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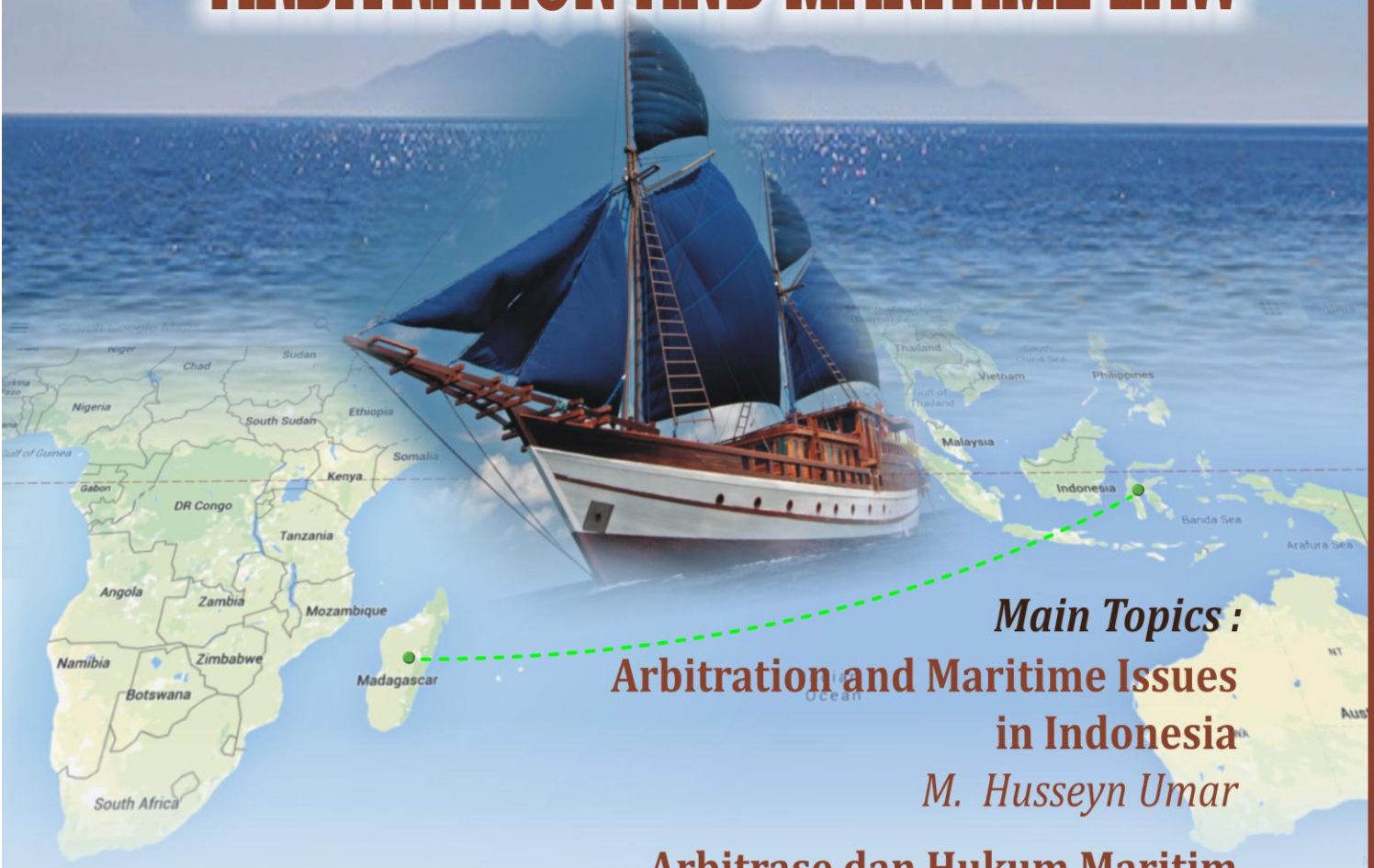
ARBITRATION AND MARITIME LAW



Main Topics :

Arbitration and Maritime Issues in Indonesia
M. Husseyn Umar

Arbitrase dan Hukum Maritim
Mieke Komar

Maritime Law & Arbitration
Frans H. Winarta

Side Topic :

Filsafat Hukum Pancasila dan Arbitrase
Huala Adolf

WIN-WIN SOLUTION

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From the Editor

In October 2014, while taking the oath the Indonesia's seventh president, Mr. Jokowi Widodo called upon his Indonesia people "to work as hard as possible to turn Indonesia into a maritime nation". The development of maritime and trade sectors may increase the potential legal and commercial disputes. In a response to this policy, on 6 April 2015 BANI Arbitration Centre in collaboration with Singapore Chamber of Maritime Arbitration (SCMA) has conducted an International Seminar on Maritime Law and Arbitration.

Maritime arbitration is not a recent phenomenon. Its history has been described in the literature and there is a wealth of materials discussing the proceedings and procedures of maritime arbitration throughout the world. Like in any business, disagreements can arise at any stage of the maritime cycle, from new building and repairs to salvage, pollution, bunker and cargo claims. All these issues are not only multiple and complex but frequently also are multi-party. Some maritime disputes, however, are not submitted to the courts for resolution. Instead, the parties may have opted to submit their disputes for resolution through the process of arbitration. While it might not always be the least expensive, especially for long drawn out disputes with many issues to resolve, but for the majority of maritime disputes arbitration is cheaper than litigation.

Also, arbitration is con□dential, especially if the Parties have not opted-in to allow for appeal. Unlike court judgments, arbitral awards are enforceable across 145 countries in the world (Signatories to the 1958 New York Convention). The enforcement process can also be initiated simultaneously in multiple jurisdictions until the award is satis□ed. The interim orders are also enforceable in certain jurisdictions even if the seat of arbitration proceeding is in a third country.

In the current issue, we are pleased to present three articles on arbitration in maritime disputes prepared by our three BANI Fellow Chartered Arbitrators, namely Messrs M. Husseyn Umar, Prof. DR. Frans Hendra Winarta and Prof. DR. Mieke Komar. These articles are complemented by an article paper prepared by Prof. DR. Huala Adolf, who looks on the Pancasila Philosophy of Law in relation to the settlement of dispute.

Enjoy reading these articles and we welcome comments and contribution of articles. Please do not hesitate to contact us at our e-mail address bani-arb@indo.net.id (our web site: http://www.bani-arb.org).

Jakarta, September 2015

M. Husseyn Umar, S.H., FCBArb., FCIArb., is Chairman of BANI Arbitration Center and also arbitrator at the institution.

Besides acting as arbitrator in ad hoc and BANI arbitrations, he was also acting as arbitrator or counsel or expert in international arbitrations. He has also acted as expert in the court in various countries. He has attended either as attendee or speaker various conferences/workshops on international arbitration in Indonesia and abroad.

Mr. Umar is listed as arbitrator in the Panel of Arbitrators/Conciliators at the International Center for Investment Disputes (ICSID), Washington D.C. and in the Panel of Arbitrators at the Asia-Pacific Regional Arbitration Group (APRAG) in Sydney. Mr. Umar is also Of Counsel in the Law Office

Ali Budiardjo, Nugroho, Reksodiputro (ABNR) in Jakarta. Before practicing law, he was a government official at the Ministry of Transport and Communication in various positions. He had been appointed as an Attache for Transport Communication and Maritime Affairs at the Indonesian Embassy in the Hague (the Netherlands). He has also been appointed as Sectoral Adviser on Shipping, Ports, Multi- modal Transport and International Maritime Legislation at the Permanent Secretariat of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. He has also been appointed as President Director of Pelni National Shipping Company and PT PANN Ships Financing & Leasing Corporation.

He also published a few books and articles on maritime law and arbitration.

Arbitration And Maritime Issues In Indonesia

M. Husseyn Umar, S.H., FCBArb, FCIArb[1]

Abstrak

Pengaturan secara umum mengenai hukum maritim Indonesia terdapat dalam ketentuan-ketentuan Kitab Undang-Undang Hukum Dagang (KUHD) yang meliputi : kapal dan muatan, operator dan perusahaan kapal, pengawakan kapal, perjanjian kerja laut, carter kapal, pengangkutan barang dan orang melalui laut, tanggung jawab pengangkutan, kecelakaan kapal serta asuransi baik di laut, sungai maupun diperairan pedalaman. Ketentuan - ketentuan hukum perdata pelayaran yang terdapat dalam KUHD tersebut bersifat *lex specialis* terhadap ketentuan – ketentuan hukum perdata yang bersifat *lex generalis* yang terdapat dalam Kitab Undang-Undang Hukum Perdata (KUHPer). Diluar itu terdapat peraturan - peraturan yang bersifat ad hoc yang mengatur hal tertentu dan harus dipatuhi. Perlu pula diketahui bahwa Indonesia tidak merati□kasi konvensi internasional tentang pengangkutan barang di laut seperti Hague/Visiby Rules. Namun secara sistematis kalangan maritim Indonesia perlu menyesuaikan diri dengan perkembangan dan praktek hukum maritim internasional, termasuk hubungannya dengan arbitrase untuk penyelesaian sengketa perdagangan maritim. Dengan demikian adalah urgen untuk mengambil langkah-langkah penyesuaian hukum arbitrase Indonesia dengan ketentuan arbitrase internasional dalam hal ini UNCITRAL Model Law.

Kata kunci : *Hukum Maritim Indonesia, Hukum Perdagangan, Lex Spesialis, Lex Generalis,UU. No. 30/1999, UNCITRAL Model Law*

[1] Presented in 19th International Congress of Maritime Arbitrators, Hong Kong, 11 - 15 May 2015

I. Main features of the Indonesian maritime law

The main features of the Indonesian maritime law are embodied in the provisions of the Commercial Code concerning the following: sea–ship and its cargo; ship operator and shipping company; the master, crew and persons on board the vessel; sea–labor agreement; chartering of vessels; carriage of goods and passengers which includes issues on sea transport contract and liability of carrier; and an accidents at sea which include collisions, ship wrecks and salvages, general average and marine insurance. The provisions on maritime law also include provisions concerning ships used in rivers and internal waters.

The Commercial Code is considered a lex specialis vis–a–vis the Civil Code as the lex generalis. Principles of the general private law embodied in the Civil Code are applicable when the Commercial Code is silent on certain issues or speci□cally refer to the provisions in the Civil Code. The contract of carriage is based on the principles of contract law in the Civil Code.

In addition to the above, there are ad hoc laws or regulations which the Commercial Code refers to, such as the regulations concerning registration of ships and rights on ships and the regulations pertaining to the nationality of ships. Note that Indonesia does not ratify any of the conventions on carriage of goods at sea.

II. Key Issues

From the legal point of view, the provisions on sea transport or carriage of goods by sea concern the rights and obligations of the carried on one hand and the rights and obligations of the shipper/receiver (consignee) on the other hand. The relationship between the carrier and the shipper focuses on the responsibility of the carrier to carry the goods to the destination point with good care and the liability of the carrier in the event the goods are lost or damaged.

Article 468 of the Commercial Code provides that the carrier is responsible from the time he receives the good until he delivers it to the receiver. Furthermore the carrier is obliged to pay compensation for the damage or non–delivery of the goods carried except if he can prove that the damage or non–delivery was caused by a circumstance that could not reasonably have been avoided by the carrier or his servants, by the inherent vice or hidden defects of the goods or by the default of the shipper. Under Article 466 a carrier is presumed to be responsible for the delivery of the goods, regardless of what portion of the journey the cargo spends on board.

The Code further provides (Article 470) that the carrier is under no circumstance allowed to limit his liability for loss or damage arising out of negligence, fault or failure in the carrying out of his (or his servant's) duties or obligations, or due to the lack of sea–or cargo–worthiness of the

vessel. The article also stipulates that the carrier will be liable for the loss of valuable goods, provided the carrier has been well noti□ed of the nature and value of such goods before the acceptance or shipment of the goods.

The provision concerning package liability limitation, however, is not always upheld by carrier which is in local currency which is regarded as low. Shipping companies trading in the domestic trade put a somewhat higher rate in their bills of lading. In practice, claims are settled through negotiations. Indonesian shipping companies in the overseas trade generally issue international bills of lading which include package liability limit in conformity with the Hague Visby Rules.

III. Choice of Law

The Indonesia private international law largely respects party autonomy with regard to choice of law. The parties concerned or the contracting parties are free to make the choice of law, and it could be the law of a third country which may have nothing to do with the interest of the parties. In most shipping agreements, such as in the case of bills of lading and charter parties, the governing law is usually English law.

International bills of lading issued by Indonesian overseas shipping companies normally include a paramount clause referring to the Hague/Visby Rules and Jakarta (Indonesia) as the forum of jurisdiction. In addition the bills of lading usually refer to the Indonesian law in so far as certain matters are not covered under the rules of the respective bill of lading. This would mean that although the Hague/Visby Rules are applicable, Indonesian law will be applied in so far as the bill of lading itself and the Hague/Visby Rules are silent concerning certain issues pertaining to the bill of lading.

It is indeed a fact that there exist little signi□cant precedents by Indonesia's court in maritime cases. This situation needs to be changed. The Indonesian court should have more opportunities to deal with admiralty cases, such as cases on limitation of liabilities. The Indonesian legal system adopts the concept that a judge should make his judgment not only based on law but also on justice and common usages, (Article 1339 of the Civil Code). This would mean that a judge should not apply provisions of law which are generally and publicly accepted as being out of date.

In the case of Gesuri Lloyd Ltd. vs. C.Y. Lee (1981), the court awarded damages of HK$ 392.510,15 as assessed by an independent adjuster, which was way above the limitation □gure that would have been applied in that case if the judge had applied Article 474 of the Commercial Code.

IV. Jurisdiction and Enforcement

a. Judicial System

Within a country jurisdiction concerns the choice of the court which, both from the geographical

and the quality standpoint, is considered to be most suitable for the settlement of a given dispute. Internationally, it consist in establishing in which circumstances national courts have jurisdiction to adjudicate upon a dispute to which one or more aliens are parties. It a□ects the judicial system in the country. Indonesia judiciary consists of three layers of courts, namely the District Court, the Appeal Court and the Supreme Court.

b. Arbitration

The settlement mechanism for the resolution of a dispute in the event that an amicable settlement could not be reached is a matter of choice that needs to be decided by the parties in the dispute. Particularly in shipping, arbitration has been widely used to resolve disputes, as is re□ected in the bills of lading, charter parties, and the MOA's for the sale and purchase of ships.

Law No. 30/1999 provides rules and procedure on arbitration and alternative dispute resolution. The law recognizes the existence of institutional arbitration conducted by arbitration institutions, besides ad hoc arbitration. One of the arbitration institutions is BANI Arbitration Center, which was established in 1977 on the initiative of the Indonesia Chamber of Commerce. The panel of arbitrators consists of Indonesian and foreign experts in various □elds, such as trade, industry, construction, mining, insurance, and shipping, etc.

Law No. 30/1999 includes some general rules on dispute settlement alternatives. The Law de□nes that a dispute settlement alternative is a mechanism for the settlement of disputes or di□erent of views through the procedure agreed upon by the parties concerned, namely the settlement out of the court by means of mediation, conciliation, consultation, negotiation or evaluation by experts. With respect to arbitration, the entire arbitration process that starts from the appointment of the arbitrator(s) must take no longer then 180 days to complete. An extension of this length of time may only be made upon the agreement of both parties and the arbitrator(s).

Law No. 30/1999 prescribes that a decision or award shall be made based on the rules of law and for upon agreement by parties, on the principle of pro aequo–et–bono. In practice, however, most arbitrator(s) apply both principles unless the parties insist to solely apply either one of those principles. When the arbitrator(s) have completed the examination and hearings, an award will be issued, which award, is to be read out in the □nal session of the proceedings.

An arbitration award can be in form of an interim/interlocutory award or a □nal award. An interim or interlocutory award is issued, whenever it is necessary; for instance, an interim decision is required due to the challenges of

jurisdiction (exception) submitted by one of the disputing parties. Or an interim measure may be issued for instance in the case of an attachment of property is requested by one party which is possible under Law No. 30/1999.

The final award concerns mainly the merit of the case. It is final and binding upon the parties, meaning that the decision is of the highest resort, so that no appeal or cassation can be made against the award. The disputing parties are bound and obligated to implement the award.

c. Enforcement of Award

Basically an arbitration award is to be implemented or executed voluntarily by the parties concerned. The law provides regulation to secure the execution of the award, especially in the event the losing party fails to implement the award voluntarily. Article 59 of Law No. 30/1999 provides that not later than 30 days as from the date when the award is issued, the original sheet or authentic copy of the award shall be registered by the arbitrator or his proxy at the Registrar of the District Court.

d. Annulment of Award

An application for the annulment of an arbitration award can be filed at the District Court where the award is registered. Article 70 of Law No. 30/1999 provides certain conditions on which basis an annulment request can be made:

1) The award is suspected to be issued based on letters or documents which turned out to be fake or declared false.
2) After the award has been issued, decisive documents that the opposite party has hidden are found
3) The award is issued based on results of deceit conducted by one party at the examination of the case

The application for the annulment shall be submitted in writing not later than 30 days as from the date of the registration of the award at the District Court. Furthermore the Law determines that in the case the application for annulment is approved by the Chairman of the District Court, an appeal against such decision can be made to the Supreme Court.

e. International Arbitration

In connection with the international trade it is important to see as to how international arbitration awards are enforced. Law No. 30/1999 does not adopt UNCITRAL Model Law. Law No. 30/1999 does provides rules and procedures for arbitration conducted in Indonesia. With respect to international arbitration, the Law provides a special regime with respect to the recognition and enforcement of international arbitration awards. The Law defines that an international arbitration award is an award which is issued by an arbitration institution or an individual arbitrator outside

the jurisdiction of the Republic of Indonesia or an award issued by an arbitration institution or an individual arbitrator which according to the law of Indonesia is regarded as an international arbitration award.

Under Law No. 30/1999, the Central Jakarta District Court is authorized to deal with the recognition and enforcement of international arbitration awards (Article 65). With respect to the recognition and enforcement of international arbitration award, Indonesia adheres to the provisions of the above mentioned New York Convention, which hasbeen rati□ed by Indonesia in 1981.

Article 66 of the Law stipulates that international arbitration awards shall only be recognized and enforced if the awards ful□ll the following requirements:

1) International arbitration award is issued by an arbitrator or arbitration panel in a country which has a bilateral or multilateral relation with respect to the recognition and enforcement of international arbitration awards with Indonesia;
2) Recognition and enforcement of the international arbitration award is limited to the award which according to Indonesian law belongs to the scope of trade/economic law;
3) International arbitration award can only be enforce in Indonesia to the extent that award does not contravene the public order;
4) International arbitration award will be enforced after securing an enforcement order (exe-quatur), from the Chairman of the District Court of Central Jakarta;
5) International arbitration award which concerns the state of the Republic of Indonesia as a party in a dispute can only be enforced after securing an enforcement order from the Supreme Court.

Conclusion

The Indonesian maritime law (commercial shipping) needs systematical and certain adjustments with the development of international maritime law and practices. Arbitration is mostly used in the settlement of disputes in the business world, including in shipping business, as an alternative to court litigation. The Indonesia's Arbitration Law (Law No. 30/1999) also includes provisions on dispute settlement alternatives, i.e. mediation, conciliation, negotiation, consultation and expert's advice. Med–arb/hybrid arbitrations are widely applied in Indonesia. There is an urgent need now in Indonesia to adjust the Indonesian Arbitration Law in line with the provisions of the UNCITRAL Model Law.

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

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

MARITIME LAW AND ARBITRATION

Prof. Dr. Frans H. Winarta, FCBArb

Abstrak

Indonesia merupakan negara kepulauan terbesar di dunia yang dua pertiga dari wilayahnya merupakan wilayah perairan. Secara geogra□s, Indonesia merupakan negara maritim yang terdiri atas beribu pulau yang tersebar dari Sabang hingga Merauke. Indonesia sebagai negara kepulauan, seperti disebutkan di dalam Konvensi Hukum Laut Internasional (UNCLOS) 1982, memiliki laut teritorial, wilayah yuridiksi, dan kawasan dasar laut.

Potensi maritim di laut lepas ini, mau tidak mau terkait dengan investasi dalam pembangunan seperti transportasi laut, perikanan, pertambangan laut, operasi lepas pantai, logistik, dan sebagainya. Penyelesaian sengketa untuk permasalahan maritim tersebut telah diatur di dalam UNCLOS yang mencakup The International Tribunal for the Law of the Sea ("ITLOS"), The International Court of Justice ("ICJ"), Majelis Arbitrase sesuai UNCLOS 1982, dan Majelis Arbitrase Khusus sesuai yang diatur di dalam UNCLOS 1982. Perlu menjadi catatan bahwa UNCLOS 1982 mengatur hak dan kewajiban negara dan tidak mengatur mengenai aktivitas perdagangan dari individu atau badan swasta.

Kata kunci : *Negara Maritim, UNCLOS, ITLOS, International Court of Justice*