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The Urgency of Express Consent to Waive State Immunity in an International Commercial Arbitration Agreement: Indonesia's Practice

Feren Thalita[1], Prita Amalia[2], Damos Dumoli Agusman[3].
[1]Universitas Padjadjaran, West Java, Indonesia, ferenthalita20@gmail.com.
[2]Universitas Padjadjaran, West Java, Indonesia, prita.amalia@unpad.ac.id.
[3]Universitas Padjadjaran, West Java, Indonesia, damos@unpad.ac.id.

Corresponding Author: ferenthalita20@gmail.com[1]

Abstract: Indonesian State-owned enterprises' participation in the international commercial transactions have become a prime example which affects the increasing need for international commercial arbitrations today and in the future. However, the State immunity that Indonesian State-owned enterprise owns may potentially give rise to issue on the implementation of the whole arbitration process, inclusive of the recognition and enforcement of the arbitral award. This issue alone has been hotly debated from the perspective of State-owned enterprises and the foreign private parties. On that account, Indonesian State-owned enterprises are still in need of a legal solution to settle the State immunity matter, whereas express consent to waive State immunity here is in question. Through the normative and comparative juridical research, the writer has found that it is urgent for Indonesian State-owned enterprises to provide express consent to waive State immunity since, inter alia, it paves a way to prevent further procedural hindrance in the whole arbitration process. The recommendation to fortify such practice is strengthened by how solely depending on other exceptions to State immunity, which have their own complexities and uncertainties, is going to bring the parties to procedural barrier that prolong the dispute settlement itself.

Keyword: Express Consent; Indonesia; International Commercial Arbitration Agreement; State Immunity; Waiver.

INTRODUCTION

Throughout this modern era, international commercial transactions are deemed to be a trend in high demand by individuals, companies, and States (Cameron, 2016; Gal, 1972; OECD, 2013; UNCTAD, 2023). The "commercial transactions", as the object of this research, is defined by Article 2(1)(c) United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ("UNCSI 2004") as any commercial transaction or contract for sale of services or goods; any loan contract or other financial transaction, including any guarantee or indemnity obligation with regard to any loan or transaction; and/or any further commercial, trade, industrial, or professional transaction or contract, excluding employment contract.

In conducting an international commercial transaction, State can function through a State-owned enterprise ("SOE") or even a certain structure that is identified with State, without having to form separate legal entity (Maniruzzaman, 2005; Yang, 2012). In general, a SOE is understood as a business entity owned or controlled by the government that commercially provides services and/or goods for the public and is also in charge of carrying out the State's public policy (Bernier, 2012; Trebilcock, 2021). When entering into a contract, a SOE and its counter-party are given the freedom to select their dispute settlement mechanism and one of the preferred mechanisms in such position is arbitration (Brower, 2019; Wilmer Cutler Pickering Hale and Dorr, n.d.). As explained by Born, arbitration is recognized as a process whereas the parties altogether submit the dispute to a non-governmental decision maker, appointed by or for the regarding parties, for the purpose of providing a binding award that resolves the dispute itself (Born, 2012). The situation where a SOE faces an international commercial arbitration dispute eventually raises many questions, one of them being how to unravel the State immunity matter in this particular scope.

State immunity is defined as a customary international law principle ("Custom") which prevents the State from being adjudicated in foreign States' courts or tribunals, devoid of its consent (Yang, 2012). State immunity is interchangeably referred as sovereign immunity (Aust, 2005). However, in a more rigid definition, sovereign immunity can rather be understood as the government's advantage to not being adjudicated in its own jurisdiction, absent of its consent (United States ("US") v. Mitchell, 1980). State immunity poses 2 (two) important forms: immunity from jurisdiction and immunity from measures of constraint ("MoC"). Immunity from jurisdiction limits the power of foreign States' courts to adjudicate cases against a State (UNCSI 2004; Wiesinger, 2006), meanwhile immunity from MoC restricts any enforcement measures made by foreign States' courts to restrain a State in the control of its properties, for example through interlocutory injunctions, or even through attachment, arrestment, seizure, or execution (UNCSI 2004; Wiesinger, 2006; Yang, 2012).

In the 19th century, States generally comply to the doctrine of absolute immunity, which prohibited a State to be adjudicated in foreign States' courts in relation to any matter. This doctrine still has its own exceptions to be applied, such as waiver by the State in preceding agreements (Yang, 2012). Moreover, throughout the mid-20th century until recently, restrictive immunity has been embraced by the majority of States and strongly established as the law of State immunity (Verdier & Voeten, 2015; Yang, 2012). This doctrine allows a State to be adjudicated in the foreign States' courts under certain conditions appertaining to the commercial or non-sovereign actions of the State (Oguno, 2016; Yang, 2012). This concept alone has been widely introduced as the "commercial exception" (CAHDI 2017).

State's separate legal entity, such as a SOE, also has the privilege to State immunity in the event it is deemed to be part of the State and/or it is practicing sovereign or governmental function (Yang, 2012). This stance will be negated once a SOE is practicing a commercial action. Under this circumstance, a SOE is not entitled to State immunity, as generally conveyed by the doctrine of restrictive immunity (Maniruzzaman, 2005). However, in practice, some of SOE's acts are not very definitive or clear-cut to whether they are deemed as sovereign or commercial (Kuwait Airways v. Iraqi Airways, 2003; Yang, 2012). Consequently, such action must be deliberately determined by the concerned foreign State's court, conforming to the foreign State's immunity law and international law.

The participations of SOEs in international commercial transactions have become the example that affects the increasing need for arbitration as a dispute settlement mechanism presently and in the future (Helice Leasing v. Garuda Indonesia, 2021; Karaha Bodas v. Pertamina, 2002; Setyawati, 2013). Article 1(1) Law No. 19/2003 concerning State-Owned Enterprises ("Indonesian SOE Law") describes an Indonesian SOE as a business entity in which the capital is wholly or majorly owned by Indonesian Government through direct participation, and it is obtained from Indonesia's separated assets. Specifically, for an Indonesian SOE

structured as a limited liability company ("Persero"), Indonesian Government shall own a minimum of 51% (fifty-one percent) of the shares, whereas the main objective of the company is the pursuit of profit (Article 1(2) Indonesian SOE Law, 2003). Accordingly, Indonesian Government holds the majority of or rather all shares of a Persero (Perdana, 2019), which originate from the State budget, reserve capitalization, and/or others (Article 4(2) Indonesian SOE Law, 2003).

The existence of State immunity has a major role throughout the entire process of international commercial arbitration entailing a Persero. The immunity of a Persero may potentially decrease the interest of a foreign private party to carry out international transactions (Siagian, 2023; Sneddon, 2019) as well as to submit to arbitration as their dispute settlement mechanism. Such issue may arise since: First, parties submit to arbitration by relying on the arbitration agreement or clause that they have consented to be bound to (Born, 2012). However, the existence of merely a basic international arbitration agreement will not lead to an automatically resolved procedural issue since what may be heavily concerned is the immunity or the protection of the SOE's sovereign State over its own affairs (Tzeng, 2016). Second, in the event the parties are deemed not to own an international commercial arbitration agreement stating the Persero's consent to waive immunity, the private party is able to utilize the commercial exception argument against the Persero, which can further complicate the whole arbitration process (Al-Qarqani v Saudi Arabian Oil Co. ("Al-Qarqani v. SAOC"), 2021). Third, in the event the status of the Persero's assets, subjects to possible execution by a foreign State's court, are classified as owned by the State, the regarding assets can be vested with immunity and thus rendering them inexecutable (Karaha Bodas v. Pertamina, 2002).

As a clear depiction, a Persero had been involved in a lawsuit revolving around its consent to waive immunity in international commercial arbitration agreement, which is in Karaha Bodas v. Pertamina (2002). However, based on the current practice in Indonesia, Perseros can give waivers of immunity through arbitration agreements or contracts in various manners (Asuransi Jasa Indonesia v. Dexia Bank, 2006; Karaha Bodas v. Pertamina, 2002), and thus may be interpreted differently throughout the arbitrations and by the courts deciding the enforcement of the arbitral awards.

According to Prof. Dr. Yudha Bhakti Ardhiwisastra, Indonesia can be considered to embrace absolute immunity (Ardhiwisastra, 1999; Verdier & Voeten, 2015). Indonesia's position in applying such doctrine can be seen from its reluctance of the commercial activity exception theory, which was addressed in the Asian African Legal Consultative Committee in 2007 (Ardhiwisastra, 1999; Babu, 2007).

Regardless, Perseros had remained the subject of lawsuits in foreign States' courts on the commercial exception basis. The example can be seen from the case of NYSA-ILA Pension Trust Fund v. Garuda Indonesia ("NYSA-ILA v. Garuda Indonesia") (1993), whereas Garuda Indonesia and other Perseros remained protected under immunity since they were not subjected to the commercial exception. On the other hand, there also exists the case of Hanil Bank v. Bank Negara Indonesia ("Hanil Bank v. BNI") (1998), whereas BNI was declared not to be entitled to immunity due to its involvement in commercial activities. Considering the cases at hand, here arises the question to whether the commercial exception cannot be definitively exercised to a Persero, regardless of Indonesia's compliance to the doctrine of absolute immunity.

On that account, Perseros, which may carry out international transactions, are still in dire need of a legal solution to settle the State immunity issue.

For that reason, the prime focus of the article falls under the urgency of express consent for a Persero to waive State immunity in an international commercial arbitration agreement from the viewpoint of Indonesia's practice. The matter is aimed at finding a solution on how to sustain the effectiveness of the entire international commercial arbitration process that includes a Persero as one of the parties.

Moreover, this article analyzes the impact of the absence of express consent to waive State immunity, indicating that any party may solely rely on "implied waiver of immunity", i.e. the presumption that a Persero has indirectly waived its immunity by agreeing to solve the dispute through international commercial arbitration (Draft Articles on Jurisdictional Immunities of States and Their Property 1991 ("Draft Articles 1991") and UNCSI 2004, Article 17; US Foreign Sovereign Immunities Act of 1976 ("US SIA 1976"), Sections 1605(a)(1) & 1610(b)(1); Yang, 2012), and/or commercial exception to resolve the State immunity issue. The elaboration to such issue is incorporated to support the conclusion regarding the urgency of express consent to waive State immunity in an international commercial arbitration agreement made by a Persero.

METHOD

Identified Problems

In accordance with the aforementioned background, this article presents 2 (two) legal issues, namely:

1. How is the urgency of express consent to waive State immunity in an international commercial arbitration agreement based on Indonesia's practice?
2. How is the impact of the absence of express consent to waive State immunity in an international commercial arbitration agreement based on Indonesia's practice?

Research Specifications

In this present research, the writer utilizes the normative and comparative juridical research. By definition, normative juridical research is understood as library legal research conducted by analyzing or reviewing available secondary data (Soekanto & Mamudji, 2003), meanwhile comparative juridical research is understood as legal research conducted based on legal comparisons (Christy, et. al., 2020). Throughout this writing, normative juridical research is carried out by examining cases of State immunity involving Perseros as well as providing analysis according to the theories and practices of international law and Indonesian law. Synchronously, comparative juridical research is also carried out by comparing Indonesia's practices with international or other countries' practices in order to achieve precise legal references.

By applying the aforementioned research specifications, this research is expected to highlight the importance of a Persero's express consent to waive State immunity in international commercial arbitration agreement, as viewed from Indonesia's practice. For that reason, a Persero and its foreign counter-party are able to take firm step to consistently use such form of consent in arbitration agreement. As a whole, this particular writing is expected to provide answers on the legal problem involving State immunity.

Type of Data

Considering that this research mainly focuses on the settlement of international commercial transaction disputes in relation to State immunity, the writer takes advantage of the related secondary data, which composed of primary, secondary, and tertiary legal materials (Soekanto, 1986). Primary legal materials that are essentially utilized are 3 (three) State immunity cases involving Indonesia's Perseros, namely: Karaha Bodas v. Pertamina (2002), NYSA-ILA v. Garuda Indonesia (1993), and Hanil Bank v. BNI (1998); Indonesian national cases related to whether a Persero's assets constitute as Indonesia's national assets; UNCSI 2004; Custom on State immunity; the principles of freedom of contract, pacta sunt servanda, and enforceability in international commercial arbitration; international commercial arbitration rules; foreign cases; as well as foreign national regulations from around the world. In addition, the secondary legal materials that are used are books, journals, documents, and other sources

published online and offline. Finally, this research utilizes tertiary legal materials, which further clarify the primary and secondary legal materials.

Data Collection Method and Data Analysis

The following discussion employs literature study as the data collection method, which involves discovering diverse theories through law resources available, such as from electronic and print media (Wajdi, et. al., 2024). Furthermore, this article adopts qualitative data analysis, meaning that the writer applies a descriptive-analytical method that links the issues with related literatures as well as opinions of legal experts, grounded in current laws and regulations. The regarding data is comprehensively analyzed and organized to produce answers and conclusions of the discussed matters (Wajdi, et. al., 2024).

RESULTS AND DISCUSSION

The Urgency of Express Consent to Waive State Immunity in an International Commercial Arbitration Agreement Based on Indonesia's Practice.

As noted above, State immunity is part of Custom (Yang, 2012). However, there are further explanations of how State immunity functions, specifically in the matter of an SOE expressly providing consent to waive it in the international commercial realm, which is usually though agreement (Yang, 2012).

Express waiver of State immunity is generally understood as the act of State or SOE to have expressed its intention to renounce its immunity (Yang, 2012). Custom or international usage recognizes waiver that is "expressed … in no uncertain terms" (Draft Articles Commentary 1991, Article 7). Express waiver of State immunity, from jurisdiction to MoC, is extensively practiced through many conventions, domestic cases, as well international case. Commonly, in an international transaction, a foreign private party can initiate an agreement negotiation in order to gain the State or the SOE's consent to provide such waiver (Connolly, 2024).

In respect of express waiver of immunity from jurisdiction, the instances relating to States or SOEs are available through Article 7(1)(b) Draft Articles 1991 and UNCSI 2004, followed by States' law: Sections 10 & 22 Australia Foreign States Immunities Act 1985 ("Australia SIA 1985"); Sections 4(1) & 4(2) Canada State Immunity Act 1985 ("Canada SIA 1985"), Article 4(2) Law of the People's Republic of China on Foreign State Immunity 2023 ("PRC SIL 2023"), Sections 3(1) & 3(2) South Africa Foreign States Immunities Act 87 of 1981 ("South Africa SIA 1981"), Section 1605(a)(1) US SIA 1976, as well as national cases: Walker International v. Congo ("Walker v. Congo") (2004), Maldives Airports v. GMR Malé International Airport ("Maldives Airport v. GMR Malé") (2013), Atwood Turnkey v. Petroleo Brasileiro (1989), and Karaha Bodas v. Pertamina (2002).

On the other hand, the application of States or SOEs' express waiver of immunity from MoC is also evident through various instances, such as Article 18(1)(a)(ii) Draft Articles 1991 and Articles 18(a)(ii) & 19(a)(ii) UNCSI 2004, followed by States' law: Section 31 Australia SIA 1985, Article 14(1) PRC SIL 2023, Section 14(2) & 14(1) South Africa SIA 1981, Sections 13(3) & 13(2) United Kingdom State Immunity Act 1978 ("UK SIA 1978"), Sections 1610(a)(1) & 1610(b)(1) US SIA 1976, as well as national cases: Maldives Airport v. GMR Malé (2013), Atwood Turnkey v. Petroleo Brasileiro (1989), and Karaha Bodas v. Pertamina (2002). International Court of Justice in the case of Jurisdictional Immunities of the State (2012) has also specifically underscored that there has to be at least 1 (one) condition fulfilled before taking any MoC against State's asset, one of them being: the State's express consent to the implementation of such action.

Some instances of express waiver of immunity, relating to arbitration, are able to be observed from Walker v. Congo (2004) and Maldives Airport v. GMR Malé (2013). In Walker v. Congo (2004), the US Court of Appeals decided that Congo had expressly consented to waive

its own immunity in the procedure pertaining to arbitration decision, which was through the contract: "Congo irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court…". Meanwhile, in Maldives Airport v. GMR Malé (2013), the Singapore Court of Appeal also decided that the Maldives Government had consented to waive its immunity from injunction since the agreement that it had entered into contended that: "…immunity from service of process, suit, jurisdiction, arbitration … or other legal or judicial process or remedy …, such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction". The judges further explained that in the event there was any assertion regarding the invalidity of the contract, the whole dispute settlement mechanism, inclusive of the sentence concerning express waiver to immunity, still applied in this case.

Furthermore, an instance of express waiver of immunity, that is precisely delivered by a separate legal entity, can be seen from Atwood Turnkey v. Petroleo Brasileiro (1989). In this particular case, Petroleo Brasileiro, as a separate legal person which the Brazil Government owned its majority of shares, stipulated in its letter of credit that Petroleo Brasileiro: "…expressly and irrevocably waives any such right of immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) or claim thereto which may now or hereafter exist…". Hence, Petroleo Brasileiro was prevented from claiming its right of immunity.

In reference to Indonesia, Karaha Bodas v. Pertamina (2002) in the US Court of Appeals clearly depicts Persero's practice in expressly waiving its immunity. This case specifically discussed the sovereign immunity of the funds held by Pertamina, a Persero owned by the Indonesian Government. In 1994, Karaha Bodas, with Pertamina and another Persero, had entered into 2 (two) contracts for the development of geothermal energy extraction facilities in Indonesia. Further, in 1998, Karaha Bodas initiated an international commercial arbitration in Switzerland, claiming that Pertamina had breached their geothermal energy contracts. The arbitral award resulting in Karaha Bodas' victory led to its further action to pursue the enforcement (including execution) of such award.

In 2002, Pertamina and the Indonesian Ministry of Finance, on behalf of Indonesia, made an appeal towards the decision released by the US District Court for the Southern District of New York since it allowed Karaha Bodas to manifest the enforcement of the arbitral award: by executing some funds in several trust accounts which were held by Pertamina and were listed in the district court's order. Here, Karaha Bodas also made an appeal against the decision as it denied Karaha Bodas' motion to execute the remaining of the funds. The issues primarily revolved around the ownership of the funds that were originated from the sale of liquefied natural gas ("LNG") extracted in Indonesia as well as whether the funds could be attached under US SIA 1976 and New York law. As a note, the Indonesian Ministry of Finance had never appeared as a party in the regarding arbitration proceeding. However, the Indonesian Ministry of Finance joined the appeal on the basis that it was deemed to have an "affected interest" in this case.

Essentially, the position of the funds was noted and regulated under Article 5 Indonesian Government Regulation No. 41/1982, encompassing that Pertamina owned 5% (five percent) of the Net Operating Income of the Production Sharing Contract ("Retention"), meanwhile Indonesian Government owned the remaining of the disputed funds.

Pursuant to Section 1610(b)(1) US SIA 1976, any asset in the US of a State's instrumentality or agency, which participated in commercial activity in the US, is not immune from execution or attachment if such party has waived its immunity from execution or attachment by express consent. In this case, Pertamina, as Indonesia's instrumentality or agency, expressly waived its immunity through its sample geothermal energy contracts with Karaha Bodas: "waive(s) any … right of immunity (sovereign or otherwise) which it or its

assets now has or may have in the future" (Article 21.7(c) Joint Operation Contract; Article 15.8(c) Energy Sales Contract). Furthermore, Pertamina was also deemed to engage commercially in the US through the usage of the regarding trust funds, in order to channel the LNG revenues. Hence, the waiver made by Pertamina has set the Retention free from the immunity from attachment.

Moreover, according to Section 1610(a)(1) US SIA 1976, any asset of a foreign State, which is utilized for a commercial activity in the US, is not immune from execution or attachment if such party has waived its immunity from execution or attachment by express consent (Karaha Bodas v. Pertamina, 2002). In this instance, Indonesia, as a foreign State, was not a party of any of the contracts and nowhere in the judgment stated that it declared its waiver of immunity from attachment. Therefore, since the remaining of the disputed funds were clearly owned by Indonesia, they were still deemed to be immune from the attachment.

The case of Karaha Bodas v. Pertamina (2002) and the contracts provisions made by both of the parties, which are illustrated above, show a clear example on how Pertamina, as a Persero, expressly waived its immunity from jurisdiction and MoC. The express waiver of immunity was made pursuant to the principle of freedom of contract, meaning that both of the parties had the liberty to determine matters or aspects of arbitration agreement (Dursun, 2012) or contract (Supancana, 2022), including the insertion of such waiver. Moreover, the principle of pacta sunt servanda gave Pertamina the obligation that the express waiver of immunity must be well sanctioned and honored (Born & Kalelioglu, 2021; Dautaj, 2024; Supancana, 2022). Ultimately, the express waiver of immunity also gave assistance towards the international commercial arbitral award to be overall enforceable (Blackaby, et. al., 2015), as Karaha Bodas succeeded to at least secure the Retention as the asset for attachment in New York.

From this case, it ought to be emphasized that when negotiating the international commercial arbitration agreement or clause, or even any contract clause which contains references to arbitration and enforceability of the awards (Maldives Airport v. GMR Malé, 2013), the parties should conduct proper research and discussion on how a Persero can expressly waive its immunity, more advantageously in a "clear, complete, unambiguous, unequivocal, and unmistakable" manner (Yang, 2012). Such research and discussion revolve around whether Indonesian law gives specific requirements or limitations on the ability of a Persero to participate in arbitration (Global Arbitration Review, 2021) and to even support the arbitral award's enforcement in the future.

Based on the explanation above, a Persero's express consent to waive immunity, both from jurisdiction and MoC, through an arbitration agreement or contract helps the parties in preventing further procedural hindrance in the whole international commercial arbitration process. Moreover, the express consent to waive immunity additionally demonstrates that a Persero is working towards flexibility in conducting an international commercial transaction. This applies since a Persero rather relinquishes its right not to follow each process in arbitration, including the enforcement of arbitral award. The usage of a Persero's express consent to waive immunity will balance the legal positions of both parties as "commercial parties" in the regarding transaction, ensuring that they fully comply to the rights and obligations contained in the agreement(s), even during dispute.

The usage of express consent to waive immunity may have a beneficial impact on the increase of foreign private parties entering into international commercial contracts and arbitration agreements with Perseros. From here, foreign private parties may build their trust upon Perseros as the express consent enables the parties to engage in each arbitration process while ensuring that the foreign private parties obtain necessary protection: certainty that some assets which Perseros own are available to be taken of MoC in the future (Atwood Turnkey v. Petroleo Brasileiro, 1989).

In the event that SOE is reluctant to provide an express consent to waive immunity, the foreign private party and the SOE may alternatively pursue other commercial ways to prevent

any State immunity issue going forward. For instance, private corporations generally do not gain advantage from State immunity (Carlin, 2009). When it is feasible, both parties can structure the international commercial transaction through a private corporation, which is a separate legal entity and is not directly controlled by the SOE or the State, rather than through the SOE itself (Sneddon, 2019). Accordingly, this solution can ideally reset the circumstance into an international commercial transaction between private parties and can further streamline each process of the international commercial arbitration in the future. Nonetheless, for the purpose of averting a potentially more complex transaction process, express waiver of immunity may be the eminent answer to solve the State immunity matter, which is in accordance with the explanation above.

The Impact of the Absence of Express Consent to Waive State Immunity in an International Commercial Arbitration Agreement Based on Indonesia's Practice.

There are notable cases to demonstrate that a SOE did not always expressly waive State immunity (Asuransi Jasa Indonesia v. Dexia Bank, 2006; Hanil Bank v. BNI, 1998; NYSA-ILA v. Garuda Indonesia, 1993). As a consequence, during dispute, private parties would potentially rely on "implied waiver" (Creighton v. Minister of Finance of Qatar ("Creighton v. Qatar"), 2000; Seetransport Wiking v. Navimpex Centrala ("Seetransport v. Navimpex"), 1993) and/or "commercial activity" (Hanil Bank v. BNI, 1998; NYSA-ILA v. Garuda Indonesia, 1993) argument(s) to assert that such SOE, including a Persero, was not vested with immunity.

1. Implied Waiver

Generally, implied waiver of State immunity is understood as a State or SOE's action which certainly signals its intention to renounce immunity (Yang, 2012). For instance, once a State or SOE agrees to be bound to an arbitration agreement, it has therefore impliedly waived its immunity from jurisdiction in foreign State's court proceedings pertaining to the arbitration itself (Australia SIA 1985, Sections 17 & 22; Draft Articles 1991 and UNCSI 2004, Article 17; PRC SIL 2023, Article 12; Singapore State Immunity Act 1979 ("Singapore SIA 1979"), Section 11(1); South Africa SIA 1981, Article 10(1); UK SIA 1978, Section 9(1); US SIA 1976, Section 1605(a)(1)). Furthermore, in the context of commercial activity or transaction, a SOE's agreement to be bound to arbitration can also be concluded as an implied waiver of immunity from asset execution (US SIA 1976, Section 1610(b)(1)) or, at least, can further impact to a SOE's non-immunity from asset execution (Australia SIA 1985, Sections 22, 17(2), & 35(2)). The conclusions may apply since the parties' action to commit to an arbitration agreement involves more obligations: to honor the binding award issued from the arbitration and to perform in good faith by not undermining the aim of the arbitration (Fox, 1987). As an important note, each national State immunity law has its own further detailed requirements, in relation to the implied waiver matter, for all the parties to pay attention to.

An example to the immunity's implied waiver can be seen from the case of Seetransport v. Navimpex (1993). Seetransport, a company from Germany, commenced arbitration with Navimpex, a Romanian SOE, through the International Chamber of Commerce ("ICC") Arbitration in France. Navimpex, in appealing the decision relating to the recognition and enforcement of the award in favor of Seetransport, also asserted its immunity in the US Court of Appeals. Under Section 1605(a)(1) US SIA 1976, a foreign State is not immune from jurisdiction as a consequence to its implied waiver of immunity. In casu, both parties have entered into a commercial contract with an arbitration clause referring to the ICC and they participated in the arbitration as well. Rationally, Navimpex, as the Romanian Government's SOE, in which Romania was one of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958's ("NY Convention 1958") signatory, was also deemed to have foreseen the possibility of any involvement of the contracting States' courts (e.g. the US) in an action to enforce the arbitral award (NY Convention 1958, Articles I & III). Consequently, Navimpex has renounced its immunity from jurisdiction by implied waiver.

Although Seetransport v. Navimpex (1993) does not specifically discuss concerning the execution of assets, it is also still noteworthy that Section 1610(b)(1) US SIA 1976 does not provide immunity to the assets of SOE involved in a commercial activity in the US, in which the SOE has impliedly waived the right to immunity from execution due to its agreement to arbitrate (McGowan, 1984; Yang, 2012). Hence, within the framework of enforcement of arbitral award, the existence of such agreement may support the SOE's assets (e.g. Navimpex's assets) to be executed without being hampered by immunity.

In respect to Indonesia's practice, the assets which a Persero possess do not always equal to the assets that the Persero rightfully own under Indonesia's national law. Indonesia's separated asset in Persero is limited solely to its share ownership (Rajagukguk, 2016). Furthermore, pursuant to Constitutional Court Judgment No. 77/PUU-IX/2011 (2011), a Persero uses its own competence to carry out its own asset management subject to Indonesian company law (Constitutional Court Judgment No. 62/PUU-XI/2013, 2013; Constitutional Court Judgment No. 77/PUU-IX/2011, 2011), which can include the management of the Persero's asset execution in case of dispute (Sefriani, 2012). Nevertheless, in reference to Article 50 Law No. 1/2004 concerning State Treasury, the execution of assets held by a Persero cannot be conducted against Indonesia's funds or goods which are not part of Indonesia's capital participation, yet still are managed by the relevant Persero.

Reflecting from the case of Karaha Bodas v. Pertamina (2002), in the event a Persero and its counter-party merely own an arbitration agreement, the counter-party can potentially claim that the Persero's implied waiver of immunity from execution includes Indonesia's rightfully-owned assets which, at that time, are possessed or managed by the Persero. This situation can still render Indonesia's assets as inexecutable since the implied waiver of its right to immunity from execution is given by the Persero, and not Indonesia (Karaha Bodas v. Pertamina, 2002). In order to solve such problem, a Persero can ensure that there prevails express consent to waive immunity from execution inside the arbitration agreement or contract, which mentions that the waiver applies to specific type of assets or particular assets that are rightfully owned by the Persero (Clifford Chance, 2013; NML Capital v. Argentina, 2013; Sneddon, 2019).

The private party, together with the Persero, may also arrange another proper protection. The protection can come from representation made by the Persero in the contract, providing that particular assets are rightfully owned by the Persero (Karaha Bodas v. Pertamina, 2002). Hence, the particular assets can be accurately executed in the future through the enforcement of the international commercial arbitral award.

Other than the presence of an arbitration agreement, there has been a notable case to conclude that certain provision in arbitration rules also takes part to form an implied waiver to immunity, not merely from jurisdiction, but also from execution. In Creighton v. Qatar (2000), through the arbitration clause contained in the contract, the parties have approved to utilize ICC Arbitration Rules in their arbitration process. Article 24(2) of these rules (in its former drafting) governed that the parties are obliged to carry out the arbitral award immediately and to waive any appeal of it. Since this specific provision imposed Qatar a clear duty to carry out the award, the France Court of Cassation ruled that Qatar has renounced its immunity from execution by implied waiver.

However, it should be also duly noted that not every arbitration rule provides a provision which can be interpreted by foreign State's court as an implied waiver of immunity from execution. For instance, Article 1(2) Permanent Court of Arbitration - Arbitration Rules (2012) clearly governs that a State-controlled entity's arbitration agreement amounts to waiver of immunity from the proceedings pertaining to the conflict. Meanwhile, such entity's consent to waive immunity from the arbitral award's execution must still be made expressly (PCA, 2012). Furthermore, Article 46(2) Vienna International Arbitral Centre Rules of Arbitration 2021 specifies that the agreement to arbitration, in compliance with these rules, will merely be considered as a waiver of immunity from jurisdiction of the proceedings pertaining to the

arbitration. Meanwhile, such party's consent to waive immunity pertaining to the arbitral award's enforcement must still be made expressly (VIAC, 2021). The diverse provisions issued by arbitration institutions eventually raise the point of how the parties cannot solely depend on any arbitration rule to consider that a Persero has completely renounced its immunity from execution by implied waiver.

Derived from the elucidation above, the implied waiver of immunity, which is grounded from arbitration agreement and rules, rather shows the signs of complexity and uncertainty in its application. The position where a Persero and a foreign private party solely rely on the implied waiver of immunity may eventually create procedural hindrance that prolong the dispute settlement itself. At the end of the day, settling the dispute effectively can be difficult to implement since the concerned assets may still be vested with immunity from MoC. Hence, the assets may not be well-executed as the compensation for foreign private party's loss or damage.

2. Commercial Exception

Commercial exception, based on the doctrine of restrictive immunity, is simply defined as an exemption of immunity in respect of or over a State or SOE's commercial activities or commercial assets (Oguno, 2016; Yang, 2012). The commercial exception itself in general may be considered as Custom (Australia SIA 1985, Sections 11, 22, & 35(2); CAHDI, 2017; Canada SIA 1985, Sections 5 & 12(1)(b); Draft Articles 1991, Articles 10 & 18(1)(c); Jurisdictional Immunities of the State, 2012; NYSA-ILA v. Garuda Indonesia, 1993; Singapore SIA 1979, Sections 5, 15(4), & 16(1); South Africa SIA 1981, Sections 4, 14(3), & 1(2)(i); UNCSI 2004, Articles 10 & 19(c); US SIA 1976, Sections 1605(a)(2), 1610(a)(2), & 1610(b)(2)). The reason behind the application of this theory is simple: when a State or SOE engages with the international market place and acts as a private party in commercial transactions, it is therefore obliged to accept the economic as well as legal consequences of its own actions, regardless of its sovereign association (Cheng & Entchev, 2014).

An example to commercial exception on a SOE's immunity from jurisdiction, in the sphere of arbitration, is evident from the US Court of Appeals' ruling, Al-Qarqani v. SAOC (2021). Al-Qarqani and others submitted the case against SAOC, Saudi Arabia's majority SOE, to Egypt arbitration panel. This dispute was in regard to the 1933 agreement between Saudi Arabia and Standard Oil of California as well as the 1949 agreement between Arabian American Oil Company and the predecessors of Al-Qarqani and others. Moreover, Al-Qarqani and others sought to enforce the arbitral award in the courts of the US. In casu, the court explained that subject to Section 1605(a)(2) US SIA 1976, the commercial exception was not relevant as the arbitration that occurred in Egypt did not prompt a "direct effect" in the US. Therefore, SAOC, was still immune to this proceeding. Further petition for this case's rehearing, submitted by Al-Qarqani and others, was also denied in 2022 (Supreme Court of the US, 2022).

Meanwhile, an example to commercial exception on a SOE's immunity from MoC, in the sphere of arbitration, can be perceived from the judgment of Boru Hatlari Ile Petrol Taşima AŞ ("Botas") v. Tepe Insaat Sanayii AS ("Tepe") (2018) in the Jersey Court of Appeal. In this case, as Botas terminated the contracts with Tepe, Tepe submitted the disputes to different arbitration proceedings in Paris within ICC Arbitration Rules. Tepe continued to seek to enforce the arbitral awards by having Botas' shares in 2 (two) Jersey subsidiary companies arrested. As a result, Botas finally argued before this court that under Sections 13(4) & 13(2) UK SIA 1978 (as modified with State Immunity (Jersey) Order 1985): 1. the shares were the assets of Turkey as they were not subject to the commercial exception. Therefore, the shares used for sovereign purposes were immune from execution; and 2. Turkey had a control over the shares. However, the court denied the claims on the bases that: 1. before concluding the commercial exception test, the court must discover whether the shares were "property of a State"; and 2. Turkey was still obliged to own proprietary interest over the shares in order to be seen as "property of the State". As the opposite, Turkey's mere ability to control the shares were deemed insufficient.

Consequently, the shares were not secured by either Turkey or Botas' immunity from enforcement.

Despite that restrictive immunity has been considered as the law of State immunity, there are several countries which remain committed to the doctrine of absolute immunity, one of them considerably being Indonesia (Ardhiwisastra, 1999; Verdier & Voeten, 2015).

Based on Indonesia's practice, there has not been any foreign State's judgment that discusses the claims over a Persero's immunity primarily based on "commercial exception" in the realm of international commercial arbitration, including in the proceeding related to the recognition and enforcement of arbitral award. However, over the time, Perseros had faced several foreign civil lawsuits on the foundation of commercial exception, such as NYSA-ILA v. Garuda Indonesia (1993) and Hanil Bank v. BNI (1998).

In NYSA-ILA v. Garuda Indonesia (1993), the trustees of NYSA-ILA ("the Fund") made an appeal before the court that the defendants, which were consisting of Garuda Indonesia and 4 (four) other Perseros, were responsible for Djakarta Lloyd (Persero)'s ("Djakarta") withdrawal liability. In casu, the Fund alleged that consistent with the commercial exception (US SIA 1976, Section 1605(a)(2)), there was a significant nexus between the defendant's commercial activities inside the US as well as the Fund's action to impose the regarding liability towards Djakarta. However, the court, in line with the previous court's ruling, viewed that there was rather no significant nexus. Since Djakarta and each defendant were seen as a distinct foreign State, Djakarta's commercial activities were not able to be attributed to the defendants. In conclusion, the defendants were still protected under the immunity from jurisdiction.

Furthermore, in Hanil Bank v. BNI (1998), BNI pleaded before the court to reverse the previous judgment. This appeal was made in reliance of challenging the jurisdiction of the previous court, taking into account its right to immunity. According to the commercial exception mandated in Section 1605(a)(2) US SIA 1976, immunity from jurisdiction is not vested to a foreign State when the lawsuit is grounded upon a commercial activity conducted outside the US, however still prompts a "direct effect" in the US. The court was eventually convinced that the commercial exception was relevant since the regarding bank transaction prompted a "direct effect" in the US. Hence, BNI was not vested with the immunity from jurisdiction.

Based on the different results coming from both cases, it is clear that Indonesia's compliance to the doctrine of absolute immunity does not prevent its Persero to be adjudicated that it is exempted from immunity due to the commercial exception theory (Maniruzzaman, 2005). Even Indonesia, as a State, is not automatically precluded from the exemption of immunity due to the commercial exception theory (Murray, 1997). The application of commercial exception does apply during foreign State's proceeding where its national State or State immunity law fully complies with the restrictive immunity approaches. As the determination of a Persero's immunity is very case-based, the commercial exception argument, asserted by a foreign private party, may rather create procedural hindrance that prolong the dispute settlement itself.

In accordance with the elucidation above, both a Persero and a foreign private party should not solely depend on the "implied waiver of immunity" and/or "commercial exception in immunity". Instead, if a Persero was willing to set aside its immunity from jurisdiction and MoC, both parties could rather resort to express consent. During the negotiation phase, both parties could certainly discuss further on how the express consent to waive immunity should be included in the arbitration agreement or international commercial contract. Alongside international law, the express consent to waive immunity may also be created based on the law of the relevant jurisdiction(s), inclusive of where the recognition and enforcement of international arbitral award shall be brought in the future (Norton Rose Fulbright, 2017; Sneddon, 2019).

CONCLUSION

When entering into an international commercial transaction, Persero has shown its practice to provide express consent as a way of waiving State immunity from jurisdiction and MoC. Here, Persero's express consent to waive such immunity, through an arbitration agreement or contract, is concluded to be urgent. First, it paves the way to prevent further procedural hindrance in the whole arbitration process, especially in the sphere of recognition and enforcement (including execution) of arbitral award. Second, it may also have an impact on the increase of international commercial contracts and arbitration agreements with foreign private parties. The existence of express consent to waiver may be seem as a form of "trust-building" between the parties as it exists to ensure the pleasant implementation of the whole international commercial arbitration process, even up to the execution of Persero's assets.

Moreover, the recommendation to fortify the practice of express consent to waive State immunity is further strengthened since depending merely on "implied waiver of immunity" and/or "commercial exception in immunity" may not going to completely solve the problem – which the complexities and uncertainties of both theories may even bring the parties to procedural barrier that prolong the dispute settlement.

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