BANI ARBITRATION CENTER
BADAN ARBITRASE NASIONAL INDONESIA

Jakarta Office • Wahana Graha Building, 2nd Floor, Jl. Mampang Prapatan No. 2, Jakarta 12760
Phone : +62 21 7940542 • Fax : +62 21 7940543 • e-mail : bani-arb@indo.net.id • http://www.bani-arb.org

BANI Bandung Office Jl.Tubagus Ismail Bawah no. 2, Bandung 40132 •
Tel: 022-2508649/2506246 • Fax: 022-2508649/ 2535307 • e-mail: banibandung@gmail.com; banibandung@plasa .com

BANI Surabaya Office Jl. Ketintang Baru II/1-3, Surabaya • Tel: 031-8287414 • Fax: 031-8290522

BANI Denpasar Office Jl. Melati No.21, Denpasar 80233, Bali • Tel: 0361-234846 • Fax: 0361-234846

BANI Pontianak Office Jl. Imam Bonjol No. 402, Pontianak 78123, Kalimatan Barat •
Tel: 0561 - 585262 • Fax: 0561 585261

BANI Medan Office Jl. Sekip Baru No.16, Medan 20112 • Tel: 061-4527799 • Fax: 061-4147192

BANI Batam Office Gedung Dana Graha Lt. 3, Ruang 307 A Jl. Imam Bonjol, Nagoya, Batam • Tel: 0778-450539 • Fax: 0778-450537

BANI Palembang Office Gedung KADIN Prov. Sumatera Selatan Lt. 3, Jl. Letkol Iskandar Kompleks Ilir Barat Permai Blok D1 No. 27, Palembang 30134 •
Tel: 0711-352793 • Fax: 0711-356187

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From The Editor

On December 5th 2008 marking his 79th birthday - BANI's Governing Board Chairman, Prof. Dr. H. Priyatna Abdurrasyid launched his new book entitled "Beberapa Bentuk Hukum Sebagai Pengantar Menuju Indonesia Emas 2020" or Various Legal Forms as Introduction towards Golden Indonesia 2020". The 548 pages book is a compilation of articles written in Bahasa Indonesia and English.

These articles express or reflect Prof. Priyatna's idea and thought and experiences that he has acquired during his long career as state attorney, legal expert, educator and arbitrator. They cover a wide range of subjects or issues, including state ideology of Pancasila (five pillars), development of science, technology and law and the brains, air space and air power, law on space and sea, fighting against corruption and arbitration. With his permission, we are pleased to reprint one of his articles on the arbitration award, where he discussed as to what makes an arbitration award a good award.

In other news, BANI has completed a two days workshop in October 2008 on Dispute Resolution in Construction. About 20 professional (mostly engineers and lawyers) from legal firms and construction contractor companies have participated in the Workshop. The workshop discussed all aspects of arbitration from framing the submission to the issue of an enforceable award, including the strategic issues that arise in the course of construction arbitration proceedings. In this issue you will find one of the papers given in the workshop on arbitration proceeding and practical suggestions on preparation for proceedings. The paper was written and presented by Mr. Anangga W, Roosdiono, one of BANI listed arbitrators.

Finally, we also review the settlement of investment dispute under the new investment law number 25 of 2007, principle of good faith in BANI arbitration and arbitration clause in Indonesia insurance policy. If you have any questions or would like to discuss any issues arising from the content of the newsletter, to contribute articles or to suggest for improving the Newsletter, please do not hesitate to contact us at our e-mail address bani-arb@indo.net.id (our web site: http://www.bani-arb.org).

December 2008

Priyatna Abdurrasyid

Arbitral Awards

ABSTRAK

Tulisan berikut membahas prinsip-prinsip dan komponen-komponen yang bersifat universal yang merupakan pedoman bagi arbiter untuk menjatuhkan putusan. Dalam prosedur formal, prinsip-prinsip tersebut termuat dalam Model Law UNCITRAL dan undang-undang arbitrase di banyak negara. Prosedur universal ini merupakan landasan agar putusan arbitrase tersebut dapat diterima, patut, adil dan mampu menyelesaikan sengketa domestik dan yang melintasi batas negara. Prosedur universal ini akan memfasilitasi para praktisi di seluruh dunia memahami proses arbitrase, yang akan meningkatkan kepercayaan pada hasil akhir dari arbitrase. Karenanya merupakan hal yang penting bahwa seluruh persyaratan dipenuhi mengenai isi maupun bentuk putusan. Arbiter berkewajiban juga mengikuti aturan-aturan yang bersifat lokal, namun demikian merupakan kewajiban para pihak yang bersengketa termasuk para pengacara untuk juga mengidentifikasi aturan-aturan yang bersifat lokal yang dipandang relevan selain perundang-undangan yang berlaku.

Dalam upaya mendapatkan putusan arbitrase yang patut, adil dan wajar, seorang arbiter harus menjelaskan fakta-fakta yang ditemukan. Putusannya dengan jelas dan terperinci mengidentifikasi fakta-fakta tersebut untuk mendukung putusan yang wajar, berlandaskan asas-asas hukum, kepatutan dan keadilan. Penjelasan meliputi semua bukti-bukti lisan dan tertulis, termasuk fakta-fakta dan hukum yang tidak diterima yang meliputi semua hal yang dipersengketakan. Penjelasan mengenai putusan juga meliputi hak dan tanggung jawab/kewajiban dari para pihak yang bersengketa, termasuk perbaikan yang diperintahkan (remedies ordered) beserta cara perhitungannya. Putusan harus lengkap, termasuk lampirannya berupa dokumen-dokumen yang diperlukan yang harus diserahkan pada pejabat yang berwenang untuk melaksanakan eksekusi putusan tersebut. Putusan tersebut harus dapat dilaksanakan; misalnya putusan tidak seharusnya mengandung hal-hal untuk melaksanakan sesuatu yang khusus yang berdampak pada hak dan kewajiban pihak ketiga, Kecuali untuk putusan sela, setiap putusan tidak meninggalkan hal-

hal yang dalam kewenangannya. Putusan-putusan sela harus dimasukkan dalam putusan akhir.

Disimpulkan bahwa putusan harus pasti, lengkap, final dan dapat ditegakkan serta mampu meyakinkan para pihak yang bersengketa bahwa putusan tersebut patut, adil dan wajar yang dibuat berdasarkan semua hal yang disampaikan untuk diputuskan, sebagai putusan akhir, tidak ambigu dan konsisten menurut parameter–parameter dalam klausul arbitrase.

A. Formal Requirements

Universal procedural principles concerning arbitral awards are found in the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade and Law on the 21st of June 1985 (the "UNICITRAL Model Law") and in the written arbitration laws of most countries. This procedure universalism is a primary reason underlying the view that arbitration is an accessible, fair, just and reasonable methodology for the resolution of domestic and cross border dispute. Practitioners from around the world have access to the information necessary to understand the arbitration process, thus providing a greater sense of trust in the final outcome.

Arbitration of international dispute should ensure that the awards they adopt at the very least include the following elements:

(i) The decision should be set forth in writing (Art. 31(1) of the Model Law; see Art. 54 of Indonesian Law No. 30 of 1999 (implicitly requiring a written document of decision.
(ii) With a clear and correct identification of the parties intended to be bound (Article 54(1)(b) of Indonesian Law No. 30 of 1999); and
(iii) The decision should set forth a clear description of the dispute (Article 54(1) of Indonesian Law No. 30 of 1999).

The decision must also contain:

(iv) The considerations and conclusions of the arbitrators (unless the parties have agreed otherwise (Art. 31(2) of The Model Law, Art. 54(1)(f) of Indonesian Law No. 30 of 1999);
(v) The date and place of the decision (Art. 31(3) of the Model Law; Art. 54(1)(1) of Indonesian Law No. 30 of 1999. (Under the Indonesian Law the date of decision is also of importance in light of various legal consequences arising upon the expiration of thirty (30) days following the date

of this decision. For instance, in a domestic Indonesia arbitration the arbitrators are required to submit and register the original decision or on an authenticated copy thereof with the Clerk of the District Court with jurisdiction over the respondent within thirty (30) days of pronouncement (Article 1(4) and 59(1) of Indonesian Law No. 30 of 1999). Failure to register has the effect of preventing the enforcement of the arbitration decision (Article 1(4) and 59(1) of Indonesian Law No. 30 of 1999).

Additionally, the date of the award is often relevant to mandate presented to the award itself. For instance, specific deadlines may be imposed on the disputants regarding performance of the award and the commencement of the actual of post award interest on unsatisfied monetary judgments; and

(vi) The signature of a required number of arbitrators (a majority pursuant to Article 31(1) of the Model Law provided the reason for an omitted signature is stated); (Art. 54(1)(j) of Indonesian Law No. 30 of 1999).

Article 54 of Indonesian Law No. 30 of 1999 concerning Arbitration and Alternatives Dispute Resolution set forth a few additional requirements including:

(i) A statement at the head of the decisions containing the word "FOR THE SAKE OF JUSTICE ON THE BASIS OF THE ONE AND ONLY GOD"). (Some may find this requirement strange in a draconian way. However, this requirement is in a sense deemed to be in the nature of an oath taken by the arbitrators when they set their hand to sign the award. It is designed to compel a greater introspection into the merits of the arbitrator's award. Thus, it is akin to the court witness' oath prior to giving testimony before the finder of fact).
(ii) The address of the disputants;
(iii) The position of the disputants;
(iv) The full name and addresses of the arbitrators;
(v) A written opinion of every arbitrator in the event differences of opinion arise among the members of the panel of arbitrators; and
(vi) The naming of the place of the decision.

Differences among jurisdictions concerning minimum award requirements do exist and further differences may arise when the rules of a particular arbitration organization are considered. However, Article 2(d) of the UNCITRAL Model Law and Article 34 of the Law No. 30 of 1999 do require compliance with any additional rules set forth in the rules of procedure of any arbitration organi-

zation adopted by the disputants. For parties adopting BANI as the administrator of their arbitration, the procedural protections of the UNCITRAL Model Law and the added protections of the additional procedural rules set forth in Law No. 30 of 1999 provide for an excellent legal foundation for fair, just and reasonable arbitration awards.

Thus, while certain universal procedural requirements are found to apply throughout the world, it is important to ensure that all rules of procedure of relevant localities are fulfilled with regards in the contents and form of an award. It is an arbitrator's duty to comply with local rules, however, it is the duty of disputants and their counsels to identify both the localities they deem relevant and to provide access to all relevant law.

The most important localities include the places of business and nationalities of the disputants; the venue of the hearings and the jurisdiction with authority over the assets and persons who may be subject to an obligation to perform the mandates of the award.

B. Drafting a Fair, Just and Reasonable Award

What makes an arbitration award a good award. A good award is an award that all of the parties are able to accept as fair and just.

Are there universal components an arbitrator should include in the typical arbitration award involving a commercial dispute? Universal components of an award include these components which the parties would expect to see in an award they are able to accept as reasonable under all of the relevant conditions and circumstances.

In order to achieve the objective of the delivery of a fair, just and reasonable decision in arbitration, an arbitrator should include a clear statement of the underlying facts. The decision should clearly identify those facts and detail necessary to support a well reasoned, legally principled, fair and just opinion.

All important documentary and oral evidence, including major assertions of rejected points of fact and law, should be summarized. Logical discussion should be set forth leading to a clear decision on all matters in dispute.

Preferably in a separate section, the decision should also provide a concise summary of the award with a definitive allocation of any continuing rights and responsibilities of the disputants, including the specific kinds of remedies

ordered and the manner of calculation of any aspects of the award requiring determination.

An award should be complete, including the attachments of copies, certified where necessary, of all documents necessary for presentation to the relevant judicial authorities in jurisdictions where enforcement of the award may be sought. As such, the decisions should set forth a sufficient history of the dispute and the arbitration to make it unambiguously comprehensible.

The award must be possible to perform. It cannot, for example, order specific performance that infringes upon third party interests, rights and obligation.

Apart from "provisional" awards, every award must completely and finally dispose of all matters within its domain. No aspects of necessary and intended relief should be left outstanding. The continuing mandate of provisional awards must be reviewed and incorporated into the final award.

The language of the award must be sufficiently certain so as to render it capable of enforcement in accordance with only one reasonable interpretation. The award must be internally consistent.

The award must include all elements necessary for its enforceability in all relevant jurisdictions and thus in accordance with relevant local laws and where applicable, the terms of the New York Convention 1958.

In its essence, the award must be cogent, certain, complete, final and enforceable. The award must appeal forcibly to the minds of reason of the disputants and judicial authorities responsible for the enforcement of the award. It must convince the disputants of the fairness, justice and reasonableness of the determinations made on all matters submitted for decision in a final, unambiguous and consistent manner in accordance with the parameters set forth in the arbitration clause.

Priyatna Abdurrasyid
Chairman of BANI Governing Board

Reprinted from: Priyatna Abdurrasyid, Beberapa Bentuk Hukum Sebagai Pengantar Menuju Indonesia Emas 2020*, PT Fikahati Aneska bekerja sama dengan Badan Arbitrase Nasional Indonesia, Jakarta 2008, p 451 – 455.*

Huala Adolf

Settlement Of Investment Disputes In Indonesia Under The Investment Law Number 25 of 2007

ABSTRAK

Makalah berikut membahas mekanisme penyelesaian sengketa menurut Undang-undang Nomor 25 Tahun 2007 Tentang Penanaman Modal ("UUPM 2007"). Berbeda dengan undang-undang yang digantikan, yakni Undang-undang Nomor 1 Tahun 1967 Tentang Penanaman Modal Asing, UUPM 2007 memuat ketentuan mengenai cara-cara penyelesaian sengketa. Ketentuan ini diatur dalam Pasal 32, yang hanya diberlakukan untuk sengketa antara Pemerintah dengan investor (asing atau domestik) dan tidak termasuk sengketa antara investor. Cara-cara penyelesaian sengketa ini termasuk negosiasi, Alternatif Penyelesaian Sengketa (Alternative Dispute Resolution atau ADR), litigasi melalui Pengadilan Negeri (hanya untuk sengketa antara Pemerintah dan investor domestik) dan penyelesaian melalui arbitrase (nasional maupun internasional). Dalam hal penyelesaian sengketa melalui arbitrase, UUPM 2007 tidak menetapkan jumlah arbiter dan memuat ketentuan yang menyatakan bahwa putusan arbitrase adalah final dan mengikat. Tidak adanya klausul tersebut dalam UUPM 2007 tidak berarti bahwa putusan arbitrase tidak mempunyai kekuatan hukum mengikat. Dengan telah diundangkannya Undang-undang Nomor 30 Tahun 1999 Tentang Arbitrase, sifat mengikat putusan arbitrase telah mempunyai kepastian hukum (legal certainty). Dalam Pasal 60 UU No. 30/1999 tersebut dinyatakan bahwa putusan arbitrase bersifat final dan mempunyai kekuatan hukum tetap dan mengikat para pihak. Adanya ketentuan mengenai penyelesaian sengketa melalui arbitrase dalam UUPM 2007 menunjukkan pertumbuhan arbitrase di Indonesia dan diterimanya arbitrase dalam sistem hukum Indonesia.

A. Various Mechanism of Settlement

Under Indonesian laws, there are various mechanisms that the investment disputes may be resolved. The data from the Indonesian Board of Investment

reveals that Indonesia has so far (as of 2008), been concluding 63 bilateral investment treaties (BITs). These BITs do contain and have their own dispute mechanisms which differ from one treaty with others.

In addition, Indonesia is also a party to a regional investment regime, most notably, the Framework Agreement on the ASEAN Investment Area of 1998 (AIA). The AIA however although contains article 17 on dispute settlement, does not establish its own investment dispute settlement mechanism. All disputes arising out from the investment within ASEAN member countries will be settled in accordance with the Protocol on Dispute Settlement Mechanism for ASEAN (1996). This Protocol lays down 3 (three) broad mechanisms as to how the dispute within ASEAN members be resolved. They include settlement by (1) consultations (article 2); (2) Good Offices, Conciliation or Mediation (Article 3); and (3) settlement by the so-called "Senior Economic Officials Meeting (Article 4); and (4) settlement by an arbitration-like means namely settlement by a Panel body (Article 5).

Indonesia is also a member to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (or the Washington Convention of 1965) in 1968.

B. Mechanisms under Law No 25 of 2007

The newly-enacted Investment Law No 25 of 2007 (Investment Law of 2007) does contain an article, namely article 32, on the settlement of investment disputes. This article is actually a new provision under the Investment Law as compared to the former investment law, Law Number1 of 1967.

Article 32 consists of four paragraphs which recognized means of settlement of disputes. They include negotiation, alternative dispute resolution, national courts, and arbitration (domestic and international arbitrations). It should be noted that Art.32 only regulates investment disputes where the parties are (i) the government, and (ii) an investor. As Article 1 of the Law states, the term of investors includes domestic and foreign investors. Disputes between investors are not subject to this Law.

The following lists the mechanism in settlement of dispute under the Investment Law of 2007.

1) Negotiation

If a dispute arises between investors and the government, the parties shall settle the disputes through direct negotiation in order to reach a consensus between the parties (para.1).

2) ADR

If negotiation fails to settle the dispute, the parties may chose settlement through, alternative dispute resolution (para.2). Note that the regulation on ADR is embodied in Art.6 of the Law No.30 of 1999. This article lays down the time limit for the parties to solve their dispute by ADR. Paragraph 7 of this Article, states that the agreement of the parties to end their disputes is final and binding. This agreement must be made in writing and must be deposited with the District Court.

If settlement through ADR fails, the parties may refer their disputes to arbitration or ad hoc arbitration (para.7). The reference of a dispute to arbitration must be based on a written agreement made before or after the dispute arises (Art.1, para.(3) of Law No.30 of 1999).

3) Court

As Paragraph 3 of Article 23 states that if an investment dispute arises between the government and domestic investors, the parties may settle their dispute in the (national) court. The parties may also submit their disputes to the district courts (Pengadilan Negeri) or to the national arbitration bodies which exist in Indonesia. Reference of commercial disputes to Indonesian district courts has not been popular. The slow process of cases, the alleged incompetence of courts to deal with modern commercial transactions and lack of legal certainty and enforceability has been blamed for the unpopularity of the courts.

4) Arbitration under the New Law

Arbitration under the new Investment Law plays an important role. Arbitration may be chosen by the parties if negotiation fails to settle the dispute (Art.32, para.2).

Arbitration may also become an alternative, as stated in para.3 of Art.23 of the Law, if an investment dispute arises between the government and domestic

investors. The reference of the dispute to arbitration must and can only be chosen on the basis of an agreement between the parties.

The use of arbitration is similarly required to settle disputes concerning the amount of compensation the government has to pay to the investor in the case of nationalization or expropriation. This provision is similar to the former foreign investment law, Law No.1 of 1967.

A difference between the new and legislation is that the earlier law specified the number of arbitrators to hear the dispute. Each party the investor and the government, chose one arbitrator. The third arbitrator, acting as the chairman of the arbitral tribunal, was to be chosen together by the parties (not by the arbitrators already chosen by the parties).

Another difference is that the former law specifically stated that the award was binding upon the parties. The new Law does not specifically mention this provision. The stipulation of the binding nature of the arbitration award under the former law may be understood in the light of Indonesian arbitration law in the 1960s. As mentioned above, Indonesian arbitration law was still then applying the Rv (Dutch Code of Civil Procedure). Therefore, the requirement that the arbitration award be binding amuses foreign investors that arbitration awards have a binding force upon the parties, and that the government will honor it.

The lack of a clause specifying that the arbitral award is binding in the new investment Law does not mean that the award does not have binding force. With the Arbitration Law enacted in 1999, the binding nature of awards (including foreign awards) is given legal certainty. Various articles under the Arbitration Law of 1999 do mention the binding nature of awards. They include Arts 15 para.3, 17 para.2, 45 para.2, 52 and 60. The most important article is Art.60 which states that "the decision of the arbitration is final and has legal force and binds the parties".

Prior to the promulgation of the Law No.30 of 1999, the position of the court towards arbitration (and arbitration agreements) has been surprisingly encouraging. Landmark cases on arbitration agreements and the absolute competence of arbitration to settle commercial disputes in Indonesia have been reported. These cases are, for example, Ahju Forestry Co v Sutomo (1981), PT Asuransi Royal Indrapura v Sohandi Kawilarang (1982), PT Arpeni Pratama Ocean Line v PT Shorea Mas. The Indonesian Supreme Court in these cases has been right to state that the arbitration agreement signed by the parties must be respected

and the district courts must stay its proceedings when the parties in dispute are bound by arbitration agreement.

Under Art.7 para.(3), there is no mention of the form of arbitration. It is right to state here that it may be national or international arbitration. Similarly, it may be institutionalized or ad hoc arbitration.

The institutionalized arbitral body in Indonesia is the Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia or BANI). BANI were set up on December 3, 1977 with the support of the Indonesian Chamber of Commerce, the Indonesian Supreme Court, the Lawyers Association, and some individuals. It was established to respond to the growing needs of the Indonesian business community for a speedy solution to business disputes. It has its own rules and procedures and maintains a list of potential impartial arbitrators to settle the disputes. The arbitrators are law professors, business persons, engineers, etc. One type of dispute under the jurisdiction of BANI is investment disputes (both domestic investment disputes as well as international investment disputes).

If an investment dispute arises between the Indonesian government and foreign investors, the parties will settle it in international arbitration. The reference of the dispute to international arbitration must be based on the agreement of the parties (Art.23 para.4).

C. Closing Remarks

The many provisions on the investment dispute mechanisms above existed in Indonesia as enshrined in BITs, regional treaty and multilateral treaty indicate that Indonesia is subject to these various mechanisms. The Law No 25 of 2007 which contains the dispute settlement most notably by way of arbitration demonstrate at best that arbitration has been playing growing and even better place in Indonesian legal system.

Huala Adolf
The author is Professor in International Law at the University of Padjadjaran and head of BANI Office in Bandung.

Madjedi Hasan

Principle Of Good Faith In BANI Arbitration

ABSTRAK

Itikad baik merupakan suatu sendi terpenting dalam hukum perjanjian, termasuk dalam proses arbitrase. Karenanya, seluruh pihak terkait dalam proses arbitrase harus melaksanakannya dengan beritikad baik. Pengacara harus menjajaki kemungkinan penyelesaian segera setelah mengetahui perkaranya dan tidak menunda penyelesaian melalui berbagai cara. Bagi arbiter, itikad baik berarti bahwa dia akan menolak penunjukan manakala jadwalnya penuh dan harus bersedia mengungkapkan sepenuhnya hal-hal yang dapat menimbulkan benturan kepentingan. Itikad baik mensyaratkan agar arbiter sebagai yang menjalankan kebijaksanaan selalu bertindak wajar, sehingga melindungi ekspektasi yang timbul dari perjanjian.

Adanya kesepakatan melakukan arbitrase hakikatnya berarti bahwa para pihak bersedia menerima putusan, sehingga pengajuan banding dapat dipandang sebagai pengingkaran terhadap itikad baik, Namun demikian, pasal 34 UNCITRAL Model Law membolehkan pengajuan banding untuk hal-hal tertentu, antara lain ketidakmampuan pihak-pihak yang berarbitrase, putusannya berkenaan dengan sengketa yang tidak dalam pengajuan atau berisi hal-hal di luar lingkup perkara yang diajukan. Di Indonesia, UU Arbitrase menetapkan bahwa pengadilan tidak berwenang mengadili sengketa antara pihak-pihak yang terkait dengan perjanjian arbitrase. Terhadap putusan arbitrase permohonan pembatalan hanya dapat diajukan apabila putusan tersebut diduga mengandung dokumen palsu, dokumen penting disembunyikan atau putusan merupakan hasil tipu muslihat

Dalam Pasal 4.6 Peraturan dan Prosedur BANI ditetapkan bahwa semua pihak dalam arbitrase memiliki kewajiban bersama untuk melakukannya dengan itikad baik, yakni berusaha menyelesaikan secepat-cepatnya dan efisien. Selanjutnya, Pasal 4.7 menetapkan bahwa sengketa harus diselesaikan tidak melebihi 180 hari sejak terbentuknya majelis arbitrase, dan hanya dapat diperpanjang dengan putusan majelis dan diberitahukan

kepada para pihak., Majelis juga dapat menjatuhkan sanksi kepada pihak yang tidak menaati peraturan sehingga memperlambat kelancaran proses. Dalam Kode Etik dan Pedoman Tingkah Laku Arbiter dijabarkan sikap dan tingkah laku arbiter yang menjadi norma etik dan pedoman bagi para arbiter dalam arbitrase yang diselenggarakan oleh BANI atau dalam arbitrase ad hoc yang tunduk pada peraturan prosedur BANI. Melihat data statistik mengenai jangka waktu pemeriksaan perkara dan jumlah putusan yang diajukan banding, dapat disimpulkan bahwa BANI telah berhasil menerapkan prinsip itikad baik dalam proses arbitrase secara konsisten.

A. Introduction

One of the essential elements to the successful endeavor in relations between individuals or parties is good faith. Deriving from the translation of the Latin term bona fide, the principle of good faith is the foundation of all law and all conventions therefore it should be the fundamental principle of every legal system. This paper provides illustration that the entering into and the performance of arbitration will also require good faith as a fundamental element of arbitration agreement.

B. Principle of Good Faith

Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. So far as the violation of positive law is concerned, one who acts in good faith is said to labor under an invincible error, and hence to be guiltless. This consideration is frequently applied to determine the degree of right or obligation prevailing in the various forms of human engagements, such as contracts in common law and the law of obligations in civil law. In fact, good faith has been identified as the key essence of a contract, and the parties are expected to act in good faith in their dealings. It requires that each party be fair and honest in negotiations and, once the agreement has been reached, that the parties also perform their respective obligations and enforce their rights honestly and fairly.

The term good faith has special significance in commercial law. Good faith doctrines enhance the flow of goods in commerce, as under them, buyers are not required, in the ordinary course of business, to go to extraordinary efforts to determine whether sellers actually have good title. A purchaser can move quickly

to close a deal with the knowledge that a fraudulent seller and a legitimate title holder will have to sort the issue out in court. Of course, the purchaser will be required to demonstrate to the court evidence of good faith.

In corporate law, the business judgment rule is based on good faith. The principle makes officers, directors and managers of a corporation immune from liability to the corporation for losses incurred in corporate transactions that are within their authority and power to make, when sufficient evidence demonstrates that those transactions were made in good faith. As in commercial law, the use of good faith in this case enhances corporate business practices; as agents of a corporation they are free to act quickly, decisively, and sometimes wrongly to advance the interests of the corporation. Good faith insulates corporate officers from disgruntled shareholders.

C. What Does Good Faith Mean in Arbitration?

Arbitration is a contract, which must be negotiated; agreed upon and performed therefore, good faith is also central to the arbitration. As required by the International Conventions and national legislation, all parties to arbitration, including lawyers, the arbitrators, the arbitration institution and the actual disputing parties themselves must enter into the arbitration with a mutual obligation to act in good faith. For example, a lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial. The lawyer should raise and explore with his or her client the issue of settlement in every case as soon as enough is known about the case to make that discussion meaningful.

Where arbitration takes place, obligations and duties should always rise to the standard of utmost good faith and full disclosure. This would mean that from the beginning the parties should be fully prepared to discuss their respective interests. They should do so in a timely and effective manner and must make themselves, reasonably available and demonstrate a proactive desire to settle the dispute. As Hill & DeLacenserie said, good faith means that one must not suffocate the arbitration process with lengthy "legalisms", procedural niceties, and endless arrays of data that result in hearings with no focus and parties are advised to resist the urge to advance every conceivable argument and sub-issue." Without good faith, the claimed advantages of effective arbitration are lost.

For arbitrators, good faith means for not accepting to act as an arbitrator when one's immediate calendar is full, and to fully disclose any prior dealings or relationships that might give rise to even an appearance of conflict of interest. Arbitrators before and during an arbitration, must therefore carry out an introspective consideration, as best they can of their own conducts, so that they do not render a biased award. The impartiality and/or independence of an arbitrator are essential features of this quasi-judicial process. But as arbitrators are often closely involved in the market that appoints them, apart from the scrutiny of their judge – like role, issues of them being partial, biased, pre-disposed and being interested in the outcome of the arbitration arise. The long-standing norms that no one should be a judge in his own cause and that justice should be seen to be done apply equally to arbitration. Under this premise, good faith requires the arbitrators as discretion exercising party to act fairly, in order to protect justifiable expectations arising from their agreement.

Equally relevant to the good faith in arbitration is a right to appeal on any question of law that arose out of the arbitral award. Given agreement to arbitrate would mean accepting as final the decision of the arbitrators, therefore to then proceed before the courts and to question the findings of the arbitrators may be considered as an act of not good faith. Nonetheless, the article 34 of UNCITRAL Model Law provides cases in which applications to set aside an award are permitted, namely in cases of:

a) Incapacity of the parties to arbitrate;

b) Lack of notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

e) The court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State or the award is in conflict with the public policy of the State.

In Indonesia, the Law Number 30 of 1999 regarding Arbitration and Alternate Dispute Resolution (Arbitration Law) states that the court has no authority to adjudicate disputes between parties to an arbitration agreement. Despite this, there are often problems with the interpretation and enforcement of arbitration clauses in Indonesia. Parties often have no alternative but to litigate in Indonesian courts, despite the arbitration clauses in their contracts. Under the Arbitration Law, recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with articles 70, 71 and 72 of the Law Number 30 of 1999 regarding Arbitration and Alternate Dispute Resolution (Arbitration Law). Article 70 states that the power to vacate an arbitration award is limited to the subsequent grounds:

a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;

b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or

c) the award was rendered as a result of fraud committed by one of the parties to the dispute.

Furthermore, the article 71 specifies that the motion to challenge must be served within 30 days of the date on which the arbitral award was filed or delivered, while the article 72 states that the District Court shall render the award not later than 30 days after the motion if filed and provide the right to appeal to the Supreme Court, who shall render the award within 30 days after it, is filed. Note that the grounds for challenge of an arbitral award enunciated in article 70 are the only grounds on which an arbitration award may be vacated, subject to one exception, decency and public order.

While many countries have adopted more restrictive approach to appeals, such right of appeals can be considered a constant threat to the finality of every award. The right to appeal at very least can delay the finality of the award and closure of the dispute. On the other hand, the right to appeal may be a stimulus to the arbi-

trators to do their work carefully and properly. Consequently, arbitrators must rely on considerations of good faith in resolving the dispute.

D. Good Faith in BANI's Arbitration

Article 4.6 of the BANI's Rules and Procedures require that all parties to arbitration must enter into the arbitration with a mutual obligation to act in good faith, endeavoring at all times to effecting resolution of the dispute as quickly and efficiently as possible. Also, based on the Arbitration Law, the Article 4.7 of the said Rules and Procedures specify that 'unless specifically agreed upon by the parties, the proceeding shall be completed within a period of not longer than 180 days from the date of composition of the full Tribunal'. However, in special circumstances where the dispute is of a highly complex, the Tribunal has also a power to extend the deadline upon notice to the parties. The Tribunal's power also includes the Tribunal's right to impose sanctions on any party which fails to comply with a ruling it makes or otherwise engages in conduct which impedes the smooth adjudication of the dispute.

For arbitrators, BANI has also issued Code of Ethics and Conduct, which defines the model attitude and conduct that, shall be the professional norm and guide in Arbitration Tribunals administered by BANI or governed by the BANI Rules and Procedures. Only those arbitrators who are either on the BANI list of arbitrators or who hold an ADR/arbitration certificate recognized by BANI can be chosen by the parties to act as arbitrators in disputes to be settled under the BANI arbitration rules. Under the Code of Ethics and Conduct, arbitrators upon nomination must disclose (in writing and to all the parties and arbitrators) all facts or circumstances that may give rise to a credible doubt as to his/her impartiality or as to his/her independence, not limited to social relationships, business/professional relationships both direct and indirect, including prior appointments as arbitrators with all disputing parties, or the fact that the main witness is a person known to him/her.

If an arbitrator has a conflict of interests with the case or the parties, they are obliged to resign under article 12.2; otherwise, no arbitrator can resign unless challenged. In the examination and hearing sessions, the arbitrators shall conduct and act in accordance with the guidelines set forth in the prevailing Rules and Procedures and with due regard to good principles of arbitration, including respect for every person's right to a decision, regard for the disputing parties

equal rights to receive equal treatment in hearing, submitting evidences, and impartial judgment without bias.

Since its establishment, such principle of good faith has consistently been observed in the BANI's arbitration proceeding, resulted in that the arbitration awards have been made with due consideration to propriety and the importance of issuing the decision within the stipulated time frame and in accordance with what has been agreed upon by the parties concerned. As shown in the following statistical data, between 2003 and 2007 there were a total of 99 cases, of which 39 cases (or 39% of the total) were settled in less than 90 days, 48 cases (49% of the total) were settled between 90 to 180 days and only 12 cases (12% of the total) the settlement exceeded 180 days.

In terms of awards rendered, the number of challenges to the award tended to decline. For example, between 1977 and 2007, BANI has rendered 194 awards, 21 of which were challenged and of these 21 challenged awards only one BANI's award was annulled. In the past five years between 2004 and 2007 of the 63 awards rendered, three challenges were made to the court against an arbitral award and of these three, two recourses of the awards were rejected by the court (or BANI's awards were confirmed) while at this writing one is still awaiting the Supreme Court's decision. In summary, the data confirms that BANI is whole-heartedly committed to the objective of providing expeditious and economical dispute resolution services by skilled professionals.

E. Closing Remarks

Arbitration - in its proceeding requires good faith on the part of the parties and the arbitrators. Lack of good faith will inevitably result in a slow process and expensive, while the result may be neither just, nor binding. The challenge is ultimately for parties, counsel and the arbitrators to find ways to present and resolve the dispute directly and effectively. Without good faith as a binding principle, justices will surely not materialize.

Madjedi Hasan
The author is Independent Petroleum Consultant and a listed arbitrator in BANI.

Junaedy Ganie

Menghindarkan Penundaan Eksekusi Melalui Upaya Pembatalan Putusan Tanpa Alasan Yang Sah - *Kasus Di Bidang Asuransi*

ABSTRACT

Arbitration award is final and binding. Its execution, however, has often been deferred due to one of the parties' request for the annulment of award, mostly without valid reasons as stated in Indonesia Arbitration Law (Law Nr. 30 of 1999). In the case of insurance claim, this would have impaired the public image and awareness to insurance's benefit thereby would impact insurance business' growth. This paper discusses mitigation measures to put away the deferment of execution of arbitration award in the settlement process of insurance claims.

In Indonesia's insurance industry, the dispute resolution clause provides selection of court litigation or arbitration, the latter is ad-hoc arbitration. Generally, it does not provide the use of institutional arbitration thereby the arbitration forum could only be decided after the dispute arises and under such circumstances the parties would often have difficulties to reach an agreement. Also, it will be quite possible that the arbitration clause in the insurance policy may contain provisions that may cause difficulties for the parties. While the beneficiary expects a certainty that the insurance provider will pay every claims, provider believes that its responsibility is limited to the valid claim and the two may not run together.

In order to resolve any differences quickly based on the law, justice and fairness, the following lists some of the recommended remedies:

1) *There will be only one forum to settle the claim (quantum) and the liability of the provider.*
2) *The beneficiary has a right to chose the arbitration forum to be used.*
3) *The request for arbitration shall not require prior approval from the opponent.*

4) *Reasons for annulment shall follow strictly the elucidation of Article 70 of Arbitration Law of 1999.*

5) *Other provisions, including the procedure for arbitration request, arbitrator appointment, choice of law, duration of proceeding and issuing award and the legal binding of the award.*

A. Latar Belakang

Undang-undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa (UU Arbitrase) secara tegas mengatakan bahwa putusan Majelis Arbitrase bersifat final dan mengikat. Pengajuan permohonan pembatalan menurut Pasal 70 UU Arbitrase oleh pihak yang tidak puas atas putusan Majelis Arbitrase memiliki keterbatasan dalam alasan-alasan yang dapat dipergunakan, yaitu apabila putusan mengandung adanya dokumen diakui palsu atau dinyatakan palsu, ditemukannya dokumen yang bersifat menentukan yang disembunyikan atau diambil dari hasil tipu muslihat. Priyatna Abdurrasyid (2002) mengartikan bahwa pembatalan putusan oleh pengadilan dapat dilakukan bilamana putusan arbitrase dilakukan dengan kewenangan yang berlebihan sehingga putusan dapat disampingkan atau bilamana sebagian yurisdiksi berlebihan.

Meskipun UU Arbitrase telah mengatur fungsi, kewenangan dan hukum acara Badan Arbitrase, namun demikian masih dapat terjadi benturan kewenangan Peradilan Umum dengan kewenangan arbitrase. Hal yang dikhawatirkan adalah apabila Pengadilan Negeri tidak menolak perkara permohonan pembatalan putusan arbitrase yang diajukan Pemohon terlepas dari alasan apapun yang dicantumkan. Sikap ini dapat memperpanjang rantai proses penyelesaian perbedaan dan menimbulkan tambahan beban ekonomi untuk menyelesaikan perkara baru tersebut. Tulisan berikut membahas berbagai kendala yuridis yang dihadapi para pihak yang berperkara dalam eksekusi putusan arbitrase, khususnya yang sering terjadi di bidang asuransi. Proses penyelesaian sengketa klaim asuransi menimbulkan dampak yang besar terhadap citra asuransi di mata masyarakat, kesadaran berasuransi masyarakat dan bagi pertumbuhan asuransi.

B. Penyelesaian Sengketa Asuransi

Klausul penyelesaian sengketa yang beredar dalam industri asuransi nasional memberikan pilihan untuk menyelesaikan perselisihan yang timbul mela-

lui arbitrase atau pengadilan atau sebatas pada forum arbitrase saja. Adapun yang dimaksudkan dengan forum arbitrase dalam praktik asuransi di Indonesia dewasa ini adalah arbitrase ad hoc. Klausul arbitrase standar pada umumnya tidak memberikan pilihan penunjukan badan arbitrase institusional sehingga pilihan ini hanya dapat dilakukan setelah timbul persengketaan padahal tentu akan sulit bagi para pihak untuk menyetujui sesuatu setelah timbul persengketaan di antara mereka.

Proses penyelesaian sengketa klaim asuransi tersebut dapat mendekatkan atau menjauhkan pencapaian asas keadilan, kemanfaatan dan kepastian hukum bagi para pihak. Dari berbagai jenis klausul arbitrase yang dipergunakan dalam polis asuransi, tidak tertutup kemungkinan adanya klausul yang isinya dapat mempersulit para pihak. Tertanggung yang menutup polis asuransi mengharapkan kepastian bahwa penanggung akan membayar setiap klaim yang timbul. Tanggung jawab penanggung hanya sebatas klaim yang sah. Keduanya tidak selalu menemukan kesepakatan sehingga penyelesaian klaim asuransi tidak selalu berjalan mulus.

C. Klausul Penyelesaian Sengketa

Untuk mencapai penyelesaian perbedaan yang efektif dan efisien dengan memperhatikan berbagai kendala dalam penyelesaian perselisihan perjanjian asuransi dewasa ini, keterbatasan pemahaman masyarakat umum tentang arbitrase dan hambatan penyelesaian perbedaan, perselisihan dan klaim secara cepat dan murah dibanding melalui forum pengadilan, penetapan aturan mengenai standar minimum isi klausul penyelesaian sengketa akan sangat bermanfaat. Untuk keperluan tersebut, menurut hemat penulis setiap klausul penyelesaian perbedaan atau perselisihan pada setiap polis asuransi yang beredar dalam wilayah RI, paling tidak harus mengandung ketentuan-ketentuan sebagai berikut:

1) Perkara yang dapat diselesaikan adalah setiap perbedaan, bukan terbatas pada perselisihan atau persengketaan. Terdapat sejumlah klausul yang hanya mengatur persengketaan saja dan bahkan terdapat klausul yang mengatur persengketaan atas jumlah klaim saja (quantum) sehingga tidak ada forum penyelesaian sengketa atas perbedaan penafsiran dan tidak ada forum untuk memutus perkara atas penentuan tanggung jawab penanggung (liability).

2) Bilamana klausul penyelesaian sengketa memberikan pilihan antara penyelesaian melalui Pengadilan Negeri atau Arbitrase, maka adalah tertanggung yang berhak memilih forum arbitrase yang akan dipergunakan. Hal ini sudah tercermin dalam tren asuransi nasional. Ketentuan ini tidak bertentangan dengan bunyi Pasal 16 Keputusan Menteri Keuangan Nomor 422/KMK.06/2003 yang melarang adanya pembatasan upaya hukum bagi para pihak.

3) Klausul penyelesaian sengketa dapat menunjuk kepada forum arbitrase ad hoc atau arbitrase institusional yang diserahkan kepada tertanggung untuk memilih sebelum sidang dimulai atau menentukan di muka pilihan forum arbitrase yang akan dipergunakan oleh para pihak. Ketentuan ini bermanfaat untuk mengatasi keterbatasan pengetahuan dan akses yang dimiliki oleh tertanggung atas pilihan arbiter yang berkualitas dengan memilih forum arbitrase institusional dan memberikan keseimbangan akses pemilihan arbiter bagi tertanggung yang awam.

4) Tidak memuat persyaratan izin dari pihak lawan terlebih dahulu bagi setiap pihak untuk mengajukan permohonan berarbitrase. Adalah Majelis Arbitrase yang dipilih yang akan menentukan apakah perkara yang diajukan termasuk dalam yurisdiksinya atau tidak. Klausul standar Polis Asuransi Kebakaran Indonesia (PSKI) yang menjadi klausul yang paling banyak dipergunakan di Indonesia akhir-akhir ini mengandung ketentuan bahwa, "Sengketa terjadi sejak tertanggung dan penanggung menyatakan secara tertulis ketidaksepakatan atas hal yang dipersengketakan". Dikhawatirkan ketentuan ini disalahartikan oleh salah satu pihak atas dasar itikad tidak baik untuk menunda atau menolak berarbitrase, misalnya dengan alasan belum ada sengketa atau belum memberikan persetujuan untuk berarbitrase. Sikap tersebut bertentangan dengan asas hakiki arbitrase untuk menyelesaikan setiap perbedaan secara cepat berdasarkan hukum, keadilan dan kepatutan.

5) Alasan permohonan pembatalan harus terlebih dahulu mendapat kekuatan hukum yang pasti berupa putusan pengadilan sesuai dengan bunyi Penjelasan atas Pasal 70 UU Nomor 30 Tahun 1999 bahwa : ".....Alasan-alasan permohonan pembatalan yang disebut dalam pasal ini harus dibuktikan dengan putusan pengadilan. Apabila pengadilan menyatakan bahwa alasan-alasan tersebut terbukti atau tidak terbukti, maka putusan

pengadilan ini dapat digunakan sebagai dasar pertimbangan bagi hakim untuk mengabulkan atau menolak permohonan". Bilamana prasyarat pengajuan permohonan tersebut tidak ada, maka hakim yang menerima perkara secara jabatan harus menyatakan diri tidak berwenang.

6) Pemohon akan menanggung semua biaya perkara dan biaya-biaya hukum/perkara yang timbul atau dikeluarkan oleh pihak lawan atas permohonan pembatalan yang diajukan ke Pengadilan Negeri bilamana permohonan pembatalan ditolak.

7) Klausul tersebut agar secara tegas menyatakan bahwa banding atas permohonan pembatalan yang ditolak oleh Pengadilan Negeri hanya dapat dilakukan atas permohonan pembatalan yang dikabulkan dan bahwa hakim harus menolak banding yang diajukan atas perkara permohonan pembatalan yang telah ditolak oleh Pengadilan Negeri. Berdasarkan Penjelasan atas Pasal 72 UU No. 30 Tahun 1999, upaya banding hanya dapat dilakukan bilamana pembatalan putusan majelis arbitrase dikabulkan. Penjelasan atas bunyi Pasal 72 UU No. 30 Tahun 1999 tidak mengandung arti ganda atau lebih sehingga telah memberikan kepastian hukum tetapi demi efisiensi biaya dan waktu, penegasan tersebut akan memudahkan Mahkamah Agung mengambil sikap dan menghindarkan memproses Permohonan Banding atas permohonan pembatalan putusan Majelis Arbitrase yang telah ditolak Pengadilan Negeri.

8) Ketentuan lain yang tidak dapat ditinggalkan adalah ketentuan mengenai tata cara pengajuan permohonan berarbitrase, prosedur penunjukan arbiter, pilihan hukum, jangka waktu pemeriksaan dan pengambilan putusan dan sifat putusan arbitrase sebagai putusan final dan mengikat para pihak.

Sebagian dari ketentuan-ketentuan di atas telah termuat dalam UU Arbitrase Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa tetapi keberadaan ketentuan tersebut dalam setiap klausul penyelesaian perselisihan akan mengeliminasi berbagai penundaan eksekusi yang dapat timbul dalam praktik bisnis asuransi dan sistem peradilan di Indonesia.

D. Kesimpulan

Untuk menciptakan tertib penyelesaian perbedaan dalam klaim asuransi dan untuk memberikan kepastian hukum bagi pencari keadilan keberadaan klau-

sul Perselisihan atau Penyelesaian Sengketa pada setiap polis asuransi perlu memenuhi suatu kriteria minimum yang siap dipergunakan atas setiap perbedaan di antara para pihak.

Junaedy Ganie
seorang konsultan asuransi dan arbiter di BANI.

Catatan: Materi tulisan ini dalam versi yang berbeda telah dimuat dalam Daily Investor (10 Desember 2008).

Anangga W. Roosdiono

Prosedur Pemeriksaan Perkara Dalam Arbitrase

ABSTRACT

In general, there is no much difference between the arbitration proceeding and court litigation. Both are adjudicating mechanism, involving a third party to resolve the dispute whose decision is binding. Arbitration is private adjudicate while court litigation is public adjudicate. The arbitration process begins with registration to the selected arbitration institution, complete with relevant evidences. The registration must be accompanied by registration and administration fees the latter is usually based on the percentage of claim and counter claim. The hearing will not start until the administration fees are paid by the parties; should a party refuse to pay its share of the fee then the other party must making it up so the hearing will proceed. The parties have a right to nominate an arbitrator.

The arbitration process is an effort to make settlement of dispute acceptable by the parties (win win solution). Therefore it is important that the arbitrators shall have a full understanding of the agreement and background of the dispute arises in execution of the agreement. In order to make the arbitration proceeds smoothly and produces an award that is fair and just, both Claimant and Respondent should make good preparation, including building a team, specifically dedicated to handle the case. The team will consist of personnel who were involved in execution of the agreement, comprehend with the content of the agreement and fully understand on the cause of the dispute. The team may be assisted by internal and external attorneys who can assist the team in relation to the laws and regulations that are pertinent in execution of the agreement. The internal team should be able to provide the right information on the case before the Tribunal. In addition, the team shall look for and provide all the evidences to the Tribunal and the other party. If necessary, the team will submit the fact and expert witnesses, who are not limited to company officers or attorneys. It is of paramount importance that the Claimant shall realize that the basis of settlement is "win win solution", so the amount of award could be less than the claim.

In the hearing, while the award is made based on certain facts and documents nonetheless the hearing has often been made to provide opportunities to parties for presenting the complete information on the materials case and disputed issues. The hearing is fully under the control of the Tribunal based on the "rules of procedures" and prevailing laws. The hearing is closed session and only attended by those who have power of attorney to attend and known by the parties. Other parties may not attend, unless they have prior approval from the parties and Tribunal. Negotiation between parties can always been made outside the hearing session with prior approval from the Tribunal. Opportunities have also to be given to the Tribunal to initiate mediation, which will be conducted outside the hearing session. Under the mediation, the role of arbitrators is to assist and to provide guidance so the parties may reach a settlement agreement.

Under the Indonesia Arbitration Law, the award will be registered in the District Court, in order to make it executable. The parties are expected to accept the Arbitration Award, as this is the forum that they have selected to settle any dispute. While annulment of the award can always be requested, the parties should be aware with the purpose of the agreement, in which it states that any dispute will be settled to obtain the win-win solution.

Proses pemeriksaan perkara dalam arbitrase secara umum tidak jauh berbeda dengan proses pemeriksaan di pengadilan. Baik arbitrase maupun litigasi merupakan mekanisme adjudikatif, yaitu pihak ketiga yang dilibatkan dalam penyelesaian sengketa mempunyai kewenangan memutuskan penyelesaian sengketa tersebut. Arbitrase termasuk adjudikatif privat sedang litigasi termasuk adjudikatif publik.

Prosedur arbitrase dibentuk oleh ketentuan hukum, perjanjian para pihak dan arahan para arbiter. Apabila para pihak sepakat bahwa arbitrase akan dilaksanakan berdasarkan aturan suatu institusi atau aturan ad hoc maka prosedur arbitrase akan tunduk pada ketentuan institusi atau aturan ad hoc tersebut. Sebagaimana dinyatakan dalam Pasal 31 ayat (1) Undang-Undang No. 30 Tahun 1999 Tentang Alternatif Penyelesaian Sengketa dan Arbitrase (UU Arbitrase), "Para pihak dalam suatu perjanjian yang tegas dan tertulis, bebas untuk menentukan acara arbitrase yang digunakan dalam pemeriksaan sengketa sepanjang tidak bertentangan dengan ketentuan dalam undang-undang ini. Berdasarkan

UU Arbitrase pemeriksaan arbitrase dilaksanakan melalui tiga (3) tahapan, yakni:

1) Tahap Persiapan atau Pra Pemeriksaan, yang meliputi perjanjian Arbitrase dalam dokumen tertulis, penunjukan arbiter, pengajuan surat tuntutan oleh Pemohon, jawaban surat tuntutan oleh Termohon dan perintah arbiter agar para pihak menghadap sidang arbitrase.
2) Tahap Pemeriksaan atau Penentuan, yang meliputi awal pemeriksaan peristiwanya, penelitian atas bukti-bukti dan pembahasannya, mediasi dan pengambilan putusan oleh Majelis Arbitrase.
3) Tahap Pelaksanaan, yang meliputi putusan arbitrase yang bersifat final dan mengikat dan pelaksanaan yang bersifat sukarela atau melalui eksekusi Pengadilan.

Tahap Persiapan

Prosedur arbitrase dimulai dengan pendaftaran dan penyampaian Permohonan kepada institusi arbitrase yang ditunjuk, dilengkapi dengan segala alat bukti yang berkaitan dengan sengketa tersebut sesuai dengan aslinya. Permohonan arbitrase harus disertai pembayaran biaya pendaftaran dan biaya administrasi kepada institusi bersangkutan. Pemeriksaan perkara arbitrase tidak akan dimulai sebelum biaya administrasi dilunasi. yang harus dibayar lunas oleh kedua belah pihak (untuk bagian yang sama). Pada umumnya penentuan besarnya biaya administrasi adalah berdasarkan persentase dari tuntutan yang diajukan Pemohon dan tuntutan balik dari Termohon. Bila salah satu berkeberatan membayar biaya administrasi, maka pihak lawan harus melunasi keseluruhan biaya agar persidangan dapat dimulai.

Dalam Permohonan arbitrase harus dituliskan secara ringkas uraian tentang permasalahan yang menjadi sengketa dan isi tuntutan ganti rugi atau pengembalian yang diharapkan dari pihak lainnya dengan melampirkan salinan naskah atau akta perjanjian arbitrase atau perjanjian lainnya yang memuat klausula arbitrase. Pemohon dapat menunjuk atau memilih seorang arbiter atau menyerahkan penunjukan arbiter kepada institusi arbitrase bersangkutan.

Proses arbitrase adalah suatu upaya untuk mencari penyelesaian atas suatu sengketa yang terjadi dalam pelaksanaan suatu perjanjian yang telah disepakati oleh para pihak yang kini bersengketa. Penyelesaian yang diharapkan dari

para arbiter adalah adanya penyelesaian yang dapat diterima oleh kedua belah pihak (win win solution). Untuk dapat mengambil suatu putusan tersebut maka hal yang terpenting bagi arbiter adalah mengerti sepenuhnya isi perjanjian yang menjadi dasar dari sengketa dan latar belakang dari terjadinya sengketa dalam pelaksanaan perjanjian tersebut. Dalam mencari penyelesaian tersebut, yang terpenting adalah pokok masalah sengketa atas pelaksanaan perjanjian dan bukan masalah prosedural perjanjian atau persengketaan.

Agar pemeriksaan berjalan lancar dan menghasilkan putusan yang adil, maka baik Pemohon maupun Termohon harus melakukan persiapan yang baik, antara lain dengan membentuk Tim internal yang khusus menangani masalah. Tim ini terdiri dari personalia yang terlibat dalam pelaksanaan perjanjian dan mengetahui isi perjanjian serta mengetahui dengan jelas sebab dari timbulnya sengketa. Tim ini dapat dibantu oleh penasehat hukum internal maupun eksternal yang dapat membantu Tim berkaitan dengan masalah peraturan dan perundangan yang menyangkut pelaksanaan perjanjian tersebut.

Tim internal inilah yang harus dapat memberikan suatu gambaran yang tepat mengenai permasalahan yang dipersengketakan kehadapan arbiter. Selain harus menguasai seluruh aspek perjanjian dan persengketaan yang terjadi Tim juga mencari dan memberikan semua alat bukti yang dapat digunakan dan disampaikan kepada arbiter maupun pada pihak lawannya. Tim internal ini juga dapat mengusulkan para pakar ataupun saksi ahli dan mendapat kuasa untuk mewakili dalam persidangan dan bukan hanya terbatas pada pimpinan perusahaan atau penasehat hukumnya.

Dalam menetapkan jumlah tuntutan dalam sengketa arbitrase, Pemohon perlu mempertimbangkan bahwa atas dasar penyelesaian secara "win win solution" maka jumlah tuntutan yang dikabulkan sering kali kurang dari yang diajukan. Kemungkinan tidak tertutup bahwa jumlah putusan atas tuntutan dapat lebih kecil dari pada biaya administrasi arbitrase. Karenanya di dalam mengajukan tuntutan Pemohon perlu melakukan perhitungan secara cermat berkaitan dengan biaya administrasi, antara lain memperhatikan jumlah tuntutan yang realistis yang dapat kiranya diterima dalam putusan arbitrase, walaupun memang kewajiban pembayaran biaya administrasi umumnya dibebankan bersama kepada kedua belah pihak.

Tahap Pemeriksaan

Walaupun dalam beberapa kasus para pihak mengajukan sengketa untuk diputuskan/diselesaikan sepenuhnya berdasarkan fakta-fakta tertentu, tuntutan tertulis dan dokumen-dokumen, namun pada umumnya suatu persidangan tetap dilaksanakan yang dihadiri oleh arbiter atau majelis arbiter dan para pihak yang bersangkutan, untuk memberikan kesempatan bagi para pihak untuk menyampaikan segala informasi yang lengkap dan adil kepada para arbiter mengenai aspek material dari permasalahan yang dipersengketakan. Persidangan arbitrase sepenuhnya berada dibawah kuasa dan kendali para arbiter, dengan tetap memperhatikan "rules of procedures" dan ketentuan perundangan yang berlaku. Persidangan arbitrase bersifat tertutup dan hanya dapat dihadiri oleh mereka yang mendapat kuasa dari pimpinan masing-masing pihak dan diketahui oleh kedua belah pihak. Pihak-pihak lain tidak dapat menghadirinya terkecuali mendapat persetujuan dari kedua belah pihak dan dari arbiter/majelis arbiter.

Dengan telah dimulainya proses pemeriksaan setelah dibentuknya Majelis Arbiter maka semua komunikasi antara para pihak dengan arbiter harus dihentikan. Semua informasi baik dalam bentuk surat-menyurat maupun dokumen atau alat bukti aslinya harus diserahkan kepada panitera sidang disertai lima (5) salinan masing-masing untuk para arbiter dan para pihak. Semua informasi yang akan disampaikan secara lisan hanya dapat diterima apabila didengar oleh para arbiter dan para pihak dalam sidang, harus terdapat keterbukaan diantara semua pihak. Setiap penyimpangan atas prosedur arbitrase termasuk namun tidak terbatas pada proses persidangan harus mendapat persetujuan oleh para arbiter dan para pihak dalam suatu persidangan dan akan dicatat dalam berita acara persidangan oleh Panitera.

Dalam setiap persidangan selalu dimungkinkan kepada para pihak untuk melakukan negosiasi di luar sidang dan dapat diadakan setiap saat atas persetujuan para arbiter dan para pihak. Kesempatan juga harus diberikan oleh para arbiter kepada para pihak untuk melakukan mediasi. Mediasi dilakukan di luar persidangan arbitrase dan bukan merupakan bagian dalam proses jalannya arbitrase. Sasaran yang harus selalu menjadi pedoman bagi para pihak adalah tercapainya suatu penyelesaian atas sengketa yang dapat diterima oleh kedua belah pihak dengan mendapat bantuan dan arahan dari para arbiter dan putusan arbiter dapat diterima oleh para pihak, sehingga hubungan dan/atau transaksi bisnis di antara para pihak dapat berjalan kembali.

Para pihak harus berusaha agar dapat tercapainya suatu penyelesaian, demi kebaikan bersama dan bukan demi kemenangan satu pihak. Cara pembatalan atas putusan arbitrase bukanlah suatu cara yang dapat dijadikan sebagai alat untuk menyatakan ketidaksetujuan.

Tahap Pelaksanaan

Dengan didaftarkannya Putusan Arbitrase pada Panitera Pengadilan Negeri sebagaimana yang ditetapkan dalam UU Arbitrase, maka putusan tersebut mempunyai kekuatan eksekutorial. Pelaksanaan Putusan Arbitrase tidaklah perlu menunggu eksekusi Pengadilan Negeri namun dapat dilakukan secara sukarela oleh pihak yang bersangkutan. Putusan Arbitrase selayaknya diterima oleh kedua pihak yang menyerahkan penyelesaian sengketa kepada para arbiter yang mereka sendiri tunjuk dan percayai akan memberikan putusan yang adil atas permasalahan dalam perjanjian yang mereka sendiri setujui untuk bekerja sama.

Terhadap Putusan Arbitrase para pihak dapat mengajukan permohonan pembatalan. Pengajuan permohonan pembatalan menurut Pasal 70 UU Arbitrase oleh pihak yang tidak puas atas putusan Majelis Arbitrase memiliki keterbatasan dalam alasan-alasan yang dapat dipergunakan, yaitu apabila putusan mengandung adanya dokumen diakui palsu atau dinyatakan palsu, diketemukannya dokumen yang bersifat menentukan yang disembunyikan atau diambil dari hasil tipu muslihat. Namun demikian, para pihak diharapkan kembali kepada maksud dibuatnya perjanjian bahwa segala persengketaan akan diselesaikan untuk mencapai sesuatu penyelesaian yang menguntungkan bagi kedua belah pihak. Penyelesaian sengketa melalui arbitrase adalah mengenai pokok permasalahan yang timbul dari perjanjian yang dibuat oleh para pihak dan diharapkan penyelesaiannya dapat melanjutkan berlangsungnya perjanjian yang telah dibuat diantara para pihak atau paling tidak dapat tetap melanjutkan hubungan kerja sama atau transaksi antara para pihak di kemudian hari.

Anangga W. Roosdiono
Penulis adalah Managing Partner Roosdiono & Partners dan arbiter di BANI