MITIGATING CASE RISK MANAGEMENT IN INTERNATIONAL ARBITRATION; ANALYSIS OF CASE NO.641K/PDT.SUS/2011

Gunawan Widjaja, Universitas Krisnadwipayana

ABSTRACT

International business may raise an international dispute, which needs to be settled through international disputes resolutions. Arbitration was one of the best alternative disputes resolution chosen in international disputes resolutions. This research aims to discuss that choosing the straight wording in disputes resolution clause will mitigate the risk of losing in international arbitration. This research is normative legal research using a case approach. It used secondary data, consisting of primary legal sources, secondary legal sources and tertiary legal sources, including the review case. The result and discussion prove that to mitigate the risk of having the correct mechanism in resolving disputes resolution, the parties in international business need to follow the most straightforward way of writing disputes resolution clause. The researcher suggests that the disputes resolution clause follow the given standard.

Keywords: Disputes Resolution Clause, Arbitration, Strategic Management, Risk Mitigation

INTRODUCTION

People always want to live in peace. Even though there is always a common understanding among people in a society, there will always be differences in view, perception, and opinion about certain things. Many of these differences may be compromised or settled wisely. However, some raised to become disputes. To maintain peace in the state, the government provides a disputes settlement mechanism through state courts. In the courts, depending on the legal system applicable, there is always a judge that would resolve the dispute.

In a business transaction between two companies that exist and domiciled in the same state, the state's court may have "full authority" over the case submitted to the court. The court can enforce the verdict over the "losing" company. In many cases, court settlement cannot satisfy the needs of the business. The long period to achieve the final and binding decision and the open system of the court hearing that made no confidentiality to the case have made business on many occasion avoid court. Another kind of disputes settlement is created (Widjaja, 2002). One among them is arbitration. Arbitration does not require an appeal to the high court and/ or cassation to the supreme court. It will save time for a dispute decision to become final and binding. Besides, the principle of confidentiality in the arbitration process made the case undisclosed to the public. Many institutional arbitrations were established and founded to assist the settlement of business disputes. With good faith and state recognition principles, an arbitration award can be executed by court order.

In an international commercial transaction, where many nations are involved, it would be difficult for the parties to settle the disputes arising out from the transaction, especially when it relates to legal remedies due to default in the transaction. To enforce a decision made by a court in another state needs mutual, reciprocal recognition (Gautama, 1998). On 10 June 1958, United Nations facilitated a Convention on the recognition and enforcement of foreign arbitral awards in New York (New York Convention) (https://www.newyorkconvention.org/english). The Convention "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also

apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

There must be an arbitration agreement for the parties in disputes to settle disputes by arbitration. The arbitration agreement must be made in writing. It can be made in an independent arbitration agreement or a clause in the transaction agreement (Daouda, 2016; Widjaja, 2020). This research will discuss the importance to mitigate risk in dispute settlement by having a simple, straightforward arbitration agreement using a case study.

LITERATURE REVIEW

According to Article 1 point 3 of Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution: "Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises." The arbitration agreement, likewise, contract in general, under the Indonesian Civil Code (Subekti & Tjitrosudibio, 2004) is regulated in Article 1320. Based on the article, to have a valid contract, there must be a consensus between a legally capable person on something (or more) that can be enforceable before the court of law (does not violate law and regulations, morality and public order) (Widjaja, 2003; Gautama, 2006; Subekti, 2019). In an arbitration agreement, the "something" that must be regulated is the content of the arbitration agreement. It is generally about how the arbitration will be conducted to settle the dispute between the parties over a particular transaction. Therefore the content of the arbitration agreement must at least includes (Widjaja & Yani, 2000):

1. The consensus of the parties to settle their disputes of the specific transaction through arbitration;
2. Whether the dispute will be resolved through institutional arbitration or an ad-hoc arbitration;
3. If it is to be decided by institutional arbitration, the name of the institution;
4. The procedural law that the institution will use;
5. The seat of arbitration that will determine the lex arbitri of the case.

It may also regulate:

1. The language used in the arbitration process;
2. The place of arbitration;
3. The number of the arbiters;
4. Other things that may be deemed appropriate by the parties.

As an agreement, an arbitration agreement may not be amended, changed or altered without consensus from all the parties in the contract. The arbitration agreement, though made by the parties in dispute, shall bind the institutional arbitration or ad-hoc arbitration and the arbiter(s) appointed by the institution or the parties (in ad-hoc arbitration) to settle the disputes. The arbitration tribunal, either institutional or ad-hoc, shall honour the arbitration agreement made and signed by the parties in writing. Any amendment or changes to the arbitration agreement must be made in writing, or the amendment shall be treated as null and void. The amendment can only be made by the parties in the contract. The institutional arbitration or ad-hoc arbitration and the tribunal/ arbiter(s) appointed by the institution or the parties (in ad-hoc arbitration) to settle the disputes can only execute and conduct the arbitration process based on the amendment made by the parties.

Unclear wording in a contract is open for interpretation. The interpretation will, in the end, may harm any of the party in the agreement. Therefore, it is suggested that the wording of the content in the arbitration agreement must be assertive, simple and straightforward. Institutional arbitration usually provides the standard clause of arbitration agreement to be used by the parties. The appointed tribunal may determine their competency to settle the dispute if any party in

dispute challenges their competency (Widjaja & Kartasasmita, 2018). The tribunal may interpret the arbitration agreement. However, the tribunal cannot amend or change the content of the arbitration agreement. To interpret does not mean to amend.

METHODS

This research is normative legal research with a conceptual and case approach. The conceptual approach is used to explain what is a straight forward arbitration agreement. Besides, it uses a case to explain the importance of the straightforward forward arbitration agreement. The case that will be used in the analysis is case No.641K/PDT.SUS/2011. Analysis was made qualitatively.

Data used in the research are secondary data, which are data available to the public. The data consist of primary legal sources (the law, regulations and court case), secondary legal sources (expert opinion, books, journals, and other means of legal views and presentations) and tertiary legal sources (dictionaries and encyclopedias). Data were obtained through literature review, either using the library and/ or online access using the google search machine.

Facts Finding in the Case

The researcher found case No.641K/PDT.SUS/2011 interesting. The case was an appeal case of an attempt to annul arbitration award. From the verdict of the case, it can be found that the case was about disputes between Indonesian companies which has an arbitration clause in the main agreement. The arbitration clause, as quoted from the verdict, read as follows:

"Any dispute arising out of or in connection with his agreement, including any question regarding its existence, breach, validity or termination, shall be referred to and finally resolved by arbitration in Jakarta (BANI), in accordance with the rules of arbitration of the international chamber of commerce (ICC rules) for the time being in force which rules are deemed to be incorporated by reference to this article. If the value of the dispute is less than US$ 10 million, the tribunal shall consist of one (1) arbitrator to be appointed in accordance with the ICC rules. If the value of the dispute is or greater than US$ 10 million, the tribunal shall consist of three (3) arbitrators to be appointed in accordance with the ICC rules. The language of the arbitration shall be the english language. The arbitral award shall be in writing, state the reasons for the award, and be final and binding on the parties. The parties hereby agree that judgment upon the award may be entered by any court (including the courts of the Republic of Indonesia) having jurisdiction thereof or having jurisdiction over the parties of their assets. This clause will survive termination of this agreement."

From the content of the arbitration agreement, it can be concluded that:

1. Place of arbitration is Jakarta, located at the BANI office;
2. Procedural rules of the arbitration are ICC rules;
3. If the dispute is less than US$ 10 million, the tribunal shall be one arbiter; or in the event, the value of the dispute is or more than US$ 10 million, the tribunal shall be three arbiters;
4. The arbitrator(s) shall be appointed in accordance with the ICC rules;
5. The language of the arbitration shall be the English language;
6. The award shall be in writing, incorporate the reasons for the award, and be final and binding.
7. The award may be enforced by any court (including Indonesian courts) having jurisdiction over the parties of their assets.
8. The arbitration agreement remains in force after the termination of the main contract.

Based on the argument on the verdict, the arbitration was conducted in Bahasa Indonesia using BANI rules, including the appointment of the three arbiters, which is according to ICC rules, shall only be one arbiter. One of the parties to the case denied an agreement that there is an amendment to the procedural rules from ICC rules to BANI rules and the language used in the arbitration process from English to Bahasa Indonesia. From the list of evidence presented in the

verdict, there are no documents in writing that proved the amendment of the arbitration clause in the main agreement.

Without the intention to judge the verdict or the case, the researcher would like to prove that the choice of the wording used in the arbitration agreement is essential. In case No.641K/PDT.SUS/2011, it becomes further disputes. From the literature review, it can be seen that many institutional arbitrations have their standard arbitration agreement.

Standard ICC Arbitration Clause (https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/)

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

SIAC model clause (https://siac.org.sg/model-clauses/siac-model-clause)

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

UNCITRAL model clause as recommended by SIAC (https://siac.org.sg/model-clauses/uncitral-model-clause)

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as present in force.

The arbitration shall be administered by Singapore Arbitration Centre ("SIAC") in accordance with its Practice Note on UNCITRAL cases."

DISCUSSION

Discussion from the arbitration clause of case No.641K/PDT.SUS/2011 proved that:

1. Even though it is not mentioned, it can be said that the seat of arbitration is Indonesia, which, therefore, the lex arbitri applicable to the case shall be Indonesian law, which includes Law No.30 Year 1990 regarding Arbitration and Alternative Dispute Resolution.
2. The place where the whole arbitration proceeding will be conducted is in Jakarta, to be exact is the legal domiciled of Badan Arbitrase Nasional Indonesia (BANI).
3. The arbitration rules shall be ICC Rules. However, it seemed that there would be an interpretation of the role of BANI. It can be interpreted that:

   a. BANI will administer the case and rent its office space to be used for the arbitration proceeding, or
   b. BANI will only rent the place so that the arbitration proceedings occur from beginning to end without administering the case.

   There is a lack of wording "administer" here. If we refer to the UNCITRAL standard arbitration clause, the body that will administer the case must be clearly stated. UNCITRAL provides its rules to be used by any arbitration; even it is not an institutional arbitration that settles disputes and does not have the facility to administer any case. The ambiguity of the role of BANI is the entry point of the problems.
4. The issue was escalated when a party to the dispute try to use BANI rules instead of ICC rules, which give BANI a more important role in the case. The intention of one party seemed to be neglected or rejected by the other party that file the annulment of BANI's tribunal award to the court of law. However, based on the content in the Supreme Court verdict case No.641K/PDT.SUS/2011, BANI overruled the arbitration agreement as if there was consent from both parties in the disputes. It is not the tribunal that interpreted and made the amendment, but BANI as the institution.

   From the researcher point of view, the use of BANI rules without the written consent of both parties cannot be justified in any way. Shall BANI would administer the case, it may be argued. However, it was never the issue since the proceedings' rules were changed to BANI rules, making BANI the sole administrator of the case. BANI as an institution shall not interfere or have the

authority to deal with the arbitration agreement. The tribunal is appointed based on the chosen rules by the parties in dispute that have the competency to decide.

5. The tribunal shall consist of one arbiter instead of three arbiters. The changes of ICC rules to BANI rules automatically overruled the appointment of the number of the tribunal. The kompetenz-kompetenz principle in arbitration gives the tribunal the right o make its own decision over their competency. While understanding that the arbitration agreement agrees on using ICC rules, the tribunal shall refer the case handling back to ICC rules and declared that the tribunal does not have the competency to settle the case. The tribunal itself is not appointed according to ICC rules.
6. The language of the arbitration must be in English. The researcher cannot see any misinterpretation that would raise the issue of using Bahasa Indonesia during the proceeding after BANI administered the case instead of English. The Indonesian law as lex arbitri does not prohibit arbitration proceeding from being conducted and administered in English, even though the parties to the disputes are Indonesian companies. However, one of them is a foreign investment company. The researcher found that the use of Bahasa Indonesia without the written amended agreement signed by the parties in disputes is a violation of the basic principles in arbitration. It reminds the researcher of prior research that studies the disputant behaviour over final and binding arbitral awards (Kartasasmita & Widjaja, 2021).

The researcher would like to draw attention to those who write arbitration agreement. It is not that the researcher dislikes or rejects the use of long paragraph in an arbitration agreement. Strategically, management would like to have a foreseeable result, even when a transaction becomes a dispute. From the lesson learned of case No.641K/PDT.SUS/2011, it can be said that to mitigate the risk of having further discrepancies over an unsettled dispute, it is better that:

1. An arbitration agreement shall follow the standard arbitration clause given by the chosen institution unless the parties would like to use an ad-hoc arbitration;
2. Seat, place, administration of the case must be clear and specific;
3. Choice of law, choice of forum and rules applicable for the proceeding must be written straightforward.

Finally, the researcher argues that by choosing the right international arbitration institution and having the standard arbitration clause incorporated, it will be the right start to draw a successful arbitration agreement. Knowing the institution and understanding the arbiter that will handle your disputes is a good start. However, this may not harm the independence and impartiality of the institution and the arbiter in handling the case.

CONCLUSION

From the above findings and discussion, it can be concluded that to benefit from arbitration as one of the alternative disputes resolutions, all process must be followed. Drafting an arbitration agreement is the crucial point to a successful arbitration. A good arbitration agreement will mitigate the first case risk management. It is the key to manage other risks in case management. It can be used to strategically handle any dispute that may be raised from any international business transaction. Drafting an arbitration agreement may become part of strategic management in international trade.

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