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Forum Non-convenience: Can International Organization be Sued in Indonesian (Industrial Relation) Court of Law

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Abstract: This paper tries to prove that the concept or doctrine of *forum non-convenience* or *forum non coveniens* can be used by international organization in Indonesian (industrial relation) court of law. This research is a normative legal research. It conducts literatures review, including review on the prevailing rules and regulations in Indonesia, especially laws and regulations pertaining to procedural law, industrial relation law and law related to international organization. The existence of international organizations in Indonesia has arisen new issue in Indonesian court of law, whereby the international organizations become party to the dispute in Indonesian court of law. Among several disputes that may arise, one of them is industrial relation dispute, which involved employee that worked with the international organization with the international organization. One of the doctrine that can be used to throw a court case from the court is known as *forum non-conveniens*. Forum non-conveniens itself is a concept that developed and used widely in countries with common law legal tradition, meanwhile Indonesia is a civil law legal tradition country. To solve the problem, this research explained the concept of *forum non-conveniens* developed in common law legal tradition, and then compared it, using comparative legal method, to find out whether there is the same institution available in Indonesia. This research focused only to the application of forum non-conveniens concept in a law suit against international organization in Indonesian (indutrial relation) court of law.

Key words: forum non-conveniens, international organization, procedural law, international private law

1. Introduction

This paper discuss about the possibility of using Indonesian procedural law as the basis for the application of *forum non-conveniens* concept to set aside a trial againts international organization in Indonesian (industrial relation) court of law. In domestic civil case, where the parties are with the same nationalities, having domestic issues or problems, which are to be executed domestically, then, unless it is clearly proven that the case belong to other jurisdiction, such as arbitration, hearing must be conducted in the domestic court of law. The situation will be different when foreign parties are inolved. They could act as plaintiff and/ or defendant. These disputes become more complicated and complex when they involved international subject persons such as international organization. In industrial relation disputes which involved international organization and its employee, does Indonesian (industrial relation) court of law have jurisdiction to settle the disputes. The question came into place

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because the employees of an international organization can be nationals of many countries, not only Indonesian nationality.

2. What is Forum Non-conveniens?

The origin of the doctrine of *forum non-conveniens* is not very clear, however its roots can been traced as far back as the sixteenth century when the plea of *forum non-competens* was found in Scottish law (Wilson, 2000). Its origin has also been linked to several nineteenth and early twentieth century cases decided in the United States in which various courts of law declined jurisdiction over a matter in favour of other forum.

It can be said that *forum non-conveniens* is a common law doctrine and a part of private international law. The doctrine has repeatedly confirmed to be a major barrier for the plaintiffs to bring a suit in the court of law, whilst it is a weapon of argument for the defendant (Soni, accessed in 2016). Under the doctrine, a district court in the United States possesses discretion to dismiss a case in the event that there is another forum or jurisdiction that is both adequate and available to hear the case; and both the public interest and the parties' private interests weigh that the case is better heard by the alternate forum or jurisdiction (Robertson, 2012).

Accordingly, *forum non-conveniens* is a matter of procedural law and not substantive law. Judges who dismiss the case based on *forum non-conveniens* never discuss about the real claim of the parties (especialy the plaintiff), but merely on the conpetency of the court of law to settle the case. There is no standard regulation on what basis will the *forum non-conveniens* be used. The answer to the *non-conveniens* is made by comparing the choosen forum (by plaintiff) with the other possible forum available. The defendant must prove that there exists another forum and that forum is the adequate and more suitable forum to settle the case. The court may reject the use of *forum non-conveniens* if the court of law is not satisfied by the defendant argument of the other adequate and suitable forum.

In civil law tradition, the concept of *forum non-conveniens* was rejected, as can be read from European Council Regulation and Jurisdiction and Lugano Convention. However in some European courts of law, judges shall have the competency to grant dismissal of a case based on the assumption that the case can be litigated more conveniently in other jurisdiction. This proves that somehow *forum non-conveniens* doctrine is and can be used in civil court of law in civil law tradition.

3. What is International Organization?

International organization is a legal subject in international law. International organization is unique. It is different from state. Unlike states, which have its own territorial, people, language, resources and a souvereign government, an international organization is lack of those. MacKenzie (2010) in A World Beyond Borders: An Introduction to the History of International Organizations mentions that states created international organization to do things that states could not do on their own or to prevent states from doing something beyond the state’s interests. It is clear that international organization can not create itself or exist on their own. This international organization was designed, supported, and operated by the states that created them. The existence of international organization is based on agreement made, executed and enforced by two or more states that have common interests, who established the international organization. Its existence is merely to fulfil the objective set out by states in their agreement. This agreement will become the only rule for the international organization which will be used as the Article on how the international organization shall behave and conduct in the world. It may have its

domicile at any member states that established the international organization, which acts as the host country for the international organization. The host country agreement along with the establishment agreement will become the documents that secure the existence of the international organization and its activities within the host country for the benefit of all member states. International organization does not have and is not able to create its owned assets. International organization assets is merely come from contribution of its member states, and must be used accordingly based on the approval of the member states.

In view that international organization does not have nationality and therefore cannot be held responsible legally, it should also noted that international organization is never a legal subject to national law. Under national law, a legal subject, except for human being must follow certain acknowledgement or incorporation by state. Meanwhile international legal subject such as international organization no acknowledgement has ever happened domestically. From these point of view, an international organization shall enjoy privileges and immunities from host country, and is not subject to the law and jurisdiction of the host country. Such immunities shall be goven to the organization itself, including any and all assets owned and registered under the name of the international organization; to the member states' representatives that stay in host country; and all foreign employess of the international organization.

4. What is the Status of the Employee of International Organization?

According to human resources management, employee issues are internal affairs issues of an organization. Human resources management deals wtih the recruitment, administration, training and career development, remuneration, until retirement or termination of the workers or employees in the organization. In the event there are disputes or discrepancies in human resources matters, they must be solved using the prevailing internal regulation of applicable to all employees.

However from the perspective of the contract law, the relation between employee and employer is an equal relation. Both employee and employer have the same capacity and capability before the law to enter or not to enter into the employment contract. None is superior to the other. The terms and conditions in the agreement are mutually agreed and accepted. The freedom of contract become the very basic principle applied to the employee and employer relation.

From human rights perspective, employee is subordinated to employer. Employer has authority over the employees, especially with un-skill and un-educated employee. The supply and demand rules applied. These un-skill and un-educated people do not and cannot protect themselves, especially their rights from the superiority of employer. In order to provide the minimum rights for these people, government shall be involved. Government must issues law and regulations to protect the employees. These law and regulations will determine the minimum rights that must be granted to the employees, including remuneration package, working hours, leaves and holidays, and retirement plans.

From International Organization's internal view, in order to regulate how the international organization shall run, the international organization may establish its internal regulation, such as employee matters, financial matters, and also internal dispute settlements procedure to settle all its internal affairs. For external matters, host country shall be responsible for the fulfilment and compliance of the international organiztion during its existence in the host country. Based on the host country agreement, any and all complaints to the international organization about anything happened to the international organization activities in host country, shall only be filed to the

Ministry of Foreign Affairs of the host country.

5. Methodology

The research method used in this reseacrh a qualitative research method, using secondary data, including laws and regulations as primary legal sources. It also used secondary legal sources such as books, articles, journals et-cetera. Some tertiary legal sources such as encyclopedias or dictionaries are used as references. To understand legal documents and the interpretations of the documents, normative legal reseacrh is used. To seek the existence of *forum non-conveniens* in Indonesia, a comparative legal method is used.

The primary legal sources used as basis of the research are as follows:

(1) Indonesian Civil Procedure Code (HIR);
(2) Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution (ADR Law);
(3) Law No.37 Year 1999 regarding Foreign Affairs (FA Law);
(4) Law No.24 Year 2000 regarding International Agreement (IA Law);
(5) Law No.13 Year 2003 regarding Manpower (Manpower Law);
(6) Law No.48 Year 2009 regarding Judicial Authority (JA Law);
(7) The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) (Vienna Convention 1986).

6. Findings and Discussion

According to IA Law Article 1 point 7, international organization is defined as intergovernmental organization which is acknowledged as internation legal subject and has capacity to make international agreeemt. The term international organization as intergovermental organization is also used in Article 1 point 5 of FR Law. The same definition can be found in Article 2 point i of Viena Convention 1986. These definitions have absolutely placed international organization as an organization established by two or more states.

Article 16 of FA Law states that the granting of immunities, privileges, and release from specific duty or obligation to international organization will be conducted in accordance to the national legislations and international law and conventions. This means the Republic of Indonesia acknowledges the granting of immunities and privileges to international organization, subject to the law and regulations in the Republic of Indonesia. To enjoy these immunities and privileges, a written agreement must be made between the Republic of Indonesia dan the international organization, in which the Republic of Indonesia will be become the host country to the international organization. This also means that Indonesia acknowledges and will sign host country agreement with international organization and may have provided immunities and specific privileges to the international organization.

To conduct its activities according to the purpose of its establishment, international organization needs people who will become its employees. These workers may come from different nationalities and/ or countries, and they shall enjoy the same advantages whereever these employees work. There will be no difference with respect to their scale of remuneration, career development, and other rights upon their termination or retirements. In such event, Indonesian nationalities who work with international organization which headquarter hosted in Indonesia shall have the same career path development and all other rights as may be enjoyed by all employee as regulated in the international organization’s internal regulations.

In view that working in international organization required special and/or specific skills and/ or educations, it should be noted that those who work with international organzations are not common labours that their minimum wages and rights must be protected by government through the enactment of law and regulations (the Manpower Law). These people have capacities and capabilities to determine what they want to achieve by working in an international environtment with an international organization. These people are educated enough to understand all the terms and conditions of their employement and the consequences of signing the employment agreement. They should also aware that all their employment relations with the international organization are subject to internal regulations of the international organization. Government of the Republic of Indonesia and other governments have no involvement in the terms and conditions of works regulated by the international organization.

Above explanations are based in the understanding that all employees or workers are equals during their employement in the international organization. It is the most important concept among people who work with an international organization. This means that any disputes or discrepancies arising out from the employee employer relations in international organization will be settled internally using the same standard, applicable for all employees and employer. Equality before the law can only be established by means of using internal rules and mechanism to settle all the disputes related to any and all employees. Owing the same rights and obligations shall also mean owing the same procedure for disputes settlement.

The involvement or the possibility of using Indonesian law and regulations on manpower, i.e. Manpower Law, will indeed destroy the meaning of equality for all employees working with an international organization. Indonesian nationalities who worked with any international organization shall enjoy the same rights and obligations with other people with different nationalities working with the international organization. In view of tax matters, their incomes are exempted from witholding tax, the same as applicable to other people of different nationalities who work with any international organization.

The possibility to sue the international organization before Indonesian (Industrial Relation) Court of law by Indonesian nationality who worked with any international organization will confuse and somehow increase uncertainty for other employees that work with the international organization. This may increase the possibility that each employee will try to seek settlement through his/ her own national court of law. At the end, there will be no more international organizations who will take employees from host country nationality as their employees.

Article 134 of HIR regulates that in the event a claim raises from a dispute that does not include in the jurisdiction of general court of law, then at any time during the hearing, judges may be required to admit that the general court of law does not have competency to trial the case, and the judge, ex officio, shall dismiss the case from the general court of law. This article shall be read in line with JA Law and ADR Law. According to JA Law there are religion court of law, administrative court of law and military court of law, besides the general court of law. In general court of law, besides the general court of law itself, there are other special courts of law which incorporated within general court of law in form of rooms. There are room for commercial court of law, room for industrial relation court of law, room for human rights court of law, room for corruption court of law and room for fishery court of law. Each room within the general court of law has its own jurisdiction. According the ADR Law, general court of law shall refuse any commercial dispute, which the parties have choosen to settle the dispute through arbitration or alternative dispute resolution. This means that Article 134 of HIR will only applied in condition that:

(1) a specific law states that a specific kind of dispute must be settled through another court of law besides the general court of law, or other room within the general court of law; or

(2) a clause in an agreement or an agreement has specifically mentioned that the parties to the agreement have agrees to settle the disputes arising from the agreement out of court of law, by using arbitration or alternative disputes resolution.

Following the given fact of law and regulations and the normative concept of law, it is clear that Indonesian regulation acknowledges the existence of international organization as international legal subject that have the capacity to act. Such international organization may be given immunities and certain kind of privileges as may be regulated, based on international law and conventions. Such immunities and certain privileges are subject to Indonesian law and agreement made and signed between the international organization and the Republic of Indonesia. By signing the agreement, Republic on Indonesia will become host country to the international organization, and will be responsible for matters that related to the existence of the international organization in the Republic of Indonesia; and the capability of the international organization to do, act and conduct activities to achieve the goal of the international organization, for what it was first established. Since international organization shall have headquarter in member states, it will mean that any international organization that have headquarter in Indonesia must have the Republic of Indonesia as its members. As member states, the Republic of Indonesia shall ensure that the establishment of the international organization shall achieve its purpose of establishment.

7. Conclusion

From above explanation and ellaboration and it can be concluded that Indonesian law and regulations may apply for international organization. The law and regulations that may apply is the law and regulations that provide immunities and privileges to international organization. The existence of other laws and regulations shall be in line with the law that provides immunities and special previleges to the international organization. In view that there exist immunities and special privileges for international organization hosted in Indonesia, and the equality before law that applied to all employees of the international organization, Indonesian (industrial relation) court of law in general shall have no jurisdiction to trial any international organization. This proves that *forum non-conveniens* doctrin can be used in Indonesian (industrial relation) court.

To apply *forum non-conveniens* It is recommended that it would be better if all work agreements made by international organization with any and all employees, irrespect of their nationalities, must incorporated a clause that all disputes and discrepancies in relation to employee employer relation will be settled using the internal regulations of the international organization, and such internal regulations shall be the only prevailing regulations. It will also be helpfull if international organization makes its own mechanism for internal disputes settlement which provide fairness to all employees, irrespect of their nationalities. As guidence for lower level court, Supreme Court shall issue regulation on the implementation of JA Law and Article 134 HIR to dismiss a court of law claims based on *forum non-conveniens* exception.

References

Indonesia. *Het Herziene Indonesisch Regelement*, published in Stb.1926-496 jo. Stb.1941-31 and Stb.1941-32 jo. 98 jo. Stb.1941-44.

Indonesia. *Law No.13 Year 2003 regarding Manpower*. Published in LN.RI Year 2003 No.39 TLN No.4279.

Indonesia. *Law No.24 Year 2000 regarding International Agreement*. Published in LN.RI Year 2000 No.185 TLN No.4012.

Indonesia. *Law No.30 Year 199 regarding Arbitration and Alternative Disputes Resolution*. Published in LN.RI Year 1999 No.138 TLN No.3872

Indonesia. *Law No.37 Year 1999 regarding Foreign Affairs*. Published in LN.RI Year 1999 No.156 TLN No.3882.

Indonesia. *Law No.48 Year 2009 regarding Judicial Authority*. Published in LN.RI Year 2009 No.157 TLN No.5076.

MacKenzie David (2010). *A World Beyond Borders: An Introduction to the History of International Organizations*, Toronto: University of Toronto Press.

Robertson Cassandra Burke Robertson (2012). "Forum non conveniens on appeal: The case for interlocutory review", *Faculty Publications*, paper 57, accessed 26 July 2016, available online at: http://scholarlycommons.law.case.edu/faculty_publications/57.

Soni Puja (2016). "Application of the doctrine forum non conveniens in the perspective of multinational enterprises", accessed 25 July 2016, availabe online at: http://www.manupatra.co.in/newsline/articles/Upload/C4181160-DF8B-474F-B757-2400551A9750.pdf.

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) (Vienna Convention 1986).

Wilson John R. (2000). "Coming to America to file suit: Foreign plaintiffs and the forum non conveniens barrier in transnational litigation", *Ohio St. L.J.*, Vol. 65, pp. 659–673.