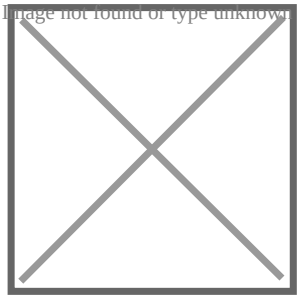

The Applicability of Foreign Law in Indonesian Employment Disputes

Indonesia is rich in natural resources, being the world's largest exporter of steam coal and refined tin, and a major exporter of gold, copper, and palm oil. However, challenges such as rapid regulation changes, corruption, complex licensing, and distrust in the legal system make it difficult for foreign investors. As a result, some foreign companies prefer to relocate their employees to work in Indonesia rather than investing directly. This raises a question: Can a foreign company's employment relationship with its employees be legally binding in Indonesia?

This article will explain both from the perspective of private international law doctrine and from the viewpoint of judges.

Employment in Indonesia is primarily governed by Law No. 13 of 2003 on Manpower, as last amended by Law No. 6 of 2023. Specifically, regulations regarding the employment relationship with foreign workers are outlined in Government Regulation No. 34 of 2021 on the Use of Foreign Workers, Government Regulation No. 35 of 2021 on the Use of Foreign Workers, and Minister of Manpower Regulation No. 8 of 2021 on the Implementation of Government Regulation No. 34 of 2021 on the Use of Foreign Workers.

Generally speaking, in Indonesia, every party has a freedom to choose the applicable law for their contract, This is derived from “freedom of contract” principle from Article 1338 of Indonesia Civil Code. However, according to the limitations on the freedom of parties in making a choice of law include (a) it must not conflict with imperative norms, (b) it must not constitute a violation of public order, (c) it must not result in legal evasion, and (d) the choice of law is only recognized in the field of property law, particularly contract law.

Imperative norms are provisions of civil law that are of a public nature and thus coercive, meaning that parties in legal relationships subject to such provisions are not free to choose an alternative law. Gautama explains that the group of norms considered imperative are regulations that are so closely linked to the economic order of a country that they cannot be set aside by a choice of law. Yu Un Oppusunggu adds that

imperative legal norms are norms formulated in positive law and are concrete in nature. Furthermore, Sudargo Gautama, provides an example of an imperative legal norm, one of which is the provision regarding employment.

Based on the legal doctrine discussed above, even if a foreign employer and their employee choose a law other than Indonesian law as the applicable law, if the work is performed in Indonesia, it must still comply with Indonesian imperative legal norms concerning employment.

One landmark case on the choice of law in employment matters is Supreme Court Decision No. 1537 K/Pdt/1989. In this case, a dispute arose from the termination of an employment relationship governed by a foreign law (Swiss law). The court ruled that, due to the employment contract explicitly stated that Swiss law would apply, the Indonesian court was not competent to hear the case because the contract was made and governed by foreign law, and the parties were foreign nationals. This will be explained as follows:
a. History
PT MI ("Company") entered into an Employment Agreement with a foreign national expert named Mr. BJR ("BJR"), who was employed as a Financial Manager for a period of four years at the company. Subsequently, as a result of the company engaging in corporate actions, including the transfer of majority shares, BJR's employment was terminated by the Company, even though his employment contract still had two years remaining. Consequently, BJR filed a civil lawsuit against the Company.

B. Judge Consideration
In this case, the Panel of Judges emphasized that the termination of employment was based on an employment agreement governed by foreign law (Swiss law). Therefore, the Panel of Judges decided to overturn the Court of First Instance decision, primarily because the employment agreement explicitly stated that the governing law of the contract was Swiss law. Furthermore, considering (i) the place of contract formation and (ii) the legal subject being foreign nationals, the jurisdiction to adjudicate the dispute belonged to the Swiss courts. The judge's consideration is as follows:
“"In this case, the basis for the plaintiff's claim is the unilateral termination of employment by the defendant. The original employment relationship between the plaintiff and the defendant was bound by an employment contract as evidenced by document P.1 (Employment Agreement). This can be clearly read in the plaintiff's admission or assertion in paragraph 1 of the claim, which states:

"That on July 1, 1984, the plaintiff was appointed by... based on an agreement made on April 2, 1984 (Document P.1), as an employee of…".

Based on the factual evidence of 'P.1', without questioning whether the termination of employment was based on a shareholders' meeting resolution or document P.8, the legal resolution of the employment termination dispute must refer to the provisions and clauses in document P.1 [Employment Agreement].

According to paragraph 16 of document P.1, it is explicitly stated: For the relationships governed by this contract, Swiss law applies, and the domicile is Zug, Switzerland. From the provisions of paragraph 16, if a dispute arises regarding employment termination or gratuity issues, the legal resolution is subject to Swiss law, and the agreed domicile is Zug, Switzerland..

The provisions of paragraph 16 are legally valid under Indonesian law. Considering that the place of contract formation was in Switzerland (a foreign country) and the legal subjects involved were Swiss nationals (foreigners), they are fully subject to Swiss law.

Therefore, the law to be applied is Swiss law, and the agreed domicile is Zug, Switzerland, which means the competent court to adjudicate the dispute is the Swiss court. The Indonesian court does not have jurisdiction to hear the case….”

However, legal scholar Sudargo Gautama criticized this decision, stating that even though the employee was Swiss and the contract was made in Switzerland, Indonesian law should still apply when the work is performed in Indonesia.

Indonesian employment law does not explicitly require that the choice of law in an employment contract must be Indonesian law. Referring to the aforementioned Supreme Court decision, it can be implied that Indonesian courts will not have jurisdiction to examine employment contracts based on foreign law. However, considering the legal doctrines, it can be concluded that a foreign company's employment relationship with its employees will be legally binding in Indonesia, provided that when the employment relationship is conducted in Indonesia, it shall complies with Indonesian employment law. Therefore, even if foreign law is chosen, compliance with Indonesian employment law is necessary when the work is performed in Indonesia.