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BANI ARBITRATION CENTER

INDONESIA ARBITRATION QUARTERLY NEWSLETTER

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CONSTRUCTION ARBITRATION

Main Topics :

Construction Arbitration
Suntana S. Djatnika

Dispute Resolution Mechanisms Under FIDIC Form of Contract
Madjedi Hasan

Claims in Construction Contracts
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Ex Aequo Et Bono Decisions
Madjedi Hasan

WIN-WIN SOLUTION

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Contents

From the Editor

How do we know if we have a "Good Contract"? According to a law professor Justin Sweet :

> "A good contract clearly informs each party what it must do and to what it is entitled. It also informs each party of its rights if the other party does not perform as promised. It anticipates the likely problems and resolves them clearly and in a way that strikes the parties as reflected a proper allocation of risks and responsibilities "

However no matter how clear a contract informs, potential dispute could occur. In the main topics Dr. Suntana S. Djatnika clearly explain how arbitration is one popular solution in construction dispute under FIDIC form of contract. Dr. Madjedi Hasan, explain very well the dispute resolution mechanism where Dispute Adjudication Board (DAB) is created in anticipation of the potential dispute that may arised. The complexity of the claims in construction is furthermore explored in Mr. Gusnando S. Anwar article. Finally, as side topics this edition of newsletter includes : the ICC emergency arbitration proses well explained by Dr. Frans H. Winarta followed by an interesting short article of the *ex aequo et bono* decisions presented by Dr. Madjedi Hasan.

We wish you a Merry Christmas and Happy New Year 2015.

Jakarta, December 2014

Suntana S. Djatnika is an arbitrator in BANI Arbitration Center since 2003 with FCBArb qualification. His education was started in Architectural Engineering in Bandung Institute of Technology, then graduated in of Economics from the University of Indonesia, Master of Business Administration and Master of Management from PPM School of Management, Master of Engineering from the Faculty of Civil Engineering, University of Indonesia, Master of Law from the University of Tarumanagara and Doctorate in the field of Engineering Sciences from the Faculty of Civil Engineering, University of Indonesia. Currently pursuing doctoral program in the field of Legal Studies at the University of Tarumanagara.

Suntana S. Djatnika is also active in the field of profession and organization, had served as Chairman of the Indonesian Institute of Architects, Engineers Council of Indonesian Engineers Association, Chairman and founder of Communications Forum of Professional Association of Construction and Environmental Services which is consisting of 12 professional associations. He holds as the Chairman of the Institute of Development National Construction Services for Professional Affairs and Corporate Affairs Section, the Vice Chairman of the Joint Secretariat of Construction Services and Insurance Services, Architectural Advisory Team Member Jakarta City, as well as various organizational activities in the field of engineering and management. In the educational activities he teachs various field such as Architectural Planning, Financial Management for the construction company, Risk Management and Investment Construction, Engineering Economics, Contract Management and other management areas.

CONSTRUCTION ARBITRATION

Suntana S. Djatnika

Abstrak

Work relationship between a project owner and its contractor in the construction sector is formulated in a construction contract agreement. In the execution, disputes between the parties often arises, one of the causes is due to changing condition. Contractor usually assumes that all informations stated in the contract are in accordance with the actual conditions, but that is apparently not the case.

The legal dispute arise due to external and internal factors. The internal factors relate mostly with the scope of works and rights and obligations, while the external factors are those that cannot be controlled by both parties. The latter includes government policy, political change, global influence, and force majeure due to the natural causes.

The dispute settlement resolution must be explicitly stated in the construction contract agreement. If the choice of dispute settlement is arbitration, the court then has no authority to adjudicate the dispute. The arbitration clause may be formulated in general or detail, while the arbitral award is final and binding for both parties and enforceable by the court.

Arbitration does not recognize the jurisprudence and the parties must act in a good faith. The effectiveness of arbitration award will; be determined by the the integrity and professionalism of the arbitrators, and the attitude of the parties and District Court in the award execution.

Key words : Construction Arbitraton, Dispute Settlement Resolution, Adjudication, Good Faith, Award Execution

Latar belakang

Dalam sektor konstruksi hubungan kerja antara pemilik proyek dengan pelaksana proyek dibuat dalam bentuk kontrak kerja konstruksi. Hubungan kerja ini didasari atas itikad baik dari kedua pihak untuk menyelesaikan pekerjaan sesuai dengan kesepakatan yang tertuang dalam kontrak kerja. Akan tetapi tidak selalu hubungan kerja ini berjalan sesuai dengan yang dikehendaki. Dalam pelaksanaannya selalu timbul perbedaan pemahaman, perselisih-an maupun pertentangan antar para pihak dan kemudian menjadi sengketa hukum. Sejalan dengan meningkatnya aktivitas pembangunan, terdapat peningkatan timbulnya sengketa antar para pihak yang terlibat dalam kontrak konstruksi. Hal ini terlihat dari data kasus sengketa di BANI Arbitration Center yang menunjukkan jumlah sengketa dalam kontrak konstruksi adalah salah satu yang tertinggi.

Salah satu dari penyebab sengketa dalam penyelenggaraan pekerjaan konstruksi adalah adanya faktor ketidakpastian (*uncertainty*) dalam setiap pekerjaan konstruksi. Kondisi ideal bagi pelaksana konstruksi adalah apabila seluruh lingkup kerja dalam kontrak kerja konstruksi dengan pengguna jasa terinci secara jelas yang tercakup dalam kontrak. Pelaksana konstruksi biasanya berasumsi bahwa seluruh informasi yang ada dalam kontrak sesuai dengan kondisi aktual, namun kondisi pekerjaan selama masa pelaksanaan seringkali tidak sesuai dengan asumsi tersebut.

Suatu kontrak kerja konstruksi mengan-dung aspek-aspek seperti aspek teknis, hukum, administrasi, keuangan/perbankan, perpajakan, dan sosial ekonomi. Pada umumnya pelaku jasa konstruksi, baik pengguna jasa maupun penyedia jasa lebih memperhatikan aspek teknis saja dan kurang memperhatikan aspek lainnya, terutama aspek hukumnya. Mereka baru menyadari pentingnya aspek lainnya pada saat terjadi perselisihan yang terjadi akibat aspek lain tadi. Ada beberapa aspek hukum yang sering menjadi penyebab sengketa hukum, yaitu[1]:

1. Penghentian Sementara Pekerjaan (*Suspension of Work*)
2. Pengakhiran Perjanjian/Pemutusan Kon-trak (*Termination of Contract*)
3. Ganti Rugi Keterlambatan (*Liquidity Damages*)
4. Penyelesaian Perselisihan (*Settlement of Dispute*)
5. Keadaan Memaksa (*Force Majeure*)
6. Hukum yang Berlaku (*Governing Law*)
7. Bahasa Kontrak (*Contract Language*)
8. Domisili (*Domicile*).

Pendapat lain tentang penyebab sengketa hukum dikemukakan oleh Priyatna Abdurrasyid yaitu[2]:

1. Informasi design yang tidak cepat (*delayed design information*).
2. Informasi design yang tidak sempurna (*inadequate design information*).
3. Investigasi lokasi yang tidak sempurna (*inadequate site investigation*).
4. Reaksi klien yang lambat (*slow client response*).
5. Komunikasi yang buruk (*poor communication*).
6. Sasaran waktu yang tidak realistis (*unrealistic time target*).

[1] Nazarkhan Yasin, *Mengenal Kl aim Konstruksi di Indonesia dan Penyelesaian Sengketa Konstruksi*, (Jakarta: Gramedia Pustaka Utama, 2003), 85.

[2] Priyatna Abdurrasyid, *Arbitrase dan Alternatif Penyelesaian Sengketa (APS)-suatu Pengantar*, (Jakarta; Fikahati Aneska, 2011), 214-215.

7. Administrasi kontrak yang tidak sempurna (*inadequate contract administration*).
8. Kejadian eksternal yang tidak terkendali (*uncontrollable external events*).
9. Informasi tender yang tidak lengkap (*incomplete tender information*).
10. Alokasi risiko yang tidak jelas (*unclear risk allocation*).
11. Kelambatan–ingkar membayar (*lateness - nonpayment*).

Terjadinya sengketa hukum tersebut dapat disebabkan oleh faktor-faktor eksternal dan internal dari pelaku perjanjian tersebut. Menurut *The Project Management Body of Knowledge* (PMBOK) tentang faktor penyebab sengketa hukum adalah[3]:

> *Internal risks are things that the project team can control or influence, such as staff assignments and cost estimates. External risks are things beyond the control or influence of the project team, such as market shifts or government action.*

Penyebab eksternal adalah faktor dari luar yang tidak dapat dikendalikan oleh pelaku perjanjian, antara lain adalah kebijakan Pemerintah, perubahan peraturan per-undang-undangan, kondisi politik, ekonomi, sosial, budaya dan pengaruh global, seperti contohnya antara lain adalah perubahan kurs mata uang rupiah terhadap mata uang asing lainnya.

Menurut PMBOK[4] terdapat beberapa kategori sumber risiko yang berkaitan dengan bidang kontrak dan hukum, yaitu[5]:

1. Pasal-pasal kurang lengkap, kurang jelas, dan interpretasi yang berbeda.
2. Pengaturan pembayaran, *change order* dan klaim.
3. Masalah jaminan, *guaranty*, dan *warranty*.
4. Lisensi dan hak paten.
5. *Force majeure*.

Penyelesaian Sengketa

Yang dimaksud dengan sengketa dalam kontrak kerja konstruksi yang di dunia Barat disebut *construction dispute* adalah sengketa yang terjadi sehubungan dengan pelaksanaan pekerjaan konstruksi antara para pihak yang tersebut dalam suatu kontrak kerja konstruksi.. Menurut *Black's Law dispute* adalah *"a conflict or controversy, especially one that has given rise to a particular lawsuit"*[6]. Berdasarkan pengertian di atas sengketa tersebut mengarah kepada peristiwa hukum.

Pilihan penyelesaian sengketa harus secara tegas dicantumkan dalam kontrak kerja konstruksi dan sengketa yang dimaksud adalah sengketa perdata dan bukan pidana. Untuk itu salah satu klausula yang wajib dibuat dalam kontrak kerja konstruksi adalah tentang penyelesaian sengketa. Klausula kontrak ini yang mengatur tentang penyelesaian sengketa yang terjadi selama pelaksanaan kontrak. Apabila pilihan penyelesaian sengketa tercantum dalam kontrak adalah arbitrase, sesuai UU No. 30/1999[7] Pasal 3 yang menyatakan bahwa pengadilan tidak berwenang untuk mengadili sengketa tersebut. Pilihan ini dinyatakan dalam klausula arbitrase atau *Arbitration Clause* atau yang dalam bahasa hukum disebut *Pactum Arbitri,* dimana UU No. 30/1999 Pasal 3 menyatakan:

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[3] PMBOK Guide, *A Guide to the Project Management Body of Knowledge, ed*. 4, (Pennsylvania: Project Management Institute Inc., 2008), 275.

[4] PMBOK Guide, *Op. Cit.,* 25.

[5] Sumber Risiko Proyek, http://manproindo.blogspot.com/2011/02/sumber-risiko-proyek.html.

[6] Bryan A.Garner, *Black's Law Dictionary*, 505.

[7] Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa.

"Suatu kesepakatan berupa klausula arbitrase yang tercantum dalam perjanjian tertulis yang dibuat para pihak sebelum timbul sengketa" atau "suatu perjanjian arbitrase tersendiri yang dibuat para pihak setelah timbul sengketa".

Pemilihan cara penyelesaian sengketa adalah bagian dari risiko yang dihadapi oleh para pihak yang bersengketa. Sengketa hukum dalam suatu kontrak kerja konstruksi dapat diselesaikan melalui beberapa pilihan yang disepakati oleh para pihak, yaitu melalui Alternatif Penyelesaian Sengketa berupa konsultasi, negosiasi, mediasi, konsiliasi dan penilai akhli, Badan Peradilan (Pengadilan), atau Arbitrase baik Lembaga atau Ad Hoc. Pilihan penyelesaian sengketa harus secara tegas dicantumkan dalam kontrak kerja konstruksi dan sengketa yang dimaksud adalah sengketa perdata dan bukan pidana. Dalam Pasal 36 dan Pasal 37 UUJK[8] diatur tentang masalah penyelesaian sengketa. Di sini dijelaskan bahwa penyelesaian sengketa jasa konstruksi dapat ditempuh melalui pengadilan atau di luar pengadilan berdasarkan pilihan secara sukarela para pihak yang bersengketa.

Menurut Pasal 1 angka 1 UU No. 30/1999 menyatakan bahwa cara penyelesaian suatu sengketa perdata di luar pengadilan umum yang didasarkan pada Perjanjian Arbitrase yang dibuat secara tertulis oleh para pihak yang bersengketa. Pada dasarnya klausula arbitrase terdiri atas 2 (dua) bentuk, yaitu klausula arbitrase yang tercantum dalam suatu perjanjian tertulis yang dibuat para pihak sebelum timbul sengketa (*Factum de compromitendo*); atau suatu perjanjian Arbitrase tersendiri yang dibuat para pihak setelah timbul sengketa (Akta Kompromis)[9].

Penyelesaian Sengketa Melalui Arbitrase.

Penyelesaian sengketa dengan menggunakan jasa arbitrase dilakukan sesuai peraturan perundang-undangan yang berlaku, yaitu UU No. 30/1999. Berbeda dengan mekanisme penyelesaian sengketa melalui mediasi dan konsiliasi yang belum diatur secara detil, mekanisme proses arbitrase telah memiliki dasar hukum yang jelas. Undang-Undang ini mencakup penyelesaian sengketa, dan hal-hal mengenai arbitrase tentang syarat-syarat, arbiter, tata cara, putusan, pelaksanaan/ pembatalan putusan, biaya-biaya, dan aturan-aturan lainnya. Putusan arbitrase bersifat final dan mempunyai kekuatan hukum tetap dan mengikat para pihak (*final and binding*).

Dalam kontrak kerja konstruksi antara pengguna jasa dan penyedia jasa konstruksi, salah satu klausula yang dicantumkan adalah tentang jika terjadi perselisihan atau sengketa. Isi klausula ini memuat tentang tatacara penyelesaian sengketa. Apabila pilihan penyelesaian sengketa melalui arbitrase, maka dinyatakan dalam bentuk klausula arbitrase. Klausula arbitrase atau *Arbitration Clause* atau yang dalam bahasa hukum disebut *Pactum Arbitri,* adalah suatu kesepakatan berupa klausula arbitrase yang tercantum dalam perjanjian tertulis yang dibuat para pihak sebelum timbul sengketa atau suatu perjanjian arbitrase tersendiri yang dibuat para pihak setelah timbul sengketa. Apabila

[8] Undang-Undang Nomor 18 tahun 1999 tentang Jasa Konstruksi.

[9] Nazarkhan Yasin, *Op. Cit*., 90.

pilihan penyelesaian sengketa tercantum dalam kontrak adalah arbitrase, maka sesuai dengan Pasal 3 UU No. 30/1999 dinyatakan bahwa pengadilan tidak berwenang untuk mengadili sengketa tersebut. Pengertian lembaga arbitrase yang termuat dalam Pasal 1 butir 8 UU No. 30/1999 adalah badan yang dipilih oleh para pihak yang bersengketa untuk memberikan putusan mengenai sengketa tertentu, lembaga tersebut juga dapat memberikan pendapat yang mengikat mengenai suatu hubungan hukum tertentu dalam hal belum timbul sengketa.

Yahya Harahap, menyatakan bahwa klausula arbitrase terdiri dari *pactum de compromittendo* dan akta kompromis. Perbedaan antara keduanya hanya terletak pada saat pembuatan kontrak. *Pactum de compromittendo* dibuat sebelum perselisihan terjadi. Dari segi isi kontrak, tidak ada perbedaan. Yang dimaksud dengan isi klausula arbitrase adalah mengenai hal-hal yang boleh dicantumkan dalam klausula arbitrase, sampai dengan sejauh mana rumusan yang dapat dicantumkan dan diperjanjikan. Penerapan isi klausula arbitrase ini berpedoman kepada ketentuan undang-undang dan konvensi. Pada prinsipnya, klausula arbitrase tidak boleh melampaui isi kontrak pokok. Klausula arbitrase tidak boleh memuat masalah penyelesaian perselisihan yang tidak ada sangkut-pautnya dengan isi kontrak pokok.

Para pihak dalam kontrak kerja konstruksi dapat merumuskan isi klausula arbitrase secara umum, yaitu para pihak memperjanjikan kesepakatan mengikat diri satu sama lain untuk menyerahkan penyelesaian perselisihan yang timbul kepada seorang atau beberapa orang arbiter. Dalam Pasal II ayat (1) Konvensi New York 1958, memperkenalkan perumusan klausula secara umum, yang menyatakan bahwa *the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them.*

Isi klausula arbitrase yang bersifat umum dapat dirumuskan secara ringkas, cukup dengan mencantumkan kalimat: "segala perselisihan yang timbul antara para pihak, sepakat diselesaikan dan diputus oleh arbitrase". Dengan kalimat yang demikian, sudah mengikat kepada mereka untuk menyelesaikan setiap perselisihan yang timbul melalui forum arbitrase. Model klausula arbitrase yang semacam ini, disebut klausula yang tidak terperinci[10].

Priyatna Abrurrasyid memberikan beberapa contoh klausula arbitrase yang bersifat umum sebagai berikut[11] :

Singapore

"Any dispute arising of or in connection with his contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference into this clause".

ICC

"All dispute arising in connection with the present contract shall be finally settled under the A Rules of Conciliation and

[10] Nazarkhan Yasin, *Op. Cit.*, 97. .

[11] Priyatna Abrurrasyid, *Op. Cit.*, 70-72

Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

UNCITRAL

"Any dispute, controversy or claim arising out of or relation to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the ICC acting in accordance with the rules adopted by the ICC for this purpose".

BANI

"Semua sengketa yang timbul dari perjanjian ini, akan diselesaikan dan diputus oleh Badan Arbitrase Nasional Indonesia (BANI) menurut peraturan-peraturan prosedur arbitrase BANI, yang keputusannya mengikat kedua belah pihak yang bersengketa, sebagai keputusan dalam tingkat pertama dan terakhir".

Pilihan dari klausula arbitrase lainnya adalah yang dibuat secara terinci. Suatu perjanjian arbitrase memuat klausula yang sangat terinci dan detail. Sebagai contoh dapat ditunjukkan dalam standar kontrak dari FIDIC (*Federation Internationale des Ingenieurs Counsels)* tentang beberapa bagian klausula arbitrase yang sangat lengkap seperti yang ditunjukkan pada butir *20.2. Appointment of the Dispute Adjudication Board (DAB);* butir *20.3. Failure to Agree Dispute Adjudication Board;* butir *20.4. Obtaining Dispute Adjudication Board's Decision;* butir *20.5. Amicable Settlement; dan butir 20.6. Arbitration.* Dalam standar kontrak Internasional seperti FIDIC (*Federation Internationale des Ingenieurs Counsels),* pilihan penyelesaian sengketa konstruksi adalah melalui arbitrase. Pilihan Lembaga Arbitrasenya adalah ICC (*the International Chamber of Commerce)* atau UNCITRAL (*The United Nations Commission on International Trade Law*).

Sehubungan dengan pilihan sengketa melalui arbitrase, hal ini harus dijelaskan pula dengan tegas dalam kontrak adalah apakah arbitrase apa yang dipilih, adalah Lembaga atau Ad Hoc, termasuk pula peraturan prosedur yang dipakai. Hal ini harus dilakukan untuk menghindari persepsi yang berbeda antara para pihak yang dapat menjadi sumber sengketa yang baru.

Berikut ini terdapat beberapa kasus kontrak kerja konstruksi yang membuat klausula arbitrase tidak jelas, sehingga dapat menimbulkan interpertasi yang berbeda diantara pada pihak.

Kasus 1 :

- Jika perselisihan yang terjadi antara kedua belah pihak sehubungan dengan Perjanjian Pemborongan ini sedapat-dapatnya akan diselesaikan secara musyawarah untuk mufakat.
- Jika perselisihan tidak dapat diselesaikan secara musyawarah dalam waktu 30 (tiga puluh) hari kalender sejak dimulainya acara musyawarah kedua belah pihak sepakat untuk menyelesaikan perselisihan tersebut menurut Peraturan Prosedur Badan Arbitrase Nasional Indonesia (BANI).

Pada kasus 1 ini masalah yang terjadi adalah pada klausula arbitrase tidak secara jelas menunjuk Lembaga Arbitrase BANI sebagai lembaga penyelesaian sengketa, tetapi

hanya menunjuk Peraturan dan Prosedur BANI. Hal ini dapat pula diinterpertasikan untuk menunjuk arbiter Ad-Hoc.

Kasus 2 :

- Apabila perselisihan tidak dapat diselesaikan secara musyawarah, maka dilakukan upaya penyelesaian oleh Badan Arbitrase Nasional Indonesia (BANI) sampai didapatkan suatu kesepakatan yang dapat diterima oleh kedua belah pihak.
- Apabila masih juga tidak dicapai penyelesaian, langkah terakhir adalah melalui jalur hukum, yaitu melalui Penyelesaian Perselisihan di pengadilan, dimana segala risiko akibat dari keputusan pengadilan harus dapat diterima oleh pada pihak dalam perjanjian/kontrak.

Dalam Kasus 2 masalahnya adalah penetapan BANI adalah untuk melakukan upaya penyelesaian sengketa yang hasilnya adalah suatu kesepakatan yang diterima oleh kedua belah pihak. BANI selaku lembaga arbitrase bertugas untuk membuat putusan dan putusan tersebut adalah final dan mengikat. Suatu penyelesaian sengketa yang disepakati melalui arbitrase tidak dapat dibawa kembali ke pengadilan.

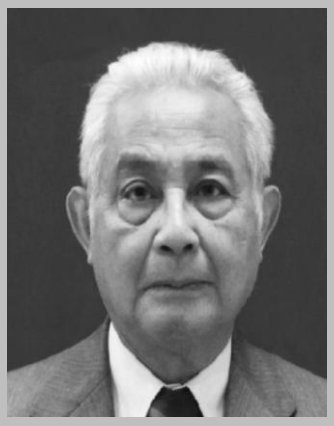
Keterbatasan penyelesaian sengketa melalui arbitrase adalah keharusan adanya perjanjian (klausula) arbitrase, tidak mengenal yurisprudensi, itikad baik para pihak menentukan efektifitas pelaksanaan putusan arbitrase, kepatuhan para pihak untuk tunduk pada putusan arbitrase dan melaksanakannya dengan benar, integritas dan profesionalisme para arbiter, sikap pengadilan terhadap pelaksanaan putusan arbitrase.

Past Events

Reception for Celebration 37th Anniversary BANI
6 December 2014

Hotel Santika Premiere Gubeng
Jalan Raya Gubeng 54, Surabaya, Indonesia

Board of BANI Arbitration Center, Mr. M. Husseyn Umar, Vice Chairman of BANI, with the Representatives : Bandung (Prof. Huala Adolf), Denpasar (Prof. Made Widyana), Jambi (Chairul Azwar), Medan (Azwir Agus), Palembang (Bambang Harianto), Pontianak (Prof. Garuda Wiko) dan Surabaya (Mrs. Hartini Mochtar Kasran)



Experience in petroleum upstream activities and engineering education, including pioneering in establishment of the first School of Petroleum Engineering in Indonesia (1962). Fields of expertise include oil production operation, petroleum reservoir management, petroleum property valuation, and assessment of project proposal for financing and due diligence, oil and gas laws and contracts, geothermal development project and training development. Clients include oil and power companies, banks and financial institutions. Also had provided statement in court and arbitration forum regarding Oil and Gas Law and contract.

DISPUTE RESOLUTION MECHANISMS UNDER FIDIC FORM OF CONTRACT

Dr. Madjedi Hasan, FCBArb

Abstrak

Kontrak tertulis adalah hukum yang mengikat diantara kedua belah pihak. untuk itu, alternatif penyelesaian sengketa melalui mediasi dan arbitrase sering digunakan didalam penyelesaian masalah konstruksi. Kontrak yang dibiuat oleh FIDIC dikategorikan sebagai kontrak internasional yang paling banyak digunakan, termasuk di proyek-proyek konstruksi di Indonesia. Prinsip yang dianut didalam kontrak ini antara lain didasarkan pada alokasi resiko yang merata dimasing-masing pihak – dimana resiko tadi dipikul oleh pihak yang paling mampu mengelolanya. Mekanisme penyelesaian sengketa terdiri dari : Dispute Adjudication Board DAB, Amicable Solution dan Arbitrase. Arbitrase adalah langkah terakhir yang diambil setelah dua langkah sebelumnya gagal.

Kata Kunci : Kontrak FIDIC, Dispute Adjudication Board, Amicable Solution, Arbitration, Inquisitorial right

What is Form of Contract?

A written contract represents an agreement that locks two or more parties into an agreed behavior. In the construction, the contract is usually more extensive having to provide for and deal with detailed conditions in respect of the risks that might arise during the construction period and beyond. Ideally it includes terms that provide protection should one or more of the parties not follow the agreed upon terms.

Disputes frequently arise over labor costs, materials and other breach of contract actions. Resolving each dispute in court is expensive; it also ties up much of the court's time and docket space. Alternative dispute resolution, such as mediation and arbitration, is common in contract disputes,

including for construction. In mediation, parties work through a mediator to reach an agreement. In arbitration, parties each present evidence and the arbitrator makes an agreement as to who is right.

Given its complexity, many associations such as International Federation of Consulting Engineers (FIDIC) has developed standard contract model which will give parties a neutral framework for their contractual relationships. The standard form of contracts and clauses are drafted by experts without expressing a bias for any one particular legal system. For instance, for the construction, plant and design industries, FIDIC has developed model contract, which becomes industry standard guide to standard conditions of contract for the construction, plant and design industries.

The FIDIC forms are the most widely used forms of contract internationally, including construction projects in Indonesia. The form is outstanding in its detailed consideration and treatment of the legal aspects of the interpretation and application of the Contract Conditions.

FIDICs Form of Contract

The FIDIC's approach to drafting contracts is based on the principle that its contracts must provide a fair allocation of risks between the parties to a contract, and that risks should be borne by the party best able to control them. Dispute resolution mechanism in FIDIC 1999 is with three major steps, and those are dispute adjudication board (DAB), amicable settlement and arbitration. A DAB can be created at the start of the project or when a dispute occurs. It is an informal process which encourages party involvement and recognizes the need for speed. The DAB has an inquisitorial right and has to give reasoned decision within 84 days. A DAB's decision will become final and binding 28 days after it is issued if the parties do not give a notice of dissatisfaction. Also, applicable law of the contract still needs to be applied.

While the project organization for design, supervision and construction may vary but the tasks must be carried out by someone either on behalf of the Employer or on behalf of the Contractor. Employer is the owner who needs the project and who will pay for the project, while Contractor is the one who will prepare all or any part of the design as required by the Employer and who will actually construct the work. In the case of construction contract, the conditions of the contract are based on design by the Employer, while for plant and design built and for EPC/turn-key projects the design is based on the Contractor.

In addition to particular conditions for each project, the contract will usually also contain general provisions, which are intended to be used unchanged for every project. Normally, the general conditions give essential project information, some of which must be completed by the Employer before issuing the tender documents, together with some information which must be added by Contractor upon submission of the tender.

Given variety of contracts, FIDIC has published books, which are the most widely used forms of contract internationally, including construction projects in Indonesia. These include:

- Green Book for Short Form of Contract;

- Yellow Book for Plant and Design Build Contract;
- Gold Book for Design, Build and Operation Project;
- Red Book for Construction Contract; and
- Silver Book for Turnkey Contract.

The form is outstanding in its detailed consideration and treatment of the legal aspects of the interpretation and application of the Contract Conditions. BANI had a list of arbitrators who have construction engineering background and experiences in resolving dispute involving FIDIC model contract.

Dispute Resolution Mechanism

Construction disputes are fairly common, and they vary in their nature, size and complexity. When not resolved in a timely manner, the disputes may become more expensive, in terms of finances, personnel, time, and opportunity costs. The visible expenses (for attorneys. expert witness, dispute resolution process) are significant. The less visible costs (e.g. company resources assigned to the dispute, lost business opportunities) and the intangible costs (damaged business relationship, inefficient dispute process) are also considerable, although they are difficult to quantify. Because of the cost effectiveness and time to resolve the disputes are critical factors, FIDIC has introduced a strategic approach to dispute prevention and resolution that employs a neutral advisor, early intervention and the ability to tailor the resolution method to the particular nature of the dispute.

These include establishment of Dispute Adjudication Board (DAB) consisting of neutral experts who will visit the site periodically in order to monitor the progress and potential problems. DAB is an informal process which encourages party involvement and recognizes the need for speed. It consists of a panel of experienced, respected, impartial and independent reviewers and is normally organized before construction begins and meets at the job site periodically. They are provided with contract documents, plans and specifications and become familiar with the project procedures and the participants and are kept abreast of job progress and developments. DAB meets with the Employer and Contractor's representative during regular visits and encourages the resolution of disputes at job level. When any dispute flowing from the contract or the work cannot be resolved by the parties, it is referred to the DAB for decision.

A DAB can be created at the start of the project or when a dispute occurs. It has one or three members with the default are three members, in which each party nominates one member for approval of others and the parties agree on third who acts as chairman. If contract contains a list, members are selected from that list, unless unwilling/ unable to act. Each party may appoint a replacement member at any time and pays half of the cost. Note that although the contract states that DAB shall comprise of either 1 or 3 suitably qualified persons, it is often the case that on large projects the tribunal may consist of 5 persons.

The DAB procedure is conceived as a method of primary dispute resolution. Thus the procedure should facilitate prompt reference of disputes to the board as soon as job level negotiations have reached an impasse. Thus referral to the DAB only after

multilevel of Employer and Contractor reviews is inconsistent with the process and counter-productive in terms of time and expense.

The DAB has an inquisitorial right and may open up, review, reverse, any certificate, determination, instructions of Engineer and grant provisional relief. Like arbitration, impartiality is of fundamental importance to the DAB's decision. DAB shall (a) act fairly and impartially as between the Employer and the Contractor, giving each of them as reasonable opportunity of putting his case and responding to other's case and (b) adopt procedures suitable to the dispute avoiding unnecessary delay or expense. The DAB has to give reasoned decision within 84 days and the DAB's decision will become final and binding 28 days after it is issued if the parties do not give a notice of dissatisfaction. Also, applicable law of the contract still needs to be applied.

With the issue of the decision, the parties are bound to give effect to the decision. The decision may be revised by some later course of action but any future action will not invalidate the necessity to comply with requirements of decision promptly. Also, the Contractor is obliged to proceed with the works in accordance with the contract irrespective of whether it agrees or not with the decision of the DAB. If a party decides to reject the DAB's decision, then it must issue a formal Notice of Dissatisfaction within 28 days of the DAB's decision with state the reason.

Notice of dissatisfaction should also be given, if DAB fails to give the decision within given time period. Where a notice of dissatisfaction is given, the parties are obliged to attempt the amicable settlement of their disputes. Unless such disputes are settled amicably, any dispute in respect of which the DAB's decision has not become final and binding will be settled by arbitration. The arbitration will start only after either the parties has first attempt to settle the dispute at amicable settlement or exceeds the 56 days after the day on which notice of dissatisfaction has given to other party.

Although its decision is not binding, the DAB has essentially wider role to encompass dispute avoidance as well as dispute resolution. Dispute avoidance can only be used if both parties wish it to take place whereas dispute resolution can be initiated by one party alone once a dispute arises. Finally, it is worth mentioning that 1999 FIDIC contracts for major works provides that where there is no DAB in place, any dispute arising should proceed directly to arbitration without the benefit of the two intermediate steps of DAB and amicable settlement.

Past Events

Regional Seminar
"Dispute Business Resolution Outside the Court through Arbitration and Alternative Dispute Resolution"
Introduction and Make The Most of BANI Arbitration Center for Business Dispute Resolution in Riau Province.

Tuesday, 25 November 2014
Balairung Hotel Pangeran
Jl. Jend. Sudirman Pekanbaru

Mr. Gusnando S Anwar is a contract specialist in the construction and fellow charter of BANI arbitrators. He is also a registered mediator with Pusat Mediasi Nasional (PMN).

CLAIMS IN CONSTRUCTION CONTRACTS

Ir. Gusnando S. Anwar, MEngSc.
MPU. Med. PA. FCBArb.

ABSTRACT

Artikel ini menyajikan berbagai klaim dalam kontrak jasa konstruksi di Indonesia yang bertujuan untuk menggambarkan kompleksitas yang menimbulkan klaim konstruksi. Kompleksitas ini perlu dipahami terutama oleh para pelaku dalam industri jasa konstruksi, bahkan sampai kepada pihak ketiga yang terlibat dalam pencegahan dan penyelesaian sengketa, baik dalam penyelesaian sengketa alternatif maupun penyelesaian sengketa akhir. Tulisan ini berdasarkan pengalaman di dunia konstruksi di Indonesia dalam proyek nasional maupun tender internasional, yang dibatasi dalam konteks pelaksanaan jasa konstruksi, tidak termasuk masa studi, perencanaan, pemeliharaan dan pemanfaatan.

Kata Kunci : Kontrak, Konstruksi, Klaim Konstruksi

This article presents various claims in the construction contracts in Indonesia, which is intended to illustrate the complexity that affecting the construction claims. This complexity needs to be understood primarily by the stakeholders in the construction industry, the third parties involved in the prevention and settlement of disputes, both in the alternative dispute resolution and final dispute settlement. This paper is based on the experiences in Indonesia's construction activities both in national and international competitive bidding, which is limited to the context of the construvtion contract implementation, not including the period of study, planning, maintenance and utilization.

INTRODUCTION

Given the investment of about Rp 400 trillion this year, Indonesia construction activities involve over 100,000 construction contracts of various scale (small, medium and large), and 10,000 contractors. In such situations, the construction claim is becoming more complicated due to various problems including lack of competence, poor construction project management and administration, and incomplete and biased rules and regulations in the execution. The following paper discusses the various claims in the construction contracts from a contractor's perspective.

CONSTRUCTION CONTRACT

Construction services are stipulated under the Law Number 18 of 1999 on Construction Services ("Law No. 18/1999" or UUJK). In a construction work, there are two parties that are involved, namely the service user (employer) and the service provider, who are bound in a construction work contract. In addition, there is also a service provider who will plan and supervise the work and is often referred to as the Consultant.

Commencing with accepting the invitation to tender and obtaining the tender documents from an Employer, Contractor will begin making calculation and preparation for the bid documents following the explanation meeting and site visit. Submission of bidding documents and bid security would usually take a month later. The bid evaluation, clarification and negotiation will usually take about 3 to 6 months (within bid bond period), before the letter awarding the contract is issued to be followed by signing the contract document. The Contractor will execute the contract with some uncertainties, which may include the unit price (with respect to inflation rate), the absence of a national standard for the general conditions of contract, detailed procedures that have not been agreed upon, and the competency of team members from both Parties.

CONSTRUCTION CONTRACT'S CLAIMS

During the construction contract execution, the contractor may seek to collect from the customer as reimbursement for costs not included in the contract price, which may the contract amendement. They consist of several groups of claims, including those associated with changes:

a. In technical specifications or designs by the Employer;
b. Due to necessity (without instructions);
d. Due to Force majeure events;
e. Due to disruption of the original contractor's work program but not associated with additional work.

The above four types of claim, when they occurr simultaneously, will result in large and complex claims. This paper will only discuss the claim associated with the last one (d), i.e. claim associated with disruption of the original contractor work program (not additional works) that often occurred during the contract execution. The claims are often large in size and becoming increasingly complicated and complex. These are often due to the lack of competence of Employer team along with its consultants in the administrative aspects of the contract, which may include an over confidence on competence or arrogant behavior of the parties. If it is not handled properly and timely, this may result in delay and causes unnecessary accumulated issues.

Major events for potential claims include, among others:

1. Land Handover
   This relates to that the Employer has not made a land acquisition before issuing the tender document or signing the construction contract. The Employer may promise during the tender that the land handover will be carried out in one sitting, but in reality this is often not the case and cause excessive delay (may last more than a year). Examples may be seen in the construction of a number of toll roads that has resulted in claims by the Contractors amounting to billions rupiah. Such excessive delays in the highway construction projects have resulted in additional costs of 20% - 30% of the original contract. The claimed costs do not add benefit to the Contractor; these additional costs to the original contract can be utilized to build 2 – 10 km new toll road. Such a concern has often be expressed by the President Director of PT (Persero) Jasa Marga (the leading state-owned company engaged in the business of toll roads in Indonesia) in various seminars on road construction work. As he said, there are three important components in the construction of the motorway, i.e. the first is land acquisition, the second is land acquisition, and the third is land acquisition.

2. Relocation of Utilities
   During the execution of the contract, utilities were sometime found and often not detected at the time of planning of the contract. These include PLN's power cable, oil and gas pipelines owned oil and gas company, PDAM's water pipes and drainage, etc. These utilities must be removed, as they would cause disruptions to the Contractor's activities. Under such circumstances, the Contractor would be entitled to additional compensation for the time loss due to the disruptions. The removal of utilities would require a specialist who is familiar and trusted by the utility owner.
   Also, some regulations have often caused delays to complete the project as scheduled. For instance the Article 13 of the Jakarta's Governor's Rule Number 128 of 2010 on the Network Utilities in strategic locations, states that:
   (1) In the event of a shift or change of location of underground utility networks due to physical development by local governments, institutions and/or contractor shall make the utility relocation according to the location and layout specified by the Governor.
   (2) The Governor through the related local government offices notifies the Agency and/or the contractor no later than 1 (one) year prior to the shifting or relocation of network layout as referred to in paragraph (1).

3. Disruption by Instruction
   One of the weakness in the project management practices in Indonesia is an intervention, due to lack of clarity with respect to the project organization and coordination along the lines of authority of the Project Management Consultant, Engineer, Construction

Management Consultants and Supervisory Consultant. Under the conditions of the contract, the Contractor is obliged to comply with instructions from the Employer and Consultants, but they often forget that there are orders that interfere with Contractor's jurisdiction, resullted in claims for additional compensation. The instructions to change the working and construction methods, including the sequence and duration might give an impact in the form of idle equipment, resources, manpower, productivity and mobility of equipment, all of these would impact the costs without additional work.

4. Traffic Diversion
   In a construction project involving road or fly over, there is often a need to divert and slow down the traffic flow below 20 km per hour. The diversion would interfere the work, including the work space and surrounding activities. At the time of tender, it is generally assumed that the traffic diversion is about five times throughout the project life, but in reality this may increase considerably due to delays in the land acquisition and discovery of utilities that must be relocated. As an indicator, the rate of traffic in the capital Jakarta today at noon time is about 1 - 5 miles per hour.

5. Nominated Subcontractors
   As the regulation states, that the removal of utilities shall be carried out by a contractor utilities who is familiar and trusted by the owner of the utility. Given the fact that such specialist contractor is quite limited nationally or the special relationship between the project owner and utility contractor, the Employer has often asked the Contract to appoint a Nominated Subcontractor (NSC) to the removal work of the utilities. Although the delay in removing the utilities by NSC will be the employer risk, however there is a need for a close coordination between the Contractor and the NSC appointed by the Employer.

6. Materials Supplied by Owner (MSBO)
   In a construction contract, it is often that the Employer, or Project owner will supply certain materials such as concrete reinforcing steel, ceramic, or ready-mix concrete. This is due to that given a large quota, subsidiaries or ownership relationship, or advance payment provisions for producers, a manufacturer may in the position to provide a guarantee of supply and more competitive price than the price offered by the Contractor. On the other side, due to the complexity of goods such as iron re-bar which may consist of various sizes and some specification of even more complex ceramics with a wide variety of motifs and colors, this might cause in some delays. As a result, the contractor's delays are not uncommon due to waiting for MSBO, thereby the price saving for the materials may be offset by the penalty imposed by Contractor delays in MSBO. It can indeed be eliminated by providing professional procurement management by Employer to make comparison the theoretical savings of MSBO system with the possible claims of Contractors for the delays in delivery of MSBO.

7. Delay Providing Documents
   Documents to be supplied by the Employer at the beginning of the contract are usually drawings and specifications, with the former is usually less (in terms of number) than the latter. As complete specifications may not be available, it has often been necessary to obtain clarification on the specification, which may eventually lead to delay in the field construction work. Even in a tender of lump sum contract, the basic requirement is that the complete construction drawings are available. The absence of construction drawing would delay the preparation of Shop Drawing, which is the basis for work implementation at site. The delay in providing a clear specification would also mean that the material and manufacture of mixed design by the Contractor will also be delayed; consequently the ordering materials or goods based on an approved sample of material and approved design mixed would be pending.

8. Approval Delay
   The process of approval of shop drawings, material samples and mixed design has often resulted in claim and the value of such a claim is often signifcant, as it may involve expatriates. The process for the Employer or consultants to approve the contractor's proposal is usually less than the 7 (seven) calendar days. However, Employer often delays the approval for shop drawings, sample materials and mixed design, with the potenial dispute is obscurity. The delay in the approval will impact the work execution.

9. Payment Delay
   Payment usually refers to payment procedure; in construction services, the payment procedures usually provides the payment after the Employer receives a complete document of request for payment from the Contractor. In the international contracts, the compensation is typically set by a very clear formula, including the the Central Bank's interest rate for the late payment that will automatically be paid in the following month without requiring an addendum or negotiation. If it is not set clear, the Contractor will receive the interest compensation according to the civil law, which may be lower than the interest rate usually charged by the executing bank.

10. Suspension of Work
    There are times when, employer is forced to order for suspending the work. The costs resulting from the suspension is usually relatively large, and it should be borne by the Employer, even though not all costs incurred by the Contractor are consistently or automatically borne by the Employer. The suspension is usually limited to 3-month period, otherwise the Contractor reserves the right to terminate the contract.

11. Termination of Contract
    Termination can occur due to the failure of the contractor to perform its obligations as agreed in the contract. Commonly known as Termination by Default, this may be associated with the work quality, time, safety and the environment and enforced by Employer. Consequently, the Contractor may suffer

a big loss and could go bankrupt because Employer may impose the maximum penalty (which is usually 5% of the contract value), redeem the performance bonds that typically is about 5% of the contract value, and put sanctions in the form of the contractor in the "black-list". Moreover, the Contractor is not allowed to charge the material that has been ordered and/or stored in the warehouse that might not be used in other projects. Also the work portion installed in situ cannot be taken into account in the progress of work. Losses could reach 15% of the contract value plus a penalty in the form of black-list, which may lead the Contractor in a bankcruptcy proceeding.

Sometimes the Employer or Project Owners may end the contract for a convenience. While it may not be desirable, but the Employer may consider this will be the best option. For example, termination for convenience once happened at a port project, because the depth and currents do not support long-term goals of the port. Also, the Termination for Convenience may occur on the manufacturer project because the location must be moved to a new land of integrated manufacturers region. In the event of this Termination for Convenience, Employer is responsible to indemnify the contractor including all costs of goods in the warehouse, and in the order; even the Contractors can obtain the expected profit opportunity when the contract is signed.

12. Unclear Procedures

These unclear procedures are usually not included in the contract documents, but could be agreeable in the Kick-off Meeting, or after the contract is signed but before the contract becomes effective. These may include the procedures for calculation approval, payment, inspection, coordination, security, communication, reporting, changes, safety, variation, handover, testing and commissioning, final account, dispute resolution and closing. Each procedure must be complete and clear to avoid differences in the opinion between the Parties and in order to eliminate the extra cost claims that may be claimed by the Contractor. Also, note that events that claims due to events that disrupt the original contractor's work program - which no additional works - that occurred during the execution of the contract is often enlarged and became increasingly complicated and complex due to the lack of competence.

DISPUTES SETTLEMENT

Contractor's claims are usually evaluated by the Contract and Cost Consultant. With the same level of competence among the interested parties in the construction industry it is expected to achieve consensus through consultation mechanisms. If consensus cannot resolve the difference of opinion, it is recommended to resolve it thorugh the dispute settlement mechanism. Chapter II of Law No. 30 of 1999 concerning Alternative Dispute Resolution and Arbitration provides that disputes or differences of opinion can be resolved through alternative dispute resolution, which may include deliberation (musyawarah). If it fails to reach an agreement, it will be settled with the help of expert advisors and mediators. Then they

can use the arbitration mechanism (institution or ad-hoc). Article 52 also states, that the Parties may also use the mechanism of "The Binding Opinion" of an arbitration institution.

CONCLUSIONS

In summary, the above examples show the complexity of claims in a construction dispute. They will involve many parties and people in resolving the dispute, including the expert, mediator and arbitrator. All processes will take place effectively only if all personnel involved have a decent competence, especially in the Construction Project Management and Contract Administration. Given approximately 100,000 construction contract transactions a year, Indonesia has only about 2,000 certified experts in the project construction management. Also, Indonesia will need experts in the dispute settlement for claim in the construction contract, who are compentent. In addition, Indonesia also need a national standard on the conditions of contract, which is applicable to the contract involving public and private construction project.

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Past Events

National Meeting of BANI Board of Executive and the Representative Offices

37th Anniversary BANI
6 December 2014
Hotel Santika Premiere Gubeng
Jalan Raya Gubeng 54, Surabaya, Indonesia

Annual working meeting the Board of BANI Arbitration Center and all Indonesia BANI Representatives

At present, Dr. Winarta is the Founder & Managing Partner of Frans Winarta & Partners Law Firm. In his practice, he handles all aspects of civil, commercial and criminal litigation. He is also experienced in international and national arbitration and alternative dispute resolution. He has experience in various kinds of disputes ranging from general corporate matters, joint venture, construction issue, oil and gas issue, mining issue, cross-border investment issue, taxation, and many more.

He has been awarded as a Fellow Certified BANI Arbitrator (FCBArb.), given under the seal of the Indonesian National Board of Arbitration (BANI). He functions as the Co-Chairman and Founder of the Indonesian Chapter of the Chartered Institute of Arbitrators (CIArb). He is also an Associate of the Chartered Institute of Arbitrators (ACIArb.) and Co-Founder of the Indonesian Chapter of the International Chamber of Commerce (ICC). He is currently serving in as the Chairman of the ICC Indonesia Court of Arbitration as well as arbitrator in various international arbitration institutions.

PROSES ARBITRASE DARURAT ICC * DALAM SISTEM HUKUM INDONESIA

Dr. Frans H. Winarta, S.H., M.H., FCBArb **

Abstract

*The new Arbitration Rules of the International Chamber of Commerce entered into force as of 1 January 2012 ("**ICC Rules 2012**"). Fundamentally, The ICC Rules 2012 aims to improve efficiency in arbitration cases, control expenses, and shorten the duration of arbitration. Within this scope, ICC Rules 2012 provides an opportunity to parties who are quickly seeking an urgent interim measure or conservatory measure that cannot await the constitution of an arbitral tribunal to have recourse to an Emergency Arbitrator. Emergency Arbitrator is governed under Article 29 of ICC Rules 2012 and Appendix V of ICC Rules 2012. This significant and remarkable procedure aims to provide urgent interim measures for parties who cannot await the constitution of an arbitral tribunal.*

Key words: *Commercial Arbitration, Emergency Arbitrator, The ICC Rules 2012.*

Dalam era globalisasi, sudah menjadi kebiasaan bagi para pelaku bisnis untuk melakukan transaksi bisnis dengan pihak dari sistem hukum, latar belakang dan budaya yang berbeda dari negara lain. Benturan yang terjadi akibat interaksi tersebut terkadang tidak dapat dihindari dan mengakibatkan terjadinya sengketa. Dalam sengketa internasional, arbitrase perdagangan (*commercial arbitration*) telah berkembang menjadi salah satu metode penyelesaian yang akurat, efisien dan praktis, yang mana fleksibilitas, kerahasiaan dan *win-win solution*, merupakan forum yang tepat untuk para pelaku bisnis dalam menyelesaikan sengketa bisnis mereka. Di Indonesia, tidak diragukan lagi, bahwa alasan utama bagi para pelaku bisnis memilih arbitrase adalah adanya kebebasan bagi pihak untuk menunjuk arbiter secara bebas (*party autonomy*) yang mempunyai keahlian di bidangnya dan memiliki intergritas tinggi sehingga kejujuran, kompetensi,

* Artikel ini sudah pernah dimuat di Harian Bisnis Indonesia pada tanggal 24 Juni 2014

** Penulis adalah Chairman ICC Indonesia bidang Arbitration dan Commercial Law, serta Arbiter ICC Paris.

independensi, dan imparsialitas mereka tidak diragukan lagi.

Kini, arbitrase dihadapkan pada tantangan untuk memfasilitasi permohanan mendesak salah satu pihak dalam sengketa bisnis sebelum majelis arbitrase (*tribunal*) terbentuk, seperti dalam sengketa jual beli saham misalnya, dalam hitungan detik saham yang dipersengketakan bisa dijual dengan mudah sehingga perlu diamankan ketika sengketa terjadi. Atau dalam soal perkapalan, jika tidak segera ditahan di suatu pelabuhan akan segera berlayar ke negara lain untuk menghindari perintah (*order*) atau putusan arbitrase (tribunal), yang berarti kesempatan menyita kapal dari pihak yang ingkar janji menjadi hilang begitu saja. *International Chamber of Commerce Court of Arbitration* (ICC) merupakan salah satu institusi yang memiliki reputasi yang terpercaya di dunia, telah mengeluarkan peraturan prosedur baru yang mulai efektif pada 1 Januari 2012 (*ICC Rules 2012*). Untuk menghadapi hal-hal tersebut, *ICC Rules 2012* telah menyediakan peraturan mengenai arbiter darurat atau *emergency arbitrator provision* yang dapat memberi solusi cepat dalam keadaan darurat dalam bentuk *interim measures dan conservatory measures* dimana faktor waktu begitu penting dalam dunia bisnis.

Proses arbitrase darurat (*emergency arbitration*) adalah suatu mekanisme untuk mengakomodir kepentingan pihak yang membutuhkan keputusan yang sangat mendesak dan tidak dapat menunggu majelis arbitrase (*tribunal*) terbentuk. Pimpinan ICC akan menunjuk seorang arbiter darurat atas adanya permohonan arbitrase darurat dan arbiter darurat tersebut harus memutus dalam kurun waktu 15 (lima belas) hari sejak permohonan diterima oleh arbiter darurat tersebut. Dengan cara ini, kepentingan yang mendesak dari pihak tersebut dapat dilindungi. Kekhawatiran bahwa nantinya putusan arbitrase hanya akan menjadi sia-sia, dapat dihindari dengan adanya proses arbitrase darurat ini. Esensi proses arbitrase darurat itu adalah melindungi kepentingan yang mendesak sehingga kalau sampai itu tertunda sama saja artinya dengan ketidakadilan. Dalam hukum ada adagium yang terkenal, *"justice delayed is justice denied"*.

ICC Rules 2012 mengatur bahwa keputusan dalam bentuk *interim* dan *conservatory measures* yang diberikan oleh arbiter darurat adalah dalam bentuk perintah (*order*) yang bersifat darurat dan tidak final. Hal ini menimbulkan potensi masalah dalam hal pelaksanaan order tersebut karena sistem hukum di Indonesia tidak mengakui order sebagai putusan yang final dan mengikat (*final and binding*). Apalagi order tersebut diberikan oleh arbiter darurat di luar wilayah hukum Indonesia. Akibatnya, pelaksanaan dari order tersebut akan mengalami hambatan.

Mengubah Aturan

Ketiadaan aturan mengenai *order* ini akhirnya akan menyebabkan hambatan bagi pihak-pihak yang mencari keadilan melalui arbitrase internasional. Bayangkan saja, ada kalanya dalam proses arbitrase dibutuhkan penyitaan mendesak (darurat) sebelum majelis arbitrase terbentuk. Misalnya terhadap saham atau kapal yang sedang berlabuh di suatu pelabuhan. Jika arbitrase darurat tidak dapat dilaksanakan, maka dalam hitungan jam atau bahkan

menit, saham yang disengketakan itu sudah dijual atau kapal yang berlabuh itu sudah berlayar pergi. Hal ini hanya akan menjadikan kemenangan pihak di dalam arbitrase perdagangan nantinya hanyalah kemenangan di atas kertas yang tak dapat direalisasikan.

Apabila kendala ini tidak segera diatasi, arbitrase akan menjadi tidak efektif sama sekali di Indonesia. Hal ini akan menyebabkan pihak asing menjadi enggan untuk berurusan dengan mitra bisnis dan hukum Indonesia sehingga menghambat kepentingan ekonomi Indonesia, khususnya iklim investasi asing (*foreign investment*) yang terjamin atau terdapat perlindungan hukum. Pihak asing akan takut melakukan transaksi pada sektor tertentu yang membutuhkan keputusan dari *emergency arbitrator* di Indonesia. Akibatnya, aktivitas bisnis di Indonesia menjadi *less favorable country* atau menjadi tujuan investasi sekunder di mata investor asing. Jadi, yang dirugikan oleh tidak adanya proses arbitrase darurat ini pada akhirnya bukan semata-mata mitra bisnis asing tapi juga kepentingan Indonesia secara keseluruhan.

Untuk mengakomodir kebutuhan yang mendesak itu, Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa perlu diamandemen, dan menganggap *order* yang diberikan oleh arbiter darurat mempunyai akibat hukum yang sama dengan putusan akhir (*award*), seperti pada sistem hukum di Singapura. Hukum Indonesia tidak boleh justru menjadi kekecualian diluar kebiasaan praktik bisnis Internasional dan seharusnya justru menyesuaikan dengan perkembangan hukum di negara lain. Kalau memang baik dan bermanfaat untuk kepentingan Indonesia, kita harus mau mengadopsi hukum Internasional. Kita harus menyadari bahwa *investor* akan lebih nyaman untuk berinvestasi di negara yang lebih akomodatif terhadap pelaksanaan arbitrase perdagangan internasional, terlebih lagi terhadap kemungkinan penyelesaian cepat melalui putusan sela atau perintah langsung arbiter melalui pengadilan.

Iklim investasi yang kondusif hanya akan tercipta apabila sengketa bisnis atau perdagangan bisa diselesaikan dengan transparan, efisien, dan adil, melalui jaminan kepastian hukum. Oleh karena itu, sudah saatnya apabila UU Arbitrase Nasional kita disesuaikan dengan perkembangan zaman dan tuntutan dunia bisnis yang dinamis. Apabila Indonesia mampu menjadi negara yang lebih bersahabat terhadap arbitrase (*arbitration friendly*), hal ini tentunya akan menjadi salah satu faktor yang dapat menjadi pertimbangan positif (*encouragement*) tersendiri bagi mitra bisnis asing dalam berbisnis di Indonesia.

EX AEQUO ET BONO DECISIONS

Dr. Madjedi Hasan, FCBArb

Abstrak

Ex aequo et bono adalah ungkapan berasal dari bahasa Latin di bidang hukum yang berarti apa yang adil dan wajar atau sesuai dengan rasa keadilan dan hati nurani. Sesuatu yang harus diputuskan ex aequo et bono adalah sesuatu yang akan diputuskan oleh prinsip-prinsip apa yang adil. Berasal dari Hukum Perancis (1806), konsep ini dapat menerima keputusan yang dibuat berdasar kesepakatan para pihak atau atas dasar kesetaraan.

Sebagian besar perkara termasuk dalam arbitrase BANI akan diputuskan menurut hukum. Namun apabila diputuskan berdasar ex aequo et bono, maka para arbiter akan mempertimbangkan hanya apa yang mereka anggap sebagai adil dan patut. Kewenangan arbiter untuk mendasarkan putusan berdasar ex aequo et bono berasal dari dua sumber, yaitu (a) persetujuan atau kesepakatan yang dinyatakan oleh para pihak dan (b) peraturan arbitrase atau *lex arbitri* yang memungkinkan kesepakatan itu.

Misalnya, Pasal 1 UU No. 30 Tahun 1999 menetapkan bahwa perjanjian arbitrase adalah perjanjian tertulis yang ditandatangani oleh para pihak sebelum sengketa timbul, atau perjanjian arbitrase tertulis yang terpisah yang dilakukan oleh para pihak setelah sengketa timbul. Selanjutnya Pasal 56 UU 30/1999 juga menetapkan bahwa arbitrase dapat membuat putusan menurut hukum atau berdasarkan keadilan dan kewajaran, dan para pihak memiliki hak untuk menentukan hukum yang mengatur penyelesaian sengketa. Demikian pula, Pasal 33 UNCITRAL Rules dan Pasal 13 ayat (4) ICC Arbitration Rules menetapkan bahwa arbiter harus mempertimbangkan hanya hukum yang berlaku, kecuali perjanjian arbitrase memungkinkan para arbiter untuk mempertimbangkan ex aequo et bono.

Dalam kontrak konstruksi, konsep ex aequo et bono dapat secara efektif diterapkan dalam menyelesaikan sengketa melalui arbitrase. Dalam hal ini kompetensi teknis arbiter menjadi sangat penting untuk memahami permasalahan dalam sengketa. Sementara itu dalam proses pengadilan, para hakim umumnya tidak memiliki keahlian substantif dalam industri yang dipersengketakan, sehingga kemampuan pengadilan untuk mengevaluasi bukti terbatas. Hal ini membuat konsep ex aequo et bono tepat digunakan dalam proses arbitrase.

Pengambilan putusan berdasarkan ex aequo et bono akan membutuhkan pengetahuan yang didukung dengan pengalaman. Demikian pula, kredibilitas seorang arbiter ditopang dengan reputasi dan pengalaman atau keahlian dibidangnya. BANI saat ini memiliki lebih dari 100 orang yang terdaftar sebagai arbiter (nasional dan asing), yang memiliki berbagai latar belakang profesi, termasuk praktisi hukum dan non-hukum dan ahli. Daftar arbiter ini dari waktu ke waktu ditinjau, ditambah atau diubah sesuai dengan kebutuhan. Dengan daftar arbiter yang mempunyai latar belakang profesi tertentu akan memudahkan BANI membuat putusan berdasar ex aequo et bono.

Kata Kunci : Ex Aequo Et Bono , Hukum Perancis (1806), Persetujuan atau Kesepakatan, Lex Arbitri, UU No. 30 1999, Peraturan tentang Arbitrase.

Introduction

Ex aequo et bono is a phrase derived from Latin that is used in a legal term which means what is just and fair or according to equity and good conscience. Something to be decided ex aequo et bono is something that is to be decided by principles of what is fair and just. A decision-maker who is authorized to decide *ex aequo et bono* is not bound by strict rules of law but may take account of what is just and fair or is free to give effect to general considerations of equity and fair-play on an award decided upon being equitable and "bona fide". The concept is derived from French Code (1806), which does not accept ruling outside of the frame of law but may accept decisions made in "composition amiable" by the parties or on the basis of equity (Switzerland).

Ex aequo et bono in Arbitration

Most legal cases including in BANI's arbitration are decided on the strict rule of law. For example, a contract will be enforced by the legal system no matter how unfair it may prove to be. But a case to be decided *ex aequo et bono*, overrides the strict rule of law and requires instead a decision based on what is fair and just under the given circumstances. In the context of arbitration, it refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand.

The arbitrator's authority to base their award on *ex aequo et bono* is derived from two sources, namely (a) the parties' express consent or agreement and (b) the applicable lex arbitri that permits that agreement. For example, as defined in the Article 1 of Indonesia's Law on Arbitration and Alternative Dispute Resolution Law (Law Nr. 30/1999), that arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises.

Nearly all arbitration rules allow the tribunal to decide a dispute in *ex aequo et bono* if duly authorized by the parties prior or during the arbitration process. For instance, the Article 33 of the UNCITRAL Rules and Article 13(4) of the ICC Arbitration Rules provide that the arbitrators should consider only the applicable law, unless the arbitration agreement allows the arbitrators to consider *ex aequo et bono*, instead. Also, the Article 56 of the Indonesia's Arbitration Law (Law Number 30/1999) states that the arbitral tribunal may render the award based on rule of law or based on justice and fairness (para 1) and the parties have a right to determine the law governing the dispute resolution (para 2).

Accordingly, any resort to *ex aequo et bono* occurs only if the parties expressly choose it in substitution for, or in addition to, their choice of law. The term *ex aequo et bono* in an arbitration agreement means that:

1) The arbitrator can decide what's equitable and good.
2) The arbitrator is restricted to deciding limits and benefits.
3) The arbitrator must be fair and impartial.
4) The arbitrator is to pick and choose the facts.

In practice, however, the issue is how far and how much flexibility is the arbitrator allowed into *ex aequo et bono*, as it will still be dependent on the parties and law and

regulations. Despite its long history in international adjudication and even though it is enshrined in the arbitration law of many countries, the concept of *ex aequo et bono* is often avoided on grounds that it operates outside of law, or is deemed to be contrary to law. In this case, the tribunal will always reassure itself of the basis of the decision making power, because of lack of authority to act as amiable composition may result in the arbitration award being set aside before the court of the seat of arbitration.

While some may also argue that the concept of *ex aequo et bono* can be unpredictable and subjective, the supporters for *ex aequo bono*, however, believe that arbitrators who are selected by mutual consent of the parties to settle the matters in controversy between them and enjoys the confidence of the parties should have also wide latitude in crafting remedies in the arbitral decision, with the only real limitation being that they may not exceed the limits of their authority in their award. Arbitrators should not be bound by precedent and have great leeway in such matters as: active participation in the proceedings, accepting evidence, questioning witnesses, and deciding appropriate remedies.

Ex aequo et bono in Construction Contract

In construction contract, the concept of *ex aequo et bono* may effectively be applied in resolving disputes through arbitration. This is attributable to the fact in resolving disputes technical competence of arbitrators is likely to be important to understanding the issues in dispute. In this respect, each party will have the ability to select an arbitrator with subject-matter expertise. In the court proceeding, it is conceivable that the judge will have no substantive expertise in the industry, and that may limit the court's ability to evaluate the evidence. It is this great flexibility of action which, combined with costs usually far below those of traditional litigation, makes arbitration and the concept of *ex aequo et bono* so attractive.

Making award based on *ex aequo et bono* will require good knowledge on the case supported by years of experience in the field. Also, the credibility of an arbitrator rests upon reputation, experience level in arbitrating particular issues, or expertise/ experience in a particular field. In the case of BANI arbitration, presently it has a list of more 100 arbitrators (national and foreign), who has various professional background, including legal and non-legal practitioners and experts such as engineer, architect, financier, insurance and other individuals meeting the requirements. The list of arbitrators from time to time are reviewed, added or amended by the Board. Given such a list of arbitrators with various professional backgrounds will certainly facilitate BANI arbitrators in making an award based on *ex aequo et bono*.

News & Events

Upcoming Events

KLRCA -BANI Joint Seminar
Kuala Lumpur, Malaysia, 5 February 2015
KLRCA (Kuala Lumpur Regional Centre for Arbitration) and BANI Arbitration Center set up a collaboration in holding a Joint Seminar in Arbitration with main topic on how international commercial arbitration, and in particuar harmonised international commercial arbitration dispute resolution methods and regional cooperation contribute to achieving the goals of the ASEAN Economic Community of regional economic integration by the year 2015.

Past Events

1. **Arbitration Seminar**
   "**Ideas and Strategies to Avoid Disputes, Manage Risk and Win in Dispute Resolution "**
   Friday, 31 October 2014
   8.30am - 5.30pm

   Location
   Hadiputranto, Hadinoto & Partners
   The Indonesia Stock Exchange Building, Tower II, 21st Floor
   Sudirman Central Business District
   Jl. Jenderal Sudirman Kav. 52-53
   Jakarta 12190, Indonesia

2. **Wolters Kluwer 2nd Annual Arbitration Summit – Indonesia**
   Friday, 12 December 2014
   Mandarin Oriental Jakarta
   Thamrin Room, 3/F
   Jalan M H Thamrin, PO Box 3392
   Jakarta 10310, Indonesia

   Wolters Kluwer 2nd Annual Arbitration Summit is designed to be interactive and to provide on opportunity in the field of international commercial arbitration.

Past Events

3. Seminar "Dispute Resolution through Arbitration and Alternative Dispute Resolution"

37th Anniversary BANI
6 December 2014
Hotel Santika Premiere Gubeng
Jalan Raya Gubeng 54, Surabaya, Indonesia

The seminar "Dispute Resolution through Arbitration and ADR", presented by Ms. Dr. N. Krisnawenda (Speaker, BANI Arbitration Center), Mr. M. Husseyn Umar (Moderator, BANI Arbitration Center) and Mr. Y. Sogar Simamora (Speaker, Law Faculty, Airlangga University, Surabaya).

Arbitrators of BANI Arbitration Center in the Seminar "Dispute Resolution through Arbitration and ADR" and 37th BANI Anniversary, 6 December 2014, Surabaya.