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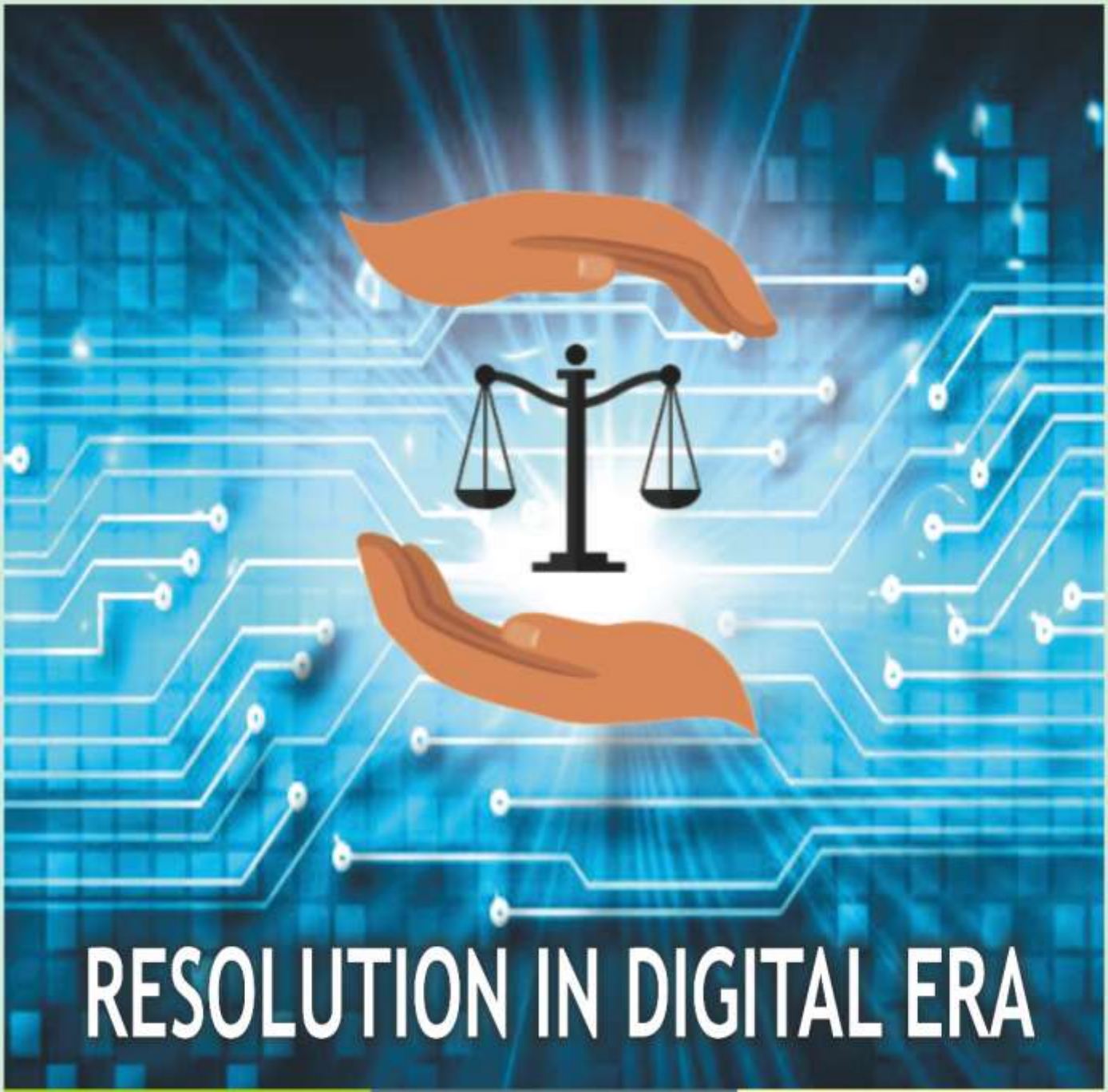

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Notes to contributors

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

Welcome to BANI Quarterly Newsletter 2021, in this 1st edition there are three articles contributed by numbers of Indonesian practitioners and academics who have dedicated their time to highlight some important issues related to alternative dispute resolution.

First article written by **Danrivanto Budhijanto**, Associate Professor at the Faculty of Law, Padjajaran University, together with **Anangga W. Roosdiono**, Senior Partner of Roosdiono Partners, and **Mursal Maulana**, Lecturer and Researcher at Transnational Business Law Department, Faculty of Law Padjajaran University. The article discusses the world vast development of cross-border transaction in digital era and the need of Online Dispute Resolution (ODR) as the method of resolving such disputes. With the lack of law instruments to facilitate ODR in many countries the writers touch how UNCITRAL Technical Notes on Online Dispute Resolution (ODR) constituted by UNCITRAL as a descriptive and procedural soft law could be an ideal rules and procedures for parties in consent in resolving their disputes through ODR.

Second article written by **Yu Un Oppusunggu,** lecturer at Faculty of Law, University of Indonesia. In this article he advocates recognition and enforcement of foreign arbitral awards should be included for a complete regulation on private international law as the international arbitration is part of private international law in the upcoming Indonesian National Legislation Program.

Andi Yusuf Kadir, Senior Partner and head of the Dispute Resolution Practice of HHP and **Zarina Marta Dahlia**, Associate in the Dispute Resolution practice group of HHP Law Firm touch some issues pertaining to arbitrator's alleged lack of independence and impartiality as the background of annulment of an arbitration award in the third article. With two case studies, the writers analyse whether allegations of an arbitrator's lack of independence or impartiality is enough to trigger the element of 'fraud' to nullify an arbitration award as stipulates in Article 70 of the Arbitration Law.

We would like to extend our sincere participation to our writers, although Covid-19 has shaken up the world, we still receiving tremendous amount of contribution, it shows that arbitration and alternative dispute resolution community has a very good spirit in sharing and helping each other to grow together.

Practitioner, academic, arbitration and alternative dispute resolution community and enthusiast are most welcome to submit article to BANI Newsletter team. We hope that this newsletter can be a place to share knowledge and views to develop arbitration and alternative dispute resolution.

Finally, we wish our readers and contributors always safe and healthy, and see you in the next edition!

Chaidir Anwar Makarim

Editor in Chief

March, 2021

UNCITRAL Technical Notes on Online Dispute Resolution as Soft Law Instrument for Online Dispute Resolution: An Indonesia Perspective

Danrivanto Budhijanto, Anangga W. Roosdiono, Mursal Maulana

Abstract

Artikel ini membahas Soft Law instrumen yang dirancang oleh UNCITRAL, UNCITRAL Technical Notes on Online Dispute Resolution yang merupakan aturan hukum yang tidak mengikat, deskriptif dan prosedural yang mengatur mekanisme penyelesaian sengketa secara online (ODR). Dengan semakin semakin meningkatnya kegiatan e-commerce, ODR dapat dianggap sebagai mekanisme yang efektif dan efisien dalam menyelesaikan sengketa yang timbul dari transaksi lintas batas di seluruh penjuru dunia, termasuk di Indonesia. Untuk memastikan pelaksanaan ODR berjalan secara optimal, keberadaan kerangka hukum yang mengatur proses penyelesaian sengketa secara online sangat diperlukan. Sejauh ini, sebagian besar negara di dunia tidak memiliki aturan hukum substantif terkait ODR. Munculnya UNCITRAL Technical Notes on Online Dispute Resolution dianggap sebagai opsi meskipun sifat instrumen ini hanyalah Soft Law semata. Meskipun tidak memiliki kekuatan hukum mengikat, para pihak yang bersengketa dapat secara konsensual memberikan persetujuan untuk menggunakan aturan ini sebagai rules of procedure.

Artikel ini disusun menjadi empat bagian. Bagian pertama merupakan pengantar yang membahas secara ringkas eksistensi ODR dalam beberapa dekade terakhir sebagai konsekuensi dari meningkatnya aktivitas e-commerce. Bagian kedua membahas sejarah perkembangan ODR dan perkembangan terkini di beberapa jurisdiksi. Bagian ketiga membahas ruang lingkup UNCITRAL Technical Notes on Online Dispute Resolution dan bagian terakhir sebagai kesimpulan mengusulkan agar instrumen Soft Law seperti UNCITRAL Technical Notes on Online Dispute Resolution dapat berfungsi sebagai instrumen yang dapat digunakan sebagai alternatif sumber hukum ODR.

Key Words: Online Dispute Resolution (ODR), UNCITRAL, Soft Law

I. Introduction

The development of advanced Information and Communication Technology (ICT), which was marked by the emergence of the internet and the World Wide Web in the 19th century, has changed the paradigm of social interaction among people. Such development is often dubbed as the era of digital disruption that causes fundamental changes in the social order. Digital disruption has indirectly changed people's behavior in conducting business transactions, one of which is the business relationship that is carried out as a result of digital disruption through e-commerce.

The Covid-19 pandemic also has changed the paradigm of the global community in conducting business transactions. Social restriction has led business transaction patterns shifted from using traditional way of purchasing products directly from stores to online shopping by using e-commerce. Digital literacy is highly considered as the main factor driven the increasing number of online shopping transaction all over the world.

In Indonesia, based on the 2020 e-commerce Survey conducted by the Central Statistics Agency (BPS), out of the 16,277 business activities, 71.18 percent of business entities started selling via the internet over the last three years. Meanwhile, 26.90 percent of businesses started selling online from 2010 to 2016[1]. Responding to that development, Indonesia's government has enacted several related regulations such as the XIV Economic Policy Package on e-commerce, Presidential Decree No. 74 of 2017 concerning the National Electronic-Based Trading System Roadmap (SPNBE) and Government Regulation Number 80 of 2019 concerning Trading through Electronic Systems (PMSE).

Online environment is constantly evolving in novel, varied, valuable and complex way so that such evolution is considered as a powerful dispute-creation engine. It also fosters more disputes and new kind of disputes including those arising from e-commerce activities[2]. It is inevitable that rapid development of e-commerce could trigger disputes to come about. Disputes in e-commerce can occur in the form of Business to Business, Business to Consumer and Consumer to Consumer. Therefore, an effective and efficient dispute resolution mechanism related to e-commerce is paramount important. The most suitable option that can be utilized to answer that challenge is Online Dispute Resolution (ODR).

In domestic level in several jurisdiction, there is hardly any regulation governing ODR mechanism. In Indonesia for example ODR provisions are scattered in various regulation, among others are the Law No 11 of 2008 concerning Electronic Information and Transaction as amended by the Law No 19 0f 2016 (Article, 18 (1) (2) (3) (4) and Article 41 (1) (2) (3)), Government Regulation Number 80 of 2019 concerning Trading through Electronic Systems (Article 72 (2)), the Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions. In term of procedural law, Indonesia Arbitration Center has just issued Decree Number 20.015/V.SK-BANI/HU concerning the Rules and Procedures for Organizing Electronic Arbitration to support arbitration hearing conducted electronically. Meanwhile, in regional level, there are efforts to create legal framework on ODR such as effort made by ASEAN and APEC.

The increasing number of e-commerce activities must be supported by the existence of legal rules governing dispute resolution procedures, especially rules regarding ODR. This article discusses the UNCITRAL Technical Notes on Online Dispute Resolution as procedural rules that can be used by disputing parties in resolving their dispute.

[1] Statistik E-Commerce 2020, Katalog BPS: 8101004

[2] Ethans Kats and Orna Rabinovich-Einy, *Digital Justice Technology and the Internet of Disputes*, Oxford University Press, 2017, p. 2.

II. Historical Development of ODR and Current Development in several Jurisdictions

A Glimpse of Online Dispute Resolution

Similar with other alternative dispute resolutions such as arbitration, mediation, conciliation, etc, ODR is an alternative form of modern dispute resolution where the use of Information and Communication Technology (ICT) particularly internet is the main character of this mechanism. In various literatures, the term ODR is used interchangeably with other terms such as e-ADR, Cyber ADR and Internet Dispute Resolution (iDR). ODR is considered as an alternative dispute resolution that is simpler, faster, efficient and convenient for the disputing parties compared to traditional alternative dispute resolution and litigation.

UNCITRAL Technical Notes on Online Dispute Resolution defines ODR as mechanism for resolving disputes through the use of electronic communications and other information and communication technology. The process may be implemented differently by different administrators of the process, and may evolve over time[3].

In its implementation, ODR not only resolves disputes arising from online business transactions, but also offline transactions[4]. Until recently, there are several platforms offers ODR such as CyberSettle, PayPal Online Mediation, iCourthause, ClickNsettle, Smartsettle, TRUSTe, Rechwijzer 2.0, Youstice, Modria, Online Schlicher, Financial Ombudsman Service, Nominet and SquareTrade[5].

Historical Development of ODR

The first ODR procedure was originally introduced by a Virtual Magistrate (VM) located at Villanova University (Philadelphia, USA) which was established by the National Center for Automated Information Research in 1995. VM is a voluntary online arbitration procedure aimed at resolving disputes between Internet Service Providers (ISP) and users. VM has the competence to handle disputes arising from defamation, intellectual property, fraud and illegal seizure of commercial secrets, etc.

Pablo Cortés divides the history of the development of ODR into four phases:

i. The first phase, ***the Hobbyist Phase***, was marked by the emergence of the internet in 1995. At that time, ODR was not yet known formally, but informally.
ii. The second phase, ***Experimental Phase***, this phase developed from 1995 to 1998 which was marked by the emergence of ODR formation initiatives by Non-Profit Organizations such as VM.
iii. The third phase, ***Entrepreneurial Phase***, this phase started from 1998 to 2002. This phase was marked by the emergence of ODR initiatives from several industries. For example, SquareTrade and CyberSettle.
iv. The fourth phase, ***Institutional Phase***, has been developing since 2002 until now. Since then, ODR services have started to increase significantly. Based on observations from Conley Tyler, as of March 2006, there are 149 ODR services worldwide.

The Arbitration Law 4.0 as Applied Theory for ODR

William Twining in *Globalization and Legal Theory* argues that it is necessary to categorize legal theories according to their

[3] Section IV UNCITRAL Technical Notes on Online Dispute Resolution

[4] Example of ODR Platform dealing with offline transaction is CyberSettle.

[5] Each platform has different of their level automation.

era, that it is problematic to universal legal theory[6]. Legal theories established in the 19th or 20th century due to different backgrounds and different approaches. Legal theories since the 21st century will be prejudiced by the challenges of the development of science and technology and globalization in various fields will greatly colour the legal theories.

The main factor for the law to be able to play a role in economic development is whether the law is able to create "*stability*", "*predictability*" and "*fairness*"[7]. The first two conditions is a prerequisite for any economic system to function as intended, namely *Firstly,* the function of the stability is potential balancing for law and accommodate the interests of competition. *Secondly*, the need for a legal function to be able to predict the consequences of a step taken is especially important for a country where the majority of its people enter economic relations beyond the traditional social environment for the first time. *Thirdly*, the aspect of justice (*fairness*), namely equal treatment and standard behaviours patterns (governance) The government is necessary to establish and maintain market mechanisms and prevent excessive bureaucracy.

The significant role of Arbitration Law 4.0 as a theoretical basis for ODR is to ensure the achievement of stability, predictability, and justice (fairness) in an legal, economical, and technological system towards human civilization in New Normal. The Arbitration Law 4.0 in the Development Law Theory approach has articulation as Arbitration Law which includes principles and rules and includes institutions and processes that embody Arbitration Law into the reality of people's lives the Industrial Revolution 4.0 as a global digital civilization[8].

The Arbitration Law 4.0 is a actual manifestation of Convergence Legal Theory (CLT) as the author's conceptual and theoretical understanding of the convergence of technological, economical, and legal variables on human and community relations in the Digital Information Age, at the national, regional and international levels[9]. The Arbitration Law 4.0 as Arbitration Law which includes principles and rules and includes institutions and processes that embody Arbitration Law into the reality of people's lives Industrial Revolution 4.0 as a global digital civilization theoretically are as follows:

1. The Law of Arbitration 4.0 applies universally and eternally which is reflected in principles and principles in accordance with the conceptual "principles" originating from the thoughts of the Natural Law Legal Theory with its scholars, namely Thomas Aquinas, Dante, and Hugo Grotius;
2. The Arbitration Law 4.0 is an order (command), obligations, and sanctions as contained in the norms of legislation by those who have power (the state) in accordance with the conceptual "rules" which are based on thoughts from the Positivism and Legism Legal Theories with the scholars namely Jellinek, Hans Kelsen, and John Austin;
3. The Arbitration Law 4.0 is the way of life or fundamental ideology of the nation (*Volk Geist*) which various according to time and place, and comes from the association of human life from time to time (historical, actual, futuristic)

[6] William Twining, *Globalisation and Legal Theory*, Butterworths, London, 2000, p. 52-53.

[7] Leonard J. Theberge. *Law and Economic Development*, Journal of International Law and Politic vol. 9 (1989). H. 232.

[8] Lili Rasjidi dan Ira Thania Rasjidi, *Dasar-Dasar Filsafat dan Teori Hukum*, Citra Aditya Bakti, Bandung, 2007 and HR Otje Salman S dan Anton F. Susanto, *Teori Hukum: Mengingat, Mengumpulkan dan Membuka Kembali*, Refika Aditama, Bandung, 2004.

[9] Danrivanto Budhijanto, *Teori Hukum Konvergensi*, Penerbit Refika, Bandung, 2014.

reflected through the behaviours of all individuals to a modern and complex society, where legal awareness the people are articulated by legal scholar (doctrine) as conceptual "institutions" derived from the thoughts of the History Legal Theory with the scholars, namely Carl von Savigny and Puchta ; and

4. The Arbitration Law 4.0 is law that is in accordance with the law that lives in society as conceptual "process" comes from the thoughts of the Sociological Jurisprudence Legal Theory with its scholars, namely Roscoe Pound, Eugen Ehrlich, Benjamin Cardozo as well as ideas from the Pragmatic Legal Realism Legal Theory with scholars are Oliver Wendell Homes, Karl Llewellyn and also Roscoe Pound , that law is "*a tool of social engineering"* and understands the importance of intellectual or reason as a source of law.

The Arbitration Law 4.0 as a conceptual *Sui Generis Lex Arbitri* with virtual jurisdiction for ODR. *Sui Generis* comes from the Latin terminology "*of its own kind or class; unique or peculiar. The term used in intellectual property law to describe a regime designed to protect rights that fall outside traditional patent, trademark, copyright, and trade secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a sui generis statute designed for that purpose"*[10]. The Arbitration Law 4.0 is based on the understanding of arbitration legal subjects who carry out arbitration legal action and have arbitration legal consequences that are connected, interacted, and transacted digital data in cyberspace. The term of cyberspace was introduced in 1984 by William Gibson in his book entitled *Neuromancer* with the following understanding :[11]

"*Cyberspace as a consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts... A graphical representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data*".

Comparative ODR in Various Jurisdictions

ODR in India

The Supreme Court of India has made efforts to establish a legal framework regarding ODR by affirming that India continues to strive to modernize the rule of law in accordance with technological developments. This effort is carried out by legitimizing the use of video conferencing in the examination of witnesses.

In the case *Grid Corporation of Orissa Ltd. v. AES Corporation*, The Supreme Court of India affirmed that:

> "When an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must inevitably sit together at one place unless it is the requirement of law or of the ruling contracts between the parties."

The validity of the use of technology in dispute resolution is emphasized in Arbitration and Conciliation Act and Section 4 & 5 of Indian's IT Act read with section 65B of Indian Evidence Act[12]

[10] Black's Law Dictionary, Ninth Edition, West Publishing Co, St. Paul, 2009, p. 1572.

[11] William Gibson, *Neuromancer*, New York: Berkley Publishing Group, 1989, p. 128.

[12] Sree Krishna Bharadwaj H, *A Comparative Analysis of Online Dispute Resolution Platforms*, American Journal of Operations Management and Information Systems, 2017.
In some arbitration cases, for example in Shakti Bhog v Kola Shipping Ltd and Trimex International v Vedanta Aluminum Ltd the Indian Supreme Court stated that the use of cyber arbitration is permissible provided that it complies with Sections 4 and 5 of the IT Act read with Section 65B of the Indian Evidence Act and Section 7, 12-18 of the A&C Act.

ODR in European Union

Consumer protection became major concern of the European Union in their economic activities as a single market. The EU continues to comprehensively develop substantive rules related to consumer protection. In addition, EU Policy makers have also developed a set of legislative and non-legislative tools that aim to make the enforcement of consumer rights in the Member States more effective or known as (EU enforcement toolbox), one of the components in the toolbox is consumer ADR which is then regulated in the 2013/11/EU Directive on alternative dispute resolution for consumer disputes (ADR Directive).

The rationale behind the institutional promotion of consumer alternative dispute resolution (CADR) mechanisms is not simply to enable individual redress, but also to secure more effective compliance with and enforcement of consumer law, ultimately seeking to increase consumer trust in the market[13].

Similar with other region, due to the increasing number of internet user, cross-border shopping by using e-commerce in Europe increased drastically since 2008 where one-third of EU citizen used e-commerce to buy something. Significant obstacle facing by EU is how to created dispute settlement arising from e-commerce activities, especially for small value claim. Since that period, EU was facing crucial choice either to adopt traditional dispute resolution or tailor new method equipped with Information and Communication Technology (ICT) which is eminently suited to the need of e-commerce[14]. Until recently, the substantive rules are regulated in Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (ODR Regulation). The scope of application of ODR regulation is only restricted to disputes arising from e-commerce and at least fifteen Member States are developing national ODR platforms or help desks.

ODR in Indonesia

Until now there are no specific rules governing ODR in Indonesia, substantive rules related to ODR are regulated in several pieces of legislation, including the following:

1. **Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution**

   Law No. 30 of 1999 does not specifically regulate ODR. Nevertheless, Article 4 paragraph (2) implicitly confirms the existence of ODR:

   > *"In the event that it is agreed that dispute resolution through arbitration occurs in the form of an exchange of letters, the sending of telex, telegram, facsimile, e-mail or in other forms of communication means, must be accompanied by a note of receipt by the parties."*

2. **Law No 11 of 2008 concerning Electronic Information and Transaction**

   Similar to Law No. 30 of 1999, the ITE Law does not explicitly mention the existence of ODR in Indonesia[15], although the rules related to ODR can be seen in several articles, particularly Article 18 and Article 41.

[13] Pablo Cortés, The New Regulatory Framework for Customer Dispute Resolution, Oxford University Press, 2016, P.30-32.

[14] Pablo Cortés, *Online dispute resolution for consumers in the European Union*, Routledge, 2011, P.2.

[15] There are several other rules that implicitly regulate ODR in Indonesia, for example, Law No. 7 of 2014 concerning Trade, Law No. 8 of 1999 concerning Consumer Protection, Government Regulation No. 71 of 2019 concerning the Implementation of Electronic Systems and Transactions.

Article 18 paragraph (4) states that:

The parties have the authority to establish court forums, arbitration, or other alternative dispute resolution institutions that are authorized to handle disputes that may arise from international Electronic Transactions they made.

3. Government Regulation Number 80 of 2019 concerning Trading through Electronic Systems

Unlike the previous laws mentioned above, Government Regulation Number 80 of 2019 has explicitly stated the existence of ODR in Indonesia. The provisions are regulated in Article 72 paragraph (2):

Settlement of disputes in trade through an electronic system can be carried out electronically in accordance with the provisions of laws and regulations.

Advantages and Disadvantages of ODR

According to Final Report published by ODR Advisory Group in 2015 ODR has there are several challenges facing by court especially for small value disputes which ODR can deals with, among others are as follow:

a. Affordable, especially for small value claims. If complainant (especially for litigant in person) brings the dispute to court it will be too costly, slow and complex;
b. Accessible, particularly for citizens with physical disabilities;
c. Intelligible, citizens can feel comfortable in representing themselves without having to hiring lawyer;
d. Appropriate, especially for internet generation and online society;
e. Speedy, so that the period of uncertainty of an unresolved problem is minimized;
f. Consistent, providing predictability;
g. Trustworthy, a forum in whose honesty and reliability users can have confidence;
h. Focused, experience and knowledge are genuinely required;
i. Avoidable, with alternative service in place;
j. Proportionate, the cost of pursuing a claim are sensible by reference to the amount at issue;
k. Fair, delivering outcomes that parties feel are just;
l. Robust; underpinned by rules of procedures;
m. Final[16].

Compared with traditional ADR, ODR is considered cost savings and conveniences for disputants. Cyber-mediation for example, may be feasible option for individuals who are unable to afford travelling long distances cost for their e-commerce dispute. Another advantage of using ODR is avoidance of complex jurisdiction issues. Since disputants can bind themselves to resolution through an agreement, jurisdictional issue can be avoided altogether[17].

Notwithstanding the advantages of ODR as mentioned above, ODR also creates several disadvantages, among others are as follow:

a. Potentially Inaccessible/ Technological Problem, especially for those having limited access to online computer and less familiar with computer;
b. Confidentiality Concern, protection of confidential material in ODR can be easily printed out and distributed[18];

[16] Online Dispute Resolution Advisory Board Group, ODR Report 2015, https://www.judiciary.uk/reviews/online-dispute-resolution/odr-report-february-2015/

[17] Joseph W. Goodman, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber Mediation Websites, Duke Law & Technology Review, 2013.

[18] *Ibid*.

c. Lack of Face-to-Face Contact, the absence of non-verbal cues may facilitate misrepresentation of identity and lead to miscommunication;
d. Language Barrier, especially for those do not use English as first language, sometimes it can lead to miscommunication;
e. Confidentiality Barrier, Confidentiality is a very crucial principle in ODR. Confidentiality in this case is defined as non-disclosure of information, documentation as well as communication. The ODR provider must ensure that the data submitted by the disputing parties can be stored properly and ensure that the data cannot be accessed by unauthorized parties. In some countries that already have legal regulations related to data protection, this principle may be guaranteed to be implemented. Therefore, the concern regarding confidentiality is not only a concern of the ODR platform but must also be supported by the national laws that govern it.
f. Legal Difficulties, the absence of clear legal standards for ODR, particularly if the need of public enforcement arises[19].

III. UNCITRAL Technical Notes on Online Dispute Resolution as Soft Law Instrument

Technical Notes on ODR is a legal product issued by the United Nations Commission on International Trade Law (UNCITRAL), which is a specialized agency of the United Nations given the mandate to modernize and harmonize the rules of international trade law. This organization was founded in 1966 through the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966. The legal rules issued by UNCITRAL can be in the form of legislative rules and non-legislative rules relating to commercial law.

In contrast to legislative rules that have binding character in the form of international agreements or convention such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), UNCITRAL also created non-binding legal instruments known as soft law such as Model Law, Legislative Guides and Technical Notes.

One of examples of soft law instruments issued by UNCITRAL is Technical Notes on ODR. The process of formulating this instrument began in 2010 when the UNCITRAL Working Group III on ODR was formed. At that time, UNCITRAL realized that e-commerce disputes had increased exponentially, therefore UNCITRAL felt the need for a simple, quick and inexpensive rule. The discussion regarding the ODR rules initially faced several obstacles, especially regarding the form of the rules to be negotiated, whether in the form of hard law which has binding legal force or rules that are soft law. These obstacles were then resolved after Working Group III revised its mandate by only formulating soft law rules in the form of Technical Notes. In 2016, precisely in the 49th session of the Working Group, Technical Notes on ODR were finally agreed to be used as a non-binding descriptive instrument[20].

UNCITRAL Technical Notes on Online Dispute Resolution as Rules of Procedures

The technical note on ODR is a legal instrument that was approved as a result

[19] Pablo Cortés, *Online dispute resolution for consumers in the European Union, Op.Cit*, p.47-58.
[20] Nadine Lederer, The UNCITRAL Technical Notes on Online Dispute Resolution – Paper Tiger or Game Changer?, Kluwer Arbitration Blog, January 11, 2018.

of a series of forty ninth discussion sessions conducted by 60 member countries and involving several other international organizations as well as a series of consultations with experts and related professional associations. This Agreement was later codified through the Resolution adopted by the General Assembly on 13 December 2016. The Technical Note consists of 12 sections. In this chapter the author will briefly discuss the contents of the technical notes.

Section I as introduction concisely overviews the scope of ODR by emphasizing the need of mechanism for settling dispute arising from online cross-border transaction. ODR is expected to be able to solve such disputes in a simple, fast, flexible and secure manner without physical presence of disputing parties on a meeting or hearing process.

In term of purposes of technical noted, it stipulates that the main objective of this legal instrument is to foster development of ODR and to assist ODR administrator, ODR Platforms, Neutral and the Parties to the ODR Proceedings by implementing its core principles ranging from principle of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency. There is one important thing to note that technical notes are only intended for disputes arising from cross-border low value and service contracts that use electronic communication. In section I it is also emphasized that the technical notes are merely non-binding instruments, only as descriptive documents. it does not impose any legal requirement binding.

Section II defines the principles in ODR. In this section it is emphasized that ODR must be carried out in a simple, fast and efficient manner. In addition, there are several important principles, including the principles of transparency, confidentiality, independence, expertise and consent of the parties.

Section III describes the stage of ODR Proceeding including negotiation, facilitated settlement and a third (final) stage. The first stage in ODR is technology-enable negotiation starting with claimant submission through ODR Platform or ODR Administrator, in which both the claimant and respondent can negotiate directly through ODR Platform. if the negotiation process fails, then the disputing parties proceed to the facilitated settlement stage, in which ODR Administration a neutral third party in charge to lead communication between them in an attempt to reach a settlement. if the facilitated settlement stage also fails, then the disputing parties can proceed to the final stage.

Section IV consist of scope of ODR Process with following criteria: (1) cross border in nature, (2) low value e-commerce transaction, (3) Business to Business as well as (3) Business to Consumer Transaction and (4) dispute arising either from sales or service contract.

Section V explains the definitions, roles, responsibilities and communication. Unlike offline ADR, ODR requires a technology-based intermediary so that ODR can not be conducted base on ad hoc basis in which administrator must be presence. ODR requires well established platform that can generate, send, receive, store and exchange required information. ODR Administrator is assigned to coordinate and administer ODR Process. ODR Administrator can be

independence or being integral part with ODR Platform. In term of communication, it consists of any form of communication as to statement, declaration, demand, notice, response, submission, notification or request which are made electronically.

Section VI sets up the commencement of ODR proceeding by which the claimant is required to provide related information before commencing the proceeding. It includes name and electronic address of claimant and respondent as well as their correspondents, grounds for claiming and response to the ground made by respondent, proposed solutions, preferred language, signature and other means of identification.

Section VII elucidates the negotiation as the first stage of ODR. Section VIII depicts the facilitated settlement and Section IX describes the final stage. Section X arranges procedure for appointment, power and function of neutral. Section XI sets the rule for using language and last section emphasizes governance that can be used as guidelines for ODR administrator and ODR platform.

Indonesia Perspective on ODR

The development of information technology should be responded to by the existence of legal rules that can answer the problems that arise in society. As explained above, until now there is no substantive legal rule that specifically regulates provisions related to ODR in Indonesia.

With the increase number of e-commerce, it is hoped that the Indonesian government can provide legal certainty to business actors, especially related to dispute resolution arising from e-commerce activities through ODR. So far, there has been a lot of pressure to revise the Arbitration Law and Alternative Dispute Resolution in Indonesia. The Indonesian government and the Legislature have in recent years intensively discussed amendments to the Arbitration Law and Alternative Dispute Resolution.

There are several obstacles to implementing ODR in Indonesia, not only obstacles related to regulations but also non-legal barriers such as the availability of infrastructure and digital literacy. In responding to these challenges, in the author's opinion, there are several efforts that can be made:

1. To Carry out legal reforms related to ODR, the initial efforts can be made by revising the existing laws and regulations or by establishing separate legal rules related to ODR.
2. To revitalize the infrastructure that supports the implementation of ODR in Indonesia.
3. To Supervise the implementation of ODR, especially for the ODR Platform.

IV. Conclusion

The development of Information and Communication Technology (ICT) has changed people's behavior. One of the aspects affected by this development is related to the online dispute resolution mechanism. In other words, advanced development of technology has changed the paradigm, dynamics and process of dispute resolution in the 21st century. One example of a dispute resolution mechanism that uses the development of Information and Communication Technology (ICT) is the Online Dispute Resolution (ODR). ODR can serve as a means of resolving disputes, either as a complement to or replacing traditional dispute resolution procedures so that it can provide answers to the challenges of the 21st century.

With the increase in electronic transactions, an efficient dispute resolution rule is needed. ODR is considered as an alternative dispute resolution that is simpler, faster, efficient and convenient for the disputing parties compared to traditional alternative dispute resolution and litigation. Notwithstanding of its advantages, ODR also has several drawbacks, particularly related to confidentiality and technological barriers. Until now, several countries have continued to make legal reforms related to ODR, including Indonesia.

Sources of ODR law do not only come from national and international laws such as treaties, there are legal rules that are categorized as soft law instrument that can be used to fill legal voids. One of examples of soft law instruments is UNCITRAL is Technical Notes on ODR. The Technical Notes on ODR is a non-binding, descriptive and procedural rules governing Online Dispute Resolution (ODR) created by the United Nations Commission on International Trade Law (UNCITRAL). The emergence of UNCITRAL Technical Notes on Online Dispute Resolution is considered as an option even though the nature of this instrument is merely a soft law instrument. Although it does not have legal binding force, the consenting parties can utilize this rule as a rule of procedure.

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PERLUKAH PENGAKUAN DAN PELAKSANAAN PUTUSAN ARBITRASE INTERNASIONAL DIATUR DALAM (RANCANGAN) UNDANG-UNDANG HUKUM PERDATA INTERNASIONAL?

Yu Un Oppusunggu[1]

Abstract

Since the last five years, the Government of Indonesia has resumed its effort to draf private international law bill. Currently the plan is to include it in the 2022 National Legislation Program (Prolegnas). In this article, the author identifies foreign or international arbitration as part of private international law issue. Therefore it should be regulated in the upcoming legislation. A special discussion is made on the issue of recognition and enforcement of foreign arbitral awards. Despite having the Arbitration Act, the author argues that recognition and enforcement of foreign arbitral awards should be included for a complete regulation on private international law. While other countries do not have such issue in their laws, the author points out to current trend of legislation in Indonesia that calls for such inclusion.

Keywords: recognition and enforcement of foreign arbitral awards; private international law act

A. Pengantar

Salah satu isu utama yang harus diantisipasi oleh para pihak dalam kontrak internasional adalah penyelesaian sengketa. Ada tiga hal yang sebaiknya mereka sadari. Pertama adalah hukum yang berlaku dalam penyelesaian sengketa. Hukum substansial atas kontrak adalah hukum yang mereka sepakati. Hukum yang dipilih ini mengatur hak dan kewajiban para pihak dalam kontrak. Jika salah satu pihak merasa haknya dilanggar, atau pihak lain tidak melaksanakan kewajibannya, berdasarkan kontrak, maka hukum inilah yang akan menilai kebenaran klaim para pihak. Dalam menuntut haknya, para pihak menggunakan hukum acara atau prosedural. Tergantung pada forum penyelesaian sengketa, hukum prosedural ini dapat berbeda dari hukum substansial di atas.

Hampir semua hukum negara mengakui hak para pihak untuk menentukan forum penyelesaian sengketa. Seperti halnya pilihan hukum (*choice of law*, *applicable law*, atau *governing law*) dasar dari pilihan forum (*choice of forum*) adalah kebebasan berkontrak. Sepanjang peraturan perundang-undangan tidak melarang, para pihak dapat mengatur sendiri bagaimana penyelesaian sengketa di antara mereka. Ada dua forum penyelesaian sengketa – pengadilan (negara) dan alternatif

[1] Dosen tetap Fakultas Hukum Universitas Indonesia yang terlibat aktif dalam persiapan Rancangan Undang-Undang Hukum Perdata Internasional dalam koordinasi Kementerian Hukum dan Hak Asasi Manusia.

penyelesaian sengketa. Untuk yang disebut terakhir, arbitrase merupakan yang paling populer. Dalam menentukan hal kedua ini, para pihak perlu menimbang berbagai faktor. Pertimbangan, yang mungkin, paling menentukan adalah pengakuan dan pelaksanaan putusan.

Hal ketiga ini menentukan efektivitas pemenuhan hak pihak yang menang dalam sengketa pasca putusan pengadilan atau arbitrase diperoleh, jika negara atau yurisdiksi asal putusan dibuat (*country of origin*) berbeda dengan negara atau yurisdiksi putusan tersebut harus dilaksanakan (*country of enforcement*). Berdasarkan hukum positif Indonesia, pengadilan dapat mengakui namun tidak akan melaksanakan putusan pengadilan asing.[2] Selain itu, proses beracara yang membuka kemungkinan bagi pihak yang kalah untuk mengajukan banding dan kasasi menjadi disinsentif untuk memilih pengadilan sebagai forum penyelesaian sengketa. Oleh karena itu, arbitrase menjadi opsi yang menarik sebagai forum penyelesaian sengketa.

Untuk mengakhiri keragu-raguan tentang pelaksanaan putusan arbitrase dari luar negeri, sejak 5 Agustus 1981 Indonesia telah mengaksesi *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[3] Namun keberlakukan Konvensi New York tidak berjalan mulus, karena ada perbedaan pendapat tentang perlu tidaknya suatu peraturan pelaksana.[4] Sebagai solusi, Mahkamah Agung menerbitkan Peraturan Mahkamah Agung No. 1 Tahun 1990 tentang Tatacara Pelaksanaan Putusan Arbitrase Asing (**Perma**). UU Arbitrase kemudian mengambil alih pengaturan pelaksanaan putusan arbitrase internasional.[5]

Sejak beberapa tahun terakhir, Kementerian Hukum dan Hak Asasi Manusia secara intensif mempersiapkan suatu Rancangan Undang-Undang tentang Hukum Perdata Internasional (**RUU HPI**). Salah satu isu yang dibahas dalam penyusunan adalah perlu tidaknya arbitrase ikut diatur dalam RUU HPI.

Tulisan ini memberikan alasan untuk memasukkan pengakuan dan pelaksanaan putusan arbitrase internasional dalam RUU HPI. Penulis berargumen bahwa untuk kebulatan pengaturan, maka RUU HPI harus ikut mengatur tentang permasalahan tersebut. Namun pengaturan ini harus diperhatikan aturan dalam hukum positif agar peraturan perundang-undangan di Indonesia dalam terlaksana secara efektif dan efisien. Dengan demikian penyelesaian sengketa nantinya dapat memberikan kepastian hukum dan memberikan keadilan.

Sebagai gambaran umum, penulis akan terlebih dahulu menjelaskan dengan

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2 Yu Un Oppusunggu, "Country Report Indonesia" dalam Adeline Chong (ed.), *Recognition and Enforcement of Foreign Judgments in Asia*, Singapura: Asian Business Law Institute, 2017, hlm. 91-104.

3 Melalui Keputusan Presiden No. 34 Tahun 1981, LNRI 1981-40, Indonesia terikat pada perjanjian internasional yang umum dikenal sebagai Konvensi New York 1958, 330 UNTS 3. Tentang latar belakang aksesi, periksa Sudargo Gautama, *Indonesia dan Konvensi-konvensi Hukum Perdata Internasional,* Bandung: Alumni, 1996, hlm. 324-329.

4 Putusan Mahkamah Agung No. 2944K/Pdt/1983 terkait dengan pelaksanaan putusan arbitrase di London untuk sengketa *Navigation Maritime Bulgare v. PT Nizwar*. Lih. Sudargo Gautama, *Indonesia dan Arbitrase Internasional*, Bandung: Alumni, 1986 hlm. 70-77; *Varia Peradilan*, 18 (1987).

5 Pasal 65-69, Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa, LNRI 1999-138, TLNRI 3872.

singkat tentang arbitrase yang masuk ke dalam lingkup hukum perdata internasional (**HPI**) Indonesia. Pembahasan berlanjut dengan penjelasan tentang usaha penyusunan RUU HPI. Kemudian penulis akan memaparkan tentang sejumlah pertimbangan untuk memasukkan atau tidak memasukkan arbitrase dalam RUU HPI. Tulisan ini diakhiri dengan suatu usulan tentang bagaimana mengatur ihwal pengakuan dan pelaksanaan putusan arbitrase internasional dalam RUU HPI.

B. Hukum Perdata Internasional Indonesia dan Arbitrase

Kata "perdata" dalam HPI menimbulkan mispersepsi bahwa persoalan yang diatur tidak mencakup hukum publik. Di sisi lain, kata "internasional" juga menimbulkan kesan bahwa permasalahan hukum yang diatur bukanlah isu hukum nasional. Namun HPI, sebagai cabang ilmu hukum, membahas tentang hubungan atau peristiwa yang melibatkan unsur asing. Tujuan dari HPI adalah untuk menentukan hukum yang berlaku atau apakah yang merupakan hukum bila dalam suatu hubungan atau peristiwa hukum terdapat dua atau lebih sistem hukum yang dapat berlaku. Sekalipun istilah HPI bersifat *contradictio in terminis*, nama tersebut tetap dipergunakan karena sudah terlalu populer dan tetap lebih baik dari nama lainnya – hukum perselisihan (*conflict of laws*).[6]

Yang dimaksud dengan unsur asing di sini, termasuk tetapi tidak terbatas, adalah para pihak, kesepakatan yang mereka buat, atau lokasi terjadinya hubungan atau peristiwa hukum tersebut. Masing-masing contoh ini menunjukkan hukum-hukum nasional yang berlaku berdasarkan ketentuan sistem hukum nasional itu sendiri. Para pihak tunduk pada hukum di mana mereka menjadi warga negara, bertempat kediaman sehari-hari, atau melakukan kegiatan usaha. Mereka yang tunduk pada hukum nasional yang sama dapat memberlakukan hukum asing untuk kontrak yang mereka buat. Sementara itu, hak kebendaan atas saham yang dipegang oleh seorang asing tunduk pada hukum negara di mana suatu badan hukum berdiri. Unsur-unsur asing tersebut dapat menunjukkan hukum yang seyogianya berlaku berdasarkan asas persamarataan kedudukan sistem-sistem hukum dalam hukum internasional.

Para sarjana tidak sepakat tentang ruang lingkup HPI. Pendapat mereka dapat kita bagi ke dalam empat kelompok.[7] Pertama, mereka yang berpendapat bahwa HPI terbatas pada isu pilihan hukum. Bagi mereka yang masuk dalam kelompok kedua, lingkup HPI meliputi juga persoalan yurisdiksi. Kelompok ketiga menambahkan ke dalamnya ihwal status orang asing (*condition des étrangers*). Sementara kelompok keempat memasukkan juga masalah kewarganegaraan (*nationalité*). Adisarjana Sudargo Gautama berpendapat bahwa kita sebaiknya menganut ruang lingkup yang terluas

[6] Sudargo Gautama memperkenalkan nama yang lebih baik, hukum antartata hukum (HATAH) ekstern sebagai ganti dari HPI. Namun istilah yang baik secara teknis ini tetap belum bisa menggantikan HPI yang sudah dipahami oleh praktisi dan akademisi hukum baik secara nasional maupun internasional. HATAH intern membahas tentang isu yang sama *mutatis mutandis* dalam sistem hukum nasional. Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, Jakarta: Badan Pembinaan Hukum Nasional (**BPHN**), Departemen Kehakiman Republik Indonesia, 1987, 6-24.

[7] *Ibid*. hlm. 8-10.

untuk HPI Indonesia.

Persoalan yurisdiksi terdiri atas keberlakuan suatu hukum atas dasar teritorial atau kesepakatan para pihak. Yang disebut pertama nyata dalam bentuk keberlakuan hukum negara atas tanah yang berada di dalam wilayah kedaulatannya. Baik berdasarkan hukum internasional maupun prinsip universal *lex rei sitae*, hukum Indonesia berlaku atas tanah.[8] Yang disebut terakhir juga dikenal dengan istilah pilihan forum.

Jika pengadilan mempunyai kompetensi – absolut dan relatif – berdasarkan peraturan perundang-undangan,[9] arbiter atau majelis arbitrase mendapatkan kewenangan dari perjanjian arbitrase yang dibuat oleh para pihak.[10] Kemungkinan Negara Republik Indonesia menjadi pihak dalam perkara arbitrase menunjukkan bahwa persoalan -persoalan HPI juga mencakup pihak yang merupakan badan hukum publik seperti dibahas di atas.[11] Oleh karena itu, arbitrase merupakan salah satu persoalan dalam HPI Indonesia.

C. Penyusunan Rancangan Undang-Undang Hukum Perdata Internasional

Meskipun HPI menggunakan "internasional", namun sumber hukum utamanya adalah peraturan perundang-undangan nasional. Dalam praktik hukum Indonesia terdapat kesan yang kuat bahwa peraturan perundang-undangan yang mengatur tentang HPI hanyalah tiga pasal dari AB tentang statuta personal, statuta realia, dan statuta mixta.[12] Namun, jika kita berpegangan pada definisi HPI di atas, segala peraturan perundang-undangan yang mengatur tentang unsur asing adalah hukum positif tentang HPI.

Usaha untuk memutakhirkan, atau mengelaborasi, peraturan tentang HPI Indonesia memang berjalan sungguh lambat. Hal ini merupakan ironi, terutama jika kita mempertimbangkan fakta bahwa secara keilmuan HPI justru terlebih dahulu berkembang dengan pesat dibandingkan cabang-cabang ilmu hukum lainnya di Indonesia. Gautama menyelesaikan *Hukum Perdata Internasional Indonesia*, yang terdiri dari 8 (delapan) buku, pada tahun 1969.[13] *Magnum opus*-nya ini kemudian menjadi dasar dari penyusunan draf pertama RUU HPI tahun 1984.[14]

RUU HPI (1984) ini terdiri dari 6 (enam) bab yang memuat 35 (tiga puluh lima) pasal. Pilihan forum, yang dasarnya adalah perjanjian, diatur secara tidak langsung dalam pasal 14 ayat (1).[15] Namun draf ini tidak mempunyai aturan tentang yurisdiksi.

Pengaturan lebih detil ada pada draf RUU HPI (1997). Draf yang terdiri dari 8 (delapan) bab ini memuat 46 (empat puluh enam) pasal. Pilihan forum kembali diatur secara umum melalui pasal tentang perikatan.[16] Berbeda dengan draf sebelumnya, Draf RUU HPI

8 Pasal 2 ayat (1) Undang-Undang No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria (**UUPA**), LNRI 1960-104; pasal 17 *Algemeene Bepalingen van Wetgeving* (**AB**), S. 1847-23.

9 Lih. mis. pasal 2 ayat (3) Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman, LNRI 2009-157, TLNRI 5076.

10 Lih. definisi "arbitrase", pasal 1 angka 1 UU Arbitrase.

12 Pasal 66 poin e UU Arbitrase.

13 Berturut-turut pasal 16-18 AB.

14 Sudargo Gautama, terlahir Gouw Giok Siong (1928-2008), menjabat guru besar di Universitas Indonesia selama 50 (lima puluh) tahun sejak 1958. Yu Un Oppusunggu, "In Memoriam Sudargo Gautama", *Jurnal Hukum Pembangunan*, vol. 38, No. 4 (2008), hlm. 439 dst. Buku 1-6 kemudian dipadatkan ke dalam *Pengantar Hukum Perdata Internasional* (1977).

15 BPHN Departemen Kehakiman, *Lokakarya Hukum Perdata Internasional*, Jakarta: BPHN Departemen Kehakiman, 1984. "Hukum yang berlaku untuk perjanjian-perjanjian ayng bersifat internasional adalah hukum yang dipilih oleh para pihak."

16 Pasal 18 ayat (1), "Perjanjian-perjanjian yang mengandung unsur asing tunduk pada hukum yang dipilih oleh para pihak."

(1997) mempunyai bab tentang hukum acara perdata internasional.[17] Bab ini mengatur tentang keberlakuan hukum Indonesia sebagai hukum prosedural, dan cara pengklasifikasian hukum materiel dan formal.[18] Selain itu draf ini juga mengatur persoalan tentang pengakuan dan pelaksanaan putusan pengadilan asing menurut hukum Indonesia.[19]

Selain menyiapkan draf RUU HPI, BPHN juga menyusun draf RUU Arbitrase.[20] Draf ini tidak berlanjut ke pengundangan, karena di masa itu pembuat undang-undang memprioritaskan RUU di bidang politik dan ekonomi lainnya. Selain draf ini, terdapat juga RUU Arbitrase dari Proyek ELIPS (*Economic Law and Improved Procurement System*).[21] Kedua draf ini mengatur tentang isu pengakuan dan pelaksanaan putusan arbitrase asing. Sebagaimana diketahui, berbeda dengan RUU HPI, RUU Arbitrase akhirnya berhasil berlanjut ke pengundangan dalam bentuk UU Arbitrase.

Semenjak tahun 2014, BPHN kembali menghidupkan usaha untuk mengundangkan RUU HPI dengan terlebih dahulu menyusun suatu naskah akademik baru.[22] Setahun kemudian naskah ini kemudian mengalami perbaikan.[23] Terhadap naskah ini pun, BPHN perbaikan lebih lanjut dan menghasilkan Naskah Akademik (2020).[24]

Sesuai dengan tahapan pembentukan peraturan perundang-undangan, naskah akademik merupakan pedoman pembuatan konsepsi RUU HPI. Naskah Akademik (2020) mengidentifikasi kewenangan yuridiksional pengadilan Indonesia, dan pengakuan dan pelaksanaan putusan pengadilan asing.[25] Sampai sekarang kedua persoalan ini diatur oleh Reglemen Acara Perdata.[26] Meskipun terdapat pembahasan tentang arbitrase – sebagai perjanjian dan forum penyelesaian sengketa, serta pengakuan dan pelaksanaan putusan arbitrase internasional – dalam Naskah Akademik (2020) namun terdapat keraguan dari penyusun konsepsi RUU HPI untuk memasukkan aturan tentang pengakuan dan pelaksanaan putusan arbitrase internasional. Alasan utama adalah untuk kelancaran pengundangan (R)UU HPI sebaiknya tidak mengatur permasalahan yang sudah dengan baik diatur oleh hukum positif.

D. Rancangan Undang-Undang Hukum Perdata Internasional Perlu Mencakup Arbitrase

Banyak pihak menganggap sistem hukum Indonesia merupakan bagian dari

17 Bab VII, pasal 41-44.
18 Pasal 41-42 Draf RUU HPI (1997/1998)
19 Pasal 43-44 Draf RUU HPI (1997/1998)
20 Draf ini sudah tersusun paling tidak di awal dekade 1980-an. Sudargo Gautama, *Undang-Undang Arbitrase Baru 1999*, Bandung: Citra Aditya Bakti, 1999, hlm. 1.
21 Proyek ini merupakan kerja sama antara United States Agency for International Development and Fakultas Hukum Universitas Indonesia. Naskah akademik untuk RUU Arbitrase tersebut disusun oleh M. Husseyn Umar dan Supriani Kardono.
22 Naskah akademik tersedia di tautan: https://bphn.go.id/data/documents/na_tentang_hpi.pdf (terakhir diakses 12 Juli 2021).
23 Naskah akademik tersedia di tautan: https://jdihn.go.id/search/monografi/detail/870242 (terakhir diakses 12 Juli 2021).
24 Naskah akademik tersedia di tautan: https://bphn.go.id/data/documents/naskah_akademik_ruu_hukum_perdata_internasional_2020-final-update-.pdf (terakhir diakses 12 Juli 2021).
25 Persoalan-persoalan lain yang diidentifikasi adalah status personal subjek hukum, ketentuan hukum keluarga, kebendaan, dan perikatan transnasional.
26 Berturut-turut pasal 100 dan 436 Rv (*Reglement op de Burgerlijke Rechtsvordering*), S. 1857 jo. 1849-63.

tradisi atau keluarga civil law. Anggapan ini dapat diterima sebagai kebenaran secara bersyarat jika kita melihat Republik Indonesia melanjutkan peraturan dari masa kolonial Hindia Belanda.[27] Salah satu ciri utama dari civil law adalah kodifikasi.[28] Kodifikasi perdana terjadi pada tahun 1847 dengan keberlakuan Kitab Undang-Undang Hukum Perdata dan Kitab Undang-Undang Hukum Dagang.[29] Kedua peraturan hukum materiel ini mempunyai Rv sebagai tandem untuk hukum formal.[30] Setelah Indonesia merdeka, kodifikasi peraturan perundang-undangan, terutama untuk hukum perdata, tetap dianggap sebagai pendekatan yang ideal.[31]

Namun pada praktiknya mempertahankan kodifikasi dalam pembentukan peraturan perundang-undangan sulit untuk dilakukan. Bukan saja harus ada *political will* dari pembuat undang-undang, tapi juga pluralisme hukum di Indonesia memberikan tantangan yang tidak mudah.[32] Praktik pembentukan peraturan perundang-undangan di masa Orde Baru kemudian menempuh pendekatan yang bersifat sektoral. Pendekatan ini sedikit banyak memberikan penjelasan mengapa BPHN menyusun *ius constituendum* tentang HPI dan arbitrase dalam dua rancangan undang-undang yang terpisah.

Namun pengundangan UU Cipta Kerja[33] mengubah praktik legislasi kita. Dengan menggunakan pendekatan *omnibus law*, UU Cipta Kerja mengubah, menambah, menghapus dan/atau mencabut 104 (seratus empat) undang-undang sektoral.[34] Tujuan dari UU Cipta adalah untuk memberikan kepastian hukum agar aktivitas ekonomi dapat berjalan lancar.[35] Menurut hemat kami, untuk efektivitas pelaksanaan serta mengingat persoalan-persoalan yang diatur, sebenarnya UU Cipta Kerja merupakan suatu undang-undang baru yang memaktub semua peraturan perundang-undangan sektoral dalam satu-kesatuan pengaturan. Hal ini pada hakikatnya merupakan suatu bentuk kodifikasi, yang meskipun tidak dikenal dalam civil law, mempunyai tujuan akhir yang sama, yakni pengaturan yang sistematis dan terstruktur.

Pendekatan *omnibus law* diambil karena Pemerintah menemukan bahwa peraturan perundang-undangan yang ada menciptakan disharmoni dan

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27 Pasal II Aturan Peralihan UUD 1945, yang kemudian diambil alih oleh Pasal I Aturan Peralihan UUD Negara Republik Indonesia Tahun 1945.

28 John Henry Merryman, *The Civil Law Tradition*, ed. kedua, Stanford: Stanford University Press, 1985, hlm. 26-33.

29 S. 1847-23.

30 Rv yang merupakan hukum acara bagi *Raad van Justitie*, yakni pengadilan yang mempunyai kewenangan untuk sengketa di antara golongan rakyat Eropa dan Timur Asing, kehilangan forum keberlakuannya semenjak Pemerintah Pendudukan Jepang menghapuskan lembaga peradilan tersebut. Yu Un Oppusunggu dan Gary F. Bell, "Indonesia" dalam Jürgen Basedow, Giesela Rühl, Franco Ferrari dan Pedro de Miguel Aensio (eds.), *Encyclopedia of Private International Law*, Cheltenham, UK, 2017, hlm. 2163, bdk Sudargo Gautama, "International Civil Procedure in Indonesia", *Asian Yearbook of International Law*, vol. 6 (1996), hlm. 88-89.

31 Lih. mis. Mr. Suwandi, *Sekitar Kodifikasi Hukum Nasional di Indonesia* dalam pertemuan ahli hukum di Jakarta (1954); Prof. Mr. St. Moh. Sjah mengambil judul pidato "Kodifikasi Bersifat Revolusioner bagi Indonesia" (1960)

32 Meskipun demikian Undang-Undang No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan, LNRI 2011-82, TLNRI 5234 sebagaimana diubah oleh Undang-Undang No. 15 Tahun 2019 tentang Perubahan atas Undang-Undang No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan, LNRI 2019-183, TLNRI 6398 tetap membuka kemungkinan kodifikasi peraturan perundang-undangan.

33 Undang-Undang No. 11 Tahun 2020 tentang Cipta Kerja, LNRI 2020-245, TLNRI 6573.

34 Meski *omnibus law* merupakan suatu istilah yang baru belakang dikenal oleh dunia hukum Indonesia, namun sebenarnya pendekatan ini sudah digunakan dalam UUPA. Lih. Yu Un Oppusunggu, "Canggih Terdengar, Ruwet Berpikir" tersedia dalam tautan https://www.facebook.com/notes/3834023846641788/ (terakhir diakses 12 Juli 2021).

35 Pasal 3 UU Cipta Kerja.

tumpang tindih, sehingga kepastian hukum tidak tercipta.[36] Tidak jelas mengapa para pelaksana dan penegak hukum gagal menerapkan prinsip-prinsip hukum *lex specialis derogat legi generalis*,[37] *lex posteriori derogat legi priori*,[38] dan *lex superiori derogat legi inferiori*[39] dalam melaksanakan peraturan, sehingga tercipta kebutuhan akan suatu *omnibus law*.

Untuk menghindari kesan tumpang-tindih undang-undang antara (R)UU HPI dengan UU Arbitrase, kami berpendapat persoalan pengakuan dan pelaksanaan putusan arbitrase internasional perlu juga diatur dalam (R)UU HPI agar keterhubungan keduanya nyata secara eksplisit.

Praktik hukum di Indonesia menunjukkan permasalahan lain, yang berkebalikan dengan tumpang-tindih pengaturan, yakni ketiadaan peraturan. Perbedaan pendapat tentang keberlakuan Konvensi New York bersumber pada ketiadaan aturan dalam Reglemen Indonesia yang Diperbaharui,[40] Reglemen Daerah-daerah Luar Jawa dan Madura,[41] dan Rv "mengenai pelaksanaan suatu putusan Arbitrase Asing."[42]

Pengaturan tentang pengakuan dan pelaksanaan putusan arbitrase internasional tidak hanya menunjukkan keterhubungan (R)UU HPI dengan UU Arbitrase, namun juga kebulatan pengaturan tentang permasalahan tersebut dalam peraturan perundang-undangan Indonesia. Jika (R)UU HPI hanya menyebut secara eksplisit tentang perjanjian arbitrase, forum arbitrase, dan putusan arbitrase internasional tetapi diam untuk permasalahan pengakuan dan pelaksanaaan putusan arbitrase internasional, maka pengaturan yang demikian justru menimbulkan pertanyaan dan inkonsistensi.[43]

Mengapa pengaturan berhenti pada putusan arbitrase internasional? Bukankah justru pengakuan dan pelaksanaan putusan arbitrase internasional menunjukkan efektivitas dan arbitrase sebagai forum penyelesaian sengketa?

Perbandingan dengan negara-negara tetangga dapat menjadi pertimbangaan. Jepang dan Taiwan[45] sama sekali tidak memasukkan arbitrase dalam UU HPI mereka. Di Korea Selatan, keberlakuan UU HPI secara otomatis mengamandemen, meski secara minor, UU Arbitrase.[46] Sementara Cina memasukkan kewenangan arbitrase untuk menentukan keberlakuan hukum asing atas hubungan hukum, dan perjanjian arbitrase dalam UU HPI.[47]

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36 Liputan6.com, "82 UU dan 1.194 Pasal Bakal Diselaraskan dalam Omnibus Law" tersedia dalam tautan https://m.liputan6.com/bisnis/read/4132932/82-uu-dan-1194-pasal-bakal-diselaraskan-dalam-omnibus-law?fbclid=IwAR0-ULLzwclcHPTAt5awIMm8eF-CyUrrF_kH7hrYuJ5kMKNJ5LEs8Bd0-CE (terakhir diakses 12 Juli 2021).

37 Undang-undang yang bersifat khusus mengesampingkan undang-undang yang bersifat umum.

38 Undang-undang yang berlaku kemudian mengesampingkan undang-undang yang berlaku lebih dulu.

39 Undang-undang yang lebih tinggi mengesampingkan peraturan yang lebih rendah.

40 *Herziene Indonesisch Reglement* (HIR), S. 1941-44, yang merupakan hukum acara untuk peradilan umum di Jawa dan Madura.

41 *Reglement tot Regeling van het Rechtswezen in de Gewesten Buiten Java en Madura* (RBg), S. 1927-227.

42 Menimbang butir ketiga, Perma.

43 Karena konsepsi RUU HPI masih berjalan, kami tidak dapat merujuk kepada pasal-pasal spesifik untuk masing-masing permasalahan yang disebutkan di sini.

44 *Act on General Rules for Application of Laws*, *Act No. 78*, 21 Juni 2006.

45 *Act Governing the Application of Laws in Civil Matters Involving Foreign Elements*, 26 Mei 2010.

46 Angka 4 Addenda, *Private International Law Act (Gukjesdabeop)*, *Law* No. 6465, 7 April 2001.

47 Berturut-turut pasal 10 dan 18 *Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China*, 28 Oktober 2010.

Meski negara-negara tetangga tidak mempunyai pengaturan yang bulat tentang HPI untuk juga mencakup arbitrase, namun kita dapat melihat tren legislasi yang ada di Indonesia. Pengaturan yang sedapat mungkin memberikan kejelasan, seperti halnya UU Cipta Kerja, menjadi suatu kebutuhan dalam pelaksanaan peraturan. (R)UU HPI juga dapat dipandang sebagai usaha kodifikasi peraturan tentang HPI Indonesia. Berbeda dengan UU Cipta Kerja yang secara luas mengubah, untuk memaktub, peraturan untuk kelancaran kegiatan ekonomi, (R)UU HPI berusaha untuk menjadi undang-undang yang bersifat umum sekaligus yang bersifat khusus.

(R)UU HPI bersifat umum terhadap hukum positif yang ada dalam pengertian bahwa undang-undang sektoral akan mengatur secara lebih lanjut tentang suatu permasalahan hukum yang diatur secara bersama-sama. Di sisi lain, (R)UU HPI bersifat khusus terhadap peraturan perundang-undangan yang ada selama permasalahan hukum mengandung unsur asing. Pendekatan ini sementara diakomodasi dalam salah satu pasal awal RUU HPI.[48] Kedua sifat ini – umum dan khusus – dapat dijalankan tanpa mengubah atau mencabut peraturan perundang-undangan yang ada saat ini. Dalam kaitannya dengan pengakuan dan pelaksanaan putusan arbitrase asing, (R) UU HPI seyogianya tetap mempertahan-kan – tidak menambahkan atau mengurangi – tata cara dan kriteria yang sudah ada dalam UU Arbitrase.

Hal ini dapat dilakukan dengan salah satu dari dua cara berikut. Pertama, (R) UU HPI mengatur secara sama dengan UU Arbitrase. Kedua, (R)UU HPI menyatakan dengan tegas bahwa pengakuan dan pelaksanaan putusan arbitrase internasional tunduk pada peraturan perundang-undangn yang berlaku. Opsi kedua bersifat lebih fleksibel, karena segala perubahan terhadap UU Arbitrase (jika nanti ada) tidak akan mengubah keselarasan pengaturan kedua undang-undang ini.

Pertimbangan efisiensi pembaca peraturan perundang-undangan juga perlu menjadi perhatian. Mengatur secara bulat permasalahan arbitrase akan memudahkan pembaca undang-undang untuk memahami secara utuh peraturan tentang suatu persoalan hukum dalam satu dokumen. Hal ini tentunya tidak untuk mengesampingkan pembacaan terhadap, apalagi keberlakuan, UU Arbitrase. Pengaturan yang bulat memberikan gambaran umum yang cukup bagi pembaca untuk memahami bahwa ada aturan yang jelas tentang pengakuan dan pelaksanaan putusan arbitrase internasional.

E. Penutup

Sebagai suatu usaha untuk mengkodifikasi peraturan HPI di Indonesia, (R)UU HPI merupakan suatu kebutuhan yang sudah terlalu lama dinanti. Pengaturan tentang pengakuan dan pelaksanaan putusan arbitrase internasional perlu dicakup agar peraturan perundang-undangan di masa depan mempunyai keterhubungan yang baik dan selaras, sehingga (R)UU HPI mengatur secara bulat permasalahan

[48] Pendekatan ini juga diambil oleh draf RUU HPI (1997/1998). Lih. angka 5 Penjelasan Umum RUU HPI (1997/1998).

arbitrase sebagai salah satu forum penyelesaian sengketa. Pengaturan yang demikian sesuai dengan tren legislasi saat ini, yakni kebutuhan pelaksanaan hukum yang menuntut peraturan yang jelas dan eksplisit. Ketersediaan pengaturan yang bulat dalam satu undang-undang memudahkan pembaca peraturan untuk memahami bagaimana hukum Indonesia mengatur tentang arbitrase. Berbeda dengan UU Cipta Kerja, namun dalam semangat yang sama, (R)UU HPI seyogianya merajut berbagai peraturan HPI yang sudah ada – baik secara implisit maupun eksplisit – di pelbagai peraturan perundang-undangan ke dalam suatu undang-undang yang bersifat umum sekaligus khusus.

Author's Biography

Yu Un Oppusunggu adalah dosen tetap di Fakultas Hukum Universitas Indonesia. Mata kuliah utama diajarnya adalah Hukum Antartata Hukum. Ia terlibat sebagai anggota Commission on Asian Principles of Private International Law (Kyoto, 2015), *rapporteur* di Asian Business Law Institute (Singapura, 2017), dan terlibat dalam sejumlah kajian akademis di berbagai Kementerian dan Lembaga Negara. Saat ini ia sedang terlibat aktif dalam penyusunan Rancangan Undang-Undang HPI dan anggota tim *bank expert* isu-isu HPI, Kementerian Hukum dan Hak Asasi Nasional Republik Indonesia. Tulisannya dimuat a.l. di akun Facebook-nya dan *Encyclopedia of Private International Law* (2017).

Fraud as Grounds to Annul an Arbitral Award: Case Study from an Attempt to Annul an Arbitral Award due to an Arbitrator's Alleged Lack of Independence and Impartiality

Andi Yusuf Kadir, Zarina M. Dahlia

Abstrak

Tulisan ini akan menelaah dasar tipu muslihat yang tertuang pada pasal 70 huruf (c) dari UU Arbitrase Indonesia sebagai alasan pembatalan putusan arbitrase di Indonesia melalui studi kasus dari dua putusan pengadilan Indonesia. Selain dari itu, artikel ini juga akan membahas tentang independensi dan keberpihakan arbiter, dan penggunaan hal tersebut sebagai alasan pembatalan putusan arbitrase. Kesimpulan dari tulisan ini menunjukkan bahwa apa batasan yang dapat tergolong sebagai 'tipu muslihat' yang dapat menjadi dasar pembatalan putusan arbitrase masih belum jelas. Selain dari hal tersebut, belum ada kejelasan terkait apakah dugaan adanya keberpihakan seorang arbiter dapat tergolong sebagai suatu 'tipu muslihat' sebagaimana dimaksud dalam UU Arbitrase.

Key words: pembatalan putusan, tipu muslihat, arbiter.

Introduction

I. On 12 May 2020, the Indonesian Supreme Court annulled a decision issued by the South Jakarta District Court that annulled a BANI Arbitral Award ("**BANI Award**") on the grounds that a fraudulent act hads taken place, under Article 70 (c) of Law No. 30/1999 on Arbitration and Alternative Dispute Resolution ("**Arbitration Law**").

   The South Jakarta District Court explained that the 'fraud' was caused by the failure of the Defendant (i.e., the winning party in the arbitration) to disclose a piece of information that, had it been disclosed earlier in the arbitral proceedings, would have prompted the Plaintiff to challenge the appointment of that arbitrator. The Defendant has therefore 'fabricated an untrue set of circumstances' to the detriment of the Arbitral Tribunal's ability to adjudicate the case fairly1. The Supreme Court overturned the annulment, but on the grounds that the absence of that piece of information was inconsequential -- even if revealed earlier on, that information 'would not necessarily demonstrate partiality'.[2]

   In analyzing both the District Court and Supreme Court's decisions, we can see an interesting conflation of two subject-matters: (i) fraudulent acts as grounds to annul an arbitration award, and (ii) the standard of an appointed arbitrator's independence and impartiality. It therefore also raises the question of whether the lack of an arbitrator's independence and impartiality is in itself grounds for an annulment of arbitral decision or if it is within the scope of 'fraud' under Article 70 (c) of the Arbitration Law.

   There is no reference to the terms 'independence' or 'impartiality' in Article 70 (c) of the Arbitration Law. In fact, Article 70 (c) only briefly stipulates that an arbitral award may be annulled if 'that

[1] South Jakarta District Court Decision No. 754/Pdt.Arb/2019/PN.Jkt.Sel, pp. 181-182

[2] Supreme Court Decision No. 460 B/Pdt.Sus-Arbt/2020, p. 9

award was a result of a fraudulent acts by any of the disputing parties.'

Article 70 of the Arbitration Law stipulates:

> *"An application to nullify an arbitration award may be made if the award is alleged to contain the following elements:*
>
> *a. letters or documents submitted in the hearings which are admitted to be forged or are declared to be forgeries after the award has been rendered;*
>
> *b. documents are found after the award has been rendered which are decisive in nature and were deliberately concealed by the opposing party; or*
>
> ***c. an award is made based on fraud committed by one of the parties to the dispute."***

With the above in mind, perhaps the most urgent question that needs to be answered is: how is 'fraud' defined? The Arbitration Law only provides that 'fraud' can be used as grounds to annul an award, but does not specify what it actually means. The next question is naturally: how can one prove that there is 'fraud'?

Only after establishing certain baselines about 'fraud' can we explore how an arbitrator's lack of independence and impartiality can fall under 'fraud'. There may be more questions than meet the eye in this regard. For instance, are *allegations* of an arbitrator's lack of independence or impartiality enough to trigger the element of 'fraud', or must it be proven *as a matter of fact* that the arbitrator is neither independent nor impartial? Or, at the outset, is it even possible to argue the lack of independence or impartiality of an arbitrator beyond the short timeframe provided right after their appointment – *in casu*, during the application for annulment of the BANI Award before a public court?

This article will explore these two main issues in three sections. The first section will attempt to dissect the two cases that were briefly discussed in the beginning of this article. The second and third sections will respectively discuss the concept of 'fraud' and 'independence and impartiality' under the applicable Indonesian law and by occasionally comparing it with case laws from other jurisdictions or provisions from certain international arbitration soft laws when relevant.

II. Case Study

In this section, two cases will be analyzed, i.e., South Jakarta District Court Decision No. 754/Pdt.Arb/2019/ PN.Jkt.Sel ("**District Court Decision**") and Supreme Court Decision No. 460 B/ Pdt.Sus-Arbt/2020 ("**Supreme Court Decision**"). The analysis will focus on the subject of the act of 'fraud' and 'independence and impartiality of arbitrators', as discussed by the parties in their arguments and by each case's panel of judges.

a. District Court Decision

The Plaintiff was an energy company and was the Respondent in BANI arbitration proceedings brought against it by the Defendant, who was the Claimant in those proceedings. After losing the arbitration proceedings, the Plaintiff sought to annul the BANI Award through the South Jakarta District Court.

The Plaintiff invoked Article 70 (c) of

the Arbitration Law for this purpose, claiming that a 'fraud' had been committed by the Defendant.[3] The Plaintiff argued that while the official elucidation of Article 70 (c) stipulated that 'fraud' can only be proven by a court decision establishing that such crime has taken place, that standard of proof is no longer applicable since the Constitutional Court's Decision No. 15/PUU-XII/2014 dated 14 November 2014 ("**MK Decision No. 15**"), which established that the official elucidation of Article 70 (c) of the Arbitration Law is no longer applicable, and that the element of 'fraud' can be fulfilled by mere reasonable doubt (*dugaan*).[4] The Plaintiff went on to elaborate on the merits of the arbitration dispute, in essence demonstrating that the Defendant and Co-defendant (the arbitral institution BANI, *Badan Arbitrase Nasional Indonesia*) has deliberately committed mistakes in its consideration of the case facts and rendering its judgment.[5]

The Plaintiff then argued that 'the arbitral award must be annulled due to there being an affiliation between the Defendant's legal counsel and one of the arbitrators'.[6] The Plaintiff argued that it had just came across information on the website of Universitas Gadjah Mada that the Defendant's legal counsel is a postgraduate candidate promoted by the arbitrator appointed by the Defendant. This affiliation, argued the Plaintiff, led to a blatant 'fraud' which is demonstrated in what the Plaintiff argued was a 'clearly false' reasoning of the arbitral tribunal in the award.[7]

In response to these arguments, the Defendant argued that, first, the Plaintiff's reading of MK Decision No 15 is mistaken in that 'reasonable doubt' is enough only to *invoke*, as opposed to *demonstrate*, a 'fraud' -- while it may be enough to serve as a basis to start court proceedings to annul an arbitral award, it would not be enough to successfully prove that there was in fact an act of 'fraud'.

The Defendant argued that the Court may not ignore the legal principle of presumption of innocence and must require the Plaintiff to submit stronger evidence to prove the alleged 'fraud'.[8] In this regard, the Defendant maintained that only a court decision can serve as strong enough evidence to prove that a fraud has indeed taken place.[9] The Defendant also noted that the merits of the arbitral proceedings should not be revisited, as the current court proceedings are limited to whether the Defendant has committed a fraud.

The Defendant also noted that the academic relationship between the arbitrator as a professor and the Defendant's legal counsel is public information that has been published on the university's website for more than 10 years,[10] and that the appointment of the arbitrator was

3 District Court Decision, pp. 6, 8.
4 District Court Decision, pp. 8-9.
5 District Court Decision, p. 16, point xi.
6 District Court Decision, p. 17.
7 District Court Decision, pp. 18-19.
8 District Court Decision, p. 41.
9 District Court Decision, pp. 41-42.
10 District Court Decision, p. 58.

previously approved by the Plaintiff.[11]

Having assessed the arguments presented, the District Court then considered that the Defendant had indeed committed fraud. In its considerations, the Court viewed that the Defendant has committed actions that fabricated the truth and misled the tribunal. This includes the Defendant and arbitrator's actions in failing to disclose their relationship, which in the Court's view, had it been disclosed, would have altered the perception of the tribunal and affected the rendering of the arbitral award.[12]

With regards to whether the basis of defining the relationship between the Defendant's legal counsel and the Defendant's appointed arbitrator is appropriate, the District Court first noted that there are no rules that regulate this. That said, by applying the standard of 'appropriateness and ethics', the District Court stated that there should not be any relationship between the legal counsel of a party and an arbitrator in that same case (be that professional or otherwise), as such will 'give rise to mistrust and suspicions from one of the parties'.[13] Yet the Court did not decisively declare whether the relationship between the parties is in violation of the independence/impartiality rule or not, but noted that the relationship between the arbitrator and the Defendant's legal counsel was 'very close'.

b. Supreme Court Decision

Following the issuance of the District Court Decision, the Defendant filed for cassation to annul the District Court Decision, thereafter becoming the Cassation Plaintiffs.

The Supreme Court accepted the cassation submission and ruled in favor of the Cassation Plaintiffs by overturning the District Court Decision, for several reasons. First, the Supreme Court deemed it wrong for the South Jakarta District Court to annul an arbitral award based on its own review of the merits of the arbitration, which violated Article 62 (4) of the Arbitration Law. Second, the Supreme Court did not see any falsification of documents, and therefore cannot find any fraud in BANI. Third, the Supreme Court deemed the 'affiliation' between the Defendant's legal counsel and the appointed arbitrator as being groundless and based on an unproved assumption. The Supreme Court stated that a degree of closeness does not necessarily translate into an affiliation that violates impartiality.[14]

While the Supreme Court ruled in favor of the Cassation Plaintiffs, it must be noted that the Supreme Court did not explain much about how the discussion on the 'affiliation' between the Defendant's legal counsel and appointed arbitrator relates to the annulment of the BANI Award.

III. Act of Fraud

As can be seen from the above cases, the annulment of the BANI Award centers around the question of whether there was 'fraud'. But what can actually constitute 'fraud' under Article 70 (c) of the Arbitration Law? In the District Court

[11] District Court Decision, p. 57.
[12] District Court Decision, p. 181.
[13] District Court Decision, p. 181.
[14] Supreme Court Decision, pp. 8-9.

Decision, the South Jakarta District Court seemed to have stretched the scope of its definition to also include the failure to submit evidence/information that subsequently 'misleads' the arbitral tribunal. In the Supreme Court Decision, the Supreme Court implied that its definition is limited to fraudulent documents in stating that 'there is no evidence that establishes as a "fact" that there were fraudulent documents, nor therefore fraud, in the BANI Award.'[15]

Unfortunately, in both of the cases above, neither elaborated on the legal basis referred to in defining 'fraud'. In another case adjudicated by the West Jakarta District Court,[16] however, the panel of judges referred to Article 1328 of the Indonesian Civil Code ("**ICC**") which regulates fraud in general. This article stipulates:

> "*Fraud shall form grounds for nullification of an agreement, if the deceit by one of the parties is of such nature that it is apparent that the other party would never have concluded the agreement without such deceit. Fraud shall not be presumed, but must be proven.*"

It must be noted that in practice, it used to be that 'fraud' can only be invoked and proven by a decision of a court pursuant to the official elucidation of Article 70 (c) of the Arbitration Law, as has been pointed out in the parties' arguments. However, MK Decision No. 15 changed that by annulling the official elucidation (not the article).[17] As a result, while there is now more certainty on what is required to invoke 'fraud' as grounds to annul an arbitral award, there is more uncertainty with regard to what is required to *prove* the alleged fraud.

The Supreme Court's approach seems to be the most consistent so far. As can be seen in other cases, it seems that 'fraud' only takes place when certain information is fraudulent in nature. In Kediri District Court Decision No. 54/ Pdt.G/2015/PN.Kdr, allegations of fraud were proven when one of the parties was revealed to have fabricated a letter of statement.[18] Similarly, in the Supreme Court Decision, the panel reasoned that as there is no fabrication of letters or other evidence, no fraud can be established.

To add a little international perspective on 'fraud' as grounds to annul an arbitral award, we can look at the UNCITRAL 2006 Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). While 'fraud' is not expressly stipulated under the UNCITRAL Model Law, it is implicitly included under Article 34 (2) (b) (ii)'s 'public policy'. This is confirmed in the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration ("**UNCITRAL 2012 Digest**"), which stated that 'public policy [under Article 34 (2) (b) (ii)] has been found to be violated if the arbitral award has been obtained by fraudulent means.'[19] The same also confirmed that a review of the merits of a case is not permitted under Article 34 (2) (b) (ii).[20]

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15 Supreme Court Decision, p. 9.

16 West Jakarta District Court Decision No. 622/Pdt.G/2013/PN Jkt Brt *jo* No. 661 B/Pdt.Sus-Arbt/2014.

17 Constitutional Court Decision No. 15/PUU-XII/2014, paras. 3.18-3.20

18 Kediri District Court Decision No. 54/Pdt.G/2015/PN.Kdr. This Decision was afterwards overturned in Supreme Court Decision No. 48 B/Pdt.Sus-Arbt/2016, in which the Supreme Court decided that no fraud had taken place because the letter of statement in discussion cannot be considered as having been fabricated. In any case, both cases affirm that the finding of 'fraud' depends on whether any fabrication of documents has taken place.

19 UNCITRAL 2012 Digest, pp. 162-163, para. 142.

20 UNCITRAL 2012 Digest, p. 161, para. 136.

IV. Independence and Impartiality

The rules regarding an arbitrator's independence and impartiality can be seen in Article 18 (1) of the Arbitration Law and Article 11 (7) of the BANI Arbitration Rules. These rules primarily take the form of a duty imposed on the appointed arbitrator to disclose circumstances that are likely to give rise to 'justifiable doubts' about their independence or impartiality.

The independence and impartiality of an appointed arbitrator may be challenged under two different circumstances: first, if the disclosure made by the arbitrator gives rise to justifiable doubts about their independence or impartiality, second, if new information is revealed that gives rise to justifiable doubts about their independence or impartiality. This is under Article 24 (3) and 24 (4) of the Arbitration Law (also confirmed by Article 12 (1) of BANI Arbitration Rules), which stipulates the following:

> *"(3) The party objecting to the appointment of an arbitrator made by the other party must submit its request for the arbitrator's recusal within fourteen (14) days after the appointment.*
>
> *(4) In the event that certain information…is revealed at a later date, the request for the arbitrator's recusal must be submitted not more than fourteen (14) days after such information is revealed."*

Arbitral awards can, as practice demonstrates, be annulled on the basis of the lack of independence or impartiality of an appointed arbitrator. However, within that context, Article 24 (3) seems irrelevant, unless an arbitral award is issued within 14 days of the appointment of the concerned arbitrator, thereby allowing the challenging party to object against the independence or impartiality of the arbitrator on the grounds of its appointment. Therefore, within the context of annulment of arbitral awards on the basis of the lack of an arbitrator's independence or impartiality, an arbitral challenge can only be submitted on the grounds of new information.

The question remains as to whether doubts regarding the independence or impartiality of an arbitrator can lead to the finding of an act of 'fraud', which give grounds to an annulment of an arbitral award. From the above case studies, we can see that it was argued that fraud can happen due to either one of the two following reasons: (i) the misleading actions of a party (which can arise from failure to disclose certain information), or (ii) the fraudulent nature of the documents submitted. It can be seen that the independence or impartiality of an arbitrator does not explicitly fall under the two interpretations above. At this point, it would be useful to note that the duty to disclose circumstances that might give rise to justifiable doubts lies with *the arbitrators*, and *not the appointing parties*.[21] As such, even in the case that an appointed arbitrator fails to disclose certain events or circumstances, it would not be sensible to hold the appointing party liable for their appointed arbitrator's breach of duty.

This is not to say, however, that the lack of an arbitrator's independence or impartiality cannot be used as grounds to annul an arbitral award, which is not a new concept. This does not seem to be

[21] Arbitration Law, Art. 18 (1); BANI Arbitration Rules, Art. 11 (7).

expressly prohibited as well in Indonesia, as the grounds to annul an arbitral award under Article 70 are not exhaustive, as confirmed by Supreme Court Decision No. 03/Arb.Btl/2005 dated 17 May 2005.[22]

V. Conclusion

Several conclusions may be made from the above analysis

First, the Indonesian Arbitration Law provides grounds for annulment of arbitral awards under Article 70. According to that article, there are three grounds that may be invoked to annul an arbitral award. In practice, the courts view that the grounds for annulment of arbitral awards are not exhaustively listed under that article.

Second, 'fraud' as prescribed under Article 70 (c) of the Arbitration Law is not clearly defined in the applicable laws and regulations and is therefore applied on a case-by-case basis. Nevertheless, several cases point to the interpretation of 'fraud' to only include fraudulent documents.

Third, it is unclear whether an arbitrator's lack of impartiality or independence may lead to a finding of 'fraud' under Article 70 (c) of the Arbitration Law. However, the practice has demonstrated that it is possible for an arbitrator's lack of impartiality or independence to serve as grounds for the annulment of an arbitral award. This is particularly so as the grounds to annul an arbitral award under Article 70 are not exhaustive.

[22] Supreme Court Decision No. 03/Arb.Btl/2005, pp. 19-20.

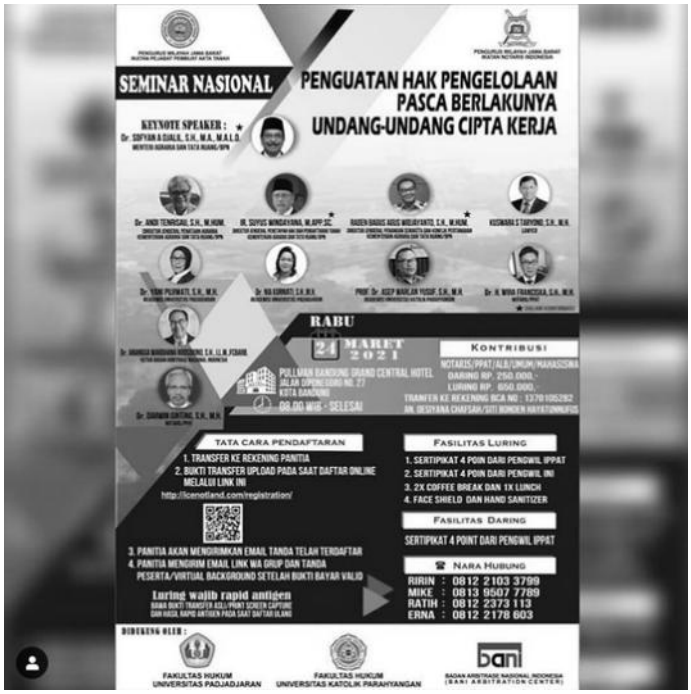
Author's Biography

Andi Yusuf Kadir is a Senior Partner and head of the Dispute Resolution Practice of HHP Law Firm. He is ranked Band 1 for Dispute Resolution by Chambers Asia-Pacific, ranked as a Leading Individual in the Legal 500 and named as "Indonesian Dispute Resolution Lawyer of the Year" by Asian Legal Business Indonesian Law Awards for four years in a row (2017-2020). Andi is listed in the A-List of Indonesia's top 100 lawyers, Asia Business Law Journal 2020, recognized as "Commended External Counsels of the Year" at the In-House Community Counsels of the Year Awards 2020 and recently he was also named as one of Asia's top 15 Litigators by Asian Legal Business 2021.

Zarina Marta Dahlia is an Associate in the Dispute Resolution practice group. She is mainly involved in handling general matters relating to commercial litigation and commercial dispute. Zarina also has experiences in legal researches, legal corporate issues, corporate acquisitions, preparing legal documents such as due diligence reports and providing advisory supports, legal memorandum and employment matters. During her time at the firm, she has covers a broad range of industry sectors including oil & gas, power, mining, infrastructure, financial services and technology.

News & Events

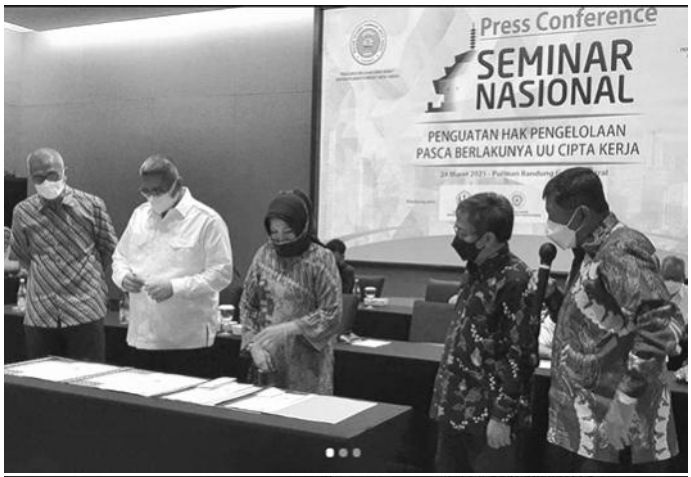
Past Events



Seminar Nasional

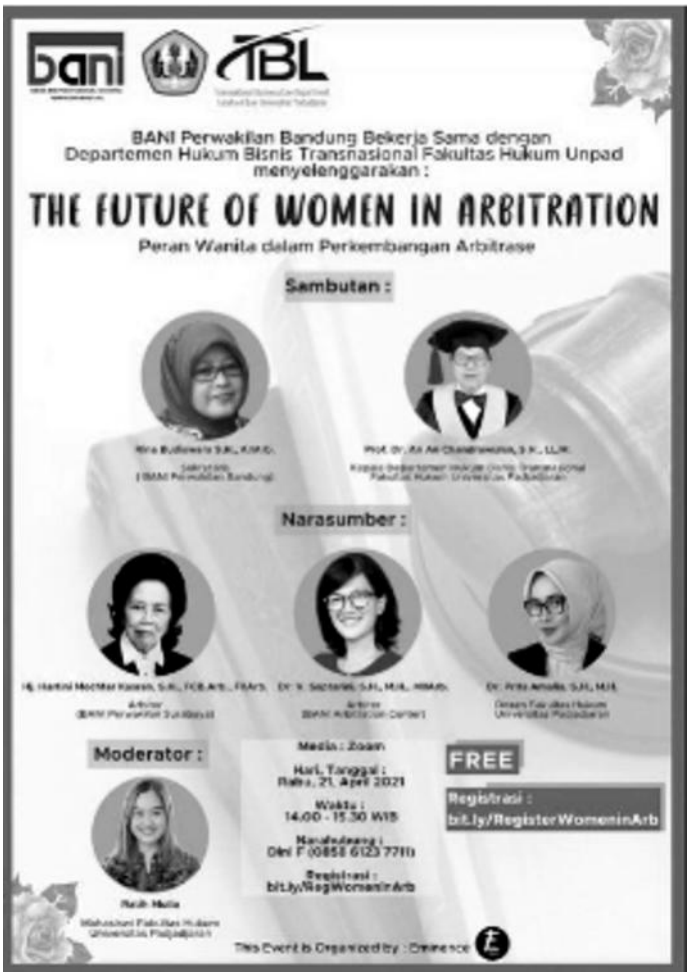
Host : Ikatan Notaris Jawa Barat & Ikatan Pembuat Akta Tanah Jawa Barat

Topic : Penguatan Hak Pengelolaan Pasca Berlakunya Undang-Undang Cipta Kerja



Penandatanganan Piagam Kerjasama antara Badan Arbitrase Nasional Indonesia (BANI) dengan INI (Ikatan Notaris Indonesia) dan IPPAT (Ikatan Pejabat Pembuat Akta Tanah) pada tanggal 23 Maret 2021 di Pullman Bandung Grand Central Hotel.

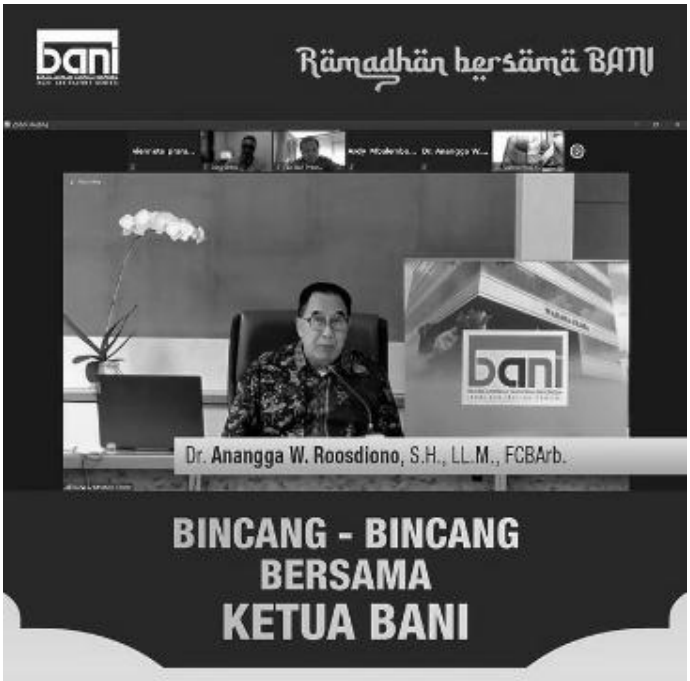
Past Events



Webinar on The Future of Women in Arbitration

Host : BANI Perwakilan Bandung bersama Universitas Padjajaran

Topic : Peran Wanita dalam Perkembangan Arbitrase

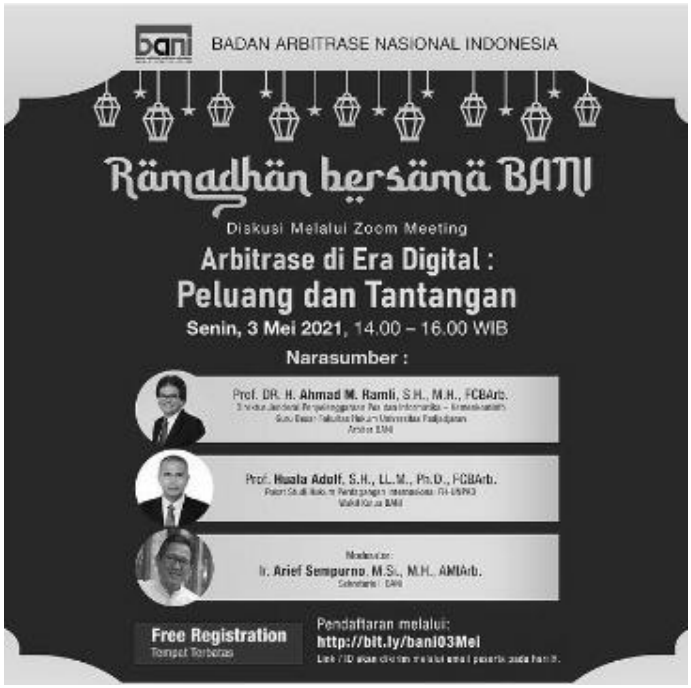


Webinar Ramadan Bersama BANI

Host : BANI

Topic : Bincang-bincang Bersama Ketua BANI

Past Events



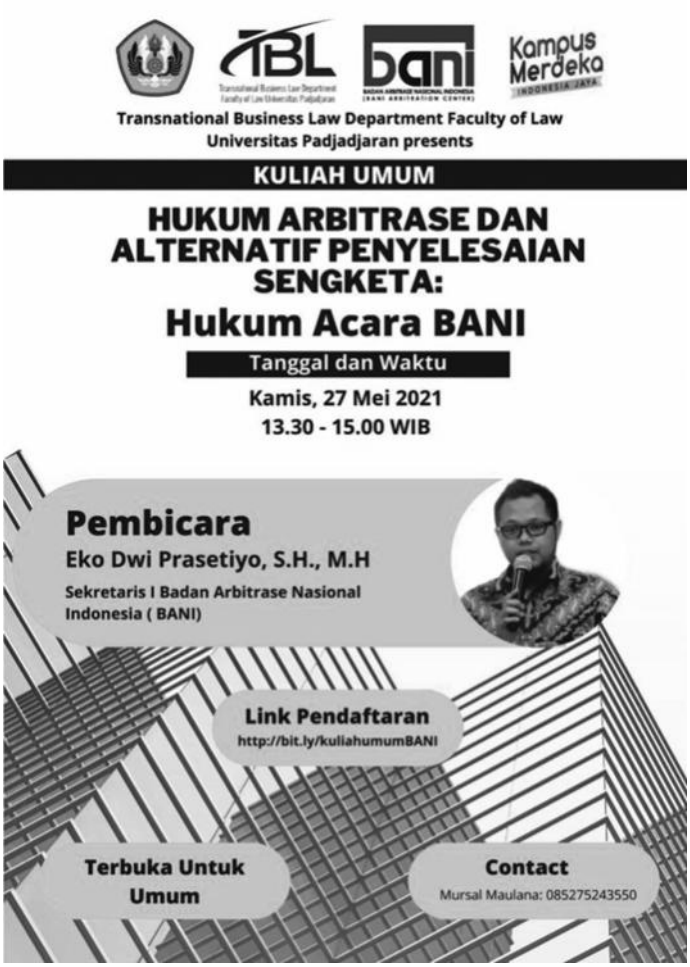
Webinar Ramadan bersama BANI

Host : BANI

Topic : Arbitrase di Era Digital: Peluang dan Tantangan

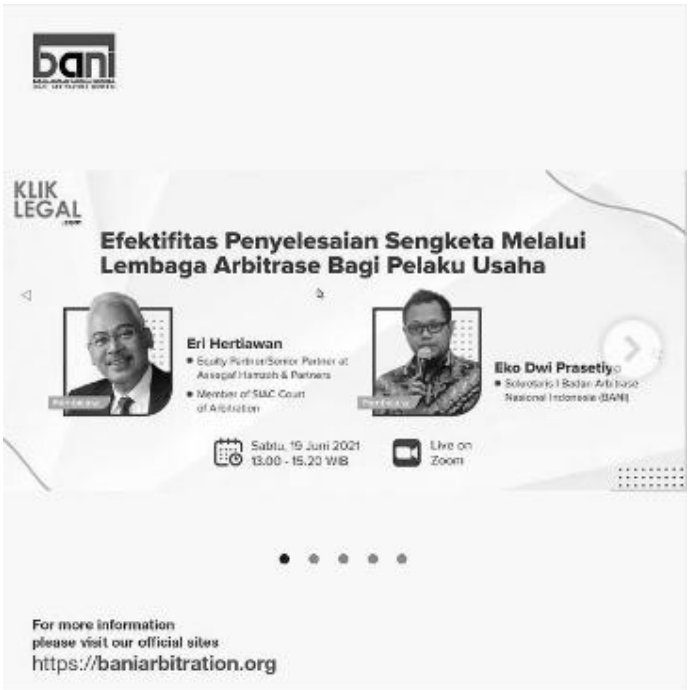
Silaturahmi BANI diadakan secara Daring dan Luring sesuai protokol kesehatan covid -19 yang ditetapkan pemerintah pada tanggal 25 Mei 202, Hotel Grand Melia, Jakarta.

Past Events



Webinar Kuliah Umum Hukum Arbitrase dan Alternatif Penyelesaian Sengketa

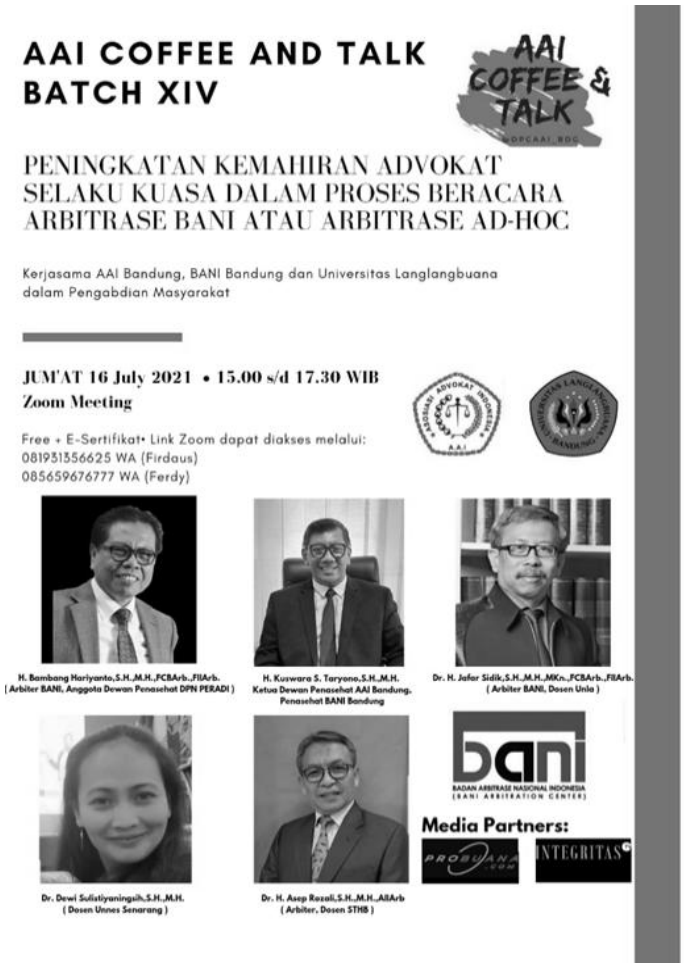
Host : BANI & Universitas Padjajaran
Topic : Hukum Acara BANI



Webinar Kliklegal.com

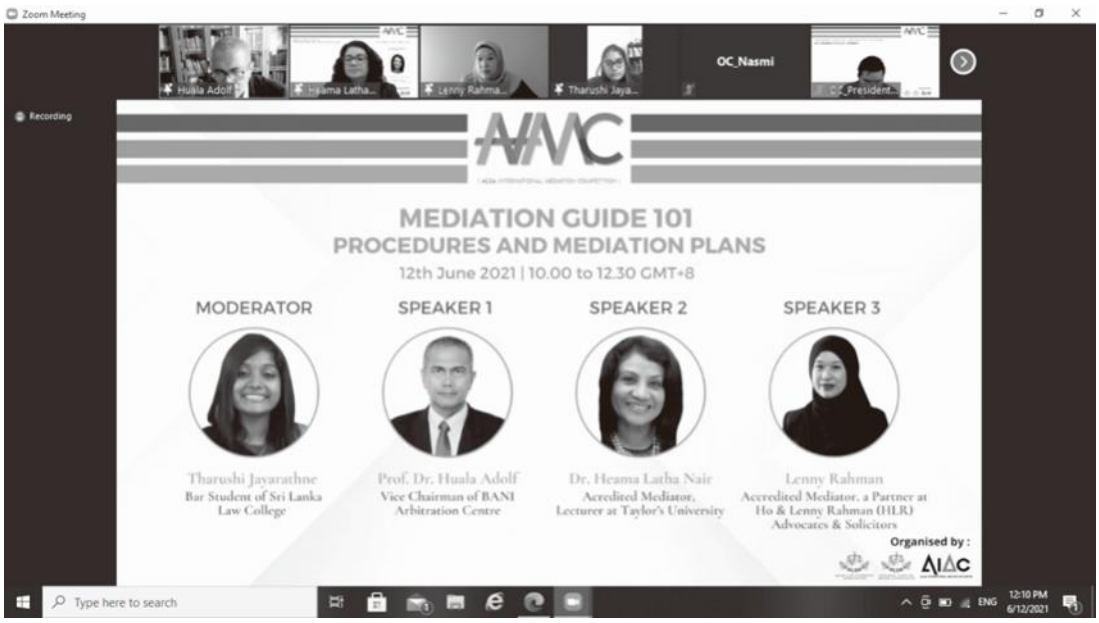
Host : Klik Legal
Topic : Efektifitas Penyelesaian Sengketa Melalui Lembaga Arbitrase Bagi Pelaku Usaha

Past Events



AAI Coffee and Talk Batch XIV

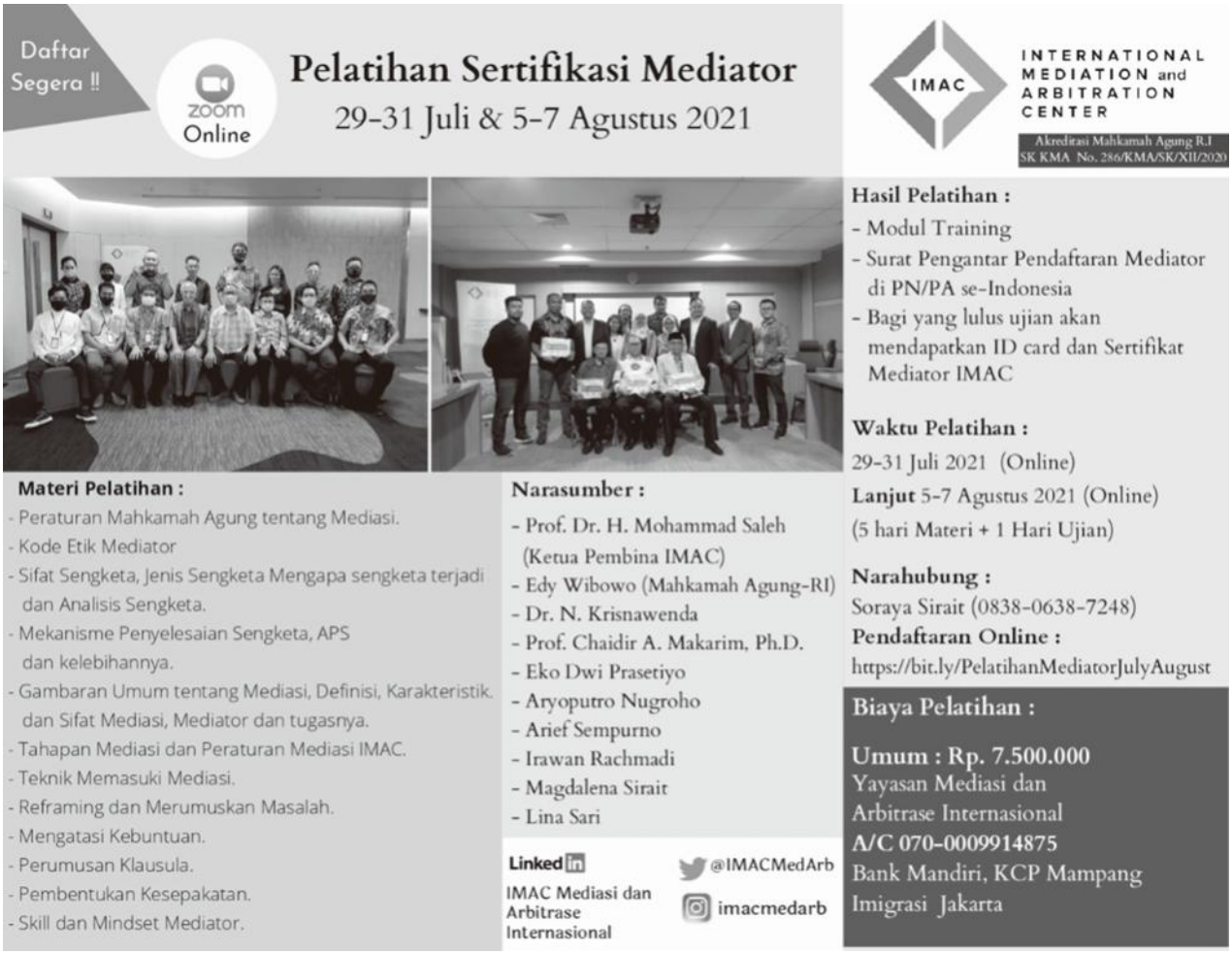
Host : AAI Bandung, BANI Perwakilan Bandung & Universitas Langlangbuana
Topic : Peningkatan Kemahiran Kuasa Hukum Selaku Kuasa Dalam Proses Beracara Arbitrase BANI atau Arbitrase Ad-Hoc



Asia International Mediation Competition (AIAMC) Webinar

Host : Asian International Arbitration Center (AIAC)
Topic : Mediation Guide 101 Procedures and Mediation Plans

Past Events



Pelatihan Sertifikasi Mediator

Host : International Mediation and Arbitration Center (IMAC)