as regulated in Article 15 of the Investment Law. Some of these obligations are implementing the principles of good corporate governance; responsible for corporate social affairs; report investment activities to the Investment Coordinating Board; respecting the culture of the community around the investment location; and comply with applicable laws and regulations. Because this is a foreign investment, there are several additional obligations. Based on Article 26 of the Foreign Investment Law, foreign capital companies are obliged to manage and control their companies based on the company's economic principles without harming the interests of the state. In addition, foreign companies are obliged to provide opportunities for the entry of national capital within a certain period of time in accordance with government determination as confirmed in Article 27 of this Law.

Choice of Law Clause in Foreign Investment Contracts in the Archipelago Capital Development Project

It cannot be denied that foreign investment cannot be separated from disputes or defaults. If a foreign investor defaults, several legal consequences will arise in the form of prosecution for fulfillment of the agreement, termination or cancellation of the agreement, cancellation of the agreement, prosecution for compensation, prosecution for fulfillment of the agreement accompanied by compensation, prosecution for termination or cancellation of the agreement accompanied by compensation (Raharjo, 2009). Article 34 of the Investment Law itself regulates sanctions when investors do not fulfill their obligations. Sanctions given by these authorized agencies or institutions are in the form of administrative sanctions, ranging from written warnings, restrictions, freezing, to revocation of business activities and/or investment facilities. This does not rule out the possibility that investors will be subject to other sanctions as regulated in the regulations.

Because this investment involves foreign parties, dispute resolution can also extend to touch foreign elements. Generally, foreign investment disputes arise due to violations of clauses in foreign investment contracts, such as cooperation contracts or licensing contracts (Rahmah, 2020). Dispute resolution with foreign investors can be resolved by local law or international law. One way to resolve foreign investment disputes through international law is international arbitration or conciliation. Based on Article 32 paragraph (3) of the Investment Law, dispute resolution between the government and foreign investors can be through international arbitration and must be agreed upon by the

parties beforehand. However, before that the dispute must be resolved through consensus deliberation first.

This dispute resolution method must be stated in the contract that has been previously made. Because foreign investment contracts are made by parties with different legal systems, the main problem faced by the arbitrator is related to the legal issues that must be used to resolve the dispute (Gautama, 2002). The resolution of this legal problem is based on the principle of *Partij Autonomie*, namely the recognition of individuals to determine for themselves the law that applies to the agreements they enter into (Gautama, 1983). The implementation of this principle is known as choice of law, which is a form of the principle of freedom of contract. Thus, the choice of law is the law chosen by the parties to the contract as a means of interpreting the implementation of the contract made, including objects, rights, obligations, and dispute resolution.

There are two different views regarding the urgency of including choice of law in international contracts. There are those who believe that the choice of law clause is not something that must be included in international contracts. This is in line with Adolf's opinion which states that the nature of the choice of law is not a condition for the validity of a contract (Prajugo, 2020). On the other hand, Clive M. Schmitthoff stated that the absence of a choice of law clause in an international contract would make the contract flawed (Prajugo, 2020). However, seeing the development of the relationship between the parties which extends to the international arena, it is important to include a choice of law clause. Bearing in mind that in a contract it cannot be separated from the possibility of disputes or defaults by one or the parties entering into the agreement. Therefore, the choice of law plays a role in determining which law applies in the contract.

Although the parties are given the freedom to determine their choice of law, this choice of law is limited. There are 3 (three) boundary aspects in determining legal choices (Gautama, 2002). First, choice of law clauses can only be stated in the field of contract law. Second, the choice of law is prohibited in relation to government-owned civil law (characterized by public law) which is coercive in nature, such as for exchange agreements, employment agreements, pacht agreements, and immovable property rental agreements. Third, the choice of law is not specifically intended to select a particular place with the aim of smuggling in other regulations that do not actually exist.

Sudargo summarizes that there are 4 (four) ways to determine legal choices (Gautama, 2002). First, through a clear and written statement in the contract clause. In this case, the clause could read "this contract will be governed by the laws of the United Kingdom". Second, determining the choice of law secretly or based on conclusions from the intentions, provisions or facts contained in the contract. Third, the determination of the choice of law is presumptive (presumption iuris), namely the judge accepts that the choice has occurred based on legal presumptions. Fourth, determining the choice of law hypothetically, namely the judge hypothesizes himself by thinking about which law is the right one to choose.

In practice, when a dispute occurs, the parties involved in a foreign investment contract prefer to file a lawsuit against the government at the International Center for the Settlement of Investment Disputes (ICSID) arbitration body. In this case, the parties must first agree to bring the dispute before ICSID and they cannot withdraw this agreement unilaterally at a later date as regulated in Article 25 (1) of the ICSID Convention. So, the parties' intention to resolve their dispute at ICSID must be stated in the investment contract clause. The legal basis used by ICSID to resolve foreign investment disputes can

come from the parties' choice of law (based on contract or tacitly), international law provisions, and/or the *ex aequo et bono* principle (the principle of decency and propriety as long as it is agreed by the parties) (Natamiharja et al., 2020).

Regarding foreign investment contracts in IKN development projects, it is important for the parties to include a choice of law clause in the contract. In this case, the choice of law can be determined in writing in the contract. In this way, it will be clear which law will be applied when a dispute or default occurs. Even though no one expects a dispute to arise in the future, it is better to anticipate it in advance by including this clause. The hope is that it can protect the interests of the parties and provide legal certainty. Bearing in mind that this investment contract is related to the national capital which is an important aspect or icon of a country.

C. CONCLUSION

The development of IKN which carries the green forest city concept is also in line with one of the investment policy directions, so that it can be supported by foreign investment. Because this case involves foreign parties, the scope of investment legal regulations is also different. The type of capital investment used can be direct (direct investment) because it is a long-term project that must continue to be evaluated and developed to create maximum development. Before being able to invest foreign capital in Indonesia, foreign investors are required to fulfill several requirements and procedures that have been stipulated in the applicable laws and regulations. Apart from that, the government needs to apply the principles of fair and equitable and the principle of state responsibility, so that it can attract many foreign investors. Apart from that, it is also necessary to pay

attention to the contents of foreign investment contracts made, such as rights, obligations, sanctions, and dispute resolution.

Even though no one expects a dispute to arise in the future, it is important to anticipate it at the start by including a choice of law clause. This dispute resolution method must be stated in the contract that has been previously made. Choice of law is the law chosen by the parties to a contract as a means of interpreting the implementation of the contract made, including objects, rights, obligations, and dispute resolution. Regarding foreign investment contracts in IKN development projects, it is important for the parties to include a choice of law clause in the contract. This will also make it easier to resolve issues to be brought to the International Center for the Settlement of Investment Disputes (ICSID) arbitration body.

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