ISSN : 1978-8398

BANI ARBITRATION CENTER

INDONESIA ARBITRATION QUARTERLY NEWSLETTER

Vol. 8 No. 2 June 2016

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Francis Lansakara

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Frans H. Winarta

WIN-WIN SOLUTION

ISSN : 1978-8398

Indonesia Arbitration
Quarterly Newsletter
Vol. 8 No. 2 June 2016

Published by :
BANI Arbitration Center
Wahana Graha Lt. 1 & 2,
Jl. Mampang Prapatan No. 2, Jakarta 12760, Indonesia
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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

From the Editor

In this publication, BANI newsletter pick-up issues related to the implementation of Arbitration law in Indonesia as well as in other parts of the world. Specializing in maritime law, Capt Francis Lansakara, wrote special topics on the different approach of an arbitration agreement between Model law and Indonesian Law. Though the difference is clear he stated how silent features of the Indonesia law on separability could be replaced with more internationally accepted term - where the law welcome for such an approach.

Article written by Priyatna Abdurrasyid (RIP) explain in a more detail way on the potential dispute that may arise within the Indonesia territory as an archipelagic state/maritime as well as air space. The writer refer to various international disputes that recently affect : china Vs other Asia countries such as : Taiwan, Philippines, Vietnam, Brunei, Malaysia and Indonesia.

Closing article by Prof. Frans H. Winarta, stressed out how ASEAN Economic Community could not only trigger economic growth in the area but potential commercial dispute as well.

Finally, BANI welcome all of the participants of APRAG Conference 2016 in Bali, under the topic of : How the Asia response towards the Rise of international Commercial Arbitration and the developments In Investment Treaty Arbitration.

Finally to all readers who celebrated Lebaran : "Eid Mubarak", may forgiving each other at this month of the year bring all the happiness to us.

Jakarta, June 2016

Laws Governing Autonomy of Arbitration Agreement Model Law Approach vs. Indonesian Law

Capt Francis Lansakara FNI – LLM London
(*specialist Maritime Law*)

Francis Lansakara, a master mariner and Director JMC NAUTICAL PTE LTD Singapore, in 2009 he was awarded Master of Laws (LLM) with specialization in Maritime Law from University of London. His research area include articles on maritime law on salvage, compensation on marine pollution, carriage of goods by sea, duties of harbor authority and arbitration. He is also the author of the web page www.fslawstudies.com. In 2014 he was awarded a fellowship by Nautical Institute of London in recognition for his work contributed to maritime education and training.

ABSTRAK

Tulisan ini membahas Undang-undang yang mengatur otonomi dari suatu kesepakatan arbitrase – yaitu perbedaan antara pendekatan Model Law vs. Undang-undang Arbitrase Indonesia. Model Law mengakui hadirnya suatu doktrin pemisahan. Di pihak lain Undang-undang Indonesia tidak serta merta menguraikan hukum pemisahan seperti didalam Model Law. Namun, Undang-undang Arbitrase Indonesia No. 30 Tahun 1999 pasal 10 terutama terkait dengan tidak batalnya suatu perjanjian arbitrase yang disebabkan oleh antara lain : (f) berlakunya syarat-syarat hapusnya perikatan pokok (h) berakhirnya atau batalnya perjanjian pokok. Namun demikian, dialam aturan BANI, pasal 18. Yuridiksi, tetap mengakui (2) klausul Arbitrase independen, yaitu : "Suatu klausula arbitrase yang menjadi bagian dari suatu perjanjian, harus diperlakukan sebagai suatu perjanjian terpisah dari ketentuan-ketentuan lainnya dalam perjanjian yang bersangkutan". Dapat disimpulkan bahwa ketentuan hukum dan peraturan di Indonesia tidak melarang pendekatan tersebut diatas.

Kata Kunci : UU RI NO.30 TAHUN 1999, BANI Rules & Procedures, Model Law, Doktrin Separability.

The ordinary meaning of autonomy refer to freedom from external control or influence or independent, when, in arbitration practice the autonomy of arbitration agreement means its ability to be considered as a separate document independently with a specific object. It is also a possibility in some cases the arbitration agreement be governed by a different law compare to the main contract. Further evidence for its independence is that non-performance or invalidity of main contract does not necessarily means arbitration agreement also inoperative or invalid this is the stance of majority of model law countries. The governing laws of autonomy of arbitration agreement are generally found under the separability or doctrine separability.

Doctrine of Separability is a peculiar phenomenon explained as where an agreement to arbitrate is stated in the main contract but treat it differently as a separate contract or separate document or as an autonomous one. This doctrine is necessary because it protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties' intention to submit disputes to arbitration is not easily defeated. Subject to parties agreement the separability can also be strengthen from the time of drafting by selecting the correct terms such as "any or all disputes arising out of this contract" this term generally covers issues as to its(the main contract) existence, validity and its termination.

Statutory support for separability arise from model law countries. Section 7 of the English Arbitration Act 1996 and the Article 1447 of the French Arbitration Law affirm that regardless of the decision by the tribunal that the main contract is null and void shall not automatically invalidate an arbitration agreement. In recent time The Kingdom of Saudi Arabia changed its arbitration law with the enactment of its 2012 New Arbitration Law 1433H (2012G). The new arbitration law of Saudi Arabia is based on UNCUTRAL Model law also recognizes the doctrine of separability. However, under the Indonesian Act (law 30 of 1999) there is some recognition with respect to validity of the arbitration agreement in case of main contract become void except that its extent is unclear. From these brief statutory provisions review it is clear where doctrine of separability is not fully supported different legal opinions would result as a consequence.

The courts' support for separability existed before the adaptation of model law, in Prima Paint v Flood & Conklin (1967) case US Supreme Courts expressed its recognition of the broader application of the arbitration clause and its separability unless fraud was directed at the arbitration clause. Similarly decision on the recognition of the doctrine of separability was found in French case ETS Raymond Gosset v Carapelli (1964) Cour de Appel Paris.

The recognition of separability was not itself sufficient. In Sojuznefteexport v Joc Oil (1990) court of Appeal Bermuda, further explained the application of separability and its limitations. The first scenario was taken as a case where the issue as to the existence of the main contract or *void ab initio* in such a case jurisdiction of the arbitrator could probably be missing. The second scenario was taken as a case where the issue is as to the validity of the arbitration agreement where the main contract exist but vitiated due to some factors.

In the above case the main contract was agreed but signature was missing in the contract form however, the arbitration agreement in the same contract was found to be valid because it was considered independent from the main contract therefore the jurisdiction of the tribunal was held to be valid. Notwithstanding the above, the justification of separability cannot be limited to above two scenarios only further development on this regard will be expected especially through arbitration of more complex cases.

Indonesian law does not directly describe the law on separability as in Model Law[1].
The model law approach as described in Article 16(1) states that the arbitral tribunal may rule on its own jurisdiction including any objections with respect to existence or validity of the arbitration agreement for that purpose an arbitration clause which forms part of a

[1] UNCITRAL Model Law 1985 with amendments 2006

contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. International Chamber of Commerce Arbitration Rules (ICC rules[2]) 2012 states in article 6(3) that if any party against which a claim has been made does not submit an answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4). However the Indonesian law 30 of 1999 Article10 mainly deal with separability of the arbitration agreement it states that an arbitration agreement shall not become null or void under any of the following circumstances: (f) effectivity of requirements for the cancellation of the main contract (h). the expiration of voidance of the main contract. In comparison with model law Article 16(1) Indonesian law comply in part and that is with respect to validity of arbitration agreement in case of main contract is null and void. Indonesian law is silence on model law requirement with respect to arbitral tribunal may rule on its own jurisdiction including any objections with respect to existence or validity of the arbitration agreement for that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

However the Indonesian Arbitral institution rules (BANI Rules) recognizes separability with a wider arbitration clause it states in Article 18 that

1. The Tribunal shall have the power to rule on any objection that it does not have jurisdiction, including any objection with respect to the existence or validity of the agreement to arbitrate.
2. The Tribunal shall be empowered to determine the existence of validity of an agreement in which the arbitration clause constitutes a part. For the purposes of this Rule an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A determination by the Tribunal that a contract is annulled by law shall not automatically annul the validity of the arbitration clause.

from the above it is clear that silence features of the Indonesian law on separability could be replaced with more internationally accepted terms and the Indonesian law does not prohibit such an approach.

In conclusion, even the model law generally described the law on separability it is not exhausted and further development can be expected especially from complex cases whereas, under the Indonesian law there are certain silence features however, BANI Rules had over come those to some extent with generally accepted terms.

[2] ICC Arbitration rules adopted 1 January 2012

Air Space Law Over The Sea (UNCLOS 1982)

H. Priyatna Abdurrasyid

ABSTRAK

Sebagai negara kepulauan, pemahaman terhadap hukum laut (United Nations Convention on The Law of The Sea, UNCLOS 1982) adalah penting bagi Indonesia, terutama dengan meningkatnya peranan maritim militer negara-negara besar di Asia belakangan ini. UNCLOS mengatur bukan cuma hukum laut tradisional tetapi juga perkembangan progresif hukum internasional yang terkait dengannya, antara lain pengaturan kawasan pantai dan tanah dasar laut dan lapisan tanah dibawahnya yang berada diluar batas yuridiksi nasional. Ketegangan akibat sengketa perbatasan dilaut Tiongkok selatan yang melibatkan negara-negara ASEAN dan Asia antara lain: Filipina, Vietnam, Taiwan, dan Indonesia Vs Tiongkok patut mencemaskan bila ada pihak yang tidak mau berkiblat pada Konvensi PBB, UNCLOS 1982. Tulisan ini kecuali membahas hal-hal penting yang tercantum dalam UNCLOS 1982, juga mengingatkan kita bahwa kecuali sengketa perbatasan laut masih ada lagi kemungkinan berkembangnya sengketa lanjutan ke batas navigasi internasional, pelayaran yang berpotensi untuk berkembang lebih lanjut mengikuti dinamika perkembangan ekonomi dan militer negara di Asia khususnya dan didunia umumnya.

Kata Kunci: UNCLOS 1982, Sengketa Internasional Perbatasan Laut, Zona Ekonomi Eksklusif, Tata Udara dan Lantai Dasar Laut.

Article 53

Right of archipelagic sea lanes passage

1. An archipelagic State may designate sea lanes and air routes there above, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.
3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and over flight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and other part of the high seas or an exclusive economic zone.
4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or over flight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.
5. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per-cent of the distance between the nearest points on islands bordering the sea lane.
6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.
7. An archipelagic State may, when circumstances require, after giving due

publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it.

8. Such sea lanes and traffic separation schemes shall conform to generally-accepted international regulations.
9. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate prescriber or substitute them.
10. The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.
11. Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.
12. If an archipelagic State does not designate sea lanes or air routes, the Right of Archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Article 54

Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage. Article 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage.

1. The impact of the 1982 UNCLOS on Indonesian National Air Space

The 1982 UNCLOS regulates various activities and here are the most important ones:

a. Territorial Waters

In the 12-miles of territorial waters, the coastal state has complete and exclusive sovereignty; foreign ships (not aircraft) are allowed to exercise the right of innocent passage for the purpose of peaceful navigation. (Examine: Articles 3, 5, 6, 7, 8, 9, 11, 12 and 13 of the 1944 Chicago Convention).

b. Contiguous Zone

In the 24 nautical miles of territorial waters from the baseline of the coast, the coastal state can exercise control for the sake of prevention, and punish violations of customs, fiscal, immigration or sanitary regulations of that coastal state.

c. Straits used for international navigation

Foreign ships and aircraft are allowed "**unimpeded transit passage"** as long as they make continuous passage, and do not endanger the safety and survival of the bordering states. The bordering states have the rights to regulate navigation and certain aspects of this passage. Compare or make an analogy of the passage through the straits or canals in the world, such as the Suez Canal, the Panama Canal, Strait of Dardanelles Strait, Bospharus and the Sea of Marmora around Turkey (will be discussed later).

d. Archipelagic States

Foreign ships and aircraft enjoy the rights of passage through or over "designated sea lanes and air routes" suitable for the "continuous and expeditious passage".

e. Exclusive Economic Zone

On the line of 200 nautical miles, the coastal states have sovereign rights (below, under the complete and exclusive sovereignty) with respect to natural resources, whether living or non-living, of the seabed and subsoil and superjacent waters, and with regards to other activities for the economic exploitations and explorations of the

zone; all other states would have freedom of navigation and over flight, as well as freedom to lay submarine cables and pipelines; the coastal states shall have the **exclusive** right to construct and regulate the construction and operation of artificial lands and other installations in the zone. "delimitation of overlapping economic zones should be effected by agreement on the basis of international law".

f. Continental Shelf

Coastal states have sovereign rights for exploration and exploitation of natural resources.

g. High Seas

All states have the right to navigation, over flight, installing submarine cables and pipelines, establishing artificial islands and other installations, fishing and conducting scientific research and other peaceful activities.

h. Island

i. Landlocked States

j. The Area

k. Peaceful Settlement of Disputes

In accordance with Article 33 of the United Nations Charter, states are expected to settle any disputes that arise through "alternative dispute resolution/ arbitration" in the interest of world peace.

2. Various Forms of Strategic Interests of Certain States

The policy of certain states with respect to adjacent waters, including the air space, above it, seems to always lead to how to preserve the survival, and maintain and develop the welfare and security of those states. There are several comparisons:

a. The period of Grotius, John Selden

Grotius, the Dutch expert on international law in the 16th century, was an advocate of the principle of "mare liberum", meaning that the ocean is free. On the other hand, John Selden, a British scholar, adhered to the principle of "mare clausum," meaning that the ocean is not free. Someone owns the ocean and, therefore, "Britain rules the waves".

b. United States of America

In 1955, the United States of America proclaimed its "Air Defense and Identification Zone (ADIZ)," followed by Canada (CADIZ) and the Philippines (PADIZ). This proclamation contains provisions through the "Regulation of the Administrator, Part 620 Security of Air Traffic," which says:

- The United States regulates the navigation of ships and aircraft on the line of 200 nautical miles from its coasts in the Pacific Ocean and the Atlantic Ocean.
- Any violation of U.S. laws on both lines can result in imprisonment or fines.

The basis of this policy is a reflection of a principle developed by an American scholar, John Cobb Cooper, who said that the U.S. interests are served by its physical and scientific abilities. Furthermore, we should trace back the U.S. positions during World War I and II, and they are:

1. The Monroe Doctrine: a policy of isolation, followed by
2. The Roosevelt Doctrine: a "preemptive strike" and
3. The Truman Doctrine: an anti-communist McCarthy Era
4. The Dulles Principle (1954)
5. The Eisenhower Interpretation (1960)

The Monroe Doctrine was being revived in opposition to face "the red menace," followed by the policy espoused by the Domino Theory (Kennedy in Vietnam, Bush-Clinton because of oil interests, resulting in the Gulf War with Iraq).

Especially if it is associated with the argument presented by John Mackinder who was quoted as saying:
Who rules East Europe commands the Heartland;

Who rules the Heartland commands the World-Island;
Who rules the World-Island controls the world."

As to air space and outer space, Stephen Gorove, a legal scholar on space, described it this way:

> "Who controls the cosmic space rules not only the earth, but the whole universe".

After the Eisenhower era, there was a concern in the United States through the critical defense zones and international law, namely *the Reagan Codicil*. As it is known by the end of World War II, the USSR imposed a zone defense that includes Eastern Europe. The United States did the same in Europe, Africa, the Middle East and Asia. With regard to the aggression in Afghanistan by the UUSR, the U.S. president at the time, Jimmy Carter, stated that any attempt to control the area around the Persian Gulf was considered as aggression against vital American interests and such aggression would be faced with a variety of means, including military force. In 1981, President Ronald Reagan announced the continuation the Carter Doctrine, *the Reagan Codicil*. This means, if necessary, the continuation with the addition of changes to the doctrine which, in essence, maintains that the U.S. will not allow Saudi Arabia to be like Iran (the coup against the Shah of Iran). (Check also the Reagan Strategic Defense Initiative).

It is necessary to consider the progressive development of international law. In this case, let us observe the same international development in Latin America through the Calvo doctrine and the Drago doctrine. An American expert on international law, Philip Jessup, suggested that it is time to embrace a "new international legal order," which was previously dominated by the fact on the application of international law created by the European countries (group of Western countries). It is necessary to develop a "peaceful, cooperative, equal world." Consequently, the question arises whether the states that emerged after World War II can be reasonably (appropriately) bound in all respects by the law where they have no part in formulating it. That is why both the Calvo and the Drago doctrines emerged, representing the application of the movement of the progressive development of international law. The core of the Calvo doctrine is to develop equality and parity among states and nations. And the essence of the Drago doctrine is not to misuse diplomatic strength or force of any kind, physical and scientific, in the relations between states.

c. Sea Lanes of Communications (SLOC)

Traditionally, a number of certain sea lanes, such as the strait of Gibraltar, the strait of Dardanelles, the Strait of Bosphorus, the Suez canal, the Red Sea, the strait of Hormuz, Bays, the strait of Malacca, the strait of Sunda, the China Sea and others are the main sea lanes for international shipping economic traffic (tankers, merchant ships and even war ships). It is difficult to change its status, either through the 1982 UNCLOS or national maritime laws. That is why Japan secretly treated the 1000 nautical miles sea lanes to the South as the "security zone" lane for its tanker fleet.

d. In this case, it is useful to examine several international agreements on the strait/ traditional sea lanes, such as:

1) The Anglo-Egyptian Treaty of Friendship and Alliance of 1937. In this agreement, the status of air space

above the Suez Canal has been determined. Article 11 of the annex says: "unless the two governments agree to the contrary, the Egyptian government will prohibit the passage of aircraft over the Suez Canal and within 20 km of it, except for the purpose of passage from East to West or vice versa by means of a corridor 10 km at Cantora." So in this case, there are legal rights in the form of "privilege".

2) U.S – Republic of Panama
The U.S. was given the lease rights on the territory of the canal and a lane on each side through the Hay- Varilla Convention of 1963.

3) The Straits of Dardanelles – Bosphorus, the Sea of Marmara
The Treaty of Lausanne, 1963
The Treaty of Montreux, 1936
(United Kingdom, Italy, Japan, Bulgaria, Greece, Rumania, Russia, Yugoslavia and Turkey). The important thing in this agreement is the obligation for aircraft to notify air routes within 3 days in advance. (Compare with articles 5 and 9 of the Chicago Convention of 1944 on "right of non-scheduled flight"and "prohibited area"). In essence, the Chicago convention gives the right of innocent passage for ships and aircraft of other states through the territorial waters of Turkey whereas in accordance with article 3 (e) of the Chicago convention, the right of innocent passage does not apply in the territory of the state for foreign aircraft, that is, "no state aircraft of a contracting state shall fly over the territory of another state or land thereon without authorization by special agreement or otherwise and in accordance with the terms thereof".

e. Various international disputes that may affect

1) China-Taiwan dispute relating to the "prolongation principle," that previously became the attention of the International Court of Justice.
2) The Spratly island dispute: the Philippines, Vietnam, Taiwan and China
3) The Paracel island dispute: China and Vietnam
4) The Natuna island dispute: Indonesia and Vietnam
5) The Timor gap dispute (former).

3. Material of thought

Articles of the 1982 UNCLOS which are dealing with and relating to the national air space are:

1) Airspace over territorial sea, article 2
2) Airspace above water forming straits used for international navigation, articles 34,38,39
3) Airspace over archipelagic water, articles 2,49,53,54
4) Over flight over exclusive economic zone, article 58
5) Airspace above the continental shelf, article 78
6) Freedom of the high seas, article 87
7) Regime of Islands, article 121
8) Right of Islands, article 121
9) Airspace superjacent to the area, article 135
10) Pollution from or through the atmosphere, articles 194, 212, 222
11) Pollution by dumping, articles 1, 194, 210, 216
12) Sovereign immunity of aircraft owned or operated by a state and used on government non-commercial service, article 236

4. Several factors for consideration

a. The right of innocent passage that can be given to foreign aircraft, although this right is contrary to article 3 (c) of the 1944 Chicago Convention, as stipulated in article 53 of the 1982 UNCLOS that

says: "…**may designate** sea lanes and air routes there above." It doesn't seem imperative, but why use the word "**may" and not "shall" or at least "will"?** It can be interpreted that there are many factors relating to the Indonesian interests that need to be taken into account and, of course, various legitimate international factors that must be considered as well.

b. The right of innocent passage through the territorial sea shall apply only to ships alone, and do not apply to aircraft, but, "…over international straits aircraft enjoy the right of unimpeded transit passage (article 38). The same rule applies to "airspace above archipelagic sea lanes," as contained in articles 53, 1 which says "…all aircraft enjoy the right of archipelagic sea lanes passage through air routes which **may be designated** by an archipelagic waters and the adjacent territorial sea."

c. UNCLOS does not specify the rights and obligations of the coastal state and other states concerning the activities of aircraft in the sea lanes of the Indonesian islands (ALKI), for instance, how the passage of foreign aircraft in the Indonesian archipelagic sea lanes which can cause problems for the coastal state concerned, or can interfere with the interest of that coastal state (transportation of hazardous materials: nuclear).

d. What if, by chance, there is suddenly the need to develop business enterprise for economic interests in the Indonesian archipelagic sea lanes (for instance: oil drilling, fisheries, agro industry in the sea and others)

e. Can the mandatory "**ICAO Rules of the Air"** above the high seas be applied in the Indonesian archipelagic sea lanes? The possibility of the "**potential air navigation hazard"** in the Indonesian archipelagic sea lanes is a risk that needs to be considered, given the location of Indonesia at a cross point between several continents and oceans and the possibility of the same sea lanes in the future.

f. What about the rights of states to regulate flights in its territory as stated in article 12 of the Chicago convention of 1944 and article 33 of the UNCLOS.

g. What about TV/radio broadcasts transmitted from an aircraft in the Indonesian archipelagic sea lanes and directed to the national territory even though "peaceful." (sort of hijacking through broadcasting)

h. The non-exhaustive nature of UNCLOS in which a lot of things seem to be left to the international and national arrangements which already exist and ones which need to be set up according to the needs through two ways, namely:
   - Following the facts, accompanying the facts, and preceding the facts.
   - Applying the law/ the existing principle, analogy or creating the law/ new principle.

i. The question is whether the UNCLOS is to be considered to regulate overall flight activities, especially associated with international law/the existing and applicable law on airspace. (read the Chicago Convention of 1944)

j. In this case, the interests of the parties concerned should be explored especially the survival of the state. Therefore, the interests of the doctrines used by, for example, the United States, in its attempts to preserve its survival need to be considered, namely the "**Doctrine of Necessity"** and the **"Doctrine of Rights of Self Preservation." (**Indonesia also used it when it proclaimed the Juanda doctrine which was listed in the UNCLOS.

k. It is possible that there are weaponry experiments during passage through the Indonesian archipelagic sea lanes or conflicts between certain states.

l. Procedures of the states' rights to conduct supervision, for instance, whether the identification can be justified. Sometimes various preventive measures need to be taken as the right to self-defense. Therefore, the term **"security"** needs an international clarification.

m. The right to conduct "**hot pursuit"** against ships and aircraft in the Indonesian archipelagic sea lanes.

n. The existence of differences in the system and navigation arrangements for ships and aircraft.

o. Whether the contents of a "flight plan" of an aircraft applies to an aircraft in the Indonesian archipelagic sea lanes, such as:

   1) Aircraft identification
   2) Type of aircraft
   3) Point of Departure
   4) Flight altitude and route to be followed
   5) Point of first intended landing
   6) Time of departure
   7) Airspeed time
   8) Estimated elapsed time
   9) Alternate airport
   10) Radio frequencies
   11) Approach aids to be used
   12) Number of person on board
   13) Pilot's name and status
   14) Fuel
   15) Remarks

   Requirements which are required by the provisions of Air Defense Identification Zone (ADIZ).

5. Various problems of Indonesian waters (territorial sea and inland waters)

   a. Oil pollution;
   b. Unimpeded passage;
   c. Protection of the marine environment;
   d. Natural resources in the seabed and subsoil, Exclusive Economic Zone, additional lanes;
   e. Enforcement and security of sovereignty at sea;
   f. Related development planning in the inland sea;
   g. National and international shipping safety;
   h. Oil drilling activities;
   i. Transportation of petroleum;
   j. Marine technology;
   k. National and international fisheries;
   l. The obligations prescribed by the 1982 UNCLOS

Jakarta, February 16, 2015

Past Events

Nasional Seminar
Arbitrase dan Masyarakat Ekonomi ASEAN

Date : 26 Mei 2016
Venue : Inna Grand Bali Beach Hotel
Sanur Denpasar, Bali

ARBITRASE PERDAGANGAN DI INDONESIA DALAM ERA MASYARAKAT EKONOMI ASEAN

Prof. Dr. Frans H. Winarta, S.H., M.H.

The author has been the Founding and Managing Partner of Frans Winarta & Partners since 1981. He received his Bachelor of Law (S.H.) from Universitas Katolik Parahyangan, his Master of Law (M.H.) from Universitas Indonesia, and his Doctor of Law (Dr.) from Universitas Padjadjaran. In 2015, the author was confirmed as Professor of Law by Universitas Pelita Harapan after teaching there for two decades and counting. As an arbitrator, the author is a Member of the CIArb (MCIArb) and admitted in the panel of arbitrators of various institutions such as BANI, SIAC, HKIAC, KLRCA, SCIA, PIAC, and CACD. The author is also the Chairman of the Arbitration Commission of ICC Indonesia, as well as a Co-Founder and Co-Chairman of CIArb Indonesian Chapter.

Abstract

The ASEAN Economic Community is predicted to gradually increase not only economic growth, but also commercial disputes across South East Asia. As such, a trustworthy dispute settlement mechanism like commercial arbitration is needed to nevertheless attract business and investment. In Indonesia, however, the development of the subject is very slow, thus arguably limiting economic growth in the country. This brief writing will discuss the reason of such sluggish development and suggest the solutions to be taken accordingly.

Keywords: Dispute Resolution, Advantage of Arbitration, ASEAN, AEC, Problems of Arbitration in Indonesia, Amendment of the Indonesian Arbitration Law, Arbitration Education.

Dilaksanakannya konsep Masyarakat Ekonomi ASEAN ("MEA") pada akhir tahun 2015 telah menciptakan pasar dan basis produksi tunggal yang baru di Asia Tenggara. Negara-negara ASEAN, termasuk Indonesia, telah memulai menghilangkan peraturan serta kebijakan yang membatasi perdagangan dan investasi di antara mereka demi menjamin pergerakan barang, jasa, modal, dan tenaga ahli yang bebas di seluruh Asia Tenggara.

Integrasi ekonomi regional tersebut diharapkan meningkatkan perdagangan dan investasi kawasan sehingga dapat memperkuat peran global ASEAN sebagai suatu blok ekonomi dunia. Hal itu memang bukan mustahil terjadi mengingat jumlah populasi negara-negara ASEAN yang hampir mencapai 630 juta dan Produk Domestik Bruto gabungannya yang melebihi 2,45 triliun Dolar Amerika Serikat.

Namun demikian, meningkatnya perdagangan dan investasi lintas batas cenderung diikuti dengan meningkatnya sengketa bisnis. Mengapa? Transaksi internasional pada praktiknya melibatkan suatu kontrak antara pihak-pihak dari sistem hukum berbeda

yang – selain memiliki kepentingan yang berbeda – memiliki pandangan, pemahaman atau penafsiran yang berbeda pula terhadap kontrak. Perbedaan tersebut sering sekali menimbulkan sengketa, yang mana dalam konteks MEA dapat menghambat lalu lintas perdagangan bebas dan perkembangan ekonomi ASEAN apabila tidak dapat diselesaikan dengan baik.

Dalam menyelesaikan sengketa bisnis di era MEA ini pelaku usaha dihadapkan pada dua pilihan, yakni pengadilan atau arbitrase perdagangan (*commercial arbitration*). Jalur pengadilan merupakan cara penyelesaian sengketa konvensional yang ditempuh pelaku usaha sejak lama. Akan tetapi pada perkembangannya pelaku usaha, terutama dalam hal transaksi internasional, cenderung menyelesaikan sengketa bisnis mereka melalui arbitrase perdagangan. Preferensi tersebut bukanlah tanpa alasan.

Keunggulan arbitrase perdagangan dari pengadilan

Penyelesaian sengketa melalui litigasi pengadilan dikhawatirkan tidak akan memberikan keadilan bagi pelaku usaha asing karena adanya anggapan bahwa pengadilan akan lebih memprioritaskan pelaku usaha lokal. Di lain pihak, arbitrase perdagangan menawarkan ajudikasi sengketa oleh arbiter yang tidak berpihak (*impartial*) dan bebas (*independent*), yang pada prinsipnya dapat ditunjuk bersama oleh para pihak, dengan menggunakan proses netral yang sudah disesuaikan dengan sistem *common law* ataupun *civil law*, di tempat yang juga netral atau disepakati bersama oleh para pihak. Penyelesaian sengketa seperti itu menjadi jawaban bagi kekhawatiran pelaku usaha asing akan sikap bias pengadilan.

Lebih lanjut mengenai penunjukan arbiter, litigasi pengadilan tidak memungkinkan para pihak dalam sengketa untuk memilih sendiri hakim yang memeriksa sengketa mereka. Hal ini dapat menyulitkan pelaku usaha, terutama apabila sengketa mereka terkait dengan permasalahan teknis yang membutuhkan pengetahuan, pengalaman, dan keahlian di bidang tertentu. Contohnya adalah sengketa konstruksi, migas, telekomunikasi, dan teknologi. Apabila hakim yang mengadili tidak memiliki pemahaman yang cukup di bidang tersebut maka bisa saja putusan yang dijatuhkan menyimpang dari tujuan mencapai keadilan. Arbitrase perdagangan memberikan jalan keluar dengan memungkinkan para pihak untuk memilih sendiri arbiter yang mengadili perkara mereka.

Hal berikutnya yang kurang digemari pelaku usaha dari pengadilan adalah proses berperkaranya yang cenderung bertele-tele dengan birokrasi panjang lebar yang memakan waktu, tenaga, dan kesabaran pelaku usaha. Contohnya di Indonesia tidak jarang pihak dalam sengketa yang sedang mengurus perkara di-'ping pong' ke sana ke mari tanpa kejelasan; sidang ditunda berkepanjangan; panitera atau pejabat pengadilan tidak ada di tempat untuk waktu yang tidak menentu dan tanpa pengganti yang dapat melanjutkan tugas atau fungsinya. Secara kontras, proses berperkara di arbitrase perdagangan cenderung sangat profesional, jelas, dan responsif.

Karakteristik lainnya dari arbitrase yang berbeda dengan pengadilan dan disukai pelaku usaha adalah: (i) penghormatan tinggi arbitrase kepada kebebasan para pihak (*party autonomy*) yang memungkinkan mereka memilih atau mengatur, antara lain, prosedur yang akan ditempuh dalam memeriksa sengketa; (ii) sifat pemeriksaan arbitrase yang tertutup (*confidential*) sehingga melindungi citra publik pelaku usaha yang bersengketa terhadap publisitas yang merugikan; serta (iii) sifat putusan arbitrase yang final dan berkekuatan hukum tetap (*final and binding*) sehingga menutup kemungkinan dilakukan-nya upaya hukum banding, kasasi, ataupun peninjauan kembali.

Terlepas dari alasan-alasan di atas, sangat disayangkan arbitrase perdagangan di Indonesia masih banyak ditutupi awan gelap ketidakpastian.

Pengaturan mengenai arbitrase perdagangan di Indonesia belum memadai

Sejak tahun 1999, Indonesia mengatur arbitrase perdagangan dalam Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa ("UU Arbitrase"). Setelah berlaku hampir dua dekade lamanya, banyak kekurangan yang nampak pada UU Arbitrase dalam bentuk kekosongan hukum, pasal yang tidak jelas atau tidak sesuai dengan praktik-praktik internasional. Tiga contoh dalam hal ini adalah terkait prinsip *compétence-compétence*, putusan sela (*interim award*), dan arbiter darurat (*emergency arbitrator*).

Compétence-compétence merupakan prinsip yang mengatur bahwa majelis arbitrase memiliki kewenangan untuk memutuskan tuntutan yang mempermasalahkan yurisdiksi majelis tersebut untuk memeriksa dan mengadili perkara yang ada. Dengan adanya *compétence-compétence* maka pihak yang beritikad buruk menjadi tidak dapat menggelincirkan (*derail*) perkara arbitrase ke pengadilan dengan alasan majelis arbitrase tidak memiliki yurisdiksi (misalnya karena perjanjian arbitrasenya tidak sah). Prinsip ini telah diakui secara universal baik dalam aturan arbitrase dan *Model Law* UNCITRAL, aturan arbitrase ICC, LCIA, SIAC, HKIAC, bahkan BANI. Namun demikian *compétence-compétence* belum diatur dalam UU Arbitrase. Akibatnya banyak pihak yang beritikad buruk, serta *troublemaker lawyers*, yang mengajukan perkara ke pengadilan meskipun ada klausula arbitrase dalam perjanjian terkait.

Mengenai putusan sela, UU Arbitrase belum mengatur hal tersebut secara rinci, terutama terkait dengan pelaksanaannya (*enforcement*). UU Arbitrase dan Peraturan Mahkamah Agung No. 1 Tahun 1990 tentang Tata Cara Pelaksanaan Putusan Arbitrase Asing hanya mengatur mengenai pelaksanaan putusan arbitrase yang bersifat final dan berkekuatan hukum tetap, atau dengan kata lain putusan akhir (*final award*). Hal ini mengakibatkan putusan sela menjadi tidak dapat dilaksanakan karena sifatnya masih dapat diubah atau dibatalkan oleh putusan akhir. Putusan Pengadilan Negeri ("PN") Jakarta Pusat di kasus *Astro v. Lippo* cukup instruktif dalam hal ini ketika menolak permohonan pelaksanaan putusan sela arbitrase internasional asal Singapura atas dasar putusan arbitrase tersebut "bukan merupakan putusan akhir / final".

Contoh lainnya yang menunjukkan kekurangan UU Arbitrase adalah terkait dengan konsep arbiter darurat yang telah diakui di banyak aturan arbitrase seperti ICC, LCIA, SIAC, dan HKIAC. Arbiter darurat merupakan suatu terobosan baru di dunia arbitrase internasional yang bertujuan untuk mengakomodasi kepentingan pihak yang membutuhkan keputusan mendesak dan tidak dapat menunggu terbentuknya majelis arbitrase. Misalnya dalam sengketa jual beli saham, dalam hitungan detik saham yang disengketakan dapat dijual dengan mudah melalui bursa efek. Oleh karena itu, saham tersebut perlu untuk segera diamankan ketika sengketa terjadi. Contoh lainnya adalah sengketa barang bergerak seperti kapal. Jika kapal objek sengketa tidak segera ditahan di pelabuhan maka kapal tersebut dapat berlayar ke negara lain untuk menghindari penyitaan.

Permasalahan yang timbul sehubungan dengan arbiter darurat adalah sama dengan pembahasan sebelumnya mengenai putusan sela: UU Arbitrase belum mengatur mengenai pelaksanaan keputusan arbiter darurat yang berbentuk perintah (*order*), bukan putusan (*award*). UU Arbitrase hanya mengatur pelaksanaan putusan arbitrase yang final dan berkekuatan hukum tetap, sehingga segala

perintah arbiter darurat tidak dapat dilaksanakan di Indonesia. Hal ini menyimpang dari praktik arbitrase internasional dan perkembangan dunia bisnis yang membutuhkan kecepatan dan kepastian hukum.

Contoh-contoh tersebut di atas akhirnya memberikan predikat yang kurang baik pada Indonesia di mata internasional, yakni Negara Tidak Ramah Arbitrase (*Unfriendly To Arbitration*), yang akhirnya menjauhkan pelaku usaha untuk melakukan investasi dan transaksi bisnis dengan pihak Indonesia. Dengan demikian sudah seharusnya UU Arbitrase segera diamandemen dan disesuaikan dengan praktik arbitrase internasional dan perkembangan dunia bisnis.

Pengetahuan mengenai arbitrase perdagangan perlu dikembangkan

Selain dari pada amandemen UU Arbitrase, pengembangan pengetahuan para praktisi hukum, hakim dan panitera pengadilan terkait dengan arbitrase perdagangan juga perlu dilakukan. Melihat kasus-kasus yang ada di Indonesia, nampak banyak praktisi hukum dan aparat pengadilan yang belum cukup memahami proses arbitrase perdagangan dan hubungannya dengan pengadilan. Alhasil banyak putusan-putusan yang tidak konsisten dan menyimpang dari Konvensi mengenai Pengakuan dan Pelaksanaan Putusan Arbitrase Asing tahun 1958 (yang telah diratifikasi Indonesia melalui Keputusan Presiden No. 34 Tahun 1981) ("Konvensi New York 1958"), bahkan UU Arbitrase sendiri.

Pembatalan putusan arbitrase internasional asal Jenewa, Swiss, oleh PN Jakarta Pusat pada perkara *Karaha Bodas v. Pertamina* merupakan suatu contoh yang relevan. Meskipun putusan PN Jakarta Pusat tersebut akhirnya dibatalkan oleh Mahkamah Agung ("MA") pada tingkat kasasi, namun kasus itu tetap menjadi perhatian nasional dan internasional karena merupakan suatu penyimpangan besar dari Konvensi New York 1958; putusan arbitrase internasional hanya dapat dibatalkan oleh pengadilan tempat arbitrase perdagangan dilaksanakan (*seat of arbitration*) berdasarkan hukum arbitrase yang berlaku di tempat tersebut (*lex arbitri*).

Di kasus *Sumi Asih v. Vinmar Overseas*, kesalahan yang serupa kembali terjadi. Di kasus tersebut PN Jakarta Pusat menolak permohonan pembatalan putusan arbitrase internasional asal Houston, Texas, dengan beberapa alasan, terkecuali bahwa PN Jakarta Pusat tidak berwenang untuk membatalkan putusan arbitrase internasional. Melihat putusan MA pada kasus *Karaha Bodas v. Pertamina*, seharusnya majelis hakim PN Jakarta Pusat dan MA secara tegas mengatakan alasan yang sama tersebut di perkara *Sumi Asih v. Vinmar Overseas*. Tidak dilakukannya hal itu menunjukkan bahwa pemahaman praktisi hukum dan aparat pengadilan mengenai arbitrase perdagangan masih perlu untuk dikembangkan.

Manfaat pengembangan arbitrase perdagangan di Indonesia

Sangat disayangkan saat ini perkembangan arbitrase perdagangan di Indonesia masih terhitung sangat lambat dan belum mendapatkan dukungan penuh baik dari kaum akademisi, praktisi, pemerintah, maupun aparat pengadilan. Yang disebut terakhir ini justru cenderung menunjukkan sikap antipati dan tidak ramah terhadap arbitrase perdagangan, bukannya melihat arbitrase sebagai mitra atau rekan (*partner*) pengadilan dalam penyelesaian sengketa.

Perlu diperhatikan bahwa jumlah perkara yang menumpuk di pengadilan Indonesia, terutama MA, sudah menjadi isu yang sangat memprihatinkan karena tidak kunjung mengalami perkembangan signifikan selama hampir dua dekade ke belakang. Penumpukan perkara tersebut akhirnya mengakibatkan, antara lain, keadilan yang tertunda (*justice delayed is justice denied*) dan menurunnya kualitas putusan.

Padahal, apabila arbitrase perdagangan dapat berkembang dengan baik dan memiliki hubungan yang harmonis dengan pengadilan maka arbitrase akan mengurangi jumlah perkara bisnis di pengadilan. Pengurangan beban kerja tersebut kemudian akan memberikan kesempatan pada pengadilan untuk lebih fokus pada penyelesaian perkara yang lebih melibatkan kepentingan umum (seperti misalnya perkara pidana dan tata usaha negara) serta meningkatkan kualitas putusannya.

Selain itu berkembangnya arbitrase perdagangan akan meningkatkan daya saing Indonesia sebagai pusat arbitrase (*arbitration centre*) sehingga memberikan kenyamanan dan kepastian bagi pelaku usaha asing, serta menarik lebih banyak transaksi bisnis, investasi dan lapangan pekerjaan. Poin ini menjadi sangat krusial dan berkesinambungan dengan tujuan diciptakannya MEA.

Kesimpulan

Keberadaan MEA merupakan suatu keuntungan bagi Indonesia dalam mengembangkan potensi ekonomi dan bisnisnya. Seiring dengan meningkatnya ekonomi dan bisnis maka risiko terjadinya sengketa akan meningkat pula. Oleh sebab itu diperlukan suatu mekanisme penyelesaian sengketa bisnis yang dapat dipercaya, netral, serta memberikan kepastian hukum kepada pelaku usaha, yakni arbitrase perdagangan.

Saat ini masih terdapat kendala-kendala yang membuat arbitrase perdagangan di Indonesia belum berjalan secara maksimal, antara lain: (i) UU Arbitrase belum memadai, (ii) hubungan pengadilan dan arbitrase perdagangan belum berjalan harmonis, dan (iii) kurangnya pemahaman para praktisi hukum serta aparat pengadilan Indonesia terhadap arbitrase perdagangan.

Dalam hal ini Indonesia harus mengejar perkembangan dan kebutuhan dunia bisnis yang memerlukan kecepatan dan kepastian hukum, terutama mempertimbangkan harapan meningkatnya transaksi perdagangan di seluruh Asia Tenggara akibat MEA. Hal-hal yang dapat dilakukan untuk mencapai maksud tersebut antara lain: (i) amandemen UU Arbitrase dengan merujuk pada *Model Law*, yang mana merupakan undang-undang contoh yang dirancang khusus oleh UNCITRAL untuk mengharmonisasikan hukum arbitrase lokal dengan ketentuan internasional sehingga dapat memenuhi kebutuhan dunia bisnis pada praktiknya; dan (ii) memberikan pelatihan, penyuluhan, dan pendidikan kepada masyarakat luas, praktisi hukum, hakim, dan panitera pengadilan, terkait dengan arbitrase perdagangan itu sendiri.

Past Events

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

News & Events

Upcoming Events

ASIA PACIFIC REGIONAL ARBITRATION GROUP 2016

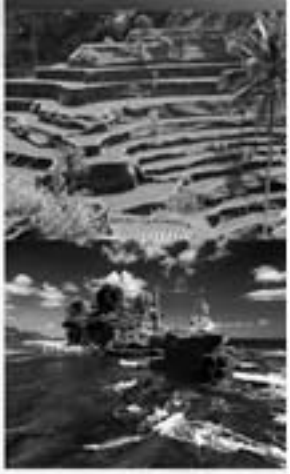
APRAG CONFERENCE 2016

aprag
Asia Pacific Regional Arbitration Group

bani
ARBITRATION
CENTER

The Rise of International Commercial Arbitration and Developments In Investment Treaty Arbitration: ASIAS RESPONSE

6 - 8 October 2016
Sofitel Nusa Dua Beach Resort, Bali - Indonesia



In October 2016, BANI Arbitration Centre of Indonesia has the honor to host the APRAG Conference. The theme of the conference is the Rise of International Commercial Arbitration and Developments in Investment Treaty Arbitration: Asias Response. This theme is taken because Asia in particular and other regions in the World have witnessed the tremendous growth of international commercial arbitration. This rise is an interesting development but also a challenge especially for the arbitration institutions in the Asia.

In addition, the regions have also witnessed the growth of investment arbitration disputes and how the countries in disputes have shown their resistance to the investor-state dispute settlement (ISDS) mechanism. This is shown among others by a number of countries, which have taken a hostile response to ISDS. A number of countries have shown their position not sign the investment treaty and plan to cancel or not to renew their bilateral investment treaties containing ISDS.

The Conference will be arranged 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 Update and Collaboration Perspectives.

Bali has always been a well known in island the world and is one of the best islands for tourism. Bali is known as the islands of Gods and it has a unique culture and tradition where its people preserve their tradition and culture in the midst of the flowing of tourism into the island .

We would like to welcome you all to come to Bali and attend the Conference. Get the fruitful and exciting discussion and exchange of ideas on international commercial arbitration. Make use the best opportunity to set up the arbitration network as well as to enjoy the Bali Island has to offer.

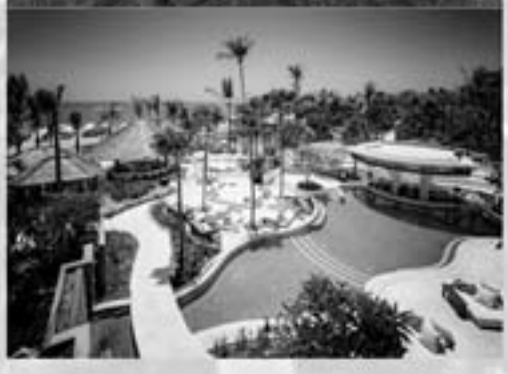
APRAG Members:

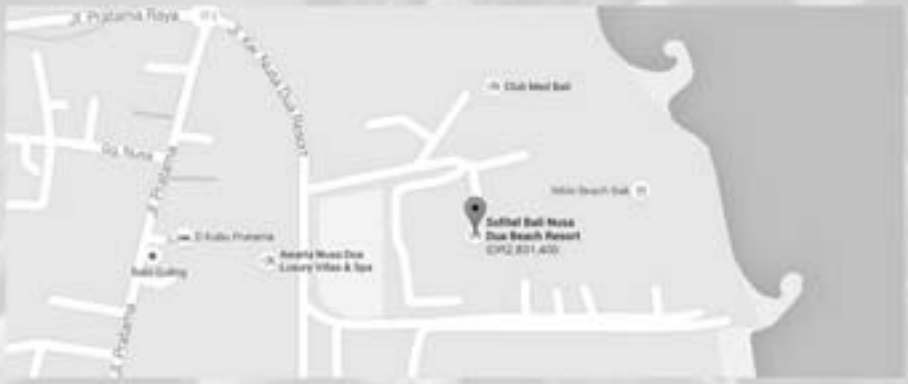
• Arbitration Association of Brunei Darussalam • Arbitration Association of Chinese Taipei • Arbitrators and Mediators Institute of New Zealand • Australian Centre for International Commercial Arbitration • Australian Commercial Disputes Centre • BANI Arbitration Center • Beijing Arbitration Commission • Chartered Institute of Arbitrators (Australia) • Chartered Institute of Arbitrators (East Asia) • Chartered Institute of Arbitrators (Malaysia) • China International Economic and Trade Arbitration Commission • Council for National and International Commercial Arbitration (CNICA) • Dubai International Arbitration Centre • FICCI Arbitration and Conciliation Tribunal • Hong Kong Institute of Arbitrators • Hong Kong International Arbitration Centre • Hong Kong Mediation and Arbitration Centre • ICC Asia • Indian Council of Arbitration • Indian Institute of Arbitration and Mediation (IIAM) • Institute of Arbitrators & Mediators Australia • Japan Commercial Arbitration Association • Jinan Arbitration Commission (JAC) • Karachi Centre for Dispute Resolution • Kazakhstani International Arbitrage (KIA) • Korean Commercial Arbitration Board • Korean Council for International Arbitration • Kuala Lumpur Regional Centre for Arbitration • Malaysian Institute of Arbitrators • Mongolian International and National Arbitration Center • Nani Palkhivala Arbitration Centre • Nepal Council of Arbitration (NEPCA) • Philippine Dispute Resolution Center, Inc • Qingdao Arbitration Commission (QDAC) • Shanghai Arbitration Commission (SHAC) • Shenzhen Arbitration Commission (SZAC) • Singapore Institute of Arbitrators • Singapore International Arbitration Centre • Thai Arbitration Institute (TAI) • Tokyo Maritime Arbitration Commission • Vietnam International Arbitration Centre • Western Australian Institute of Dispute Management

SOFITEL NUSA DUA BEACH RESORT

Indulge in a fine blend of French elegance and unique Balinese culture at Sofitel Bali Nusa Dua, a lavish 5-star beachfront resort with gorgeously landscaped pools and gardens against an immaculate stretch of white sand bordering the Indian Ocean.

Take on leisurely walks along leafy pathways or spend refreshing moments at the centrepiece lagoon pool. Unwind with soothing treatments at So Spa; rejuvenate at vietura bali artisan of anti-aging, or stay in shape at So Fit fitness centre.Enchant your taste buds at the resorts two restaurants and two bars. A kids club takes young guests into a fun world of discovery. Memorable meetings are possible with 12 function rooms, including a grand ballroom and a ballroom with ocean views.Ideal for business, leisure, or family fun, Sofitel Bali Nusa Beach Resort welcomes patrons to discover its luxury beachfront offerings for their memorable Bali holiday, only 30 minutes from the airport and main attractions within easy driving range.





The official conference website www.apragbali2016.com or apragbali2016.baniarbitration.com provides a registration and accommodation booking for participants convenience.

Accomodation booking by participants through the conference websites above will automatically apply the special participants rate for the venue hotel.

In addition to Sofitel Nusa Dua as the venue hotel where participants is advised to stay for convenience, the there are a choices of alternative hotels in the area nearby the Conference Hotel that are also recommended for participants. Below are the options:

- Mercure Bali Nusa Dua
- Grand Aston Bali Beach Resort Nusa Dua
- IBIS Style Bali Benoa.

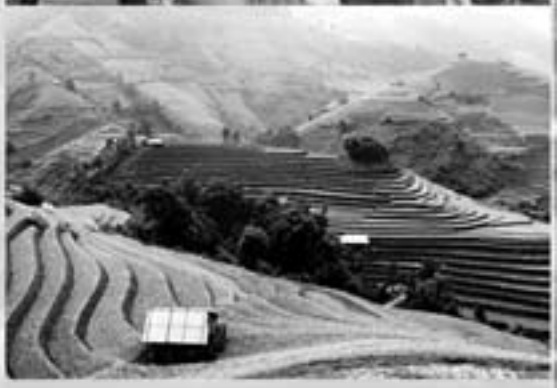
The conference organizer has arranged a special room rates for participants of APRAG CONFERENCE 2016 staying at venue hotel or the above alternatives hotels.

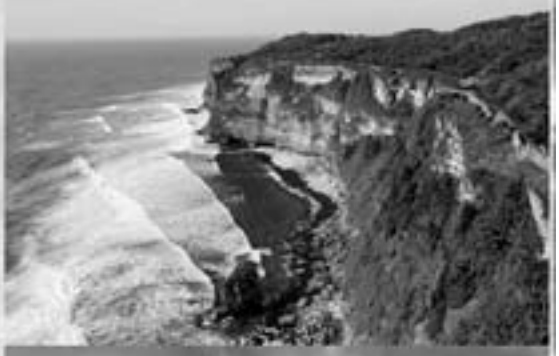
For further inquiry regarding conference venue and hotel reservation, please contact: mice@pesonawisata.com

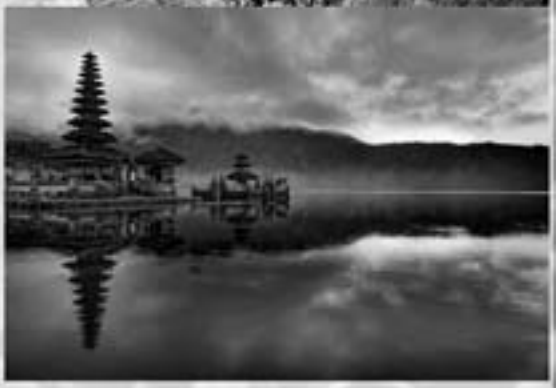
OPTIONAL TOUR
Post Conference

- Watching Kecak dance at Pura Luhur Uluwatu
- Sightseeing at local markets
- Temples tours: Tanah Lot, Uluwatu
- DEVDAN theatrical performance

All above optional tours can be arranged during your arrival, or please contact: mice@pesonawisata.com







The Rise of International Commercial Arbitration and Developments In Investment Treaty Arbitration: ASIAS RESPONSE

6 - 8 October 2016
Sofitel Nusa Dua Beach Resort, Bali - Indonesia

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(*) t.b.c.

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NAME :

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CLOSING DATE AND PAYMENTS

- Latest date for participant's registration and its corresponding payment is 6 September 2016 Admission fee: IDR 8,000,000 per person, which includes 2 days conference and materials kit, lunch and coffee breaks as well as Gala Dinner
- Special Rate for BANI Listed Arbitrators, Member of IArbI, students and academics, or group of 2 persons or above from same organization/company with discount.
- Strictly limited capacity. Register early to guarantee seat availability.
- Kindly complete the above Registration Form and send it by fax : +62 21 7940543 or by email : bani-arb@indo.net.id, or you can also register, booking the hotel and getting other information through the website of APRAG 2016 at apragbali2016.baniarbitration.org.

REGISTRATION SHALL ONLY BE HONORED AFTER THE REGISTRATION PAYMENT IS TRANSFERRED TO :

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A/C 800119340800 (IDR account)

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Website: www.baniarbitration.org

APRAG CONFERENCE 2016
PROGRAM
The Rise of International Commercial Arbitration and Developments In Investment Treaty Arbitration: Asia's Response

Thursday, 6 Oct. 2106			
09.00 – 17.00	Delegates Registration		
17.00 – 19.00	Meeting of APRAG Representatives		
19.00 – 21.00	Dinner		
DAY 1 Friday, 7 Oct 2016			
07.00 – 08.00	60	Preparation	VIP room
08.00 – 08.20	20	**Balinese Traditional Procession**	EO
08.20 – 08.30	10	Welcome Address - Chairman BANI	M. Husseyn Umar
08.30 – 08.45	15	Opening Address – APRAG President	Yu Jianlong
08.45 – 09.00	15	ASEAN Secretary General – Keynote Address	HE Le Luong Minh *
09.00 – 09.15	15	Chief of Justice of the Supreme Court of the Republic Indonesia – Keynote Address	Prof. Dr. H. M. Hatta Ali SH., MH.*
09.15 – 09.20	5	Striking the Balinese cultural Gong as the blessing symbol of the Opening the Conference	
09.20– 09.30	10	**Coffee Break**	
Session 1 09.30 – 11.20		**Diversity and Unification of Arbitration Practices in Asia**	Chair : Dr. Michael Pryles
09.30-09.40	a	Is there a common international arbitration culture in the Asia Pacific Region ?	Prof. Anselmo Reyes
09.40-09.50	b	Is the march of common law procedure too pervasive?	Yoshimi Ohara
09.50-10.00	c	Who should control the length of a hearing?	Stephen Nathan QC
10.00-10.10	d	Is the role of arbitrators different?	Michael Lee
10.10-10.20	e	Are adversarial proceedings appropriate?	Lee Young Seok
10.20-10.30	f	Is there a fundamental difference in the approach to commercial transactions?	Ms. Kim Rooney
10.30-10.40	g	Is the approach to dispute resolution in general different?	Lawrence Teh
10.40-10.50	h	Is it possible to ensure international uniformity in arbitration procedures and culture?	Philip Yang
10.50-11.20	30min	Q&A	
Session 2 11.20-12.50		**Third Party Funding and Costs in Investment and Commercial Arbitration ?**	Chair : Prof. Dr. Colin Ong
11.20-11.30	a	Should third-party funding in Investment and Commercial arbitration be allowed?	James Kwan
11.30-11.40	b	Issues of confidentiality and privilege - can third-party funding be regulated?	Dr. Nikolaus Pitkowitz
11.40-11.50	c	Should there be a harmonised system of costs in international arbitration?	Prof. Ben Hughes
11.50-12.00	d	Are there any best practices for reducing time and costs in Investment Treaty Arbitration and commercial arbitration that can be adopted throughout the region?	Prof. Michael O'Reilly
12.00-12.10	e	Can an egregious error on the award of costs by an arbitral tribunal be challenged in the seat and at the courts of enforcement?	Michael Hwang SC
12.10-12.20	f	Should there be harmonisation of practices on dealing with security for costs in the Asia-Pacific region?	Andrew Moran QC
12.20-12.50	30min	Q&A	

12.50-13.50		**Luncheon Adjournment**	
Session 3 **13.50-15.20**		**Investment Arbitrations in Asia**	Chair : David Bateson Prof. Hi-Taek Shin
13.50-14.00	a	Has Investment Arbitration had any effect in shaping Investment Treaties of States?	Stephen Jagusch QC
14.00-14.10	b	Are Investment Treaty Arbitration cases dominated by the same arbitrators and law firms from US and Western European countries?	Teresa Cheng SC
14.10-14.20	c	Do Asian witnesses and Asian law firms face cultural disadvantages in appearing before European Tribunals?	Yu Jin Tay
14.20-14.30	d	As some Asian States have withdrawn from BIT treaties and Investment Treaty Arbitration, is this an opportunity for the ICC and UNCITRAL to flourish?	Lucy Reed
14.30-14.40	e	Indonesia's Experience in Investment Arbitration	Fritz H. Silalahi *
14.40-14.50	f	The UNCITRAL Arbitration Rules as a Unifying set of Arbitration Rules for the AEC	Corrine Montineri
14.50-15.20	30 min	Q&A	
15.20-15.30		**Coffee Break**	
Session 4 **15.30-16.40**		**Current Issues on commercial and investment arbitration within the new ASEAN Economic Community**	Chair : M. Husseyn Umar
15.30-15.40	a	Prospects for harmonization of commercial and investment arbitration within the new ASEAN Economic Community	Abhinav Bhusan
15.40-15.50	b	Are there unique attributes of international arbitration culture in ASEAN.	Prof. Sundra Rajoo
15.50-16.00	c	How should commercial arbitration complement the current dispute resolution mechanisms in ASEAN	Prof. Frans H. Winarta
16.00-16.10	d	What are the opportunities for the international arbitration community to assist in developing best practices for international arbitration within the AEC	Chou Sean Yu
16.10-16.20	e	A harmonised system of international commercial arbitration within the AEC and Beyond ?	Prof. Locknie Hsu
16.20-16.50	30 min	Q&A	
		Break - recess	
19.00 – 22.00		**Gala Dinner**	
		DAY 2 **Saturday, 8 October 2016**	
Session 5 **09.00-12.25**		**Members Update and Collaboration Perspectives**	Chair: Yu Jianlong
09.00-09.10 09.10-09.20 09.20-09.30 09.30-09.40 09.40-09.50 09.50-10.00		ACICA BAC CIETAC DIAC HKIAC JCAA	Deborah Tomkinson Fu Yong Chen ... ... Prof. Tatsuya Nakamura
10.00-10.30	30 min	Q&A	
10.30-10.40		**Coffee Break**	
10.40-10.50 10.50-11.00 11.00-11.10 11.10-11.20 11.20-11.30 11.30-11.40		KCAB KLRCA PDRCI SIAC VIAC BANI	... ... Lim Seok Hui ... Prof. Huala Adolf
11.40-12.10	30 min	Q&A	
12.10 – 12.30		Closing Remarks	Dr. Michael Pryles
12.30 – 14.00		**Lunch**	

Past Events

1. 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

2. CEPANI

Seminar on Brussels : International Arbitration Hub

(Exchanging ideas on international alternative dispute resolution)

Date : Tuesday, 15 March 2016 | 1:30 pm – 4 pm
Venue : Pullman Hotel, Jakarta

Signing Cooperation Agreement between **BANI** (**Mr. Umar Husseyn,** Chairman Arbitration Center of BANI) and **CEPANI** (**Mr. Dirk De Meulemeester,** President of Cepani and Attorney at Law)

3. National Seminar

Law Choices for Business Enterprises in Service and Goods Procurement in the Asean Economic Community Commencement in Disputes Settlement in BANI

Date & Time : Thursday, 17 March 2016 | 09.00 a.m.– 02.00 p.m.
Venue : Santika Premier Surabaya, Indonesia

In responding the business changing environment in the regional economic communities, especially in Asean region, BANI Surabaya Representative Office presented a National Seminar.
The prominent speakers ranging from business practitioners to scientific academician, they are from National Construction Services Development Board, Indonesia Public Listed Companies Association, East Java Public Works Office and Law Faculty of Airlangga University.