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INDONESIA ARBITRATION CENTER

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Editorial

Indonesia and International Arbitration Seminar

International arbitration is the answer to resolving disputes in an increasingly global economywhere transactions appear to take place in a borderless environment until disputes threaten the efficiency of world trade. The tension that exists between a foreign trader or investor and a local court to whom he must submit his dispute cannot be understated, be it a different incomprehensible language or a peculiar legal system.

While the world is moving towards a universal framework for dispute resolution like the UNCITRAL Model Arbitration Law and the New York Convention on the Recognition and Enforcement fo Foreign Arbitral Awards, the greater part of the world has yet to wholly embrace a unified system of law to resolve dispute. The business community must educate itself on such matters as a lack of international arbitration knowledge of the country where one does one's business will go to increase the risk in doing business in the countries concerned, whether your business is in manufacturing, construction, real estate or even IT.

Given such background, in conjunction with its 30th anniversary BANI hosted the International Arbitration Seminar on "Indonesia and International Arbitration" in Jakarta. BANI invited six speakers from Singapore, Brunei and Indonesia who spoke on the International practice and experience and the enforcement of arbitral awards. The subjects that were discussed are of critical importance to persons interested in how international arbitrations can be effectively and fairly conducted. More than 100 participants comprising the business persons, lawyers, academicians, etc. were charmed by the active panel discussions, We are pleased to present two of the papers in the current issue of our newsletters, while the remaining papers are planned for the next issues. The two papers provide an overview on the Separable Doctrine in the Indonesia Arbitration Law 30 of 1999 in relation to the International Arbitration System and the Different Form of Investment Treaty Arbitration and Protection that are available to Foreign Investor investing in countries outside their home base. In this issue, we also present three additional articles on Settlement in International Arbitration and What this might for ADR, Selecting the Place of Arbitration, and Insurance Dispute Resolution through BANI. We do hope you will enjoy reading these articles.

Finally, to achieve our goal for disseminating information on arbitration/ADR, of course is not something that we can do alone. We look forward to receiving your comments and articles for our next issues.

Articles

Separable Doctrine Dalam Pasal 10 UU 30/1999 dan Keterkaitannya Dengan Sistem Arbitrase Internasional

Prof. Dr. H. Priyatna Abdurrasyid

Separable Doctrine in the Law 30 of 1999 and its relation to the International Arbitration System

The paper provides some illustrations on the strength of separable doctrine in Law Number 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, namely Article 10. Article 10 determines the legal strength and the imperative validity of arbitration agreement, providing the Arbitration Tribunal with a right to make final and binding decision on the dispute. The source is the 1958 New York Convention (among others Article II); also the Arbitration Law has been inspired by Article 33 of UN Charter which encourage the parties to any dispute to first seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The separable doctrine deals with the effect on an arbitration clause of an agreement that either the main agreement containing the arbitration clause itself was not entered into by one of the parties. By virtue of such doctrine, the main (underlying) agreement and the arbitration agreement have separate existence, and the fact the former is invalid does not affect the validity of the latter, nor is the arbitration deprived of jurisdiction to determine the validity of the former. The doctrine in essence rests on the practical necessity to enable a dispute resolution process/if intended by the parties to be effective.

Under the separable doctrine, an arbitration agreement that has been agreed to by the parties that meets all the required elements may not be annulled, even by the Court, unless agreeable by the parties. These required elements that shall be agreed in the arbitration agreement include the presence of the parties, in writing, has recitals, location, properly dated and signed and open for public. The arbitration agreement shall insure that agreement is valid under the law; also the dispute is arbitral, what the impact is if it is violated and whether the parallel court legally may state that they are not competent.

The latter is clearly stated in Article 3 of Arbitration Law, which states that the District Court shall have no jurisdiction to try disputes between parties bound by the arbitration agreement. Furthermore Article 11 states that the existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court and the District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this act and the District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act.

Pasal 10 UU 30/1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa Umum menetapkan bahwa suatu perjanjian arbitrase tidak menjadi batal oleh keadaan tersebut di bawah ini:

a. Meninggalnya salah satu pihak;
b. Bangkrutnya salah satu pihak;
c. Novasi;
d. *Insolvency* salah satu pihak;
e. pewarisan;
f. berlakunya syarat-syarat hapusnya perikatan pokok;
g. Bilamana pelaksanaan perjanjian tersebut dialihtugaskan pada pihak ketiga dengan persetujuan pihak yang melakukan perjanjian arbitrase tersebut;
h. Berakhirnya atau batalnya perjanjian pokok.

Pasal ini menetapkan kekuatan hukum dan berlakunya suatu perjanjian arbitrase secara imperatif, yang memberikan mandat/kekuatan hukum kepada suatu Majelis Arbitrase untuk memberikan keputusan final dan mengikat atas sengketa yang diajukan kepadanya. Perlu diperhitungkan agar majelis dalam kerjanya tersebut tidak melebihi mandat yang telah diberikan. Pemberian mandat ini dilandasi hak/kekuasaan yang berada dalam lingkup kekuasaan para pihak yang bersengketa. Para pihak dalam suatu perjanjian arbitrase memiliki empat ciri hak, yakni pertama mereka berdaulat, kedua memiliki otoritas, ketiga berjurisdiksi terhadap sengketa-sengketanya dan masing-masing independen, tidak bisa dicampuri oleh pihak manapun tanpa kehendak/izinnya.

Atas dasar hukum keempat ciri tersebut, dapat diteliti dalam perjanjian arbitrase yang telah disepakati oleh para pihak bentuk sengketanya itu apakah "General Arbitration", artinya segala/semua sengketa dalam hubungan perjanjian pihak-pihak tersebut harus diserahkan kepada arbitrase atau "restricted arbitration", yakni sengketa-sengketa tertentu tidak ke arbitrase, atau "narrow arbitration", hanya sengketa khusus tertentu saja diselesaikan melalui arbitrase.

Demi kejelasan perlu kiranya diketahui dan dipastikan elemen-elemen pokok yang harus disepakati di dalam suatu perjanjian arbitrase, yakni adanya para pihak (parties), disusun secara tertulis (in writing), diisi dengan penjabaran (recitals), kesepakatan tempat bersidang (location), diberi tanggal (duly dated), ditandatangani (signatures) dan terbuka keberadaannya untuk umum (publication). Inter-

national requirement dari suatu perjanjian arbitrase bersumber utama pada "New York Convention 1958", antara lain Pasal II yang menyatakan sebagai berikut:

- The agreement is in writing;
- It deals with existing or future disputes;
- Disputes arise in respect of a defined legal relationship, whether contractual or not;
- They concern a subject matter capable of settlement by arbitration;
- Legally capable parties;
- It is valid under the law.

Selanjutnya suatu perjanjian arbitrase itu akan menunjukkan/memastikan bahwa perjanjian itu sah menurut hukum, sengketa/ketidaksefahaman "arbitable", apa dampaknya kalau penyelesaian ini dilanggar dan apakah pengadilan yang "paralel" secara hukum menyatakan dirinya tidak berwenang. Untuk ini dapat dilihat pada Pasal 3 UU 30/99 yang menyatakan bahwa Pengadilan Negeri tidak berwenang untuk mengadili sengketa yang telah terikat perjanjian arbitrase. Selanjutnya, Pasal 11 menyatakan bahwa:

(1) Adanya suatu perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termuat dalam perjanjiannya ke Pengadilan Negeri;

(2) Pengadilan Negeri wajib menolak dan tidak akan campur tangan di dalam suatu penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali dalam hal-hal tersebut yang ditetapkan dalam Undang-undang ini.

Perjanjian arbitrase merupakan fondasi hukum (pasti) untuk menyelesaikan sengketa/ketidaksefahaman melalui arbitrase/aps, dan mencatat persetujuan dan kesepakatan para pihak mengajukannya ke arbitrase. Suatu persetujuan/kesepakatan harus ada bagi terlaksana proses arbitrase (indispensable). BANI memberikan suatu penilaian yang sangat positif terhadap keinginan/niat/kesepakatan para pihak untuk berarbitrase ("autonomie de la volonte" teliti "rules and procedure" BANI). Tentunya dengan adanya kewajiban menghargai dan mematuhi ketentuan-ketentuan hukum nasional yang berlaku secara penuh, seperti tercantum dalam UU 30/99.

a. Klasifikasi Perjanjian Arbitrase

Diketemukan dua bentuk perjanjian arbitrase, pertama perjanjian arbitrase ("arbitration clause") dan kedua apa yang dinamakan "submission agreement". Perjanjian Arbitrase menatap ke depan di mana "submission agreement" menatap ke masa lalu, di mana yang pertama merupakan suatu hal yang terjadi sehari-hari, biasanya dicantumkan di dalam kontrak yang menyatakan bahwa sengketa-sengketa yang timbul atau akan timbul akan diselesaikan melalui arbitrase/aps. Sedangkan yang kedua merupakan perjanjian yang disepakati (tiba-tiba) dan menyerahkan sengketa yang terjadi saat itu ke arbitrase/aps. Untuk selanjutnya sebutan untuk kedua tersebut akan digunakan istilah perjanjian arbitrase saja, karena memang tidak ada perbedaan yang prinsipiil antara kedua istilah ini. Yang pertama biasanya singkat-tegas-jelas, sedangkan yang kedua dapat panjang lebar dan adakalanya diselesaikan melalui arbitrase ad hoc, yakni bukan oleh lembaga seperti BANI.

b. Berlakunya doktrin Internasionalism terhadap setiap perjanjian arbitrase (standard baku)

Terdahulu sudah diberikan elemen-elemen apa yang harus dipenuhi oleh suatu perjanjian arbitrase dan apa yang dapat dijadikan sebagai parameter hukum (arbitrase). Parameter ini merupakan hasil suatu perkembangan hukum arbitrase sejak lama yang muncul dalam praktek, kebiasaan yang dikembangkan oleh ICC, ICSID, SIAC, BANI dan lain-lain. Melalui doktrin tampak bahwa di manapun kita berada, ketentuan-ketentuan/kebiasaan hukum arbitrase itu banyak persamaannya. Landasan-landasan persamaan ini ditetapkan di dalam Pasal 38.1 Statute of the International of Justice, yakni:

1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
   a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
   b. *international custom, as evidence of a general practice accepted as law;*
   c. *the general principles of law recognized by civilized nations;*
   d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Suatu kenyataan dalam praktek ialah bahwa suatu perjanjian untuk menyelesaikan sengketa/ketidaksefahaman melalui arbitrase tidak pernah menyendiri (terisolasi) dari perjanjian yang ada. Perjanjian arbitrase tersebut merupakan bagian/terkait dengan kontrak pokok ("underlying contract"). Perjanjian arbitrase pada umumnya merupakan "penumpang" atau terkait dengan suatu perjanjian yang ada. Oleh karena selalu harus diperhitungkan adanya perjanjian arbitrase yang sah sebagai landasan hukum berarbitrase, yakni adanya underlying contract, terjadinya contract, perjanjian arbitrase memuat tata-cara penyelesaian sengketa yang timbul melalui arbitrase (procedures) dan apakah perjanjian arbitrase tersebut juga menggariskan hal-hal yang memastikan bahwa putusan yang diterbitkan itu final and binding and enforceable.

Penyepakatan untuk berarbitrase melalui arbitrase akan diselesaikan "in the usual way" (Musthill, Commercial Arbitration, hal 107) atau berdasarkan suatu "midnight clause" jelas tidak memenuhi elemen-elemen persyaratan. Oleh karena tepatlah ketika Musthill berkata "an arbitration agreement has its own life".

Pokok-pokok lain yang perlu diperhitungkan ialah pengembangan berbagai bentuk ADR yang telah ditemukan, yakni:

- Dialogue
- Negotiation
- Mediation
- Side bar
- Conciliation
- Shake up the game board
- Silver rule
- Dispute Prevention
- Binding Opinion
- Valuation
- Expert Appraisal
- Expert Determination
- Special Masters
- Ombudsmen
- Mini-trial
- Private Judges
- Summary Trial
- Musyawarah untuk mufakat
- Runggun Adat
- Begundem
- Rembug Desa
- Hakim Perdamaian
- Kerapatan Ninik Mamak
- Barangay/Barrio
- Shalish/Southeast Asia
- Share bargaining
- Shariah council
- Discussion
- Facilitation
- Compromise
- Adjudication
- Bargaining
- Consensus
- Diplomacy
- Quality Arbitration
- Shadow bargaining
- Settlement
- Refereeing
- Umpiring
- Dispute review board
- Settlement conferences
- Counseling
- Intervention
- Caucusing
- Troubleshooting
- Evaluation
- Pang pada payu (Bali)
- Mangde sami polih (Bali)
- Afiesem (Ghana)
- Baraza (Congo)
- Besara' (Kalimantan)
- Renmin Tiaojie Weiyuanhui (China)
- Shuo ho ti (China)
- Dakhala (Arabia)
- Panchsheel (India)
- Dequitub (India)
- Du-wrai (Afganistan)
- Accord
- Collaborative negotiation
- Collaborative Problem solving (CPS)
- Collective bargaining
- Commission of inquiry
- Community board
- Complimentary dispute resolution
- Compromiso arbitral
- Conciliatory process
- Conseil de prud'hommes
- Arbitration
- Combination of Processes

Dalam penerapannya perlu diperhatikan berbagai sistem hukum di dunia dan hal-hal berikut :

- *Good faith*
- *Non-Confrontation*
- *Cooperation*
- *Law of the parties*
- *Law of the procedure*
- *Non-Disclosure*
- *Non-Publication*
- *Time Limitation*
- *Confidentiality*
- *Equality*
- *Unanimity*
- *Contradiction*
- *Non-Interference*
- *Non-Intervention*
- *Impartiality*

Setiap bentuk sengketa, apakah perdata maupun publik (kecuali dilarang undang-undang) dapat diarbitrasekan, sebagaimana dinyatakan dalam Pasal 33 Piagam PBB yang berbunyi:

1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*

2. *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.*

Berlatar belakang pada pokok-pokok tersebut, maka dapat dipastikan adanya kekuatan dari "separable doctrine" yang tercantum di dalam Pasal 10 UU 30/1999, yakni bahwa suatu perjanjian arbitrase yang telah disepakati oleh para pihak dengan memenuhi persyaratan elemen-elemen yang perlu tidak dapat dibatalkan, bahkan oleh Pengadilan, kecuali oleh para pihaknya sendiri dengan kesepakatan bersama. Mungkin saja dapat dimanfaatkan oleh apa yang disebut "group companies doctrine" yakni walaupun dibentuk oleh salah satu anggota perusahaannya, dapat saja perjanjian arbitrase yang diperjanjikan oleh yang satu diterapkan kepada yang lainnya. Tentunya melalui pengkajian yang seksama.

Prof. Dr. H. Priyatna Abdurrasyid
Chairman of BANI Arbitration Center

Penyelesaian Sengketa Klaim Asuransi melalui BANI

Junaedy Ganie

Insurance Dispute Resolution through BANI

Indonesian insurance industry has accommodated dispute resolution clauses in the policy, which may differ between one policy to others depending on the insurer, type of insurance and originating countries of the clauses. Such clauses may also vary from limiting the scope to arbitrate dispute on quantum of claim to that attending to any dispute. A clause that limits its scope of dispute to quantum will still require another resolution forum for all other matters including the cause of loss or policy interpretation. However, there has been a recent trend towards uniformity; introduced by insurance association this may include introduction of dispute resolution clauses in the Standard Policy, such as for fire, motor vehicle and earthquake. Under the standard dispute clause (A), any dispute would be settled through arbitration while under standard clause (B) it is the court that will decide. Dispute Clause (C) which is the most commonly used, the clause provides the Insured with a right to select whether to resolve a dispute by arbitration or through the court.

For general insurance claim not exceeding Rp 500 million and Rp 300 million for life insurance, the local insurance industry has set up a Mediation Body called Badan Mediasi Asuransi Indonesia (BMAI). The decision of BMAI tribunal will bind the insurer, but the client still has a right to bring

up the dispute to an arbitration panel. As the arbitration clauses in the insurance industry mostly adopt the ad hoc arbitration type, it leads to a question as to how would an institutional arbitration such as BANI may provide services to the insurance industry and its consumers.

The provision referring to the ad hoc arbitration should not close out the institutional body to take part in the resolution of insurance dispute. This may occur when the parties to the contract, agree to ignore the ad hoc provision and select the institutional arbitration to resolve the dispute (pactum de compromintendo). The institutional arbitration would give an advantage over the ad hoc, considering that such institution including BANI has developed over time its administrative rules and procedures, tested set of criteria in the appointments of arbitrators and Code of Conduct in proceeding and its decision. The limited knowledge and access to the qualified arbitrators have been one of the constraints for the Insured to initiate submission of an insurance dispute. Under such circumstances, the Insured may consider and select the arbitrators from BANI's list of arbitrators.

In conclusion, introduction of clause for institutional arbitration would be determined by the readiness and capability of the insurance industry and arbitration body. Keeping in mind the existence of the standard rules and procedures that have been tested over the past 30 years, the parties in dispute may also consider applying the Rules and Procedures of BANI in any insurance dispute resolution. By this way, although it is not involved in dispute resolution, BANI has indirectly contributed to interest of the public through either one or the combination of the use of its Rules and Procedures, the nomination of its registered arbitrators to settle an ad hoc insurance arbitration or the use of its meeting facilities and the experienced resources BANI's secretariat can offer.

Banyak penyelesaian klaim asuransi yang tidak berjalan dengan lancar. Berbeda dengan praktek yang terjadi, dalam persepsi umum penyelesaian sengketa atas klaim asuransi hanya dilakukan melalui pengadilan. Masyarakat pada umumnya belum mengenal peranan arbitrase dalam penyelesaian suatu perselisihan dalam suatu perjanjian asuransi sampai mereka mengalami perselisihan terutama dalam penyelesaian klaim asuransi dengan penanggung. Sementara itu, penyelesaian perkara asuransi melalui badan peradilan dapat membawa berbagai konsekuensi yang lebih berat dalam penyelesaian perselisihan asuransi.

Bagir Manan mengatakan bahwa bila secara teknis, fungsi peradilan atau tugas yang mengadili dirumuskan sebagai "memeriksa dan memutus perkara" yang tidak selalu sama dengan "menyelesaikan" atau "solusi" atau "memecahkan" suatu perkara atau sengketa. Selanjutnya dikatakan tentang perlu sekali adanya perubahan orientasi "memutus perkara" menjadi menyelesaikan perkara". Arbitrase dapat merupakan jawaban atas kebutuhan perubahan orientasi tersebut.

Arbitrase adalah suatu tata cara untuk menyelesaikan suatu perselisihan selain melalui pemeriksaan oleh pengadilan dan terjadi bilamana satu atau lebih orang diangkat untuk mendengarkan argumentasi yang diajukan para pihak yang bersengketa dan untuk memberikan putusan atas perselisihan tersebut Arbitrase umumnya timbul karena kesepakatan antara para pihak untuk menyelesaikan suatu perselisihan melalui arbitrase, baik atas kesepakatan yang dicapai sebelum atau sesudah perselisihan timbul. Penyelesaian tersebut umumnya lebih disukai karena lebih murah, lebih cepat, lebih informal dan tidak melibatkan publisitas.

Priyatna Abdurrasyid mengatakan bahwa arbitrase merupakan suatu istilah yang dipakai untuk menjabarkan suatu bentuk tata cara damai yang sesuai atau sebagai penyediaan dengan cara bagaimana menyelesaikan sengketa yang timbul sehingga mencapai suatu hasil tertentu yang secara hukum final dan mengikat. Industri asuransi telah memberikan fasilitas penyelesaian perselisihan melalui forum arbitrase tetapi selama ini peranan Badan Arbitrase Nasional Indonesia (BANI) dalam penyelesaian perselisihan pada perjanjian asuransi masih terbatas. Melalui tulisan ini, marilah kita perhatikan bagaimana masyarakat dapat membawa perselisihan yang timbul kepada BANI dan bagaimana BANI dapat meningkatkan peranannya bagi industri asuransi.

Klausul Penyelesaian Perselisihan dalam Perjanjian Asuransi

Industri asuransi Indonesia mengenal berbagai jenis klausul penyelesaian sengketa yang berbeda isinya dari satu jenis polis ke jenis polis lainnya bahkan dari satu penanggung ke penanggung lainnya untuk jenis polis asuransi yang sama. Klausul penyelesaian perselisihan yang beredar di Indonesia mulai dari ketentuan mengenai penyelesaian yang terbatas atas perselisihan mengenai jumlah klaim yang timbul (quantum) sampai pada penyelesaian atas setiap perselisihan yang timbul.

Dewasa ini, industri asuransi Indonesia sudah memulai penyederhanaan dan penyeragaman klausul penyelesaian perselisihan untuk jenis-jenis asuransi tertentu yang telah memiliki polis standar Indonesia, misalnya untuk Polis Standar Asuransi Kebakaran, Polis Standar Asuransi Gempa Bumi dan Polis Standar Asuransi Kendaraan Bermotor. Pada polis yang telah memiliki klausul penyelesaian perselisihan standar tersebut terdapat tiga jenis klausul penyelesaian sengketa. Klausul Penyelesaian Perselisihan (A) menentukan bahwa perselisihan yang timbul akan diselesaikan melalui arbitrase. Klausul Penyelesaian Perselisihan (B) menyatakan bahwa perselisihan yang timbul akan diselesaikan melalui pengadilan. Pada klausul (C), tertanggung memiliki hak untuk memilih bilamana timbul perselisihan untuk menyelesaikan perselisihan melalui arbitrase atau pengadilan. Di antara ketiga jenis klausul tersebut, klausul (C) adalah yang paling sering dipergunakan untuk jenis asuransi yang telah memiliki klausul penyelesaian sengketa yang standar. Klausul-klausul standar tersebut mulai dipergunakan penanggung untuk berbagai jenis polis asuransi lainnya.

Dalam perjanjian asuransi, penentuan jenis klausul penyelesaian sengketa yang akan dipergunakan pada umumnya ditentukan sepihak oleh penanggung kecuali atas penutupan polis asuransi yang dilakukan oleh broker asuransi profesional yang telah terlebih dahulu membahas dasar pemilihan klausul dengan kliennya. Berbeda dengan prak-

tek umum yang memungkinkan para pihak terlibat secara bersama-sama dalam mempersiapkan isi suatu perjanjian atau dapat mempelajari terlebih dahulu isi suatu perjanjian sebelum mengikatkan diri, perjanjian asuransi dipersiapkan sepihak oleh penanggung (contract of adhesion). Sifat perjanjian asuransi tersebut pada umumnya mendudukkan tertanggung pada posisi bila tidak menerima berarti tidak membeli atau menerima apa adanya Keadaan tersebut sering kali belum mendorong tertanggung untuk mempelajari isi perjanjian sebelum mengikatkan diri, bahkan, tertanggung belum tentu akan mempelajari secara rinci ketentuan-ketentuan dalam polis asuransi yang telah dibeli termasuk ketentuan mengenai penyelesaian perselisihan. Keterbatasan pemahaman tertanggung tentang jenis klausul dan pertimbangan dalam pemilihan klausul yang dipergunakan telah menimbulkan persepsi umum pada pemegang polis bahwa perselisihan yang timbul dalam suatu perjanjian asuransi akan diselesaikan melalui pengadilan, terlepas dari jenis klausul yang tercantum dalam polis yang dimilikinya.

Penyelesaian Klaim Asuransi dalam nilai nominal yang kecil

Industri asuransi Indonesia telah melakukan suatu langkah besar yang memberikan arti penting bagi kepentingan tertanggung melalui pendirian Badan Mediasi Asuransi Indonesia (BMAI) yang telah beroperasi sejak awal 2007. Badan tersebut dapat berperan dalam penyelesaian perselisihan atas klaim asuransi yang tidak melebihi Rp 500,000,000.- bagi perselisihan yang menyangkut polis asuransi umum atau asuransi kerugian sampai dengan Rp 300,000,000.- untuk polis asuransi jiwa yang diajukan kepadanya. Putusan BMAI akan mengikat penanggung tetapi tetap memberikan keleluasaan kepada tertanggung untuk membawa perselisihan yang timbul melalui forum penyelesaian sengketa lain, sesuai dengan ketentuan yang tercantum dalam polis yang dimilikinya bilamana tertanggung tidak puas dengan putusan BMAI. Ketentuan ini menunjukkan bahwa meskipun badan mediasi tersebut didirikan berdasarkan kesepakatan para penanggung, tertanggung yang membawa perselisihan yang timbul kepada badan tersebut tidak dibatasi haknya.

Melalui keberadaan BMAI diharapkan klaim-klaim yang melibatkan nominal yang kecil akan dapat diselesaikan secara cepat dan murah. Sementara itu, atas klaim yang melibatkan jumlah yang lebih besar dari wewenang yang dimiliki oleh BMAI, tertanggung dan penanggung tetap mengacu kepada ketentuan yang dimuat dalam klausul penyelesaian perselisihan yang melekat pada polis asuransi masing-masing.

Peranan BANI dalam penyelesaian perselisihan pada perjanjian asuransi

Majelis arbitrase untuk keperluan penyelesaian perselisihan dalam perjanjian asuransi umumnya adalah bersifat ad hoc yang dibentuk dan bubar sesuai dengan kebutuhan masing-masing kasus yang timbul. Prosedur pelaksanaan yang ditempuh dalam arbitrase ad hoc tidak bersifat baku tetapi berdasarkan kesepakatan para pihak yang terlibat serta pengalaman para arbiter yang diangkat. Walaupun terdapat berbagai variasi, sebagian besar klausul arbitrase yang dipergunakan dalam perjanjian asuransi di Indonesia dan perkembangan yang muncul menentukan bahwa penanggung dan tertanggung masing-masing akan mengangkat seorang arbiter dan kedua arbiter yang telah diangkat akan menunjuk seseorang yang lain sebagai arbiter ketiga merangkap ketua majelis arbitrase.

Isi klausul arbitrase dalam perjanjian asuransi tersebut di atas menimbulkan pertanyaan bagaimanakah lembaga arbitrase institusional seperti BANI dapat berperan dalam penyelesaian sengketa asuransi? Ketentuan klausul arbitrase ad hoc tidak serta-merta menutup pintu bagi keterlibatan BANI dalam penyelesaian sengketa asuransi. Pertama-tama, dengan kesepakatan kedua belah pihak, para pihak dapat bersepakat untuk tidak mengindahkan klausul arbitrase yang telah ada dalam polis asuransi (pactum de compromintendo) dan menunjuk BANI setelah perselisihan timbul. Para pihak dapat mempertimbangkan keberadaan BANI yang telah berusia 30 tahun dan telah memiliki ketentuan administratif dan prosedur, persyaratan pengangkatan arbiter yang telah teruji serta Kode Etik dan Pedoman Tingkah Laku Arbiter yang dimiliki BANI sebagai dasar untuk memilih untuk menyerahkan penyelesaian perselisihan asuransi kepada BANI. Hal ini sejalan dengan pendapat Priyatna Abdurrasyid yang mengatakan bahwa arbitrase adalah hukum prosedur (law of procedure) dan hukum para pihak (law of the parties).

Suatu klausul arbitrase dibuat dengan memperhatikan kesiapan berbagai pihak yang mungkin terlibat dan berpijak pada pemikiran bahwa sebuah klausul dibuat untuk dipergunakan dalam jangka waktu yang lama. Setiap pilihan akan dipengaruhi oleh kesiapan dan kemampuan pasar asuransi Indonesia pada umumnya dan lembaga arbitrase institusional yang mungkin terlibat. Keterbatasan pengetahuan dan akses tertanggung dalam pemilihan arbiter dapat menjadi pertimbangan tertanggung untuk mengusulkan agar penyelesaian perselisihan yang timbul diserahkan kepada BANI. Bilamana, keinginan tersebut tidak tercapai, salah satu pihak yang memerlukan terutama tertanggung karena keterbatasan pengetahuan yang dimiliki dapat memilih seorang arbiter yang terdaftar pada BANI untuk diangkat dalam suatu majelis arbitrase ad hoc.

Dengan pertimbangan keberadaan prosedur BANI yang baku dan telah teruji, salah satu pihak yang bersengketa dapat pula mengusulkan untuk mempergunakan ketentuan administratif dan prosedur BANI dalam menyelesaikan suatu perselisihan asuransi. Dengan demikian, sekiranya BANI tidak terlibat secara institusional dalam penyelesaian suatu perselisihan asuransi, secara tidak langsung BANI dapat memberikan kontribusi bagi kepentingan masyarakat yang memerlukan melalui pemakaian prosedur arbitrase yang dimilikinya, melalui arbiter BANI yang ditunjuk untuk keperluan arbitrase ad hoc dan bahkan melalui pemanfaatan fasilitas ruang persidangan dan sekretariat BANI.

Junaedy Ganie
Arbiter BANI dan praktisi asuransi

Settlement in International Arbitration (and what this might for ADR)

Danny McFadden

As international arbitration embraces the new millennium arbitrators and in-house lawyers are engaged in seeking new pathways to keep arbitration fresh, effective and relevant. Modern arbitration run by a proactive arbitral tribunal has what has been described as new windows of opportunity to assist parties reach an amicable settlement during the arbitration . In order to explore these new opportunities practitioners and parties will need to keep an open mind. It may well need a change of perception especially by Anglo-American practitioners with regard to the types of settlement techniques used by their civil law colleagues.

Many believe there are no real obstacles to the synergies that can be achieved by the combining of the best features of mediation and arbitration . However it is not simply about reworking the pure mediation/conciliation/arbitration versus Med-Arb debate but challenging practitioners to re-examine their own practices in encouraging settlement.

The current Arbitration climate

Today international arbitration is still seen as the default method for resolving disputes around cross-border commercial contracts but it is attracting increasing amounts of criticism worldwide for being slow and expensive. Settlement rates in international arbitration are reputed to be significantly lower than they are in most state commercial court proceedings, where, in many jurisdictions, the judges now use a variety of tools to promote early settlement.

It is clear that the international arbitration community is aware of the criticisms and is concerned to improve the product. Papers such as the UNCITRAL Notes on Organising Arbitral Proceedings, the IBA Rules on the Taking of Evidence in International Commercial Arbitration and Guidelines on Conflicts of Interest in International Arbitration are all documents aimed at making international arbitration work better.

Although some of these papers refer to the role of the tribunal in encouraging settlement, at present the approach to this taken by tribunals varies very significantly from jurisdiction to jurisdiction. In all jurisdictions it is rare for arbitral tribunals to recommend that the parties try using formal mediation.

Whilst many courts in Europe now generally enforce ADR clauses and decline jurisdiction where these are not observed, arbitral tribunals tend to find reasons to accept jurisdiction and proceed with the arbitration, even where one party may have breached an obligation to mediate before commencing arbitral proceedings.

This reluctance to embrace mediation contrasts with jurisdictions like Australia where reinsurance contracts, for example, exhibit a proportionately higher use of mediation or expert determination clauses than their international counterparts and the parties are more likely to insist that mediation be attempted before arbitration. This trend, not as yet seen elsewhere, is due to the fact that the Australian courts have proven to be more likely to refer a dispute to mediation or expert determination. European jurisdictions are also seeking innovative solutions to combine the best of mediation and adjudicative proceedings. In Germany, for example, in order to promote the acceptance of mediation a model project has been introduced to trial the use of judge mediators who act as mediators, but if the case does not settle the case is handed back to the referring judge.

Commission on Settlement in International Arbitration

This summer CEDR established a Commission that will investigate the different approaches currently taken to promote settlement in international arbitration and make recommendations as to how arbitral institutions and tribunals might give parties greater assistance in finding ways to settle their disputes earlier and more cost effectively.

The first meeting of the CEDR Commission on Settlement in International Arbitration, with over 25 international jurisdictions represented by 70 members, took place in London in July. The Commission is co-chaired by Lord Woolf of Barnes (former Lord Chief Justice of England and Wales) and Prof. Gabrielle Kaufmann Kohler (partner of Schellenberg Wittmer).

At the initial meeting the Co-Chairs set out the Commission's role to investigate approaches to settlement within the framework of international arbitration. An important part of the investigation will be the inputs and comments submitted by the world's leading arbitration bodies. The Commission has identified 45 consulting ADR organisations to input into research that will help determine its findings next year. The organisations cover a wide range of national and international jurisdictions.

The Commission will be supported by a select group of rapporteurs who will be responsible for research, drafting the early discussion paper and the final report. The Commission will meet again during 2007 and early 2008 to produce a 'White Paper' for publication to be launched at an international conference to be held in 2008.

At the first Commission meeting

There was broad agreement that there is a need for a robust debate about the topics raised by the Commission because it is focusing on areas where minds still differ and there are diverging views, which are often grounded in civil law and common law traditions. The Commission members who come from diverse international jurisdictions agreed that there is a compelling case for the best practices of different international arbitral bodies and countries to be considered in order to draw up innovative ways of achieving settlement. This should lead to tribunals considering adopting a more holistic approach to case management and settlement.

The views of in-house counsel representing some of Europe's largest corporation were particularly interesting and

revealed that it is often the case that corporate clients do not feel their needs are being met by arbitration as it is now practiced. They called for more emphasis to be given to addressing arbitration problems and warned that many corporate clients are now reluctant to use or choose arbitration to resolve their disputes.

Lord Woolf stated that the responses to the Commission survey struck him most for highlighting cultural differences. He thought it would be valuable to identify through the Commission the different role of Arbitrators in different countries. He went on to say that he hoped the Commission could address the apparent lack of confidence Arbitrators have in involving mediation in the process.

The Commission drawing from the issues raised during the meeting resolved to broaden the scope of the debate to look at ways to conduct empirical research and to continue to invite the views of the international arbitration community. The next meeting scheduled to meet in the autumn promises to be both stimulating and informative with the goal of producing draft recommendations for a final report to be published in 2008.

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Arbitration and Investment Disputes

Dr. Colin Y.C. Ong

Introduction

Parties who choose to refer their disputes to international arbitration look forward to an efficient, fast and certain conclusion of their disputes culminating in an arbitral award that is rendered by the tribunal. A successful party would seek to enforce his award and reap the fruits of his labour after having undergone a laborious arbitration process.

An important distinction must be drawn between Commercial Arbitration Disputes and Investment Arbitration Disputes. The former is relatively straightforward in nature and involves the resolution of a dispute between two or more parties by way of reference to an independent tribunal and the process is generally done under the overall umbrella of the New York Convention in mind, as the majority of countries are parties to this important multilateral Convention. In this regard, Article V of the New York Convention would be the main legal grounds in which a party can properly challenge an award before a national court at the seat of arbitration and to have that court declares that the award is to be set aside in whole or in part .

Investment treaty arbitrations however constitute a different mechanism and there are other material issues that have to be borne in mind. Historically, foreign investors who had their investments confiscated by force or damaged by the Government of the state ("the Host State") in which they had invested had very little remedies at hand. Generally a private individual or legal entity does not have any locus standi to bring an action against a State under the principles of International law. A Wronged investor had only two possible remedies. Any arbitration agreement would not cover issues or expropriation. The investor could attempt to enforce any contractual rights that it may have in the domestic national courts of the Host State. This was however an often hopeless exercise as the national courts in certain cases would have been under the influence of the Host State itself and would not accord an equitable result. The maligned investor could then try to lobby their own state ("the Home State") to put diplomatic pressure on the Host State or to ask the Home State to take out legal proceedings against the Host State before an international court, on behalf of its national (investor).

Foreign Investors would generally prefer to try to find a means to obtain relief for any loss or damage caused to them as a result of the host State's illegal measures. Such relief can be of either a forceful or of a declaratory nature. A forceful nature generally refers to restitution in kind and declaratory nature relief which includes seeking declarations of unlawful measures and recommendations for correcting such unlawful measures. Generally, it is rather more difficult for States to accept the forceful type of relief, though they have been common in inter-State investment arbitration . This paper provides a general overview on the different forms of investment treaty arbitrations and protection that are available to foreign investors investing in countries outside their Home State.

Key features of investment treaties

An investment treaty is generally concluded between two different states with the intention to offer legal protection to nationals of each state. The key features of investment treaties include the following:

(a) They permit investor claims against the state without having to exhaust local remedies;
(b) They allow foreign investors who fall within the investment treaty a right to make a claim for damages;
(c) They allow investors to go and seek direct enforcement of awards before domestic courts

Investment arbitration engages disputes that have arisen from the exercise of public authority by the state as opposed to the private acts of the state. Investment arbitration has even been compared by some commentators to be akin to a domestic legal administrative system. Some commentators have gone so far as to argue that "the emerging regime of investment arbitration is to be understood as constituting an important and powerful manifestation of global administrative law ."

The regime of international investment arbitration began in the early 1970s and has been rapidly developing since the 1990s. States have become more confident and in an attempt to invite more foreign investment, have consented, sometimes less willingly, to an international regime in which foreign multinational investors are given the protec-

tion and ability to enforce international arbitration claims against states in disputes arising from the state's regulation of investor assets.

Investment Treaty Arbitration claims are generally not subject to customary local limitations that may apply to non investment arbitration claims such as imposing the need of a litigant to first exhaust any remedies that may be available locally. Foreign investors can under investment treaty arbitration directly bring a claim for damages.

Bilateral Investment Treaties

As an investment treaty generally incorporates the procedural framework and enforcement mechanism that is also found in international commercial arbitration, foreign investors can look to enforcing the arbitral awards before the local courts with very limited judicial interference by such courts.

Investment arbitration emanated from the conclusion of thousands of investment treaties which were generally bilateral investment treaties (BITs). Many of the BITs were entered into between a developed country and a developing country. The developed country was more interested in ensuring that there was adequate and secure protection given to its citizens, companies and legal entities who were going to invest in the territory of the developing country. The developing country would usually have to adopt the same as it was keen to attract more foreign investment by the investors from developed country. A typical BIT would then generally define who would be classified as a "qualifying investor" and what would be deemed to be a "qualifying investment".

In the absence of a definition of the term "national", one will have to look at the definition accorded by the Host State's foreign investment laws. These laws are implemented to generally provide and offer protection to all foreign nationals and the usual definition of the term "National" would generally include both natural persons as well as companies.

A company is generally treated by most tribunals as a national of the state in which it was incorporated or registered. The majority of countries require for investments to be brought in through a locally incorporated company in the Host state. In view of this fact, most BITS would have adopted the position adopted by the ICSID Convention. The said Convention generally stipulates that a company which has been incorporated in the Host State, but has its shares owned by nationals of the Investor's Home State, is to be treated as a company of the Investor's State . In the absence of any express language to the contrary in a BIT, arbitral tribunals in investment arbitrations would generally hold that foreign investors that hold shares in the Company incorporated within the Host State would have the right to claim against the Host state under the BIT .

International arbitration tribunals have also held that a foreign investor in a BIT has a direct right to bring an action against the Host State whether or not it is the actual majority owner of the local company or whether or not it has any control over the company .

Multilateral Investment Treaties

The proliferation of BITS in the 1990s then evolved into Multilateral Investment Treaties (MITs) and then further gave rise to a series of revolutionary regional investment treaties that obliged member states to agree to compulsory investment arbitration . A multilateral investment treaty simply means a treaty signed by three or more States.

One of the most successful and important of multilateral investment treaties is that of the Energy Charter Treaty ("ECT") that was signed by the EU leaders on the 17th December 1994 and entered into force on the 16th April 1998 . The ECT binds over 50 states and provides protection for foreign investments from investors emanating from member states in the energy industry. In ASEAN, the ASEAN Agreement for the Promotion and Protection of Investments is another example of a MIT . One of the common features that is to be found in a MIT as well as BIT is the duty to treat qualifying foreign investors and investment "fairly and equitably" .

ICSID

In 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention" or "the Washington Convention" was established. This convention then formed the basis of the establishment of the International Centre for Settlement of Investment

Disputes (ICSID) and it came under the ambit of the World Bank. With the formal entry into force of the Convention by Serbia on the 8th June 2007, today there are 155 member states have ratified the Convention. ICSID provides the administration of a neutral international arbitration mechanism to resolve investor-state disputes, and in doing so, assists the flow of investment into developing countries in the World. Currently, it is estimated that there are over 1000 BITs which contain the Host State's advance consent to undergo ICSID arbitration in the event of any investment disputes that may arise between the foreign investor and itself. Many modern foreign investment laws also now include various provisions that offer foreign investors with the right to submit any investment disputes to ICSID arbitration. Some of the fundamental principles of such laws will include stipulated provisions for there to be equal and non-discriminatory treatment of foreign investors and foreign investments; to allow for easy transfer of capital return, fair and fast compensation to be provided in the event of any expropriation or nationalisation.

ICSID allows for a strong framework in which to enforce ICSID arbitral awards which assist in providing protection available against attempts by local courts to frustrate the awards . In a similar manner, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism that was entered into force in Vientiane, Lao PDR on the 29th November 2004 was also intended to become a mini ICSID that was supposed to resolve any similar disputes between the ASEAN member states . This DSM is however likely to be revised and enhanced further with the signing of the landmark ASEAN Charter by the ASEAN leaders on the 20th November 2007 to integrate the region as a legal organisation bound by one set of rules.

ICSID Investments and ICSID Arbitrations

» *Investments that are generally covered by ICSID*

The ICSID Convention itself qualifies and limits the jurisdiction of ICSID to legal disputes that culminate directly out of "investments". However, one of the problems of the Convention is that it fails to provide any definition to the term "investment". This means that the contracting parties and the arbitral tribunal hearing the case must determine the scope of the term "investment" on an ad hoc case-by-case basis.

This would then again only take place after the Secretary-General of ICSID itself has determined that, on the basis of the information available in the Notice or Request for Arbitration, the dispute itself does not fall greatly outside the jurisdiction of the ICSID Centre. In addition, ICSID requires very carefully drafted and clear language to allow the dispute to be brought for arbitration within the ICSID. For example, where the arbitration agreement provides that "a dispute shall be submitted…to ICSID arbitration" there has clearly been a consent by the Host State to refer to ICSID Arbitration . However, where the agreement provides that "in the event of a dispute the parties shall consent", it is clear that there has been no valid consent given by the parties as such, the ICSID Centre itself would not register the case.

ICSID Investment disputes may emanate from a variety of different economic activities including agriculture, banking, energy, industrial activities, oil & gas matters. Various ICSID tribunals have given a broad definition to the term "investment" to include economic matters such as the provision of banking facilities and loans; building industries; oil concessions; mining and production of minerals and joint venture ventures. The inclusion of an ICSID arbitration clause in an agreement by itself would give a positive presumption in favour of the existence of an investment.

In general, the scope of the term "investments" covered by many BITs are more extensive than those that fall under the ICSID Convention.

» *Investments and Investors that are generally covered by BITs*

Generally, the definition of qualifying "investments" is widely defined in BITs to include any assets. This expansive definition is also followed by a lengthy list of investments that can include real property; contractual rights; assignment rights and shares in a limited liability company.

The breadth of the coverage of the BIT would depend upon the negotiating powers of each of the 2 respective countries. Some BIT treaties attempt to restrict the very broad definition of investments by way of specific limitations or exclusions.

Some problems may arise in areas where there are joint ventures between the foreign and local investors. Host states may attempt to impose restrictions on what may be covered under the investment as they only intend for genuinely foreign investments and foreign investors to enjoy the protection of such BIT agreements. They may view that domestic investments should be subject instead to local domestic law and local dispute resolution processes and not the BITS.

Salient features of an ICSID Arbitration

It is important to note that ICSID itself is an administrative body and is certainly not a judicial body. One can view the ICSID as international law body that is akin to the International Court of Justice. ICSID is certainly not a commercial arbitration body like the International Chamber of Commerce ("ICC").

The ICSID Convention itself cannot confer any protective rights onto a foreign investor. It simply provides for the ICSID mechanism to become available whenever a foreign investor has a dispute with an ICSID Contracting State or any National State body that have already entered into an earlier agreement to enter into ICSID arbitration. In such cases where Host States have agreed to ICSID arbitration, a foreign investor will simply have request invoke the ICSID arbitration agreement in its main agreement with the state giving notice of ICSID arbitration. Another way of an investor getting within ICSID arbitration could take place where both the Host State and the Home State of the foreign investor are also Contracting ICSID States to the ICSID Convention and the Host State is prepared to give consent to such arbitration.

ICSID arbitration is generally known for the following advantages:

(a) ICSID proceedings are always kept independent from domestic national court systems and are governed only the relevant ICSID rules as well as international law principles. The ICSID Convention does not allow for any intervention of diplomatic protection or immunity to be given in the arbitration process.

(b) lCSID awards are comparatively easily more enforceable than commercial arbitral awards which have to be enforced under the 1958 New York Convention. Under the ICSID Convention, ICSID awards are automatically enforceable before the national courts of all Contracting States without any right of challenge . In short an ICSID award is to be treated as though it was a final appealed judgment of a national court.

(c) Extensive and experienced legal staff of the Secretariat of the ICSID Centre help in giving broad administrative support. The tribunal is always assigned a personal secretary that will assist the tribunal in acting as a neutral mode of communications between parties and arbitrators. The secretary will not only arrange phone conferences or physical meetings, but will also keep notes of all meetings and hearings; assist to process the payments of the tribunal and more importantly it also assists the tribunal in preparing any draft procedural orders.

(d) Due to the fact that ICSID comes under the World Bank Group, this provides greater leverage in encouraging losing State parties to comply with awards. Contracting State generally are fearful of not able to obtain future loans from the World Bank and this can be a deterring factor in ensuring that the Contracting State complies with awards issued against it.

(e) ICSID charges administrative fees that are comparatively much lower that those that are charged by its commercial arbitration counterparts such as the ICC. In addition to usual disbursements and expenses, the fees of ICSID arbitrators are generally pegged and they are entitled to have a comparatively smaller fixed fee of less that US$3000 per day of meetings or other preparatory work performed in connection with the arbitration proceedings.

Dr. Colin Y. C. Ong
President of Arbitration Association of Brunei and a panel member of ASEAN Protocol on Enhanced Dispute Settlement Mechanism

Pilihan Tempat Arbitrase

Meria Utama

Selecting Place of Arbitration

Arbitration is possible only if there is an agreement between the parties providing for it. The agreement is usually put in the arbitration clause in a contract or submission agreement. The parties may agree on anything regarding as to how the arbitration should proceed including the place of arbitration. In the legal terms, the place of arbitration means a place where the arbitration proceeding will be held. This paper discusses some relevant factors in determining the place of arbitration. These include the skills of arbitrators, facilities, conveniences, costs and political factors, but the most important consideration is the legal environment. Failure to make a clear choice of the place of arbitration in arbitration agreement may lead to unexpected results. Problems may arise if the parties do not state clearly where the arbitration will be held and how the arbitration proceeding will be governed. The legal environment relates to the law of arbitration, namely whether the law in the country in which the arbitration takes place will support the proceeding or enforce the awards without any complicated formalities. Parties to an international commercial arbitration are generally free to choose the place of their arbitration. The law applicable to the arbitration proceeding will be the law of the place of arbitration, thus it would be appropriate to select the place where the courts favors arbitration as a mean of dispute resolution and as little as possible interfere with the arbitration proceeding. In conclusion, the parties should carefully decide as to where the arbitration will be conducted. As Law Number 30 of 1999 states, Indonesia is a country that supports arbitration and ADR.

Tempat arbitrase artinya adalah kedudukan arbitrase yang berarti tempat di mana proses arbitrase dilaksanakan. Tempat arbitrase adalah pusat terjadinya proses arbitrase. Pengarang buku kadang-kadang menyebut tempat arbitrase ini sebagai "Place of arbitration " atau "Seat of arbitration" akan tetapi keduanya memiliki pengertian yang berbeda. Alan Redfern dan Martin Hunter dalam buku mereka "Law and Practice of International Commercial Arbitration" menyebutkan bahwa "seat of arbitration" berarti pusat proses arbitrase terjadi, sedangkan "Place of arbitration" adalah tempat di mana arbiter dan pihak bertemu, pemeriksaan dokumen, melakukan kunjungan , dan mendengarkan saksi. Philip De Ly dalam bukunya "Place of Arbitration" tidaklah membedakan kedua istilah ini, Dia hanya menyebutkan bahwa tempat arbitrase sebaiknya dibedakan antara tempat arbitrase dalam pengertian geografis dan tempat arbitrase dalam pengertian hukum.

Tempat arbitrase dalam pengertian hukum artinya tempat utama di mana proses arbitrase dilaksanakan. Ada dua pendapat mengenai istilah ini. Pendapat pertama diambil dari Pasal 2 Resolusi Institute De Droit International tahun 1957. Pasal ini menyebutkan bahwa tempat arbitrase dalam pengertian hukum berarti tempat di mana majelis arbitrase melaksanakan pertemuannya pertama kali. Pendapat kedua mengatakan bahwa tempat arbitrase adalah tempat di mana putusan arbitrase dibuat. Yang terpenting tempat arbitrase dalam pengertian hukum menjadi dasar hukum arbitrase karena tempat arbitrase ini akan berkaitan dengan sistem hukum yang juga berlaku dalam arbitrase.

Tempat arbitrase dalam pengertian teritorial berarti tempat pemeriksaan, melihat bukti-bukti atau pertemuan majelis. Dan dalam hal ini tempat arbitrase dalam pengertian hukum memiliki arti yang sama dengan "seat of arbitration".

Sebetulnya, pilihan tempat dalam arbitrase haruslah jelas. Pihak yang terlibat dalam kontrak harus mengetahui bahwa pilihan tempat ini memang harus dimasukkan ke dalam klausula kontrak mereka atau dalam persetujuan khusus untuk arbitrase. Bagaimana jika para pihak tidak dengan jelas menentukan pilihan tempat arbitrase mereka atau para pihak lupa untuk memilih tempat arbitrase mereka?

a. Pentingnya Tempat Arbitrase

Penentuan tempat arbitrase ini sangat penting karena akan berkaitan dengan beberapa aspek misalnya pilihan hukum dalam arbitrase internasional. Persetujuan untuk mengajukan sengketa ke arbitrase, proses dalam arbitrase komersial internasional termasuk penolakan terhadap putusan arbitrase, hukum dalam menyelesaikan sengketa, dan pengakuan dan pelaksanaan untuk putusan arbitrase. Pengadilan nasional suatu negara yang menjadi tempat arbitrase memiliki kekuasaan untuk mengintervensi dan bertanggung jawab untuk membantu hal-hal yang berkaitan dengan proses arbitrase baik dengan atau tanpa permintaan dari pihak yang bersengketa atau arbitrernya. Misalnya memeriksa dokumen tertentu atau memaksa untuk mendatangkan saksi-saksi, menjamin perlindungan terhadap bukti atau barang yang berkaitan dengan kasus yang diselesaikan di arbitrase, dan mempersiapkan pengakuan dan pelaksanaan putusan arbitrase.

Tempat arbitrase juga memegang peranan penting ketika para pihak yang kalah ingin mengesampingkan putusan arbitrase, atau melakukan perlawanan terhadap putusan

arbitrase tersebut. Jadi, proses dalam mengesampingkan putusan arbitrase hanya dapat dilaksanakan di tempat Arbitrase dilaksanakan.

Hal penting lainnya dalam menentukan pilihan tempat arbitrase adalah hukum arbitrase dari negara tempat arbitrase dapat mempengaruhi proses arbitrase itu sendiri. Kadang-kadang hukum tempat arbitrase bisa menjadi hukum yang akan dipergunakan untuk proses arbitrase. Berdasarkan hukum ini dapat ditentukan apakah persetujuan arbitrase itu sah atau tidak, apakah sengketa memang bisa diselesaikan oleh arbitrase atau tidak, atau bagaimanakah proses arbitrase dilaksanakan, dan lain sebagainya.

Oleh karena itu tidak dapat diragukan lagi bahwa menentukan pilihan tempat arbitrase adalah suatu hal yang penting. Walaupun pilihan tempat arbitrase memang tidak dapat menjamin lancarnya proses arbitrase. Namun kadang-kadang salah dalam menentukan pilihan tempat arbitrase yang buruk dapat menjadi suatu hal yang fatal atau lupa mencantumkan pilihan tempat arbitrase dapat menjadi penyebab masalah-masalah lain di masa yang akan datang.

b. Hal-hal yang Penting dalam menentukan Tempat Arbitrase

Ketika para pihak ingin menentukan tempat arbitrase, ada banyak hal yang harus dipertimbangkan, misalnya kemampuan dari para arbiter, staf sekretariat, penerjemah, pustakawan, ruangan pertemuan, pemondokan yang baik, fasilitas transportasi dan komunikasi tempat tersebut, kewarganegaraan para pihak, tempat domisili atau tempat utama bisnis para pihak, juga sebaiknya dipertimbangkan juga.

Penentuan tempat arbitrase dapat juga dilakukan dengan alasan kenyamanan. Ada beberapa faktor yang harus para pihak pertimbangkan dalam menentukan tempat arbitrase yaitu faktor ekonomi, faktor politik, dan faktor hukum.

Faktor ekonomis artinya para pihak harus mempertimbangkan tentang efisiensi biaya arbitrase. Selama proses arbitrase, mungkin pengacara membutuhkan beberapa informasi dari ahli yang berkaitan dengan sengketa, misalnya para surveyor, akuntan, insinyur, dan lainnya. Kemudian jika pilihan tempat arbitrase tidak jauh dari tempat utama bisnis berlangsung, atau negara para pihak, maka biaya untuk mendatangkan para saksi ahli tersebut dapat lebih murah.

Faktor politik juga harus dengan baik dipertimbangkan dalam menentukan pilihan tempat arbitrase. Faktor politik akan berkaitan dengan diterimanya para pihak dalam suatu negara tertentu, apakah di sana misalnya adanya larangan masuknya para pihak dalam suatu negara , para penasehat hukum mereka atau bawahan para saksinya.

Alasan lain yang juga tak kalah penting untuk dipertimbangkan adalah mengenai akomodasi, transportasi, layanan komunikasi dan fasilitas lainnya yang berkaitan dengan proses arbitrase. Ruang untuk pemeriksaan , akomodasi hotel bagi para pihak yang terlibat adalah faktor penting adalah untuk menjamin berlangsungnya proses arbitrase berjalan dengan lancar.

Akan tetapi hal terpenting yang harus dipertimbangkan adalah hukum dari tempat arbitrase tersebut. Faktor Hukum di tempat arbitrase akan berkaitan dengan aspek hukum lain dalam proses arbitrase. Apakah hukum ini akan mendorong proses arbitrase berjalan dengan lancar, atau apakah negara tempat proses arbitrase itu akan melaksanakan putusan arbitrase tanpa syarat formal yang rumit.

Sebetulnya faktor-faktor tersebut adalah hal penting untuk menentukan tempat arbitrase akan tetapi pilihan tempat arbitrase sering pula didasarkan pada alasan tradisi dan netralitas. Alasan tradisi karena para pihak memilih tempat tersebut karena yakin bahwa sebelumnya tempat ini pernah menjadi tempat berlangsungnya suatu proses arbitrase berjalan dengan baik. Dan alasan netralitas berarti bahwa para pihak memilih tempat arbitrase karena tempat itu netral dan tidak ada pihak yang berkepentingan terhadapnya. Netralitas juga berarti bahwa hukum dan pengadilan nasional negara tersebut mendukung proses arbitrase berlangsung di negara mereka, Indonesia pada saat ini dapat dikatakan sebagai negara yang mendukung proses arbitrase berlangsung di negaranya. Hal ini bisa terlihat dengan berlakunya UU N0.30 tahun 1999. Oleh sebab itu dalam membuat klausula suatu kontrak adalah suatu hal yang penting untuk mencantumkan klausula arbitrase yang di dalamnya juga disebutkan pilihan tempat arbitrasenya tentunya dengan berbagai pertimbangan di atas.

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