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From The Editor

It is now widely accepted within both national and international business communities that businesses often attempt to avoid the regular litigation and arbitration process by pursuing alternative forms of dispute resolution that are more closely tailored to the specific interests of their business. Parties now have before then a wide variety of dispute resolution processes including litigation, negotiation, mediation, arbitration and various hybrid forms of ADR which combine features of various models in order to attempt to secure the benefits from each. This includes combining mediation and arbitration into a single two step process. Such process is traditional form a neutral brings the parties together and encourages them to settle through mediation; if the mediation does not resolve the dispute the same neutral commences a fresh arbitration hearing.

In this issue we are pleased to present two articles on the subject. Mr. Widyana from BANI office in Denpasar discusses why we need to study ADR, while Ms. Krisnawenda will talk one of the hybrid forms of ADR that has been applied in BANI. Also, in this issue our three listed arbitrators, namely Messrs. Husseyn Umar, Fred G. Tumbuan and Mrs. Nurdjanah AS provide overview, respectively, on the managing arbitration cost, certain principles of Indonesia contract law that relevant in International Arbitration and the the Moot Court, which is an extracurricular activity at many law schools as educational tool.

We do hope you enjoy reading it. Again we would like to remind that if you happen to have news items or articles that you would like us to include in the next newsletter please do not hesitate to contact the BANI Secretariat with the necessary details.

June 2008

I Made Widnyana

Why Do We Study ADR

ABSTRAK

Makalah ini membahas Alternatif Peyelesaian Sengketa, di mana para pihak membuat putusan akhir sendiri mengenai pengakhiran sengketa. Proses ini berbentuk bantuan yang terstruktur dalam melakukan negosiasi atau mediasi, di mana pihak ketiga (mediator) tidak membuat putusan tetapi hanya memfasilitasi melalui proses yang terstruktur tersebut. Untuk mencapai solusi berlandaskan pada kerja sama yang umumnya terkenal sebagai "win-win solution" tersebut para pihak harus memperluas pemikirannya dan berusaha mencari solusi yang kreatif yang memenuhi persyaratan masing-masing pihak yang bersengketa.

Introduction

Dispute Resolution commonly called "Alternative Dispute Resolution" is a series of processes intended to settle dispute between (among) parties. At first dispute settlement is looked into as an alternative to a judge's decision, on a dispute in accordance with law.

The ADR is a statement used by many writers to explain growth that shows applicable techniques to settle dispute without formal decision obtained through arbitration and court. The ADR mechanism usually includes an independent mediator acting as the third party or the neutral party. In Indonesian Law No. 30 of 1999 Concerning "Arbitration and Alternative Dispute Resolution", the Article 1.10 states that "Alternative Dispute Resolution (ADR) shall mean a mechanism for the resolution of disputes or differences of opinion through procedures agreed upon by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment".

So, the types of Alternative Dispute Resolution based on this law are: consultation, negotiation, mediation, conciliation and expert assessment. In my opinion, arbitration is also a type of ADR because arbitration shall mean a mechanism of settling civil disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing Parties (see Article 1 point 1 of Indonesian Law No. 30 of 1999).

Needs To Study ADR

In the daily life of the original legal society (traditional legal community), a form of ADR has actually been performed and practiced. Merely, the terminology being used and its procedures were not precisely the same as the ones applied in modem ADR. In a village community, the life pattern is simple, excessively bound, and influenced by tradition and custom, and remains in force. Notwithstanding, if we examine carefully whatever is done by the traditional community, especially on dispute resolution, the principles are similar to the ones in ADR. (I Made Widnyana, 2007: 35)

Studying ADR will help you to be a better lawyer. For law students to focus exclusively on the litigation process is like medical students studying only surgery as a means of curing illness. Of course, that is not what medical students do. They study an extensive range of subjects for the treatment and cure of illnesses. Law students too must extend their problem-solving focus beyond the litigation arena. Law students cannot afford to ignore development in ADR as many of these processes become institutionalized within the judicial system in court-annexed programs. Law students must understand ADR processes and develop the skills which are necessary to use them. It is important to learn to identify the factors which make a particular method the process of choice. (Jacqueline M. Nolan-Haley, 1992: 3)

It is the basic right of everyone in the society to be able to demand and get a quick decision on a problem. But the fact now is not like that. Use of present legal systems doesn't guarantee a quick process with a low cost. Therefore, nowadays our societies are looking for other relevant mechanisms to solve this problem. A system that is likely to be a promising one is the Alternative Dispute Resolution (ADR). (I Made Widnyana, 2007:23)

Characteristic of the Dispute Resolution Process

The main characteristic of the Dispute Resolution Process is that the parties make decision upon the result their dispute that is the final decision. The process is the forms of structured assistance of negotiation or mediation, in which the third party (mediator/interviewer) doesn't make any decision, but applies a structured process to help parties to settle their dispute. Control on final resolution forms is still with the parties.

In traditional process of decision through court and arbitration "winner takes all". In the system of ADR, it tries to apply a co-operative solution. "Co-operative solutions" which is commonly called "win-win solution" is a resolution in which the parties feel they equally win. To find a co-operative solution requires people to expand their thinking and to look for creative solutions that fulfill the requirements of each of the parties in dispute.

Advantages of the Dispute Resolution

The most commonly cited advantages for the Dispute Resolution processes are:

- ***Quicker*** • Settlements are usually achieved within weeks or months of starting the process rather than within months and years as can occur within adjudication and arbitration.
- ***Cheaper*** • With settlement being achieved earlier, there are usually less legal fees, witness expenses and (in commercial disputes) fewer lost business opportunities whilst management time and business finance are set aside to fight the litigation. However disputants do have to pay for the neutral intervener of their choice as they do in arbitration.
- ***Informal*** • The rules of procedure and evidence in the adversarial processes are often incomprehensible to non-initiates, but with the consensual process the disputants can organize meeting times and places that are convenient to them and can organize rules for the process that suit their particular requirements. They can emphasize what is important to them regardless of its legal relevance. Consequentially, the disputants have a better understanding of the process and, accordingly, are able to contribute more. They are more in control of the resolution of their own dispute.
- ***Confidentiality*** • As these processes are private they keep the disputants from adverse publicity and ensure trade secrets are not made public. Within the process, communications, including those made privately to the third party, are confidential and this tends to encourage more open and honest exchanges thus helping the third party to assist the parties achieve resolution.

- ***Choice of Neutral*** • Parties can choose a neutral whom they respect and trust and who has expertise in the area of their dispute. This save time and reduces cost.
- ***Enhanced Relationship*** • Because the informal processes are consensual and strive for co¬operative solutions rather than those necessary according to the rules of law, often the parties come away with solutions that satisfy more of all they needs. This enhances relationships between them. Solution that people agree to themselves and which they feel have advantaged them are usually more readily adhered to than those that have been imposed. If one side wins and the other side loses, as in the adversarial processes, usually the loser feels resentment and has no commitment to the solution but only adheres to it because of the fear of punitive enforcement action. This situation does little to enhance the relationship between the parties.
- ***Remedies*** • In the DR processes a greater range of remedies is available than in litigation. Renegotiation of a contract, considerations of non-legal issues and of non-legal factors (such as the long-term business relationship of the parties and emotional impediments to rational decision making) can take place in reaching settlement.
- ***More Disputants*** • As the parties are not limited to those the law regards has having standing, all parties actually affected by the dispute can be present or represented within the process.
- ***Finality*** • The DR processes that are voluntary and use the private providers eliminate the appeal processes and achieve true finality of resolution. The agreed result is enforced as a contract. The settlement is embodied in a contract signed by the parties at the end of the "hearing". Because the parties have taken an active part in crafting the solution, the "sticking" rate for ADR settlements is usually high. Parties are satisfied with the result they have worked out themselves and usually abide by it.
- ***Hearing Certainty*** • The time and location of the hearing is at the parties' choice. If the parties so desire, the "hearing" can continue as long as necessary to achieve finality on the one day.

- ***Own Procedure*** • Disputants can individualize the procedure to their requirements. Factors such as time, hearing date, issues statement rather than pleadings, truncated times for replies to documents can be laid down by the parties themselves. This control can be used to overcome any fear that DR processes can be used to delay the resolution of a dispute.
- ***Clarify Issues*** • DR processes can narrow, or at least clarify, the issues for trial even if final settlement is not reached within the process. This should save costs at any trial that eventuates (Jennifer David, 1994: 6-7)

Bibliography

Brams, Steven J. & Taylor Alan D. 1999, *The Win-Win Solution*, W.W. Norton & Company, New York, London.

David, Jennifer1994, *Mediation for Lawyers Manual*, Dispute Resolution Seminar, Universitas Udayana

Nolan-Haley, Jacqueline M 1992, *Alternative Dispute Resolution*, West Publishing Co, St. Paul, MN 55164.

Widnyana, I Made, 2007, *Alternatif Penyelesaian Sengketa*, Indonesian Business Law Center (IDLC) and Kantor Hukum Gani Djemat & Partners, Jakarta.

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N. Krisnawenda

Hybrid Arbitration In BANI

ABSTRAK

Salah satu bentuk penyelesaian sengketa bisnis yang mulai banyak digunakan adalah penyelsaian melalui arbitrase dan mediasi. Arbitrase adalah suatu cara penyelesaian sengketa di mana para pihak mengajukan sengketanya kepada pihak ketiga yang netral yang kemudian membuat putusan mengenai penyelesaian sengketa. Putusannya mengikat para pihak dan karenanya para pihak memegang peran penting dalam pemilihan arbiter Sementara ini dalam konsiliasi dan mediasi, peran pihak ketiga dibatasi hanya sebagai fasilitator yang memperlancar komunikasi dan negosiasi para pihak. Dengan demikian, proses mediasi mendorong para pihak untuk bekerja sama mencapai penyelesaian dan menentukan dengan masukan dari mediator hasil-hasil yang dipandang adil dan wajar.

Salah satu kritik dari mediasi adalah putusannya tidak mengikat, sehingga apabila kesepakatan tidak tercapai atau salah satu pihak tidak mau mematuhi apa yang sudah disepakati maka mereka harus menyelesaikan sengketanya melalui proses yang lain seperti arbitrase dan litigasi. Berlandaskan pada manfaat dan kekurangan dari arbitrase dan mediasi, maka telah dikembangkan proses hybrid yang menggabungkan sifat-sifat yang baik dari arbitrase dan mediasi. Proses hybrid ini umumnya digunakan untuk situasi-situasi khusus (specific) di mana para pihak yakin bahwa penyelesaian sengketa memerlukan penengah yang mampu untuk memainkan dua peran.

Di Indonesia, BANI telah mengembangkan hybrid arbitration sejak 2003. Proses yang digunakan adalah arbitration-mediation-arbitration (arb-med-arb). Proses dimulai dengan arbitrase, di mana dalam sidang pertama arbiter akan menawarkan untuk menyelesaikan sengketa dengan mediasi, yang dapat dilakukan para pihak dengan atau tanpa mediator. Apabila mediasi berhasil mencapai kesepakatan baik keseluruhan maupun hanya sebagian, maka hasilnya dapat dituangkan dalam putusan arbitrase. Sementara apabila gagal mencapai kesepakatan, para pihak akan mengajukan hal-hal yang belum disepakati kepada arbitrase.

There are many forms of dispute resolution that have developed over the years. The best-known and most widely implemented system is that of arbitration and mediation. Arbitration differs from litigation in that it is a third-party settlement process that uses citizen panels of arbitrators instead of a judge or jury. Investment agreements, construction contracts, and insurance contracts are but a few of the types of agreements and contracts that can include provisions for arbitration of disputes. The decision and award made by the arbitrator typically is final and binding on the parties, and not subject to make any appeal. Arbitration allows for considerably more interactions among the people involved than traditional courtroom justice. Again, large membership organizations, such as BANI, have established and proven rules and procedures, and can provide a list of experienced neutrals who can serve as arbitrators.

Arbitration is a method of resolving a dispute in which the disputants present their case to an impartial third party, who then makes a decision for them which resolves the conflict. Since most arbitration hearings are binding on the parties, it is imperative that the parties have an active role in the selection of the arbitrator, or arbitrators. On the other hand, arbitration - while final and binding, wrenches control over the outcome of the dispute away from the disputants, places it in the hands of a third party decision-maker and reduces the disputants to the role of observer rather than active participants in the process of resolving their own dispute. Then, once the arbitrator renders a decision on behalf of the parties, that are bound by it and it generally is not subject to appeal, even if the arbitrator's decision is based on a mistake or misapplication of law or fact. These factors have in recent years, caused a number of disputants to opt for mediation over arbitration as the preferred means for resolving their disputes.

Conciliation and mediation have come to be used as enhancements to communication and negotiation as opposed to arbitrary settlements by third parties, providing settlement options. Through the intervention and supervision of a trained, professional mediator, who serves as a facilitator of communication between the parties and as a catalyst for reaching agreement between the opposing interests, the parties become active participants in the dispute resolution process, and help forge the terms and conditions of their own settlement. In the mediation, a third party simply helps the disputants develop a solution on their own.

Thus, the mediation process encourages the parties to work together to reach, with assistance from the mediator, an amicable resolution of their disputes, and to determine for themselves –with the input and advice of counsel– the result or range of the results that the parties believe is fair and reasonable under the circumstances. The mediator, then, controls only the dispute resolution process; he or she renders no decision with the respect to the substance of the dispute. Instead, the parties themselves determine that result. Mediations are especially helpful for parties who have issues other than just settlement to deal with. Often the parties are a lot closer to settlement than they think - the problem is with communication

One criticism of mediation is that the result is non final and binding, so if a settlement is not reached, or one party does not want to do what they agreed, the parties must move to another process. Mediation, is a non adversarial, non-binding dispute resolution process in which the disputing parties, either with or without their attorney present, meet with a third neutral party (the mediator) in a good faith effort to achieve a prompt, economical, confidential, fair and mutually desirable resolution of some or all disputed issues. While it is true that not reaching a settlement through mediation means that some other resolution process must then be used. The mediation process is not always settle the disputes. Parties who don't reach settlement can then move on to arbitration or litigation.

However, the voluntary, nonbinding mature of mediation is the target of one of the few criticisms leveled against the process by parties who seek the kind of finality of result that arbitration offers. Given the benefits and perceived drawbacks of arbitration and mediation, there exists today a hybrid process that combines the best attribute of mediation and arbitration. That process are med-arb, arb-med or arb-med-arb. Today, many of these processes are being combined into "hybrids" to be applied to specific situations in order to achieve specific goals. Hybrid processes are generally used when parties believe a dispute requires elements of multiple processes and a practitioner is skillful enough to fill two roles.

Med-arb combines the best features of mediation and arbitration into a single, two-step hybrid process. In med-arb, the disputing parties, either on their own or with the assistance of counsel agree in advance to resolve their differences through mediation. With the understanding that, if mediation proves wholly or

partially unsuccessful, or if the mediation process extends beyond a predetermined deadline with no agreement on all or some of the issues, the parties will submit any and all unresolved issues to arbitration, the arbitration is performed by a pre-designated arbitrator or panel of arbitrator. Any and all terms and conditions of settlement agreed to by the disputants in mediation are memorialized in a memorandum of agreement prepared by the mediator before commencement of the arbitration phase. Unlike the nonbinding memorandum of agreement prepared by the mediator in the traditional mediation process, the memorandum prepared by the mediator in med-arb typically, is by prior agreement of the parties, binding upon them for the arbitration phase.

Accordingly, the med-arb process provides the disputants with the best that mediation and arbitration have to offer. It furnishes them with a clean incentive to resolve the disputed issues promptly, affordably, amicably and to their mutual satisfaction through mediation, by holding open the prospect of an adverse, non appealable determination by the arbitrator if a mediated settlement is not reached. By the same token, med-arb promises the finality of a binding arbitrated result with respect to unresolved issues, thereby avoiding the necessity of a costly, protracted, appeal-ridden litigation. The hybrid approach thereby encourages maximum autonomy, participation and creative problem-solving by the disputants through mediation, while ensuring that, in any event, a final, binding resolution of all issues is near at hand.

The other hybrid procedure is arbitration-mediation (hereafter called arb-med), in which the order is reversed, with the parties arbitrating first, followed by mediation. At the conclusion of the arbitration, the arbitrator(s) make a binding decision which is memorialized but not disclosed to the parties. The parties then mediate and if successful it will be concluded with an agreement by the parties. Under such process the result is not final and binding since the arbitration process has been terminated. If not successful in arriving at a resolution the arbitrators announce their decision and the parties are bound by the decision. This procedure places the parties during the mediation phase, in a position of deciding whether they want to control the outcome of their dispute by working out a solution on whether they want to be bound by the unknown solution imposed upon them by the arbitrator(s).

In Indonesia, BANI arbitration center which is founded thirty years ago has since 2003 used the hybrid arbitration involving mediation, conciliation and

negotiation, although the Rules and Procedures have only be made available in 2006. The BANI hybrid procedure is arbitration-mediation-arbitration (hereafter called arb-med-arb). The process begins with the arbitration, in which at the first hearing, the arbitrator(s) will offer to the parties to resolve their differences through mediation. If they agree, the arbitration hearing will temporarily be suspended and the parties will then mediate which can be facilitated by the arbitrator(s) or without facilitation by third parties. If the mediation is successful it will be concluded with an agreement by the parties and may be made as an arbitration award, thereby the award is final and binding. All documents/data used in the mediation will not be used in consideration in the arbitration award, unless the parties request. If mediation proves wholly or partially unsuccessful, or if the mediation process extends beyond a predetermined deadline with no agreement on all or some of the issues, the parties will submit any and all unresolved issues to arbitration.

The past five years data show that the application of hybrid arbitration in BANI has provided the award that are more acceptable to the disputants. The admissibility and appropriateness for an arbitrator to act conciliator or mediator such as practiced in BANI is among the most controversial issues among international arbitration practitioners. The views and practices in this respect differ widely. While some regarded that the combination is desirable, others regarded conciliation efforts by the arbitrator as inappropriate. The differences in the views clearly have their origin in different legal cultures.

For instance, in the Common Law countries a judge is not permitted to be actively involved in settlement facilitation. This is reflected in the arbitration practice of some countries. In the Civil Law countries, the position varies; in France, for example, conciliation is expressly mentioned as one of the functions of the judge (also applies to arbitrator). In Germany, Austria and Netherlands, the judge is held at any stage of the proceedings to see an amicable settlement of the dispute. In Mexico, the combination is not admitted and conciliation efforts are performed by a court official different from the judge trying the case. In Japan, a mediator who is also serving as arbitrator will be more effective in facilitating the parties to reach agreement, resulting in peace settlement between the parties.

In conclusion, the hybrid arbitration would promote the disputants to resolve the dispute with the end result of as they wish, because they are the ones who

make the decision. On the other hand, the agreement resulted from hybrid arbitration has legal binding since the decision will become the arbitration award and "executable". The other positive point is that the award originates from the agreement that has considered the optimum interest of the parties, so the execution will not require court decision.

N. Krisnawenda
Member of BANI's Governing Board and listed arbitrator at BANI Arbitration Center

M. Husseyn Umar

Managing Cost In Arbitration

ABSTRAK

Salah satu elemen dalam mekanisme penyelesaian sengketa yang efisien adalah biaya perkara. Secara resmi, biaya berperkara di pengadilan di Indonesia tidak mahal, Namun demikian, prinsip ini tidak mudah diterapkan karena berbagai hal, antara lain perkara tersebut mungkin sangat kompleks dan berjalan cukup lama termasuk proses banding, kasasi dan peninjauan kembali. Di sisi lain biaya berperkara di forum arbitrase lebih terukur, yang berarti bahwa pihak yang berkontrak dapat mengendalikan biaya tersebut. Namun demikian biaya berpekara melalui arbitrase tersebut tidak selalu murah, dibandingkan dengan biaya litigasi di pengadilan. Biaya yang tinggi dan waktu yang lama dapat disebabkan oleh aturan mengenai prosedur dan kemungkinan peninjauan kembali putusan untuk kondisi-kondisi tertentu (seperti ISCID) dan atau sikap tidak koperatif dari salah satu atau para pihak atau perilaku arbiter.

Dalam arbitrase, biaya yang dibebankan kepada para pihak umumnya mencakup biaya pendaftaran dan biaya untuk administrasi, fasilitas dan honor arbiter, yang terakhir umumnya ditetapkan sebagai persentase dari besarnya gugatan. Biaya ini akan meningkat apabila ada rekonpensi. Oleh karena itu, untuk mengendalikan biaya berperkara ini pertama-tama harus dilakukan dengan rasionalisasi jumlah klaim (termasuk rekonpensi) menjadi lebih realistis. Faktor lain adalah berkaitan dengan jumlah arbiter, biaya perjalanan, dampak dari bantuan hukum dan pengacara yang mewakili dalam persidangan dan saksi-saksi. Beberapa lembaga arbitrase memberikan aturan arbitrase yang sederhana dengan biaya yang rendah, khususnya untuk sengekata dengan klaim yang kecil. Prosedur ini termasuk penggunaan satu arbiter, persidangan yang tidak lama dan hanya meliputi pemeriksaan dokumen. Hybrid arbitration yang meliputi negosiasi/rekonsiliasi dapat mempercepat penyelesaian sengketa, sehingga dapat menurunkan biaya berperkara.

General

It is quite natural that business actors always seek the most effective dispute settlement media as the choice of forum. One of the elements to indicate an efficient dispute settlement mechanism is the low cost factor. Low cost dispute settlement mechanism will be more favorable to settle business dispute since business actors consider cost effectiveness and certainty in the result of such dispute settlement are very important.

In general there are two types of dispute settlement mechanism; one is litigation in court and two, dispute settlement through arbitration which is actually one mode of alternative dispute resolution. It is necessary for the business people, in particular in Indonesia, to know the cost which has to disburse in order to settle dispute whether through court or arbitration.

For business people dispute settlement through arbitration is more attractive compared to court litigation.. Before coming to the discussion on the issue on cost in arbitration, as to how to manage cost in such proceeding, in particular in Indonesia, since arbitration is still not widely popular especially in the local business community, some brief discussion on cost involved in court litigation compared to cost in arbitration would seem to be necessary.

Court Litigation versus Arbitration

Theoretically, the Indonesian court has a principle to handle every case by simple, swift and inexpensive manner. However, sometimes this principle is hard to be applied as the case might be complicated and the trial itself might last very long. Moreover, the amount of court cost in proceeding may vary as each District Court (the court of first instance) has the authority to set up the court fee for every cases adjudicated by the court. Consequently, there is no uniform court fee in Indonesia.

Officially the court in Indonesia offers a low cost of proceeding despite the disadvantage of time consuming and many limitation of inflexibility. However, in fact the cost could be much higher because in practice the case could go further to pass an appeal at the High Court and cassation (or even thereafter judicial review) at the Supreme Court to obtain a final and binding decision.

Besides there is also something that needs to be considered that the cost of the court proceeding could be very much excessive to the formal cost as set up

by the District Court. It is common knowledge that some of red tapes practices manifested in form of the so called "in-official cost" still exist in the Indonesian court system. There is indeed no valid information on how much the standard of this excessive or unofficial cost at the court could be but it would make dispute settlement through court litigation becomes inefficient and very costly.

The efficiency and the effectiveness of dispute settlement through arbitration in the first place depend on the agreement of the parties concerned as provided in the arbitration agreement they entered into and subsequently whenever they start the arbitration. In the arbitration agreement the contracting parties normally make reference to the conditions and the arbitration procedure to be applied whenever difference of opinion or dispute arise including with regard to the venue of the proceeding. In the case of ad hoc arbitration the setting up and the administering of the arbitration mechanism need to be arranged by the parties concerned. In institutional arbitration the institution sets up the arbitration proceeding and the administering of the case according to the established standard Rules of Procedure and Rules of Cost/Tariff of Arbitration. So since the arbitration institution provides published Rules of Cost/Tariff of Arbitration, it is up to the parties concerned as to how they should or would deal with the cost of arbitration.

Beside the various advantages which are addressed to arbitration, such as confidentiality of proceeding, simplified procedure, professional criteria in the appointment of arbitrator(s) and the final and binding effect of the award, compared to court cost, cost of arbitration is relatively a "manageable cost", meaning that the disputing parties concerned in principle are able to control or to measure it. (It is to be noted however, that cost in arbitration is not always cheap compared to cost of litigation in court. There have been studies, in particular in the United States where it was found that cost in arbitration could be much higher than cost in court litigation, in particular with respect to claims on insurance pertaining to consumer goods. There were also cases of arbitration which involved a considerable time and cost because of the rules of procedure used which allow under certain condition a review to the award (ref. ICSID Rules of Procedure) and or because of the uncooperative attitude of the parties (or either one of the parties) or because of certain conduct of the arbitrator).

Managing Cost in Arbitration

The cost of arbitration that is to be charged to the parties normally cover registration fee (usually it is a fixed sum) and arbitration cost/fee which include the fee/cost for administering and facilitating the case and the arbitrator's fee. Please note in this regard that arbitration institutions may have different rules on cost/ tariff. Normally arbitrator(s) or arbitration institution determine or fix the arbitration cost/fee as a certain percentage of the claim amount submitted to arbitration. Therefore if the claimant submits a large sum of claim amount (which may include various specified or unspecified claim items) it will cause that he has to pay a relatively big amount of cost of arbitration which would also cause that the respondent has to pay a big amount of money because normally (at least at the first instance) the arbitration fee is to be equally shared. On the other hand if the claimant submits a small or realistic amount of claim then the arbitration cost/ fee will be fixed accordingly. It is quite often in practice that claimant includes many various specified or unspecified claim items in the total claim amount submitted as compensation for the alleged act of default (breach of contract).

For instance it also includes, interest and compound interest to be charged Compensation claim for loss of profit is also quite often be included which is difficult to assess, the more so if it is not supported by strong arguments and/or evidences. It is also quite often that the so called claim for "immaterial losses" is included on the argument that claimant has suffered such a mental stress or loss of reputation etc. because of the allegedly committed default by the respondent. It is quite often that a big amount is submitted for such claim. Of course it is very difficult for the arbitrator (tribunal) to make judgment on such claim; it is difficult to assess and entertain such alleged condition and its cost. In practice such claim is mostly rejected by the judge in court or by arbitrator(s) or at least very rarely considered and accepted.

A claim item for the compensation of legal cost incurred which is included in the total claim amount in court litigation, to the best of my knowledge, has never been accepted by the court in Indonesia on the reason that under the law there is no obligation for plaintiff/claimant to be represented by or to involve lawyer(s) in court proceeding. Even though arbitrator (tribunal) is free in its decision they mostly follow the court practice.

All those elements of the total claim as discussed above will of course increase or inflate the claim amount submitted to arbitration which is then used by the

arbitrator/arbitration institution as the basis to determine the cost of arbitration which then could be quite high that even sometimes to the surprise of the claimant/parties concerned. The arbitration cost will further increase if the respondent party submits a counter claim (claim in contravention) using about the same approach by submitting an inflated counter claim amount. As discussed above normally additional arbitration fee/cost will be charged to the amount of the counter claim.

From the above discussion it is quite clear that in the first place the disputing parties themselves are to manage the cost in arbitration by rationalizing the claim amount (including the contra claim amount) to the most realistic figures. In addition other factor that may contribute to of the cost in arbitration are such as whether the arbitration would involve one arbitrator (single arbitrator) or a panel of arbitrators, especially in ad hoc arbitration), whether the venue of the arbitration would involve a lot cost of travel etc., the cost impact of legal assistance and the lawyer representation in the proceedings and the presenting of witnesses (either factual or expert witness) need to be carefully considered.

Certain arbitration institutions provide simplified rules of arbitration with low cost of arbitration which is especially intended to be addressed to dispute with small claims. The simplified procedure may include the appointment of single arbitrator, with short or without proceedings, examination by documents only etc. Combined process of dispute settlement, between negotiation, mediation/conciliation and arbitration may accelerate or speed up the entire dispute resolution that may be reached between parties which could perhaps result in the reduction of cost of the arbitration provided that the arbitration institution under its rules provides eventual reduction of cost in such situation.

Conclusion

Finally, to conclude, the issue on managing cost in arbitration, as discussed above is, in the first place in the hands of the parties concerned in the arbitration process. They would be able to manage/control the cost in arbitration, by agreeing on more simpler procedure of arbitration if possible, by not inflating the submitted claim and to fully and actively cooperate in the process of the arbitration process. The arbitrator or the arbitration institution could facilitate the interest of disputing parties by providing simplified procedure and reasonable level and practical system of cost/ tariff of arbitration. In short, as discussed above, managing cost in arbitration is a matter that needs to be seriously dealt

with by the parties concerned and the institution involved in administering and facilitating the arbitration.

Lastly, it is to be noted, that this short presentation paper does not discuss, cost that may be incurred in relation to the enforcement of arbitration award.

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Certain Indonesian Contract Law Principles That Are Relevant in International Arbitration

ABSTRAK

Makalah berikut disiapkan berdasarkan pengalaman Penulis sebagai saksi ahli dalam persidangan arbitrase internasional di Singapura dan Jakarta. Dalam makalah dibahas beberapa asas dalam hukum perjanjian Indonesia yang relevan dengan arbitrase internasional, khususnya beberapa aspek dari hukum Indonesia dalam perjanjian-perjanjian komersial yang tunduk pada hukum Indonesia. Asas-asas ini antara lain doktrin Stare Decisis, itikad baik, rebus sic stantibus, penafsiran kontrak dan force majeure.

Stare Decisis adalah suatu doktrin di mana dalam perkara yang sama hakim wajib memberi putusan yang sama yang pernah dibuat oleh hakim yang terdahulu. Dalam sistem common law yang tidak dikodifikasi doktrin ini memberikan kesinambungan, kohesi dan dapat diperkirakan (predictability). Berbeda dengan sistem common law, doktrin ini tidak dikenal dalam sistem civil law, termasuk Indonesia. Sebaliknya, asas itikad baik merupakan suatu asas yang penting dalam sistem civil law, sementara dalam sistem common law, tidak ada kewajiban untuk melaksanakan perjanjian dengan itikad baik meskipun secara umum konsep tersebut memegang peran penting.. Dalam hukum perjanjian Indonesia asas itikad baik ini diatur dalam Pasal 1338 dan 1339 KUHPerdata, yang masing-masing menyatakan bahwa suatu perjanjian harus dilaksanakan dengan itikad baik dan suatu perjanjian itu tidak hanya mengikat untuk hal-hal yang dengan tegas dinyatakan di dalamnya, tetapi juga untuk segala sesuatu yang menurut sifat perjanjian diharuskan oleh kepatutan, kebiasaan atau undang-undang. Asas ini juga merupakan dasar doktrin rebus sic stantibus, yaitu doktrin yang menyatakan bahwa sesuatunya tetap berlaku selama keadaan tidak berubah, asas itikad baik ini berlaku dalam pelaksanaan maupun pembuatan kontrak.

Selanjutnya, dalam sistem civil law seperti yang dianut oleh Indonesia, penafsiran kontrak berbeda dengan sistem common law, yang menggunakan pendekatan objektif dengan tidak melihat maksud dari para pihak tetapi mencari makna dari kata-kata yang terttulis dalam kontrak. Pendekatan yang dikenal dengan "parole evidence rule" tidak termasuk bukti-bukti lisan yang bertentangan dengan yang tertulis dalam kontrak. Dalam sistem civil law yang menggunakan pendekatan subjektif dalam pembentukan dan penafsiran kontrak, para pihak dapat mengajukan bukti-bukti dalam negosiasi dan dokumen-dokumen yang dapat menjelaskan maksud sesungguhnya dari para pihak.

Introduction

As this seminar is jointly organized by SIAC and IKADIN, I therefore believe that it may be of interest to the participants that I review in this paper certain Indonesian contract law principles which are relevant in international arbitration. For it has been my experience as an expert witness in international arbitration held in Indonesia and in Singapore, where I had to comment on certain aspects of Indonesian contract law concerning commercial agreements governed by Indonesian law which are the subject of an international arbitration, that both the arbitrators as well as the parties' solicitors coming from a common law background appeared not all too familiar with Indonesian contract law principles. This is not surprising as Indonesian contract law belongs to the civil law (named after the "civilians" or citizens of Rome) system.

In view then of the above I therefore intend to consider in this brief paper some specific Indonesian contract law principles which essentially are civil law concepts. As obviously this seminar is not the forum to deal with most, let alone all, the Indonesian contract law principles which may be relevant in an international arbitration, I shall, therefore, limit myself to examining in this paper those principles which I deem important and hopefully useful to the participants.

1. The Doctrine of *Stare Decisis*

Different from the civil law which is a codified law, the common law is case law or judge-made law. It consists of decisions given by English judges in numerous individual disputes. As a recognizable body of law it dates back to the first written records of decisions in the fourteenth century and gradually replaced trial by battle or equally speculative forms of solution by Divine intervention. [1]

A case decided in one of the higher courts which state a principle of law is called a precedent. In the nineteenth century the English judges developed the doctrine of obligatory precedent or ***stare decisis***. This essentially requires that precedents must be followed by judges in similar cases in the same court and in the courts below it, whether the judges agree with such precedents or think them just and however old they may be. This doctrine of precedent gives continuity, cohesion and predictability in the common law system being a legal system without a Code.[2] Said doctrine of stare decisis is not known to the civil law since the civil law judge is bound by a Code laid down many years earlier. In Indonesia the principles and provisions governing contract law are laid down in Book III of the Indonesian Civil Code ("**ICC**"), which is a replica of the 1838 Dutch Civil Code, promulgated in Indonesia in 1848 and which is still operative pursuant to Article II of the Transitional Provisions of the 1945 Constitution which has partly become Article I of the Transitional Provisions by virtue of the Fourth Amendment to the Constitution. It is, therefore, not surprising that Dutch case law and writings of Dutch legal scholars dealing with and commenting on specific legal issues found in the 1838 Dutch Civil Code are still consulted and referred to by Indonesian legal practitioners.

In this connection I wish to make the observation as a caveat that the New Dutch Civil Code ("**NDCC**") which came into force in Holland in 1992 is not part of Indonesian law. Any references to the NDCC in any proceedings, arbitral or otherwise, regarding contracts which are governed by Indonesian law are therefore to be made with the above in mind. This is so as the NDCC is not **merely a restatement** (as some may think) of Dutch law based on Dutch case law which originates from the period when Dutch law was a guidance for understanding and interpreting Indonesian law. In **New Netherlands Civil Code, Patrimonial Law** page XX at paragraph 20, Professor A.S. Hartkamp, when referring to the mandate which was given to Professor Meijers in 1947 to draft a new Civil Code, states that:

[1] Michael H. Whincup, *Contract Law and Practice, the English System and Continental Comparisons*, fourth edition, Kluwer Law International 2001, p.1.

[2] *Id.* p.2.

> " …. the work must not be misunderstood as a mere restatement of the law with the aim to remove superfluous and obsolete provisions, and to codify judge-made law and special statutes. The previous sections have shown that Meijers decidedly did not approach his task in such a limited way. By means of some examples it will be shown that the law itself has undergone many important and interesting innovations". [3]

Professor Hartkamp goes on to state at paragraph 33 page XXVI that: "… in regard to the important innovations, some of which were mentioned before, foreign influences are much more balanced. …… influence from the common law may be seen, e.g. in the articles on error, undue influence, anticipatory breach of contract, and liability for independent contractors; German influence is visible in the new section on general conditions and in the rules on the role of good faith (reasonableness and equity) in contract law."

In a similar vein, Zweigert and Kötz in **An Introduction to Comparative Law** when analyzing to which family of Codes the NDCC belongs, state at page 103: "… one cannot allocate it either to the German or the Roman legal family. Founded on intensive comparative law, it is akin on many points to the common law (as on avoidance of contracts for error or 'improper exploitation of circumstances'), and on others follows the Vienna Convention on International Sales (as on liability for breach of contract). One can only conclude that it has hit upon a style of its own, founded on the European ius commune".[4]

Based on the comments of the scholars referred to above it can be said that the NDCC brought many innovations into Dutch law, some borrowed from other legal traditions including the common law, and as a result the law under the NDCC is quite different in many respects from the law under the 1838 Dutch Civil Code. Such being the case it would, therefore, not be right to export the NDCC to Indonesia as reference and consider it as if it were still the same as Indonesian law. This, however, is not to mean that we cannot learn from the Dutch experience regarding e.g. the evolutionary change in the meaning of the preeminence of good faith in the performance of an agreement as will be mentioned later in this paper.

[3] P.P.C. Haanappel and Ejan Mackaay, *New Netherlands Civil Code, Patrimonial Law*, Reprinted 1997, Kluwer Law and Taxation Publishers, Deventer. Boston, Netherlands.

[4] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, Third Edition, Clarendon Press, Oxford 1998, p.103.

2. The Principle of Good Faith

In common law, different from the civil law as we will see later, there is no statutory duty to act in good faith. Albeit the concept of good faith plays an important role in many contexts in the common law, there is not a duty to act in good faith that is as general and extensive as the duty to act in good faith found in the civil law. This is particularly the case with respect to contract law. The civil law as will be discussed later explicitly allows an agreement to be interpreted so as to take account of the requirements of equity and good faith, whereas the common law places emphasis on the fact that an agreement is an agreement. A common law trained lawyer acting as an arbitrator should therefore not apply common law concepts when looking at Indonesian contract law concepts of e.g. good faith, contract interpretation, force majeure etc.

In Indonesian contract law good faith or ***bona fides*** is expressly stipulated in article 1338 section (3) ICC that "Agreements must be performed in good faith". What did the legislator mean by the legal term good faith? The answer to this question is set forth in article 1339 ICC which stipulates as follows:

> "Agreements are binding not only to what is therein expressed, but also as to that which is required, according to the nature of the agreements, by equity, usage or statute".

It should be obvious that the legal term equity as used here should be taken in the sense of "what is just and equitable" or expressed in a more common way "what is **reasonable** and **equitable** (redelijkheid and billijkheid)". Although the terms "reasonable" and "equitable" have each their own emotional value, however, in a legal sense there is no significant difference between them. [5]

It should be kept in mind that the term good faith mentioned in article 1338 section (3) ICC refers to **objective good faith**. The parties to an agreement will be said to have complied with their duty to observe good faith in their performance of the agreement if their actions can truly be said to be reasonable and equitable.[6] Thus compliance with the obligation in performing an agreement is not dependent on the internal disposition of the party concerned (also referred to as **subjective good faith**). If a party, therefore, acts in an unreasonable and

[5] Asser-Hartkamp, *Verbintenissenrecht II*, Deel II Algemene Leer Der Overeenkomsten, 10 e Druk, bewerkt door Mr. A.S. Hartkamp, W.E.J. Tjeenk Willink-Deventer, 1997, p. 287.

[6] *Ibid.*

inequitable way it will be of no good defense for him to advance that he honestly believed his conduct to be reasonable and equitable.

The question at hand now is to examine whether article 1338 (3) ICC, besides having a **supplemental function** as is expressly provided in the above referred article 1339 ICC, does also have a **derogating function**. Can good faith derogate from the obligations of the debtor and thus restrict the rights of the creditor? In a well-known decision commonly referred to as the "**Sarong arrest**" the Dutch Supreme Court (HR 8 January 1926, NJ 1926, 203.) took the view that good faith could only supplement contractual rights and obligations and could, therefore, not derogate from those rights and obligations. This view was severely critised by prominent jurists such as Meijers, Scholten and Van Oven.[7] Although it was only in 1967 that the Dutch Supreme Court appears to have abandoned the abovementioned view by expressly acknowledging that good faith, besides having a supplemental function, can also have a derogating effect, however, even before that year judicial opinion has in a number of cases departed from the abovementioned strict grammatical interpretation of article 1338 and 1339 Indonesian Civil Code as reflected in the above referred Sarong arrest. [8]

The abovementioned long debated and critized view of the Dutch Supreme Court in respect of the controversy over the preeminence of good faith or legal certainty, has now been resolved in the Dutch New Civil Code Book VI, Article

[7] J.M. van Dunné, *Verbintenissenrecht*, Deel 2, 2e, herziene druk, Kluwer-Deventer, 1993, p. 83.

[8] Asser - Hartkamp, *op. cit.*, p. 300

258. It has done so in favour of good faith which is thus established as the overriding principle.[9]

As to the question what constitute unforeseen changes of facts, conditions and circumstances so that good faith either suspends or extinguishes a creditor's right to demand performance that will have to be judged on a case to case basis. There is obviously no strict test for what constitute an unforeseen material change. However, the following tests could perhaps be applied:

- Would it be reasonable or equitable to insist on the performance of the contract in accordance with its terms in the context of the change which has occurred?
- Would such performance result in a significant imbalance in terms of the benefit to be derived from the contract by each party?
- If the parties had foreseen the events which have occurred, would they have entered into the contract on those terms and given their consent to it?

A careful reading of the abovementioned tests will show that they are an application of (i) the principle of good faith in the performance and enforcement of contracts and (ii) the notion that consent is given only to contracts of benefit to the consenting party and that the consent is qualified by the expectation and requirement that the other party will act in good faith. It is in this connection that I should like to mention the clause ***rebus sic stantibus*** (as long as things stand as they are) which since the time of the middle ages purported to protect

[9] Article 258 (6.5.3.11):
1. The judge may at the request of one of the parties modify the consequences of a contract or entirely or partially cancel the same on the ground of unforeseen circumstances, which are of such a nature that the counter-party based on standards of reasonableness and equity may not expect the unchanged preservation of the contract. The modification or cancellation can be pronounced with retroactive effect. (In Dutch: 1. De rechter kan op verlangen van een der partijen de gevolgen van een overeenkomst wijzigen of deze geheel of gedeeltlijk ontbinden op grond van onvoorziene omstandigheden welke van dien aard zijn dat de wederpartij naar maatstaven van redelijkheid en billijkheid ongewijzigde instandhouding van de overeenkomst niet mag verwachten. Aan de wijziging of ontbinding kan terugwerkende kracht worden verleend).
2. No modification or cancellation shall be granted if the circumstances based on the nature of the contract or the common prevailing opinions are at the risk of the party invoking them. (In Dutch: 2. Een wijziging of ontbinding wordt niet uitgesproken, voor zover de omstandigheden krachtens de aard van de overeenkomst of de in het verkeer geldende opvattingen voor rekening komen van degene die zich erop beroept).

a contracting party against the consequences arising from circumstances occurring after the conclusion of the contract concerned.

This was done by means of a tacit extinguishing condition known as the ***clausula rebus sic stantibus***. Thus the contract is deemed to be made subject to the condition that the circumstances in which it was concluded remain unchanged.[10] An important principle that emanates from the ***rebus sic stantibus*** rule is that the party's consent (which pursuant to article 1320 section (1) ICC is a requirement for a valid contract) is qualified by reference to the continued existence of a set of contemplated circumstances because, for example, he would never have entered into the contract if he believed or had foreseen that it would become totally one-sided. In such a case the derogating effect of good faith obliges the other party to refrain from enforcing its strict contractual rights as it would be unconscionable to do so. It can therefore be said that ***bona fides*** or good faith is in truth the basis of the doctrine of ***rebus sic stantibus***.[11]

A good example that the requirement of good faith varies from case to case can be seen from Indonesian jurisprudence. In the case where someone bought a plot of land before World War II at a certain price, the payment of which became due after the war, namely after obviously the market value had increased many times, the Supreme Court did not amend the contract price but instead imposed an obligation to re-sell the plot of land at a reasonable price to a third party and share the profit of such sale.[12] Different from the above case, the Supreme Court in its decision rendered in 1955 refused to permit land which had been pledged (jual gadai) for a price prior to World War II to be redeemed for the same price and instead applied its own "**gold formula**" for redemption. The Court decided that since the price of gold had increased many times during the intervening years, equity (keadilan) required that the fluctuation of the currency be borne equally by the parties.

So far we have discussed the derogating effect of good faith in the **performance** of the contract. Does good faith also play an important role during the stage of **formation** of the contract? The answer is affirmative. In terms of the formation of the contract good faith affects what the parties are taken to have

[10] Asser-Hartkamp, *op. cit*. p. 320.

[11] *Ibid*. p. 321.

[12] Mahkamah Agung Case 28 May 1953 No. 62aK/Sip/1952, dalam perkara "Jual - Beli Bersyarat", published in H. 1953 - 2 and 3 as reported in part in J. Satrio, S.H., *Hukum Perikatan*, Perikatan Yang Lahir Dari Perjanjian, Buku II, Citra Aditya Bakti, 1995, p. 170-172.

intended and to what they can be considered as having given their consent. Good faith implies that the contract should have fair clauses and have benefit for both parties. In this connection it is worth mentioning that the Usury Act (***Woekerordonnantie***) of 1938 expressly provides that in the case of an offense to reason and equity arising from an imbalance of benefit at the inception of the contract, the court may determine that the benefitted party may not obtain a judicial finding of contract breach for the other party's failure to perform. In such a case, an Indonesian court may intervene either at the request of the disadvantaged party or ***ex officio*** both to any prayers for specific performance as well as a finding of breach against the disadvantaged party and to reform judicially the contract terms to impose a balance of rights and obligations not offensive to reason and equity or even to declare the contract void.[13]

3. Interpretation of Contract

The civil law, to which legal system Indonesian contract law belongs, adopts an approach towards the interpretation of contract that is essentially different form the common law. The common law takes a more **objective approach** to the interpretation of contract by not looking at the actual intention of the parties but instead to seeking the meaning of the words used in writing in the contract. This common law approach known as the "**parole evidence rule**"[14] excludes oral evidence that seems to contradict the written contract. It is, therefore, quite common that common law lawyers include a clause in agreements they have drafted

[13] Usury Act (Woekerordonnantie) of 1938, Article 2(1): "Whenever between the reciprocal obligations of the parties to a contract from the outset there is such a difference in value so that, in view of the circumstances, the disproportion of such obligations is excessive, the judge may then at the request of the disadvantaged party or even ***ex officio*** mitigate the obligations of such party or declare the contract void, unless it is reasonable that the disadvantaged party had fully foreseen the consequences of the concluded contract and such party had not acted with frivolity, inexperience or in distress". (In Dutch: Indien tusschen de wederzijdsche verplichtingen der partijen bij eene overeenkomst van den aanvang af een zoodanig verschil in waarde heeft bestaan, dat, in verband met de omstandigheden, de onevenredigheid van die verplichtingen buitensporig is, kan de rechter, op verzoek der benadeelde partij of ook ambtshalve de verplichting dier partij matigen of de overeenkomst nietig verklaren, tenzij aannemelijk is, dat de benadeelde partij de gevolgen van de door haar aangegane verbintenis ten volle heeft overzien en zij niet gehandeld heeft in lichtzinnigheid, onervarenheid of noodtoestand).

[14] Black's Law Dictionary, Eighth Edition, defines the parole-evidence rule as follows: The principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing. This rule usu. operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form.

as follows: "this agreement is intended to be the final and complete expression of the parties' agreement and no additional term or amendment can be made or added other than in writing".

It may be of interest to the participants that I mention here that prior to its rescission in 1934 a similar provision to the "parole evidence rule" could be found in article 1897 ICC which read as follows:

> "No evidence by witnesses shall be permitted concerning that which is claimed against or beyond the content of the written instrument, and neither also about that which one might assert to have been said prior, at the time of or after the execution of said instrument"[15].

Albeit Indonesian law in specific instances requires that an agreement be in writing and embodied in a notary deed on pain of nullity, the role of such writing is quite different (see article 1870 ICC regarding conclusive evidence (volledig bewijs) of notary party deeds (partij akten).

The civil law takes a **subjective approach** to the formation and interpretation of contracts. An agreement is what the parties to the agreement have actually intended when they gave their consent. Consequently, in interpreting and determining the meaning and content of an agreement Indonesian law, like other civil law traditions, does not exclude oral evidence. Any of the parties can submit evidence of pre-contractual negotiations and documents and proffer evidence of post-contractual behavior and discussions that could explain the true intent of the parties. It is not surprising, therefore, that the ICC has article 1343 which provides:

> "If the wording of an agreement is open to several interpretations, one shall ascertain the intent of the parties involved rather than be bound by the literal meaning of the words".

Therefore when one needs to interpret a contract, one should focus on the actual intent of the parties in priority to the written word. If there is a lacuna that needs to be filled then such lacuna should filled by applying equity, usage and statute as expressly permitted by article 1339 ICC. In this connection it is truly odd to read the provision in article 1342 which stipulates:

[15] W.J. Zwalve, C.Æ. Uniken Venema's Common Law & Civil Law, Inleiding tot het Anglo-Amerikaanse vermogensrecht, W.E.J.Tjeenk Willink-Deventer, 2000, p.573.

> "If the wording of an agreement is clear, one is not allowed to deviate from it through interpretation".

For whether the wording of a specific clause is clear is in itself a matter of interpretation[16].

As can be seen from article 1343 ICC there is an important connection between interpretation and equity. A correct interpretation of a contract should be the result of an application of an interpretation in equity as required by article 1338 section (3) ICC. When parties disagree on the content of a contract, the arbitration tribunal should look for what is **reasonable and equitable** on the assumption that what parties had intended was a reasonable and equitable deal. Thus one ends up with a reasonable and equitable interpretation of the contract.

Specifically as regards an industrial contract, in trying to find the intent of the parties the tribunal is allowed by article 1346 ICC[17] to look at national and local customs and usage. Consequently industry standards prevailing in a given field may be introduced when the tribunal is looking for the true intent of the parties.

Should there be no common intent on a given issue, article 1339 ICC could then be used to supplement the contract with the necessary equitable obligations. This way a further interpretation is given to the contract, not based on what the parties had intended but instead on what good faith pursuant to article 1338 section (3) ICC requires. The result would be a reasonable and equitable interpretation of the contract.

4. Supervening Illegality

Supervening illegality during the performance of a contract causing the contract to become unenforceable due to legal impossibility to perform is one of the types of **force majeure** (***vis major***) that is recognized in Indonesian contract law. Professor R. Subekti, former Chief Justice of the Supreme Court of Indonesia, dealing with the issue of the defense of the debtor against whom a claim for compensation or cancellation of the contract is made wrote the following[18]:

[16] For a doctrinal discussion of article 1342 ICC (article 1378 Old Dutch Civil Code), see Asser-Rutten II, Verbintenissenrecht, Deel II Algemene Leer Der Overeemkomsten, 6e druk, bewerkt door Mr. L.E.H. Rutten, 1981, p. 222-224.

[17] Article 1346 ICC: "Obligations which are ambiguous, shall be interpreted by what is usual (customary) in the country or at the place where the agreement was made".

[18] Prof. R. Subekti S.H., *Law in Indonesia*, Gunung Agung - Jakarta 1973, p. 67-68.

> "The debtor to whom is launched a claim for compensation or cancellation of the contract, can in his defense put forward reasons to avert the claim."

It is possible that he puts forward that the non-performance of the contract is due to events which could not be expected before and for which he was not responsible at all. Because of those events it was quite impossible for him to fulfill his contractual obligations. In that case the debtor puts forward that there was a force majeure. If his plea is accepted by the Judge, the debtor will not be condemned to compensation, nor will the contract be cancelled against his will. It is because he is not considered to be in default or to have neglected the interests of his creditor.

As for the conception of force majeure, there has been a change in the course of time. According to modern vision it is not necessary that there must be a big calamity or a catastrophe or other acts of God, which has prevented the debtor to carry out his duty, but it is enough that in certain circumstances it will be considered to offend human feelings when the creditor claims the fulfillment of the contract. In such a case the Judge will accept the plea of the debtor that he was in force majeure. For instance, an importer, who could not deliver certain goods to the buyer because unexpectedly the Minister of Trade has issued a regulation prohibiting the import of such goods, should be considered to be in force majeure".

It may be of interest to the participants to know that the Dutch Supreme Court in its decision on the same subject of supervening illegality had this to say[19]:

> "If conversely a validly made agreement is with respect to its performance affected by a new law in such a way that performance becomes by law a prohibited act, the consequence thereof is then not that the agreement has become void. Rather the enactment of said law has the effect that the agreement may not otherwise be performed except with due observance of said law".

Dealing with the concept of **illegality** the editors of a comparative study of the Principles of European Contract Law and Dutch Law as found in the NDCC had the following to say:

[19] Asser-Rutten II, *op.cit*. p. 203.

> "A general and self-evident restriction to the right to claim performance follows from Art. 3:40 BW (NDCC), where a juridical act (e.g. a contract) is considered to be null and void if it is contrary to bona mores or order public because of its content or its intention (Art. 3:40 BW)."

The example mentioned above (Art. 9:102 PECL.No. 4) would constitute such an illicit contract. A claim for the specific performance of an obligation arising from such a contract may not be upheld. The same would hold true if it was not the conclusion of the contract but rather the performance of the obligation that was prohibited by law or decree. An example thereof would be the imposition of a trade embargo after the conclusion of the contract.[20]

Accordingly in the case of supervening illegality a choice has to be made namely, whether to obey the law of the state or to ignore the law and instead obey the private obligations pursuant to the agreement which has been entered into. Essentially, therefore, what we have here is a situation of a conflict of duties: the duty to obey the law, the public interest, which should weigh heavier than the duty to perform the agreement which has been concluded. Consequently, to insist on performance of an agreement that has become unenforceable because said performance has become illegal as it is prohibited by a lawfully enacted supervening law or regulation is therefore undoubtedly contrary to good faith which must be observed in the performance of an agreement.

Like the common law which has accepted for more than a century that events occurring after the contract has been made may make the contract imposible or impractical to fulfill – because, for example, the law now forbids it or its subject-matter has been destroyed, or a party is prevented by illness from performing the promised services[21], Indonesian contract law as evidenced by the articles 1244 and 1245 ICC recognizes the concept of **force majeure** which is an effect and result that arises from the occurrence of certain events which affect the performance of the contract. Supervening illegality as we have seen above is one of those events which excuses the non-performing party from performance of the contract. And if we acknowledge that the existence of a higher duty can make the performance of a lower obligation "**impossible**" as in the case of **legal impossibility** caused by supervening illegality, then the concept of impossibility can

[20] Danny Busch et al, *The Principles of European Contract Law and Dutch Law*, A Commentary, 2002 Ars Aequi Libri, Nijmegen & Kluwer Law International, The Hague/London/New York, p.354.

[21] Michael H. Whincup. *op. cit*. p.303.

be expanded even further to include impossibility in other cases wherein the performance would be contrary to a higher interest. An example would be if the fulfillment of the obligation will expose the non-performing party to an immediate serious danger for life, freedom or health or reputation. There is then in those cases "**moral impossibility**". Thus the concept of **objective impossibility** as is the case of supervening illegality is expanded to include the cases of **subjective impossibility**[22] .

Article 1244 ICC provides that two essential requirements must be fulfilled before the existence of impossibility of performance by force majeure will be accepted namely, (i) there must be an outside event or extraneous change of situation affecting the performance of the contract and (ii) said outside event or extraneous change of situation must have occurred without the fault of the non-performing party. In such case article 1245 ICC provides that the non-performing party will be excused from performance of the contract because of force majeure and will therefore not be liable for any costs, damages and interests. It may be of interest to the participants to know that English courts too appear to recognize a similar concept called "frustration".[23] An example is "**commercial frustration**" which Black's Law Dictionary, Eighth Edition at p.694, defines to mean: "An excuse for a party's nonperformance because of some unforeseeable and uncontrollable circumstance".

What should the arbitral tribunal do when faced with a situation where one of the parties (the Respondent) is by law forbidden or prevented from performing its obligations under the agreement in question? I am of the view that since the agreement has become incapable of performance, it has thereby lost its meaning and purpose for both parties (Claimant and Respondent alike) and therefore such agreement ceases to have any substantial justifications for its continued existence. It, therefore, is in my view reasonable, equitable and proper that the arbitral tribunal makes a ruling that the agreement in question is formally terminated, otherwise the Respondent would be prejudiced in there being no finality and consequently be faced with legal uncertainty with regard to carrying on with his business.

What is the position of the non-affected party (the Claimant) in the case where non-performance by the Respondent is caused by force majeure? In such a case

[22] Asser-Rutten I, Deel I *Verbintenissenrecht, De Verbintenis in het Algemeen*, 6e druk, bewerkt door Mr. L.E.H. Rutten, W.E.J. Tjeenk Willink – Zwolle, 1981, p. 251.

[23] Michael H. Whincup. *op.cit.* p.305-306.

the Claimant will ipso jure be released from his obligation to perform since the contract in question has ceased to exist. Examples of this rule can be found in article 1545 ICC where the subject-matter of a contract of exchange is lost without the fault of the owner and in article 1553 ICC if the leased property is during the duration of the lease totally destroyed by an accident. In both cases the respective contracts are deemed terminated by operation law.[24] This appears also the position of the English courts that "if it should happen in the course of carrying out a contract that a fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms, then the contract is at an end" said Lord Denning in **The Eugenia**, 1964.[25]

With the above brief review of supervening illegality I have come to the end of this sketchy presentation of some Indonesian contract law principles relevant to international arbitration. It is my sincere hope that my fellow Indonesian advocates will be induced to delve deeper into the topics of this seminar and make the extra effort to go directly to the original source materials referred to by the speakers.

Fred B.G. Tumbuan
Senior Managing Partner of the Law Firm TUMBUAN PANE in Jakarta, specializing in the corporate and business law, and also a listed arbitrator in BANI.

[24] Asser-Rutten II, *op.cit.* p.325.

[25] Michael H. Whincup. *op. cit.* p. 305.

Moot Court and Arbitration

By Nurdjanah A.S

ABSTRAK

Makalah ini membahas mengenai Moot Court, yaitu salah satu sarana pengajaran dalam pendidikan ilmu hukum, di mana para peserta mengikuti suatu simulasi dalam persidangan di pengadilan. Sasaran utama adalah melatih mahasiswa dengan pengetahuan yang menyangkut aspek praktis yang menghubungan teori dan praktek. Moot Court ini juga meliputi perkara-perkara yang diselesaikan dalam arbitrase. Dalam kegiatan ini mahasiswa dapat mempraktekkan prosedur dalam arbitrase. Di Indonesia, Competition of Jessup Competition in Public International Law pada bulan Februari 2008 telah menyelenggarakan National Competition di Jakarta, yang diikuti oleh 20 perguruan tinggi.

Moot Court

Moot court is an extracurricular activity at many law schools in which participants take part in simulated court proceedings, usually to include drafting briefs and participating in oral argument. "Moot court" usually refers to a simulated appellate court case or it is a simulated hearing or trial, in which the students hear a case and negotiate it like in real life. The Moot court does not involve the examination of witness or the presentation of evidence; rather, it is focused solely on the application of the law to a common set of evidentiary assumptions to which the competitors must be introduced. In the United Kingdom and Commonwealth countries, the phrase "a moot court" may be shortened to simply "a moot" and the activity may be called mooting ("to moot" means to bring something for discussions).

Moot Court plays real life roles of Prosecuting Attorney, lawyers Attorneys and something Judges, all proceeding on the case. The students will receive a case as if they lawyers or advocates for one or both of the parties. Students will then write briefs, participate in oral arguments or both (ILSA, 2007)

The Aim of Moot Court

The important aim of the Moot Court is to train the legal knowledge of students, for the practical aspects of a lawyer life to create links between theory and practice. Primary the students will prepare and train for a proper and successful they activity in court, such as speech without texts self confidence and debate activities, but it focus in single issue and improve their ability in writing the process in Moot Court.

One of various Moot Courts is in commercial arbitration cases. In this activity the students can practice the arbitration procedure according to commercial arbitration case. The parties in the commercial contract choose the arbitration commercial court for the settlement of dispute among them. Today arbitration is one of the business community's self regulatory practices of dispute settlement (Z. Asikin KA, 1978:7). Article 2 of the Protocol on Arbitration Clauses had been signed in Geneva 1923 said that the arbitral tribunal shall be governed by the will of the parties and the law of the country in whose territory takes place (Huala Adolf, 2002:29).

The students can practice arbitration in Moot Court of commercial arbitration in law schools, and they have good experience and self confidence for the future life, if they practice as arbitrators, lawyers, advocates, etc. Moot Court can develop strong in writing and oral advocacy skills, intellectual flexibility, the ability to function well under pressure, and the self-confidence necessary to be successful in practice. The students can participate in Moot Court competition such as William C. Vis International Commercial Arbitration Moot Court and also Philip C. Jessup International Moot Court Competition (Jessup Competition) in Public International Law.

The goal of the Vis Arbitral Moot is to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client and to train law leaders of tomorrow in methods of alternative dispute resolution. The clinical tool to train law students will include the writing of memorandums for claimant and respondent and the hearing of oral argument based upon the memorandums - both settled by arbitral experts in the issues considered.

The Moot Court in Indonesia

In Indonesia the Competition of Jessup Competition in Public International Law held National Competition (National Rounds) from 8 to 10 February 2008 in Jakarta. The event was the seventh competition, which was jointly held by the Indonesian Society for International Law (ISIL) and the Constitutional Court and twenty teams from the state and private universities took part in the competition. They were competing to get the Awards of The Indonesian Constitutional Court National Rounds, among others were Best Team Award, Mochtar Kusumaatmaja Award, for the First Runner-Up, Hassan Wirajuda Award for the Second Runner-Up, and The Best Oralist was given the Ali Alatas Award. The 20 teams had struggled for a place in Semifinals and Final on Sunday (10/2) at 13.00 Western Indonesia Time in the Panel and Plenary Court Rooms of the Constitutional Court.

The competition was also attended by 48 judges who were lecturers and legal practicioners such as lawyers from Indonesia and other countries. The teams managed to get into the semis and the final which was held on Sunday (10/2) were the teams from University of Indonesia (UI), Parahyangan University (Unpar), Padjadjaran University (Unpad), and Pelita Harapan University (UPH) who then fought for the Best Team Award.

References

Indonesia Society of International Law, *Indonesia National Round*, Philip C.Jessup International Law Moot Court Competition, 2008.

Sudargo Gautama, 1995, *Indonesian Business Law*, PT. Citra Aditya Bakti, Jakarta.

Wolters Kluwer, *Law & Business*, Corporate and Comercial Law-2008, Includes 2005-2007.

Nurdjanah A.S.
Lecturer in International Law at the University of Tanjungpura, Pontianak (West Kalimantan) and a listed arbitrator in BANI

Review by **AS Nurdjanah**

"International Sales Law and Arbitration, Problems, Cases and Commentary"

by **Joseph F. Morrissey & Jack M. Graves**

The book focuses specially on the United Nations Convention on Contracts for the International Sale of Goods (CISG). The book is unique in a sense that it used an integrated approach at the interaction of substantive contract law and dispute resolution. The book should interest the students, counsel and advocates who are concerned with cross-border transactions. The combination of materials powerfully demonstrates both how a lawyer drafts an international sales contract and how the transactional and arbitral provisions interact if the deal does not go as anticipated. With respect to international commercial arbitration, analyzes a variety of materials including the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) and the New York Convention, and various sets of arbitration rules. It is ideal for students preparing for the Willem C. Vis International Commercial Arbitration Moot, with focuses on both international sales and arbitration (Wolters Kluwer Law & Business: Corporate and Commercial Law – 2008).

Training On Arbitration And ADR In Bandung

Bandung BANI Arbitration Office in cooperation with the Centre for International Trade Law of the University of Padjadjaran held a two-day training on arbitration and Alternative Dispute Resolution. The training was commenced on 18-19 February 2008 in Savoy Homann Hotel, Bandung.

The speakers included the dean, also a listed arbitrator of BANI, Prof. Dr. Ahmad M. Ramli, chair of the BANI Bandung Office, Huala Adolf, listed arbitrators and vice chairs of BANI Bandung Office, H. Iing Rochaman and H. Jafar Sidik. The speakers from the academics were the senior lecturers of the faculty of law of University of Padjadjaran, Mrs. Efa Laela Fakhriah and Mrs. Sinta Dewi. The topics presented at the training among others were the Overview on the ADR; Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution; Drafting Arbitration Clauses; the Arbitration Clause in the Construction and Sharia Banking Contracts; and the Recognition and Enforcement of Arbitration Awards.

In his opening address, the chair of the BANI Bandung Office stated the essential role of arbitration in resolving the commercial disputes in Indonesia. This was true in the light of the role of arbitration could play in the provision of better means of resolution of commercial disputes.

The participants attending the training included companies, practicing lawyers, lecturers and students. The participants were as well given a moot arbitration in the end of the session to provide them a better understanding and appreciation about arbitration and ADR procedures.

ADR in Asia Conference

Friday, 12 September 2008, Four Seasons Hotel, Hong Kong

ARBITRATION AND MEDIATION GLOBAL PLATFORMS FOR DISPUTE RESOLUTION

Hong Kong International Arbitration Centre in conjunction with Hong Kong Corporate Counsel Association will be holding a one-day conference plans devoted to effective arbitration and mediation in resolving dispute. One of the topics to be discusses at the conference is the issue of Negotiation and Drafting of International and Domestic Dispute Resolution provisions.

For detail please contact:

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Indonesian Arbitrators

1. H. Priyatna Abdurrasyid
2. M. Husseyn Umar
3. Harianto Sunidja
4. H.R. Sidjabat
5. Sudargo Gautama
6. T. Mulya Lubis
7. Abdullah Makarim
8. Soegiri
9. Anangga Wardhana Roosdiono
10. H. Gusnando S. Anwar
11. Januar Hakim
12. H. Agus G. Kartasasmita
13. Jusuf Arbianto Tjondrolukito
14. H. Bismar Siregar
15. Mohammad Salim
16. H. Ali Basya Loebis
17. Akmam Umar
18. Augusdin Aminoedin
19. H. Adi Andojo Soetjipto
20. B.M. Kuntjoro Jakti
21. Sunarindrati Tjahjono
22. Hj. Lieke Rukmini
23. Fatimah Achyar
24. H. Benjamin Mangkoedilaga
25. Hary Djatmiko
26. Hj. Hartini Mochtar Kasran
27. Rudhi Prasetya
28. Ismet Baswedan
29. Maliki Tedja
30. Hariwardono Soeharno
31. Fred B.G. Tumbuan
32. Sutan Remy Sjahdeini
33. Humphrey R. Djemat
34. Abdul Hakim Garuda Nusantara
35. Adhi Moersid
36. Frans H. Winarta
37. H. Kahardiman
38. Suntana S. Djatnika
39. Hasjim Djalal
40. Fransiska Oei
41. I Made Widnyana
42. I Gusti Ngurah Oka
43. I Wayan Tantra
44. M. Daud Silalahi
45. Djuhaendah Hasan
46. Moh. Hasan Wargakusumah
47. H. Ahmad M. Ramli
48. Huala Adolf
49. Tengku Nathan Machmud
50. Mariam Darus
51. H. Fathurrahman Djamil
52. Martin Basiang
53. Etty R. Agoes
54. N. Krisnawenda
55. Henry Kapen Silalahi
56. Nurdjanah A. S.
57. Herujono Hadisuparto
58. Yudi Haliman
59. Jimmy Sutjianto
60. Omar Ishananto
61. Wawan Setiawan
62. Rachmat Purwono
63. Mustofa
64. Richard Wahjoedi
65. H. Iing Rochman K
66. H. Jafar Sidik
67. Madjedi Hasan
68. Ichjar Musa
69. Junaedy Ganie
70. W. Suwito
71. Purwanto
72. Anita Dewi Anggraeni Kolopaking

International Arbitrators

1. Albert Jan Van den Berg
2. Andrew John Rogers
3. Arthur L. Marriot
4. Custodio O. Parlade
5. Cecil Abraham
6. Colin Y. C. Ong
7. David A. R. Williams
8. Dato' Jude P. Beny
9. Gregory Churchill
10. Ian G. Pyper
11. Jan Paulsson
12. Jacques Covo
13. Jean-Christophe Liebeskind
14. Ms. Karen Mills
15. Leslie Chew
16. Ms. Louise Barrington
17. Michael Hwang
18. Ms. Meef Moh
19. Michael Charles Pryles
20. Nick Stone
21. Paul Whitley
22. Phai Cheng Goh
23. Soonwoo Lee
24. Tan Chee Meng
25. Varghese George
26. Vasudevan Rasiah
27. Woo Tchi Chu
28. Lawrence Boo
29. A. James Booker
30. Michael Sinjorgo
31. Antonino Albert de Fina
32. Robert B. Morton
33. Justice K. Govindarajan
34. Richard Tan

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Article 1 of BANI Rules and Procedures

Arbitration Agreement

If the parties to a commercial agreement or transaction have agreed in writing that disputes in relation to that agreement or transaction shall be referred to arbitration before the Indonesian National Board of Arbitration/BANI Arbitration Center ("BANI"), or under the Rules of BANI, then such dispute shall be settled under the administration of BANI in accordance with these Rules, subject to such modifications as the parties may agree in writing, so long as such modifications do not contradict mandatory provisions of law nor the policies of BANI. Amicable resolution of dispute through arbitration at BANI shall be based on goodwill of the parties based on cooperative and non-confrontational procedures.

Article 2 of BANI Rules and Procedures

Prevailing Procedure

These Procedural Rules shall apply to arbitrations conducted by BANI. By designating BANI and/or choosing the BANI Procedural Rules for resolution of a dispute, the parties to the agreement or dispute shall be deemed to have agreed to waive the process of case examination through the District Court in connection with the agreement or dispute, and to execute any award made by the Arbitration Tribunal based on the BANI Procedural Rules.