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Priyatna Abdurrasyid

Adjudication in Insurance
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WIN-WIN SOLUTION

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From the Editor

BANI quarterly newsletter welcomes the 1st publication of year 2016, which is to be an important year for BANI. We are pleased to inform that starting in October 2016, for the next two years BANI will serve as a host for the Asia Pacific Regional Arbitration Group (APRAG), which is a regional federation of arbitration associations which aims to improve standards and knowledge of international arbitration, and will make submissions on behalf of the region to national and international organizations. For 2016, the APRAG Conference will be held in Nusa Dua Bali from 6 to 8 October 2016.

In this edition we are pleased to present three articles. The first article was written by Prof. Priyatna Abdurrasyid (RIP)'s, who discussed another method for dispute resolution, i.e. Expert Determination. The second paper is by Dr. Junaedy Ganie and Frans Lamury who discuss the adjudication, which is another legal process of resolving dispute and widely applies in insurance business. The paper focuses the discussion on the adjudication practices in Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI), which is an association comprising of all insurance companies and reinsurance companies operating in Indonesia whose membership in the association is on a compulsory basis. The objective of its establishment is to provide fair and simple insurance claim settlement processes through an alternative dispute resolution in order to raise public confidence and interest towards insurance protection while contributing to the increase in welfare of the society.

Finally, but not least Prof. Huala Adolf describes the arbitration rules regulating the denial of arbitrators, which is the right of a party to a dispute. It is normal that the parties to the dispute expect fully that the arbitrators would solve the dispute fairly. This expectation brings in it the desire of the parties that the arbitrators must be experts, and must be completely neutral or independent. As he quoted an old saying "Justice Delayed is Justice Denied", that there would be no meaning of justice if it is not given at appropriate time.

We hope you enjoy your reading and we continue to welcome any comments arising from the content of the newsletter, contribution of articles or suggestion for improving the Newsletter. Our e-mail address : bani-arb@indo.net.id (our web site: www.baniarbitration.org).

Jakarta, March 2016

ENFORCEABILITY OF AN EXPERT DETERMINATION

Prof. Priyatna Abdurrasyid

Abstrak

Expert Determination atau Ketetapan Ahli didalam suatu proses penyelesaian sengketa adalah suatu pilihan dimana seorang ahli independen untuk suatu kasus khusus ditunjuk oleh kedua pihak untuk memutuskan masalah yang disengketakan. Keputusan ahli ini telah sebelumnya disetujui oleh para pihak serta bersifat mengikat dan final. Ketetapan Ahli biasanya bermanfaat untuk digunakan memecahkan masalah khusus seperti; Intelectual Property, Teknik, Sengketa Akunting, Konstruksi, Pembelian, dan seterusnya, karena dapat dengan cepat memutuskan suatu sengketa yang khusus sifatnya. Untuk itu maka keputusan arbitrase yang bersifat final dan mengikat dapat berupa ; (1) Putusan yang dibuat oleh Arbitrase Tribunal (Art. 54,60 UU 30/99), (2) Putusan mengikat yang dikeluarkan oleh lembaga Arbitrase (Art. 52,53 UU 30/99), (3) Putusan Expert Determination (Kesepakatan yang disetujui para pihak, Art. 6,3 dan 56 UU 30/99).

Kata Kunci : expert determination, ahli independen, intellectual property, teknik/konstruksi, akunting, pembelian.

Peaceful Dispute Settlement

Various mechanism of peaceful dispute settlement to achieve a final acceptable solution of a dispute by the intervention of a third party appointed to impose his decision. Once the mechanism is agreed upon, neither party can unilaterally withdraw from the process. The parties can still settle the dispute themselves but if not, then a binding determination will be made which, in principle, is enforceable through existing rules. What about an expert determination?

This is the referral of a dispute to an independent third party to resolve a dispute by using his own expertise. It is particularly useful for resolving valuation disputes, e.g. intellectual property, technical issues, accounting disputes, construction, purchasing, etc. It can be cheaper and quicker than arbitration as the expert can conduct his own investigations within an agreed time limit without relying upon or waiting for information to be provided by the parties. But there is no appeal from the decision of an expert. Unlike an arbitrator, an expert can be sued for negligence.

The main difference between expert determination and arbitration is that the expert can use his own knowledge to reach his conclusions and is not required to give reasons for his decision. In civil law systems experts are frequently retained to determine the subject matter of a contract such as to the price of sale agreements. The expert is empowered by the agreement reached by the parties and his decision is binding as a contract. For instance, parties can submit a dispute to BANI Arbitration Centre for expertise to obtain an expert determination as to contractual compliance or adjustments in performance in cases of great technical complexity. The expert is empowered to make findings within the limits set by the request for expertise, after giving the parties an opportunity to make submissions.

The results of the technical expert will be binding only if the parties have made an

express stipulation in advance to that effect. But in this case it is not clear if and how the determination of the expert can be challenged. The expert's intervention can help the parties to resolve questions amicably or simply to establish certain facts. Disputes or differences often arise between business parties any day as to whether or not proven, and economically recoverable by agreement. These disputes or differences agreed by parties can be referred to an independent expert (determination) unless the parties who are parties to the disputes otherwise unanimously agree.

The appointed expert should have a reasonable commercial, practical, technical on legal experiences in the area of dispute and shall be required to undertake to keep confidential matters coming to his knowledge by reason of his appointment and carrying it out. The expert who has been agreed upon or appointed shall act based on expert determination and not as an arbitrator. He shall investigate the dispute and make his decision on it in any manner that he shall see fit, subject to the following:

1. He shall observe the principle of procedural fairness and natural justice.
2. He shall make his decision in writing and include in it a statement of the reasons for making his decision.
3. The investigation and decision shall be kept confidential between the parties and him.
4. Based on the existent, valid simplified applicable laws.

The determination of expert shall be final and binding upon the parties, being agreed in advance and in writing, except that the expert may correct his decision where in his opinion it contains a clerical mistake, an error arising from an accidental slip or omission, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the decision. The increasing use of an expert determination to resolves disputes once they have arisen can be seen in some of the major construction projects carried out in recent years. Any dispute had to be referred to the Panel of Experts Determination and then, if either party so requested afterward could be referred to arbitration.

Court will usually not intervene when matter referred to determination of an expert. Expert evidence differs from expert determination. In an expert determination, the expert makes the final determination based on his own knowledge even without having heard arguments from the parties. On the other hand an expert in arbitration merely assists the tribunal to determine relevant issues, but the decision is ultimately the tribunal's own. Any expert report made by a tribunal appointed expert and its findings will be assessed by the related tribunal.

Conclusion

In summary, the decisions in arbitration are built in three different formats, all final and binding, namely:

a. Award rendered by an Arbitration Tribunal (Art. 54, 60 UU 30/99).
b. A binding opinion issued by an Arbitration Institution (Art. 52, 53 UU 30/99).
c. Decision resulting from an Expert Determination (agreement by parties, art. 6, 3, 56 UU 30/99).

Jakarta, 4 November 2010

ADJUDICATION IN INSURANCE

Dr. Junaedy Ganie, SE, MH, FCBArb., MCIArb., ANZIIF (Snr. Assoc.), AAIK (HC), CIP, CLU, ChFC
Frans Lamury, ANZIIF (Snr. Assoc.), AAIK (HC)

Abstrak

Makalah ini membahas implementasi ajudikasi dalam klaim asuransi. Proses adjudikasi adalah salah satu cara penyelesaian sengketa, seperti yang lazim dijalankan di Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI). Termasuk dalam pembahasan presensi masing-masing pihak didalam kontrak asuransi, biaya, kerahasiaan atau confidentiality, perwakilan para pihak, dan seterusnya. Statistik BMAI menunjukkan bahwa dari sebanyak 456 klaim asuransi yang ditolak, hasil adjudikasi dan mediasi yang dilaksanakan oleh BMAI mencatat adanya 216 klaim atau 48% yang diputuskan untuk dibayar oleh asuransi, 120 kasus klaim atau 26% ditarik kembali oleh insurer dan sisanya 120 kasus klaim atau 26% dinyatakan pihak asuransi tak bersalah.

Kata kunci : Adjudikasi, Aspek Hukum, Asuransi, Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI), Kontrak Asuransi, Confidentiality.

What is Adjudication?

The legal definition of Adjudication is the legal process of resolving a dispute. Three types of disputes that are resolved through adjudication: disputes between private parties, such as individuals or corporations; disputes between private parties and public officials; and disputes between public officials or public bodies. The requirements of full adjudication include notice to all interested parties (all parties with a legal interest in, or legal right affected by, the dispute) and opportunities for all parties to present evidence and arguments. The adjudicative process is governed by formal rules of evidence and procedure. Its objective is to reach a reasonable settlement of the controversy at hand. A decision is rendered by an impartial, passive fact finder, usually a judge, jury, or administrative tribunal.

A hearing in which the parties are given an opportunity to present their evidence and arguments is essential to adjudication. Following the hearing, the decision maker is expected to deliver a reasoned opinion. This opinion is the basis for review if the decision is appealed to a higher tribunal (a court of appeals). It also helps ensure that decisions are not reached arbitrarily. Finally, a well-reasoned opinion forces the judge to carefully think through his or her decision in order to be able to explain the process followed in reaching it.

Adjudication of a controversy generally ensures a fair and equitable outcome. Because courts are governed by evidentiary and procedural rules (in US as well as by stare decisis), the adjudicative process assures litigants of some degree of efficiency, uniformity, and predictability of result.

Adjudication at BMAI

In Indonesia, one of the institutions which conduct the adjudication is Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI). BMAI was established in September 2016. It is an association comprising of all insurance companies and reinsurance companies operating in Indonesia whose membership in the association is on a compulsory basis. The objective of its establishment is to provide fair and simple insurance claim settlement processes through an alternative dispute resolution in order to raise public

confidence and interest towards insurance protection while contributing to the increase in welfare of the society.

BMAI handles claims disputes between Insurers and Insurers/Policyholders/ Beneficiaries on both admission of liability and amount of loss or benefit payable from Insurers as well as with respect dispute on reinstatement or surrender of life insurance policy. It also deals with admission of liability and amount of claims disputes between members of BMAI. The mediation has the objective to resolve the disputes by engaging mediators and facilitating peaceful means without making any evaluation or award on the disputed case. The adjudication tribunal will conduct the hearings and issue the adjudication award in the event that amicable resolution through mediation process cannot be achieved.

Reasons for the BMAI establishment

There was a common phrase occasionally appeared in the readers column in a media that insurance persons are usually very persistent and that they will keep coming back trying to convince people of their need for insurance protection, be it for their personal assets, life or commercial property and interest or liability risks. They will always show up until a deal is closed but where are they at the time of claims? It is a reflection that settlement of claim disputes by the insurers are not always satisfactorily to the insurance consumers, known as Insureds. To the Insureds, especially individual policyholders, a claim rejection from an insurer may bring them to a dead end while keeping in mind that many cannot afford to go to costly legal proceedings at court or arbitration and especially when the amount involved can be smaller than the legal costs. Combined with their lack of knowledge towards policy terms and conditions and the heavy burden to carry being in a legal dispute, many might give up their rights while the consequence of such an attitude would only lead to stronger public perception of distrust towards insurance protection with no doubt will tarnish the reputation of the insurance industry.

Prior to the establishment of BMAI, insurance claims disputes were settled through arbitration proceedings or court. However, many of the claims involved small amounts while their legal costs could be higher than the amount in dispute while the process can take a long time (specifically on settlement through court). As such, settlement of claims in that nature through court or arbitration would be inefficient. Within the same period, insurance companies were facing a number of unfair bankruptcy legal suits from disputed claims such as the cases with Manulife and Prudential that had to go a long way to avoid bringing healthy insurers into liquidation from unfair bankruptcy risks, a situation which was later changed under the Bankruptcy Law Nr. 37 Year 2004 to the advantages of the insurance industry. The insurance industry was also happy to see that a judicial review attempt by legal practitioner to turn down what so called the exclusivity of the insurance and reinsurance companies were unsuccessful. In return, the insurance industry had to demonstrate its stronger sense of commitment to provide access for consumers to file for their claims and be placed in a stronger bargaining position.

Claims service is the display window of the insurance service providers. Effective, low cost and fair claim settlement process will contribute greatly to the reputation and credibility of the national insurance industry and hence would create better public acceptance and pave for bigger market share nationally while making the insurance industry as one of the preferred career destinations in Indonesia.

It is also believed that dispute settlement through a dedicated and specialised institution such as BMAI will be better and more effective than settlement through Consumer Dispute Settlement Agency or *Badan Penyelesaian Sengketa Konsumen* (BPSK) as mandated by Consumer Protection Law. Keeping such situations in mind, insurance practitioners had agreed upon the necessity to provide a simple, low cost and effective platform for the Insureds to bring disputed claims and hence the establishment of BMAI.

BMAI's Jurisdiction

According to BMAI, adjudication is a means of dispute resolution outside of arbitration and court proceeding that parties have agreed to be settled through BMAI and subject to the maximum claim amount set under the prevailing Rules and Procedures of BMAI. Adjudication process at BMAI is designed as a simplification of an arbitration process wherein there is only one written statements from each party is required i.e. the Claimant's Statement of Claims and the Respondent's Statement of Defence. There is neither replication nor rejoinder.

BMAI will deal with adjudication request from eligible Claimant as follows:

1. When member of BMAI cannot resolve a dispute directly with the Claimant based on the claims filed by the Claimant within 30 days since the objection from the Claimant is received by the Respondent.
2. The amount of claim or benefit in dispute is not more than Rp 750 million per claim for general insurance and Rp 500 million per claim for life insurance.
3. The nature of claims submitted not on the decision of commercial consideration, on pricing policy or other policies such as premium rate, cost and foreign exchange rate or any case being under investigation by the authority.

Existence of BMAI under the insurance contract.

All insurers being the members of BMAI are required to attach an "Important Notice" to each insurance policy issued to the Insureds/Policyholders containing a statement that in the event they do not agree to any claim declinature by the Insurers, they are entitled to bring the claim to BMAI to resolve through a mediation or adjudication provided any one claim will not exceed Rp 750 million for general insurance and Rp 500 million for life insurance. The notice clearly states that the mediation and adjudication services are provided free of charge to the consumers and that they are free to accept or decline the adjudication award of BMAI.

In addition, all members of BMAI are also required to put in their letter of claims repudiation to the Insureds – and this is very effective- an "Important Notes" which states that although their claim is rejected, but if they do not agree with the reasons of repudiation, they may bring the case to BMAI for settlement through mediation and adjudication process. Again, the services are provided free of charge and that they are free to accept or decline the adjudication award of BMAI.

As the Dispute Clause attached to the insurance policy has stated the existence and function of BMAI, the Important Notice above is somewhat redundant albeit, the current Dispute Clause needs rewording in order for the sequence of events leading from the mediation process to the adjudication proceeding to flow clearly. It is better to transfer vital elements from the Important Notice which has not been incorporated under the Dispute Clause to the Dispute Clause to convert the relevant important provisions from merely as an insurer's statement into an agreement stated in the insurance policy binding both insurers and the insureds.

Cost of Adjudication

In accordance with its mission to provide low cost dispute resolution and increase insurance protection credibility before the public, BMAI provides adjudication without charging any cost to either party in dispute, except for the cost of any witness or expert brought to the proceeding to be borne by the requesting party. BMAI survives from the membership fee payable from all the members.

Confidentiality

The adjudication process is closed to the public and confidential in nature. Either party is not permitted to communicate with any or all members of the tribunal in any way except during the hearing process. BMAI or either party may claim for indemnification for loss or damage arising out of any breach of confidentiality or assurance for avoidance of reoccurrence of similar breach.

Representation

Both parties in dispute have to appear at the hearing without the presence of either third party lawyer or Claimant's broker. No legal representation is allowed at the hearing. Individual Claimant may be accompanied by up to 2 persons who will have no right to speak at the hearing except at the permission from the tribunal. Institutional Claimant has to appoint one and at the most 3 persons, who should be their own permanent employees, as the permanent authorised representative at the adjudication process. Respondent has to appoint one and up to 3 persons, who should be their own permanent employees, as the permanent authorised representative at the adjudication process.

Period of adjudication process

Adjudication process to be completed in no more than 60 days from the date of the establishment of the Tribunal and may be extended based on specific reasons. BMAI applies strict and shorter time limit for each stage in the adjudication process in order to ensure that it can provide a simpler, faster and efficient claims dispute settlement.

Law, Language and Place of Adjudication

The applicable law is the law of the seat of the adjudication. The adjudication process is conducted in the Indonesian language unless both parties agree to select any other language. Adjudication process is to be held at the place determined by the Board of BMAI.

Nature of the Adjudication

It is compulsory for the Respondent to abide by the award delivered by the Tribunal while the Claimant is entitled to opt whether to accept or decline the award. The award will become final and bind both parties once the Claimant has agreed with the award. Neither party may refuse or provide injunction against the award but to adhere to the award based on utmost good faith. BMAI will closely monitor compliance of the parties to the contents of the award and will liaise with the Financial Service Authority (OJK) on any kind of non-compliance to the award.

Adjudication Process

1. In the event that a dispute cannot be resolved through a mediation process, Claimant may submit a request for adjudication based on the prescribed form and complete supporting information to the Chairman of BMAI and such request for adjudication must be made within 10 days from the date a mediation process declared to be unsuccessful to reach amicable settlement.
2. The Board of BMAI has to advise Claimant confirmation of acceptance ~~of~~ or declinature of the adjudication request within 10 days of receipt of such request. In case of a declinature, BMAI has to provide reason (s) for the

declinature. Claimant is allowed to resubmit their request by complying to the conditions stated within 15 days from the date of BMAI's declinature.

3. Prior to the commencement of the adjudication process, each party will have to sign a prescribed Adjudication Agreement Letter stating among others as follows:
   a. Either party will not involve BMAI as witness whenever the dispute will be brought to arbitration or court and nor will they demand adjudicator or BMAI to surrender, in part or in whole, the adjudication documents.
   b. Both parties will submit and bound entirely by the rules and procedure of BMAI.
   c. Both parties will hold BMAI and the member of the Tribunal harmless of any claim or indemnity arising out of their action or any other matter related to their services or the dispute or claim submitted by the Claimant.
4. According to its Rules and Procedures, the Board of BMAI will form an Adjudication Tribunal of 3 adjudicators and in each tribunal at least one member is to possess legal profession background. According to the official Profile of the Association, the Tribunal of 3 comprises of 1 former judge at court of justice and 2 former insurance practitioners and it is the Chairman of BMAI who is responsible to form the Tribunal. One of the members will be the appointed Chairman of the Tribunal. Only BMAI's registered adjudicator may be appointed as member of the tribunal.
5. In case there is a need to extend the period of submission of Response from the Respondent, such delay may not be longer than 7 days from the initial date set.
6. Cancellation of a Request for Adjudication after submission of Response from the Respondent may only be granted by the agreement of the Respondent.
7. Any change to the Request for Adjudication after submission of Response from the Respondent may only be allowed by the agreement of the Respondent provided the change relates to factual matters not on the legal basis of the Adjudication Request.
8. Examination of the dispute is conducted in writing. Oral examination or hearing only at the discretion of the Tribunal.
9. Both parties have equitable rights and opportunity to put forward the statement of cases, submit evidences and their respective witnesses.
10. Either party may not record the hearing process by any means.
11. Tribunal will only examine the case based on a single Claim Proposal and a single Response from the other party. There shall be subsequent Submission and Response or Conclusion as the case of the common arbitration proceeding in Indonesia.
12. Should the parties agree to try to reach an amicable settlement during the course of the adjudication, the Tribunal may allow the parties to postpone the adjudication process up to maximum of 30 days.

Has BMAI met its intended role?

From the period of its establishment in September 2006 to 2013, BMAI had handled 476 cases. Out of which, 252 cases were settled amicably by mediation and 35 cases were resolved by adjudication. There were 90 cases found to be outside the jurisdiction of BMAI and interestingly there were 99 cases withdrawn by the Claimants. There is

no outstanding case to date. In average there were 5.47 cases per month and 65.7 cases per year. In 2014 and 2015 there were 51 cases and 50 cases respectively in total. The higher number of cases settled by mediation had also reflected the competence of the mediators to bring disputing parties to amicable resolution.

From the total number of insurance claims dispute cases brought by the insuring parties to be resolved by BMAI, we can appreciate the positive impact BMAI has brought to the insurance businesses. The smaller number of cases in 2014 and 2015 might had reflected BMAI's contribution to the better attitude of the insurers in their daily claims handling and hence claims rejections might have reduced. In terms of the benefits BMAI has brought to the insurers, policyholders and beneficiaries as the following statistics show.

Life Insurance

Out of 165 claims cases rejected by insurers and brought to BMAI for mediation, there were 70 cases (42%) that insurers were liable to pay and there were 49 cases (30%) insurers were not liable to pay while on the other 46 cases (28%) claimants decided to withdraw.

Out of 25 cases that were not resolved by mediation and subsequently brought to adjudication proceeding, the tribunal awarded that there were 18 cases (72%) that insurers had to pay. This made it in total, insurers at the end, had to pay 88 cases or 53.3% of the claims they initially rejected.

General insurance

There were 236 cases brought to the mediators at BMAI and out of which insurers were liable to pay 105 cases (45%) and 57 cases (24%) insurers did not have to pay and there were 74 cases (31%) claimants agreed to withdraw. There were 30 cases not resolved by mediation that were brought to adjudication tribunal and out of which 23 cases (77%) insurers had to settled and 7 cases (23%) insurers were not liable. It made in total, insurers had to pay 128 cases or 54% of claims initially rejected.

Social insurance

There was no claim dispute brought to BMAI under social insurance.

From the above statistics, we can see the insurance industry had rejected 456 claims that the Insureds/Policyholders/ Beneficiaries had brought to BMAI. Following the mediation and adjudication services provided by BMAI, insurers had to pay 216 claim cases (48%) and claimants decided to withdraw-120 cases (26%) while for the remaining–120 cases or 26% that insurers were indeed not liable.

Conclusion

The above figures have demonstrated that the insurance industry has successfully established a mechanism to control the attitude of their members to improve quality of their services to their customers by the establishment of BMAI. By doing so, the credibility and public confidence and interest towards insurance businesses will also increase. To the benefit of the society, the insureds whom without the existence of BMAI might never be able to find a fair, simple and low cost means to resolve and recover their rights with respect the claims insurers have rejected. Both the mediation and adjudication proceeding would have provided a learning experience to the insurers involved. The number of claims the claimants finally withdrew also proved that not all claims lodged with insurers are claimable and this situation indicates the need for the insurers to ensure a fair and efficient claim assessment system to be put in place.

Jakarta, 22 Februari 2016

Dr. Junaedy Ganie, SE, MH, FCBArb., MCIArb., ANZIIF (Snr. Assoc.), AAIK (HC), CIP, CLU, ChFC

A seasoned professional, a business leader and entrepreneur with a solid proven track record. His experience as a business practitioner and his legal qualification combined with his past experiences in providing effective risk solutions to various kinds of businesses from investment, banking and finance, property, retail, transportation, construction, manufacturing, pharmaceutical, telecommunication and other infrastructure projects to mining, shipping, aviation, petrochemical, oil and gas, forestry and plantation have given him invaluable advantages to his profession as an arbitrator and mediator.

Junaedy has been an arbiter at BANI since 2007 and at BMAI from 2014. His past work experiences had been mostly with US joint venture or US affiliated companies comprising AIG, Cigna, IBS (then associated with Citicorp insurance Brokers) and including in representing Lippo Group for 16 years as CEO of Aon Indonesia. His last executive function was as the President Director of BNI Life since 2011 to 2014 and was responsible for the successful transformation of the company.

Junaedy Ganie is a Doctor in Business Law from University of Padjadjaran (cum laude). Earlier educations include undergraduate study in Economics and post graduate study in Business Administration (UK based De Montfort) and Senior Management Course at INSEAD Business School in France. His professional qualifications are as Member of Chartered International Arbitrator (MCIArb), Fellow Charter BANI Arbitrator (FCBArb), Chartered Life Underwriter (CLU), Chartered Financial Consultant (ChFC), a Certified Insurance Professional (CIP) and Senior Associate, both from Australian & New Zealand Institute of Insurance and Finance and is a Fellow/Ahli Asuransi Kerugian (on honoris cause basis), AAIK (HC) from Asosiasi Ahli Manajemen Asuransi Indonesia (AAMAI).

Junaedy is author of Hukum Asuransi Indonesia text book.

Frans Lamury, ANZIIF (Snr. Assoc.), AAIK (HC)

Born in Flores (NTT) on 23 July 1942. Presently, holding several positions i.e. The Chairman of Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI), Independent Commissioner of Lippo General Insurance Tbk, listed as Arbitrator at BANI Arbitration Center and at BMAI, Member of Dewan Pakar of Asosiasi Ahli Managemen Asuransi Indonesia (AAMAI).

Started his insurance career in 1962. Joined several insurance companies both national and joint venture, occupied several managerial position, became President Director of Royal Indrapura Insurance Company in the year 1987. Joined PT Lippo General Insurance Tbk in the year 2000 as Vice President Director and retired at the end of year 2004.

Formal education : finished high school in the year 1961. Joined several local universities but none completed.

Gained insurance knowledge from Australian Insurance Institute, Melbourne and Chartered Insurance Institute, London and also through insurance courses and training from both local and overseas institutions.

Holding Senior Associate Membership of ANZIIF (Autralia and New Zealand Institute of Insurance and Finance) and the certificate of Ahli Asuransi Indonesia (Kerugian) from Asosiasi Ahli Managemen Asuransi Indonesia (AAMAI).

Since the year 2000 until now, often appointed as Member as well as Chairman of Ad-Hoc Arbitration Tribunals dealing with general insurance claims disputes.

Huala Adolf is professor at Faculty of Law, Universitas Padjadjaran, Bandung, Indonesia. He is Chairman of Center for Arbitration and Alternative Dispute Resolution (Universitas Padjadjaran). He is also an Arbitrator and Fellow (FCBArb) of BANI Arbitration Center, Jakarta, Indonesia and Vice Chair of Indonesian Arbitrators Institute (IArbI). He published books and articles mainly on arbitration, international trade law and international contract law.

PENGINGKARAN TERHADAP ARBITER

Prof. DR. Huala Adolf

"Justice delayed is justice denied"
(William Penn, 1693)

Abstract

The denial of arbitrators is the right of a party to a dispute. This right is normal. The parties to the dispute expect fully that the arbitrators would solve the dispute fairly. This expectation brings in it the desire of the parties that the arbitrators must be experts, and must be completely neutral or independent. This paper merely describes the arbitration rules regulating the denial of arbitrators. It also provides suggestion as to how to anticipate them.

Keywords: *denial, arbitrator, the arbitration rules.*

Pengantar

Salah satu permasalahan yang mungkin dan dapat timbul dalam praktek arbitrase di Indonesia adalah masalah pengingkaran terhadap arbiter. Masalah ini terutama timbul karena salah satu pihak, pemohon atau termohon, merasa atau memiliki bukti yang menimbulkan kesangsian terhadap kenetralan atau independensi terhadap arbiter pilihan pemohon atau termohon.

Dalam suatu klausul arbitrase, biasanya dapat ditemukan klausul arbitrase yang di dalamnya disebutkan jumlah arbiter yang akan menangani sengketa. Termasuk di dalamnya hak suatu pihak untuk menunjuk arbiter pilihannya dan pihak lainnya berhak pula menunjuk arbiter pilihannya. Dua orang arbiter yang ditunjuk masing -masing pihak akan duduk sebagai anggota majelis arbitrase. Dua anggota arbiter ini akan menunjuk arbiter ketiga yang akan bertindak sebagai ketua majelis arbitrase. Syarat arbiter dalam Pasal 12 UU Nomor 30 Tahun 1999 antara lain bahwa ia:

(1) Tidak mempunyai hubungan keluarga sedarah atau semenda sampai dengan derajat kedua dengan salah satu pihak bersengketa;

(2) Tidak mempunyai kepentingan finansial atau kepentingan lain atas putusan arbitrase[1].

Terhadap hak suatu pihak untuk mengangkat arbiter ini dapat ditanggapi oleh pihak lainnya dengan hak ingkar. Hak ingkar adalah hak pihak lain untuk mengingkari arbiter pilihan pihak lain. Pasal 22 UU Nomor 30 Tahun 1999 menyatakan:

(1) Terhadap arbiter dapat diajukan tuntutan ingkar apabila terdapat *cukup alasan dan cukup bukti otentik* yang menimbulkan keraguan bahwa arbiter akan melakukan tugasnya tidak secara bebas dan akan berpihak dalam mengambil putusan.

(2) Tuntutan ingkar terhadap seorang arbiter dapat pula dilaksanakan apabila terbukti adanya hubungan *kekeluargaan, keuangan atau pekerjaan dengan salah satu pihak atau kuasanya*. (*Cetak miring oleh penulis*).

Selanjutnya, Pasal 12 huruf (c) dan (d) di atas menegaskan pentingnya prinsip kenetralan dan prinsip independensi arbiter di dalam memutus sengketa. Kenetralan dan independensi yang dipegang teguh arbiter akan menambah integritas (majelis) arbitrase di dalam memutus sengketa. Dengan mendasarkan pada integritas ini, para pihak bukan saja akan menghormati majelis arbitrase tetapi juga putusan yang dikeluarkannya. Pasal 12 huruf (c) dan (d) mengaitkan kenetralan dan independensi ini dengan hubungan keluarga sedarah atau semenda sampai dengan derajat kedua dan tidak mempunyai hubungan finansial dengan para pihak. Pasal 22 menyebutkan syarat hubungan keluarga. Apabila dikaitkan dengan Pasal 12, maka hubungan ini terkait dengan hubungan keluarga sedarah atau semenda sampai dengan derajat kedua dengan salah satu pihak yang bersengketa.

Kata "kepentingan finansial" dalam Pasal 12 dapat pula dikaitkan dengan batasan "hubungan pekerjaan dengan salah satu pihak atau kuasanya." Hubungan pekerjaan mengindikasikan bahwa pernah terjadi suatu hubungan pemberian suatu jasa tertentu yang di dalamnya salah satu pihak membayar suatu jumlah uang atas pekerjaan jasa yang diberikan oleh pihak lain. Sedangkan syarat kedua dari huruf (d) yaitu kalimat "kepentingan lain atas putusan arbitrase" tidaklah jelas benar pengertiannya. Ketidakjelasan ini menggu-gurkan atau membuka peluang alasan lain berupa "kepentingan lain" di samping yang digariskan dalam Pasal 12 huruf (c) dan (d).

Pada umumnya arbiter yang ditunjuk oleh pihak lainnya dan ternyata kemudian secara sukarela mengundurkan diri, pihak yang arbiter pilihannya diingkari akan melakukan tindakan berikut: pertama, ia akan memulai dari awal mencari arbiter pengganti pilihannya. Kedua, karena arbiternya diingkari, ia akan pula melakukan tindakan sama yaitu mengingkari pula arbiter pilihan pihak lainnya. Alasan yang pernah diangkat oleh suatu pihak terhadap arbiter pilihan suatu pihak adalah karena pihak yang menunjuk arbiter ini adalah berasal dari satu almamater atau perguruan tinggi yang

[1] Priyatna Abdurrasjid menjabarkan keadaan-keadaan yang mana seorang arbiter dianggap menunjukkan sikap memihak: a. Arbiter memiliki hubungan kreditur dan debitur dengan salah satu pihak; b. Arbiter membeli klaim dari salah satu pihak dalam arbitrase; c. Arbiter menunjukkan sikap bermusuhan kepada salah satu pihak; d. Arbiter berprasangka terhadap salah satu pihak; e. Arbiter memiliki perselisihan atau hubungan yang dipaksakan dengan salah satu pihak. (Priyatna Abdurrasjid, *Arbitrase dan Alternatif Penyelesaian Sengketa (APS)*, Jakarta: Fikahati, Edisi 2, 2011, hlm. 81).

sama. Bisa pula diajukan alasan bahwa arbiter yang dipilih adalah mantan dosen atau pembimbing karya tulisnya, apakah itu makalah, skripsi, atau karya ilmiah lainnya. Atau dapat pula diangkat alasan karena arbiter yang dipilih berasal dari suatu region (provinsi atau pulau) tertentu di Indonesia yang sama dengan region asal dari pihak yang memilihnya.

Pihak yang diingkari kemudian berupaya mencari alasan-alasan yang menurutnya sah dan kuat untuk digunakan sebagai alasan untuk mengingkari kembali arbiter pilihan pihak lainnya. Alasan yang diusungnya biasanya juga alasan yang tidak jauh dengan alasan yang dikemukakan oleh pihak lawannya itu. Apabila pada akhirnya kedua belah pihak sudah sulit mencari alasan untuk mengingkari arbiter pilihan pihak lainnya, sasaran yang kemudian dapat diajukan pengingkaran adalah ketua majelis arbitrase. Alasannya dapat sama, asal muasal perguruan tinggi, asal muasal region, atau alasan lainnya yang dapat ditemuinya.

Tindakan saling resiprositas terhadap arbiter pilihannya atau di dalam UU tidak disebutkan berapa kali dapat dilakukan. Hal ini membawa konsekuensi yang cukup fatal bagi arbitrase, terutama pihak pemohon yang berupaya mencari keadilan. Konsekuensi ini berupa berlarut-larutnya proses pembentukan majelis arbitrase dan kemungkinan tidak dapat dilaksanakannya persidangan karena susunan majelis arbitrase terus menerus tidak pernah terjadi karena mendapat pengingkaran dari para pihak.

Bertolak dari latar belakang tersebut, permasalahan utama dalam tulisan ini adalah apa dan bagaimana pengaturan hukum acara arbitrase dalam hal terjadinya pengingkaran yang timbul berulang-ulang ini? Dan bagaimana pula solusi untuk menghindari berlarut-larutnya terbentuk-nya susunan majelis arbitrase untuk dapat segera memeriksa sengketa dan memutus sengketa? Bukankah ungkapan termasyur William Penn di atas benar adanya yaitu bahwa "keadilan yang tertunda-tunda berarti pengingkaran terhadap keadilan"?

B. Hak Ingkar dalam Peraturan Prosedur Arbitrase

1. Hak Ingkar

Hak ingkar adalah hak yang dimiliki oleh para pihak terhadap adanya keraguan atau bias terhadap seorang arbiter. Hak ingkar terhadap seorang (atau lebih) arbiter merupakan lembaga hukum yang dikenal dalam hukum arbitrase. Pengaturan mengenai hak ini dimuat semata-mata untuk menentukan bahwa susunan majelis, terutama arbiter menegakkan teguh kenetralan dan kemandirian di dalam memutus perkara. Beberapa sarjana atau literatur mengaitkan kewajiban untuk menjaga kenetralan dan kemandirian ini dengan istilah 'bias'.

Bila terbukti seorang arbiter telah melakukan 'bias', menurut beberapa sarjana arbiter dapat dinon-aktifkan, diganti[2], atau bahkan dimintakan pertanggung-jawaban atas perbuatannya itu[3]. Hak ini harus dikemukakan sebelum majelis arbitrase baru saja terbentuk. Bila salah satu pihak merasa ada keraguan terhadap seorang arbiter namun ternyata ia mengikuti persidangan, tindakannya ini dapat dianggap sebagai penerimaan secara diam-

[2] Priyatna Abdurrasyid, *Op.cit.,* hlm. 81.

[3] Paul D. Friedland, *Arbitration Clause for International Contracts*, New York: Jurisnet, 2007, hlm. 18n (mengutip pendapat antara lain Craig, Park and Paulsson, Alan Phillip, dll.).

diam dan dianggap telah menanggalkan hak ingkarnya[4].

Redfern dan Hunter mengungkapkan, pengingkaran terhadap seorang arbiter adalah peristiwa yang jarang terjadi. Tetapi, kejadian pengingkaran terhadap arbiter, baik arbiter anggota atau ketua majelis arbitrase, dapat terjadi terutama bila (para) pihak mengangkat ahli hukum ternama untuk mewakilinya[5]. Menurut Redfern dan Hunter, upaya pengingkaran bukan saja dapat menyebabkan tertundanya persidangan arbitrase, tetapi juga perlu menjadi pertimbangan bagi pihak lain (pemohon) mengenai (alasan) pengingkaran ini supaya susunan majelis yang akan menangani sengketanya menjadi lancar di dalam melaksanakan tugasnya sebagai arbiter[6]. Juga bagi lembaga arbitrase, adanya pengingkaran ini pun perlu mendapat perhatian karena upaya pengingkaran ini paling tidak akan menunda-nunda jalannya persidangan arbitrase.

2. Prinsip Independen dan Impartiality

Biasanya alasan pengingkaran terhadap seorang arbiter yang ditunjuk pihak lain dapat karena dua alasan utama, yaitu alasan kenetralan *(impartiality*) dan alasan kemandirian (*independence*). Dalam arbitrase, kedua kata ini menentukan integritas majelis arbitrase di dalam memutus perkara yang diserahkan kepadanya[7].

a. Independent

Kata "independent" memiliki pengertian yang berbeda dengan *impartiality*. Margaret Moses mengartikan kenetralan (*independent*) ke dalam tiga hal. Pertama, bahwa arbiter tidak memiliki hubungan atau kepentingan keuangan di dalam sengketa atau hasil dari sengketa. Kedua, arbiter tidak "bergantung pada salah satu pihak karena adanya keuntungan, misalnya karena adanya hubungan pekerjaan atau klien. Ketiga, bahwa arbiter tidak memiliki hubungan bisnis atau hubungan profesional dengan salah satu pihak[8]. Sementara, James H. Carter et.al., mengartikan independensi sebagai "seseorang yang tidak memiliki hubungan keuangan, personal atau profesional dengan suatu pihak dan tidak akan mendapatkan keuntungan dari putusan arbitrase"[9]. Selanjutnya, Rubino-Sammartano mengartikan independen sebagai adanya kekurangan berupa ketergantungan (pada suatu pihak). Beliau menggunakan istilah "ketergantungan psikologis" (*psychological dependence*) dari seorang arbiter[10].

Seorang arbiter akan tidak netral

4 Priyatna Abdurrasyid, *Op.cit.,* hlm. 81.

5 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, 1986, hlm. 175. Dalam berbagai literatur, upaya "pengingkaran" lebih menonjol dalam hal pengingkaran salah satu pihak terhadap keabsahan perjanjian atau klausul arbitrase. Pengingkaran ini tampak pula dalam berbagai analisis mengenai pengingkaran terhadap putusan arbitrase. Pengingkaran ini diajukan semata-mata (mungkin) karena pihak yang mengajukan pengingkaran ini kalah atau dikalahkan dalam putusan arbitrase. (Lihat misalnya: Stuart Dutson et.al., *International Arbiration: A Practical Guide*, London: Globe Business Publ., 2012, hlm. 96 atau 207 dst.).

6 Redfern and Hunter, *Ibid*.

7 Pengertian Netral dan Independen dibahas panjang lebar dalam: Mauro Rubino-Sammartano, *International Arbitration: Law and Practice,* The Netherlands: Kluwer, 2nd.ed., 2001, hlm. 330 dst., Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge: Cambridge U.P., 2012, hlm. 135 dst., dan Simon Greenberg et.al., *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge: Cambridge U.P., 2012, hlm. 274.

8 Margaret L. Moses, *Op.cit.,* hlm. 136.

9 James H. Carter, et.al., "Appointment, Disclosures, and Disqualification of Neutral Arbitrators," dalam: James H. Gaitis (eds.), *Guides to Best Practice in Commercial Arbitration.,* New York: Juris, 2010, hlm. 6. (Beliau mengungkapkan: "*...one who has no close financial, personal, or professional relationship with a party and will not profit from the arbitration's resolution*").

10 Mauro Rubino-Sammartano, *Op.cit.,* hlm. 330.

(independen) apabila ia berasal dari kantor hukum yang sama dengan salah satu pihak. Sesuatu pihak pernah pula mendalilkan unsur ketergantungan ini dikaitkan karena arbiter pilihan salah satu pihak adalah salah satu partner atau *associate* dengan ketua majelis arbiter dalam suatu firma hukum. Atau, apabila sengketanya bersifat internasional, arbiter berasal dari kewarganegaraan atau kebangsaan yang sama dengan salah satu pihak[11].

Sedangkan Simon Greenberg memberi batasan independen sebagai "*the absence of actual, identifiable relationships with a party to proceedings or someone closely connected to the party*" (atau tidak adanya hubungan yang nyata atau yang dapat ditunjukkan dengan salah satu pihak dalam suatu persidangan atau seseorang yang memiliki keterikatan yang dekat dengan suatu pihak)[12]. Menurut Greenberg, ada tidaknya tolok ukur untuk menentukan kata independence ini bergantung pada adanya 'bias'. Tolok ukur ini hanya melihat unsur yang dapat dilihat ("*tangible element*"), yaitu (adanya) fakta-fakta yang dapat ditunjukkan atau dibuktikan[13].

b. Impartiality

Margaret Moses mengartikan *impartiality* atau kemandirian ini sebagai "tidak bias karena adanya setiap sengketa dan bahwa arbiter tidak memiliki alasan untuk memberi perlakuan lebih kepada pihak lainnya"[14] James H. Carter mengartikan impartiality sebagai seseorang arbiter yang bersikap terbuka dan tidak menunjukkan bias atau prasangka tehradap salah satu pihak atau terhadap perkaranya[15]. Sedangkan sarjana lainnya Rubino-Sammartano menyatakan bahwa kata *impartiality* lebih mengarah kepada "*state of mind*" dari seorang arbiter[16]. Kriteria "*state of mind*" ini dinyatakan pula oleh Redfern dan Hunter. Kedua sarjana ini mengemukakan sebagai berikut: "*... is thus a subjective and were abstract concept than independence, in htat it involves primarily a state of mind. This presents special difficulties in terms of measurement*...[17]".

Untuk impartiality ini Rubino-Sammartano mengkategorikannya sebagai "*fundamental requirement*" (persyaratan dasar)[18]. Misalnya, seorang arbiter yang memiliki hubungan erat dengan salah satu pihak dapatlah dianggap ke dalam kategori ini. Contoh lainnya adalah dalam sengketa perdagangan yang salah satu pihaknya adalah suatu organisasi perdagangan. Arbiter yang dipilih adalah anggota dari organisasi perdagangan itu. Dalam keadaan seperti ini, arbiter itu dapat dianggap sebagai tidak netral (*partial*)[19].

Impartiality tidak terkait dengan tampakan bias dari luar. Unsur ini tidak mensyaratkan adanya hubungan yang nyata ("*tangible relationship*") yang dapat menyebabkan seorang arbiter bertindak tidak adil. Tidak adanya impartiality ini dapat disebabkan

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11 Mauro Rubino-Sammartano, *Op.cit.,* hlm. 330.

12 Simon Greenberg et.al., *Op.cit.,* hlm. 275.

13 Simon Greenberg et.al., *Op.cit.,* hlm. 275.

14 Margaret L. Moses, *Op.cit.,* hlm. 136.

15 James H. Carter, *Op.cit.,* hlm. 7. (Beliau mengungkapkan seorang arbiter "*is one who is open-minded and neither biased in favour of not prejudiced against a particular party or its case*").

16 Mauro Rubino-Sammartano, *Op.cit.,* hlm. 331. "State of Mind" atau perasaan subyektif dari arbiter tersebut. Menurut hemat penulis, dengan kata "state of mind" ini lebih menekankan kepada pengungkapan yang bersangkutan (arbiter) mengenai kemungkinan adanya konflik kepentingan dengan salah satu pihak.

17 Redfern and Hunter, *Op.cit*., hlm 239, para. 4-55, terkutip dalam Simon Greenberg et.al., *Op.cit.,* hlm. 276.

18 Mauro Rubino-Sammartano, *Op.cit.,* hlm. 331.

19 Mauro Rubino-Sammartano, *Op.cit.,* hlm. 330.

oleh adanya motif yang tidak dapat diukur atau motif psikologis atau prasangka-prasangka[20].

Dari kedua pengertian di atas, tampak ada perbedaan yang cukup tipis. Karena itu, yang paling penting untuk diperhatikan bagi seorang arbiter adalah, sebelum memutus untuk menerima perkara, ia perlu mengkaji dan mempertimbangkan dirinya apakah ia memiliki hubungan keuangan, atau keuntungan pribadi dari putusan yang akan dikeluarkannya. Pertanyaan yang juga penting adalah, apakah ia memiliki hubungan masa lalu atau sekarang dengan para pihak atau kuasanya.

James H. Carter memberi nasihat berikut kepada calon arbiter yang dipilih dan akan menangani sengketa. Beliau mengingatkan, untuk mencegah terjadinya polemik yang mungkin akan timbul, segera setelah seorang arbiter dipilih untuk menangani suatu perkara, ia harus terlebih dahulu mengevaluasi persoalan kenetralan dan kemandirian. Termasuk di dalamnya ia harus menilai atau mengevaluasi nama-nama para pihak, kuasa (hukumnya), dan juga arbiter lainnya yang dituntuk untuk memutus perkara[21].

3. Hak Ingkar dalam Beberapa Aturan Arbitrase

Kewajiban arbiter untuk mengungkapkan kenetralan dan kemandiriannya dalam arbitrase dan hak ingkar para pihak terhadap arbiter termuat di dalam prosedur beracara arbitrase di semua lembaga arbitrase. Berikut adalah beberapa prosedur beracara arbitrase di BANI. Sebagai pembanding, peraturan beracara arbitrase menurut UNCITRAL Arbitration Rules, peraturan prosedur arbitrase ICC dan peraturan prosedur arbitrase SIAC.

a. Peraturan Prosedur Arbitrase BANI

Peraturan Prosedur Arbitrase BANI merupakan peraturan berarbitrase yang berlaku dan dipraktikkan dalam praktik acara arbitrase di bawah BANI. Sebagai lembaga arbitrase, BANI menerapkan dua kebijakan hukum mengenai kenetralan dan kemandirian arbitrase ini. Pertama, sebelum susunan majelis arbitrase ditetapkan, setiap arbiter yang dipilih sebagai anggota dan ketua majelis wajib membuat dan menandatangani pernyataan diri tidak memihak. Pernyataan ditandatangani di atas meterai.

Kedua, kewajiban mengenai kenetralan dan kemandirian ditegaskan di dalam peraturan arbitrase BANI dalam Pasal 12 ayat 2. Pasal ini menyatakan kewajiban kepada arbiter untuk mengundurkan diri apabila ia memiliki pertentangan kepentingan dengan perkara atau para pihak yang bersengketa. Sebaliknya seorang arbiter tidak boleh mengundurkan diri dari kedudukannya setelah susunan majelis arbitrase terbentuk. Pasal 12 ayat 2 ini menyatakan:

> Calon atau arbiter yang mempunyai pertentangan kepentingan (*conflict of interest*) dengan perkara atau para pihak yang bersengketa wajib untuk mengundurkan diri.
>
> Sebaliknya apabila Majelis telah terbentuk maka tidak seorang pun arbiter boleh mengundurkan diri dari kedudukannya kecuali terjadi pengingkaran terhadap dirinya sesuai dengan ketentuan-ketentuan Peraturan Prosedur ini dan peraturan perundang-undangan."

Peraturan prosedur BANI memuat pengaturan mengenai hak ingkar ini dalam

[20] Simon Greenberg, *Op.cit.,* hlm. 276.

[21] James H. Carter, *Op.cit.,* hlm. 7.

Pasal 11 ayat (1) yang berbunyi:

> "Setiap arbiter dapat diingkari apabila terdapat suatu keadaan tertentu yang menimbulkan keraguan terhadap netralitas dan/atau kemandirian arbiter tersebut. Pihak yang ingin mengajukan pengingkaran harus menyampaikan pemberitahuan tertulis kepada BANI dalam waktu paling lama 14 (empat belas) hari sejak diberitahukan identitas arbiter tersebut, dengan melampirkan dokumen-dokumen pembuktian yang mendasari pengingkaran tersebut. Atau, apabila keterangan yang menjadi dasar juga diketahui pihak lawan, maka pengingkaran tersebut harus diajukan dalam waktu paling lama 14 (empat belas) hari setelah keterangan tersebut diketahui pihak lawan."

Terhadap pengingkaran, Pasal 11 ayat 2 meletakkan kewajiban kepada BANI untuk membentuk *tim khusus* untuk meneliti bukti-bukti yang diberikan pihak yang mengingkari. Pasal 11 ayat 2 menyatakan:

> "BANI wajib meneliti bukti-bukti tersebut melalui suatu tim khusus dan menyampaikan hasilnya kepada arbiter yang diingkari dan pihak lain tentang pengingkaran tersebut. Apabila arbiter yang diingkari setuju untuk mundur, atau pihak lain menerima pengingkaran tersebut, seorang arbiter pengganti harus ditunjuk dengan cara yang sama dengan penunjukan arbiter yang mengundurkan diri, berdasarkan ketentuan-ketentuan pasal 10 di atas. Atau jika sebaliknya, BANI dapat, namun tidak diharuskan, menyetujui pengingkaran tersebut, Ketua BANI harus menunjuk arbiter pengganti."

Pasal 11 ayat 3 peraturan prosedur BANI menyatakan bahwa bila pihak lain atau arbiter tidak menerima pengingkaran dan Ketua BANI juga tidak menerimanya, maka arbiter yang diingkari harus melanjutkan tugasnya sebagai arbiter. Pasal 11 ayat 3 mengenai Kegagalan Pengingkaran menyatakan:

> "Apabila pihak lain atau arbiter tidak menerima pengingkaran itu, dan Ketua BANI juga menganggap bahwa pengingkaran tersebut tidak berdasar, maka arbiter yang diingkari harus melanjutkan tugasnya sebagai arbiter."

Pasal 11 ayat 4 mengatur hak mengingkari arbiter yang dipilihnya apabila ia mengetahui adanya bukti yang menunjukkan atau mengarah kepada ketidak-netralan atau kemandirian arbiter yang ditunjuknya. Pasal 11 ayat 4 ini menyatakan:

> "Suatu pihak dapat membantah arbiter yang telah ditunjuknya atas dasar bahwa ia baru mengetahui atau memperoleh alasan-alasan untuk pengingkaran setelah penunjukan dilakukan."

b. Peraturan Prosedur Arbitrase UNCITRAL

Peraturan prosedur arbitrase UNCITRAL mengenai pengingkaran arbiter termuat di dalam Pasal 9 hingga Pasal 12. Pasal 9 memuat kewajiban arbiter untuk menyampaikan hal-hal apa saja yang dapat menimbulkan prasangka kenetralan dan kemandiriannya sebagai arbiter. Penyampaian kemandirian ini disampaikan kepada para pihak. Pasal 9 peraturan prosedur UNCITRAL berbunyi:

> "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been

informed by him of these circumstances."

Pasal 10 menyatakan bahwa seorang arbiter dapat disangkal apabila terdapat suatu keadaan yang dapat menimbulkan keraguan (*doubts*) terhadap kenetralan atau kemandiriannya. Suatu pihak yang memilih arbiter pilihannya dapat pula mengingkari arbiter pilihannya apabila terdapat atau terungkap kemudian adanya keraguan terhadap kenetralan dan kemandiriannya. Pasal 10 berbunyi:

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made."

Pasal 11 mengatur pengiriman pengingkaran. Pasal ini menyatakan bahwa suatu pihak yang bermaksud mengadakan pengingkaran terhadap seorang arbiter, harus mengirimkan pemberitahuan tentang pengingkarannya dalam jangka waktu 15 hari sejak pengangkatan arbiter atau dalam jangka waktu 15 hari setelah terdapat keadaan dalam Pasal 9 dan Pasal 10 yang baru diketahui oleh suatu pihak. Pasal 11 menyatakan:

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment."

Selanjutnya, Pasal 12 menyatakan bahwa bila pihak lainnya tidak menyetujui pengingkaran dan arbiter yang diingkari pun tidak mengundurkan diri, maka putusan terhadap pengingkaran tesebut akan dilakukan oleh pejabat penunjuk (*pengurus lembaga arbitrase*) apabila arbiter yang ditunjuk itu dipilih oleh pejabat penunjuk (ayat 1 (a)).

Apabila penunjukan arbiter dilakukan oleh pejabat lainnya (bukan oleh pejabat penunjuk), maka putusan mengenai pengikaran akan dilakukan oleh pejabat penunjuk lainnya tersebut (ayat 1 (b)). Apabila pejabat penunjuk menyetujui pengingkaran tersebut, arbiter pengganti akan dilakukan sesuai dengan tata cara penunjukan arbiter.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
   (a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

c. Peraturan Prosedur Arbitrase ICC

Peraturan prosedur arbitrase ICC termuat di dalam Pasal 14. Pasal ini menyatakan bahwa pengingkaran terhadap seorang arbiter dengan alasan adanya ketidaknetaralan atau kemandirian, pengingkaran tersebut dikirimkan kepada Sekretariat ICC. Surat pengingkaran dilengkapi dengan bukti berupa fakta dan keadaan-keadaan yang mendasari adanya pengingkaran tersebut (Pasal 14 ayat 1).

Pengiriman surat pengingkaran, *pertama*, harus dilakukan dalam jangka waktu 30 haru sejak diterimanya pemberitahuan pengangkatan arbiter. Atau, *kedua*, dalam jangka waktu 30 hari sejak tanggal didapatinya fakta atau keadaan-keadaan yang menjadi dasar atau alasan untuk diajukan pengingkaran (Pasal 14 ayat 2).

Setelah adanya surat pengingkaran ini, Sekretariat ICC kemudian akan memutuskan diterima tidaknya pengingkaran dan pada saat yang sama bila diperlukan, mengenai pokok pengingkaran, setelah Sekretariat memberikan kesempatan kepada arbiter tersebut, pihak lainnya atau para pihak dan anggota majelis arbitrase untuk memberi komentar atau pendapat secara tertulis dalam jangka waktu yang secukupnya. Pendapat tertulis tersebut akan dikirimkan kepada seluruh pihak dan arbiter lainnya. (Pasal 14 ayat 3).

Article 14: Challenge of Arbitrators

1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators."

d. Peraturan Prosedur Arbitrase SIAC

Peraturan prosedur arbitrase SIAC mengenai pengingkaran ini mendapat ketentuan yang lebih khusus, yaitu dalam 3 pasal (Pasal 11 hingga Pasal 13 Peraturan Prosedur SIAC). Pasal 11 mengenai pengingkaran arbiter menyatakan bahwa setiap arbiter dapat diingkarai apabila terdapat keadaan yang dapat menimbulkan keraguan yang beralasan (*justiable doubts*) mengenai kenetralan dan kemandirian arbiter atau apabila arbiter tidak memiliki keahlian yang diperlukan yang sebelumnya para pihak telah sepekati. (Pasal 11.1).

Pihak yang memilih pun dapat mengajukan pengingkaran terhadap arbiter pilihannya hanya apabila terdapat keraguan atau dugaan keraguan yang ditemukannya di kemudian hari (Pasal 11 ayat 2). Selanjutnya, Pasal 12 mengatur tata cara pemberitahuan pengingkaran. Pemberitahuan pengingkaran diserahkan kepada Sekretariat (*Registrar*) dan dikirimkan pula kepada pihak lainnya, arbiter yang diingkari dan anggota serta ketua majelis arbitrase. Pemberitahuan mengenai pengingkaran harus dibuat secara tertulis disertai dengan bukti-bukti. Sekretariat dapat meminta penundaan arbitrase hingga pengingkaran ini diselesaikan (Pasal 12.2).

Apabila seorang arbiter diingkari oleh suatu pihak, pihak lainnya dapat menyetujui pengingkaran tersebut. Arbiter yang diingkari dapat juga mengundurkan diri dari kedudukannya sebagai arbiter. Pengunduran diri secara sukarela bukan berarti bahwa dugaan atau alasan pengingkaran tersebut berdasar (Pasal 12.3). Pasal 12.4 mengatur penggantian arbiter apabila arbiter yang diingkari mengundurkan diri.

Pasal 13 mengatur keputusan mengenai pengingkaran. Pasal 13.1 menyatakan bahwa dalam jangka waktu 7 hari sejak diterimanya pemberitahuan mengenai pengingkaran, pihak lainnya dapat tidak menyetujui adanya pengingkaran dan arbiter yang diingkari tidak secara sukarela menarik diri, maka Pengurus (*the Court*) akan memutus pengingkaran tersebut (Pasal 13.1)[22].

Apabila Pengurus (lembaga arbitrase) menerima pengingkaran tersebut, arbiter pengganti akan dipilih sesuai dengan prosedur mengenai pengangkatan arbiter yang berlaku (Pasal 13.2). Namun apabila lembaga arbitrase menolak pengingkaran tersebut, arbiter akan melanjutkan kedudukannya. Namun apabila Lembaga (*Registrar*) memerintahkan penundaan arbitrase sesuai dengan Pasal 12.2, sambil menunggu keputusan oleh Lembaga arbitrase, arbiter yang diingkar berhak untuk melanjutkan persidangan (Pasal 13.3).

Satu hal yang menarik dari ketentuan Peraturan Prosedur arbitrase SIAC ini adalah bahwa adanya pengingkaran ini disyaratkan pengenaan biaya. Tidak ada penjelasan dalam pasal mengenai pengenaan biaya ini. Namun alasan yang dapat diterima adalah adanya pengingkaran ini telah menyita waktu dan pikiran lembaga arbitrase untuk bersidang, memeriksa bukti-bukti sampai membuat putusannya. Pasal 13.4 menyatakan bahwa lembaga arbitrase (*the Court*) dapat menetapkan biaya yang harus dibayar. Pasal ini memberi kebebasan kepada lembaga arbitrase siapa yang akan

[22] Pasal 1.5 Peraturan Prosedur Arbitrase SIAC menjelaskan arti "Court": means the Court of Arbitration of SIAC and includes a Committee of the Court.

membayar biaya tersebut (Pasal 13.4). Putusan lembaga arbitrase mengenai keputusan pengingkaran ini bersifat final dan tidak dapat diajukan keberatan (Pasal 13.5).

Bunyi ketentuan Pasal 11 hingga Pasal 12 ini berbunyi:

Rule 11: Challenge of Arbitrators

11.1 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.

11.2 A party may challenge the arbitrator nominated by him only for reasons of which he becomes aware after the appointment has been made."

Rule 12: Notice of Challenge

12.1 Subject to Rule 10.6, a party who intends to challenge an arbitrator shall send a notice of challenge within 14 days after the receipt of the notice of appointment of the arbitrator who is being challenged or within 14 days after the circumstances mentioned in Rule 11.1 or 11.2 became known to that party.

12.2 The notice of challenge shall be filed with the Registrar and shall be sent simultaneously to the other party, the arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the reasons for the challenge. The Registrar may order a suspension of the arbitration until the challenge is resolved.

12.3 When an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

12.4 In instances referred to in Rule 12.3, the procedure provided in Rules 6, 7, 8 or 9, as the case may be, shall be used for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limits provided in those Rules shall commence from the date of receipt of the agreement of the other party to the challenge or the challenged arbitrator's withdrawal."

Rule 13: Decision on Challenge

13.1 If, within 7 days of receipt of the notice of challenge, the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily, the Court shall decide the challenge.

13.2 If the Court sustains the challenge, a substitute arbitrator shall be appointed in accordance with the procedure provided in Rules 6, 7, 8 or 9, as the case may be, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limits provided in those Rules shall commence from the date of the Registrar's notification to the parties of the decision by the Court.

13.3 If the Court rejects the challenge, the arbitrator shall continue with the arbitration. Unless the Registrar ordered the suspension of the arbitration pursuant to Rule 12.2, pending the determination of the challenge by the Court, the challenged arbitrator shall be entitled to proceed in the arbitration.

13.4 The Court may fix the costs of the challenge and may direct by whom and how such costs should be borne.

13.5 The Court's decision made under this Rule shall be final and not subject to appeal".

C. Evaluasi

Uraian mengenai berbagai peraturan arbitrase di atas menunjukkan bahwa peraturan mengenai hak ingkar (para pihak) ini mendapatkan tempat dalam pasal-pasalnya. Hak ini memberi kesempatan kepada para pihak untuk memastikan bahwa arbiter yang dipilih oleh pihak lainnya (dan arbiter pilihannya) dapat menjamin kenetralan dan kemandiriannya di dalam melaksanakan persidangan dan membuat putusan.

Dari beberapa aturan di atas, alasan-alasan untuk pengingkaran tidak menyantumkan secara spesifik seperti misalnya adanya hubungan pekerjaan dan keluarga[23]. Peraturan arbitrase umumnya menyatakan cukup adanya alasan "meragukan" terhadap kenetralan dan kemandirian seorang arbiter[24].

Hak ingkar ini tampaknya pula merupakan pengecualian terhadap kebebasan (para) pihak di dalam menentukan arbiter yang dipilihnya. Pengecualian dalam arti, hak ini membatasi atau paling tidak memberi reservasi kepada pihak lainnya bahwa apa yang suatu pihak pilih mengenai arbiter pilihannya tidak akan merugikan pihaknya atau paling tidak mencederai "*due process of law*" persidangan arbitrase terutama kenetralan dan kemandirian arbiter.

Dari berbagai aturan di atas, alasan-alasan untuk pengingkaran tidak menentukan secara spesifik seperti misalnya dalam Pasal 12 UU No 30 Tahun 1999, yaitu adanya hubungan pekerjaan dan hubungan keluarga. Peraturan arbitrase pada umumnya cukup menyatakan cukup adanya alasan-alasan yang meragukan (*doubts*) terhadap kenetralan dan kemandirian seorang arbiter.

Kebebasan para pihak untuk antara lain menentukan arbiternya tunduk pada hak pihak lain dan pihak arbiter untuk menerima atau menolaknya. Terutama untuk arbiter, dari berbagai peraturan arbitrase di atas, tampak terdapat dua kemungkinan bagi arbiter yang diingkari untuk mengambil tindakan.

Pertama, ia menanggapi pengingkaran dengan menyatakan pengunduran diri secara sukarela dari keanggotaannya dalam majelis arbitrase. Perlu ditekankan di sini bahwa seperti ditegaskan dalam peraturan arbitrase SIAC Pasal 12.3, pengunduran diri ini bukan berupa penggenapan atau pembenaran bahwa alasan yang suatu pihak ajukan pengingkaran adalah benar. Kebenaran ini sudah tentu harus dibuktikan dulu. Peraturan arbitrase dalam Pasal 12. 3 SIAC mengisyaratkan adanya keinginan ia tidak mau mempermasalahkan atau memperpanjang persoalan. Sehingga keputusan yang ia lakukan adalah

[23] Pasal 12 UU No 30 Tahun 1999.

[24] Misalnya Pasal 11.1 Peraturan Arbitrase SIAC; Pasal 20 UU No 30 Tahun 1999; atau Pasal 10 Peraturan Arbitrase UNCITRAL.

mengundurkan diri secara sukarela dengan alasan menghindari hingar bingar adanya pro kontrak, pengingkaran versus penolakan alasan pengingkaran, dan seterusnya.

Keputusan pengunduran secara sukarela ini tanpa terkait dengan keputusan pihak yang memilihnya. Apakah pihak ini menerima alasan pembenaran berdasarkan bukti-bukti yang diajukan oleh yang mengingkari. Atau, apakah pihak ini menolak alasan pengingkaran yang disertai dengan alasan bukti-bukti pengingkaran,

Kedua, permasalahan akan timbul apabila arbiter yang diingkari dan pihak yang memilih arbiter menolak alasan pengingkaran. Dalam hal keadaan ini peraturan arbitrase mengatur agak berbeda. Peraturan prosedur arbitrase BANI akan membentuk suatu tim khusus untuk menangani pengingkaran ini.

Sedangkan peraturan prosedur ICC, SIAC atau pun UNCITRAL tidak secara khusus pembentukan suatu tim khusus ini, tetapi cukup sekretariat saja yang menanganinya. Peraturan prosedur SIAC mengatur agak detail mengenai adanya pengingkaran ini. Peraturan prosedur SIAC mensyaratkan adanya pengingkaran dan alasan serta bukti -buktinya diserahkan juga kepada seluruh anggota majelis arbitrase yang telah terbentuk, termasuk ketua. (Peraturan lembaga ini juga menyatakan bahwa pihak majelis tersebut-lah juga mempunyai kewenangan untuk menilai apakah alasan pengingkaran tersebut dapat diterima atau ditolak. Apabila majelis menerima alasan pengingkaran, pengingkaran ditolak, sedangkan apabila majelis menolak alasan pengingkaran, persidangan akan dilanjutkan.

Yang juga penting adalah persyaratan mengenai jangka waktu bagi sesuatu pihak untuk mengajukan pengingkaran. Umumnya jangka waktu cukup sempit, yaitu 14 hari (SIAC), BANI (14 hari), UNCITRAL (15 hari). Jangka waktu yang relatif lama diberikan oleh ICC (30 hari). Menurut hemat penulis, pengenaan syarat 14 hari seperti yang telah dipraktekkan BANI adalah jangka waktu yang tepat. Jangka waktu 14 hari ini sudahlah cukup bagi suatu pihak untuk mencari atau mendapatkan informasi mengenai latar belakang atau keahlian calon arbiter ini.

Prosedur arbitrase SIAC juga mengatur pengenaan biaya yang akan dibebankan oleh lembaga terkait adanya pengingkaran ini. Persyaratan ini tampaknya menarik untuk dijadikan acuan. Alasannya, *pertama*, adanya pengenaan biaya yang jumlahnya ditentukan lembaga dan akan ditentukan oleh lembaga pihak mana yang akan membayar, menjadi pertimbangan apabila ada pihak yang berupaya menggunakan lembaga pengingkaran ini yang tujuannya mengulur-ulurkan persidangan (Pasal 13.4 Petaturan Prosedur Arbitrase SIAC).

Kedua, pengenaan biaya pun adalah hal yang wajar diterapkan mengingat pembentukan tim khusus seperti halnya di BANI atau penelitian alasan pengingkaran oleh lembaga terkait adanya bukti-bukti pengingkaran sudah tentu membutuhkan perhatian dan pikiran serta waktu dari para anggota atau pengurus lembaga untuk meneliti dan menilai serta memberi pendapat mengenai pengingkaran.

Tolok ukur yang tampaknya penting untuk dijadikan salah satu pegangan adalah ada tidaknya itikad baik dari pihak yang mengajukan pengingkaran. Permasalahan yang mungkin lahir dari tolok ukur itikad baik ini adalah apa yang menjadi ukuran suatu itikad itu baik.

Memang tidaklah mudah untuk menarik garis merah untuk menjelaskan suatu itikad itu baik atau buruk. Namun demikian,

ukuran yang mungkin dapat digunakan adalah, pertama, apakah itikad mengingkari ini didasarkan alasan yang logis atau dapat diterima secara logika (apabila alasan pekerjaan atau hubungan keluarga tidak mencakup di dalamnya).

Kedua, tolok ukur yang juga dapat digunakan adalah apakah pihak yang mengingkari bermaksud atau beritikad mengundur atau menunda waktu persidangan arbitrase. Sebagai perbandingan, lawan dari pengertian itikad baik, yaitu itikad buruk atau itikad tidak baik, dikenal dalam hukum kontrak internasional. Dalam prinsip UNIDROIT mengenai kontrak internasional dikenal prinsip itikad baik ini dalam Article 2.1.15. Pasal ini berada di bawah judul "*Negotiations in bad faith*" (perundingan beritikad buruk). Yang dimaksud dengan negosiasi beritikad buruk adalah ketika suatu pihak yang bernegosiasi ternyata sebenarnya tidak bermaksud untuk mencapai kesepakatan dengan pihak lainnya[25].

Dalam pengertian ini, tampaknya yang dapat dijadikan tolok ukur untuk memahami istilah itikad tidak baik ini adalah adanya tidak ada niat untuk suatu pihak untuk menyelesaikan sengketanya melalui arbitrase. Niat tidak mau menempuh arbitrase ini bertentangan dengan niat para pihak yang sejak awal sudah sepakat untuk menyelesaikan sengketanya (yang akan timbul) oleh arbitrase dengan ditandatanganinya klausul atau perjanjian arbitrase dalam kontrak atau perjanjian yang para pihak sepakati.

Ketentuan peraturan yang juga penting adalah status keputusan lembaga. Penegasan bahwa keputusan lembaga arbitrase mengenai diterima tidaknya alasan pengingkaran dari salah satu pihak bersifat final dan tidak dapat diajukan banding atau perlawanan adalah tepat[26]. Intinya, keputusan lembaga arbitrase mengenai dasar-dasar pengingkaran tidak dapat diajukan bantahan atau banding. Hal ini memberi kepastian hukum terhadap tertunda-tundanya persidangan dan adanya pengingkaran terhadap arbiter.

D. Penutup

Kesepakatan para pihak yang menyerahkan sengketa kepada arbitrase adalah suatu kesepakatan yang memberi kewenangan atau kompetensi absolut kepada arbitrase untuk menangani sengketa. Kesepakatan para pihak untuk menyerahkan sengketa kepada arbitrase tersirat di dalamnya kepercayaan para pihak kepada arbitrase agar sengketanya dapat diselesaikan menurut hukum dan seadil-adilnya.

Kepercayaan yang besar ini sudah tentu harus pula diikuti oleh pemberian keyakinan kepada para pihak oleh arbitrase bahwa arbiter yang akan menangani dan menyelesaikan serta memutus sengketanya adalah arbiter yang memiliki kredibilitas, keahlian dan integritas serta yang sangat penting kenetralan dan kemandiriannya di dalam memutus sengketa.

Berdasarkan pertimbangan itulah, logis apabila pengaturan mengenai kenetralan dan kemandirian ini merupakan sesuatu hal yang penting untuk diatur di dalam peraturan prosedur arbitrase.

Dari berbagai peraturan arbitrase di atas, tampak masih adanya beragam pengaturan mengenai penanganan terhadap penging-

[25] Article 2.1.15 (Negotiations in bad faith), ayat 3 berbunyi:
(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

[26] Peraturan arbitrase Pasal 13.5 SIAC.

karan. Peraturan berbeda ini wajar dan tampaknya tidak menjadi suatu hal yang menjadi kompleksitas dari arbitrase. Peraturan yang membedakannya hanyalah sekedar teknis pelaksanaan dari bagaimana lembaga menangani pengingkaran.

Satu hal yang penting adalah, kewajiban arbiter untuk mengungkapan dirinya bahwa ia akan bertindak netral dan mandiri dalam menangani suatu sengketa adalah sesuatu hal yang penting, bahkan mutlak. Pernyataan kenetralan dan kemandirian inilah jaminan bagi arbitrase untuk memberi putusan terhadap sengketa yang para pihak serahkan.

Keputusan lembaga untuk menangani adanya pengingkaran perlu sesegera mungkin untuk diputuskan. Hal ini penting agar dapat dihindari tertunda-tundanya persidangan yang pada akhirnya akan menyebabkan keadilan menjadi tertunda (*Justice delayed is justice denied*).

News & Events

Past Events

1. Arbitration Seminar for Japanese Companies in Singapore

Time/ date : 3.00 p.m. – 5.00 p.m. / 19 October 2015

Venue : Conference Room at the Japanese Association in Singapore, 120 Adam Rd, Singapore 289899

In extending the dissemination of BANI arbitration within the Japanese businessmen, Mr Shintaro Uno, the first Japanese arbitrator in BANI, had guided a discussion in Singapore, under the topic of "Practice and Features of BANI Arbitration". The discussion was attended by Japanese businessmen representing Japan companies. The feedback showed that the participants were satisfied with the seminar, especially in obtaining information of BANI rules and procedures in arbitration.

2. 7th Asia Pacific Mediation Forum Conference

Synergizing Eastern and Western Construct Mediation: Towards Better Understanding

Date : 10-12 February 2016
Venue : Lombok-West Nusa Tenggara

3. FIDIC 2015 - Two-Day Training

The Practical Use of FIDIC Contracts for construction

Date : 22-23 February 2016
Venue : Trans Luxury Hotel Bandung – Indonesia

4. YOUNG ARBITRATORS FORUM
International Chamber of Commerce (ICC): Introduction to ICC

Date : 26 and 27 February 2016
Venue : Brikfield Asia College, Petaling Jaya Campus, VSQ@PJ City Centre, Jalan Utara, Section 14, 46200 Petaling, Jaya, Selangor Darul Ehsan

5. KLRCA International Investment Arbitration Conference (KIIAC 2016)

Date : 10 Mar 2016 - 11 Mar 2016
Venue : KLRCA Bangunan Sulaiman, Kuala Lumpur
Time : 9:00 AM - 7:00 PM

The conference – **the first of its kind in Asia** – will address the complex issues raised by **investor-State arbitration**, with a particular focus on the Asia Pacific region. Twenty-five speakers from all over the world will gather at the state-of-the-art premises of the KLRCA and share their experience and thoughts on the progress and prospects of investment arbitration.
This international conference is another milestone for the KLRCA in our effort in rebranding and increasing the awareness of the KLRCA and alternative dispute resolution (**ADR**) especially in the sphere of investment arbitration. This would also fulfil one of the KLRCA's missions in facilitating capacity building of the service sector.

For more information about the conference programme, please visit**:** http://klrca.org/events/klrca-international-investment-arbitration-conference-iiac-2016/

Upcoming Events

1. ICCA 2016 Congress Mauritius : 8-11 May 2016
International Arbitration and the Rule of Law: Contribution and Conformity

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

MAURITIUS
ICCA 2016
Welcome to AfrICCA

Date : **8 – 11 May 2016**
Venue : **Swami Vivekananda International Convention Centre (SVICC), Pailles, Mauritius**

The ICCA Congress is the largest regular conference devoted to international arbitration. It takes place every two years, on each occasion in a different city. In selecting a host city, ICCA recognizes significant recent advancements as a venue and centre for international arbitration, among other criteria. The 2012 Congress, held in Singapore, and the 2014 Congress, held in Miami, each attracted over 1,000 delegates.
The May 2016 Congress will focus on the theme: "International arbitration and the rule of law: contribution and conformity"

Breaking news: the Keynote Address at the Mauritius Congress will be delivered by Egyptian Nobel Peace Prize Laureate Mohamed El Baradei, and the Gala Dinner Guest Speaker will be Secretary General of the United Nations Ban Ki-moon.

REGISTRATION IS NOW OPEN
VISIT THE CONGRESS WEBSITE AT www.iccamauritius2016.com >>

In the year leading up to the 2016 Mauritius Congress (May 2015 - May 2016), ICCA is offering a 50% discount on ICCA Membership for nationals of African states.

2. APRAG Conference 2016

"Rise of International Commercial Arbitration and Developments in Investment Treaty Arbitration"

Event Date : 6 - 8 Oktober 2016
Venue : Sofitel Nusa Dua Beach Resort, Nusa Dua, Bali

Main Theme of the conference:
"The Rise of International Arbitration and the Development of Investment Treaty Arbitration: The Asian Response"

The Conference would be in 5 Sessions :

1. Diversity and Unification of Arbitration Practices in Asia
2. Third Party Funding and Costs In Investment and Commercial Arbitration ?
3. Investment Arbitrations in Asia
4. Prospects for harmonization of commercial and investment arbitration within the new ASEAN Economic Community
5. Members Updates and Collaboration Perspectives

Notes to contributors

If you are interested in contributing an article about Arbitration & Alternative Dispute Resolution, please sent by email to bani-arb@indo.net.id. The writer guidelines are as below :

1) Article can be written in Bahasa Indonesia or English 12 pages maximum
2) Provided by an abstract in one paragraph with Keywords (Bahasa Indonesia for English article & English for Bahasa Indonesia article)
3) The pages of article should be in A4 size with 25 mm/2,5 cm margin in all sides
4) The article used should be in Ms. Word format, Times New Roman font 12 pt
5) Reference / Footnote
6) Author Biography (100 words)
7) Recent Photograph