

THE ROLE OF THE ARBITRATION BOARD IN THE SETTLEMENT INVESTMENT DISPUTES

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ARTICLE INFO

History of the article:

Received: 09/01/2024

Corrected: 16/01/2024

Accepted : 25/01/2024

Published: 25/01/2024

Keywords:

Arbitration, Dispute, Investment.

ABSTRACT

The arbitration clause is one of the efforts to attract foreign investors and to give confidence to entrepreneurs from developed countries as capital lenders will get legal treatment for the guaranteed of their activities in Indonesia. The dispute settlement process through arbitration is basically no different from the dispute settlement process through the courts in general, but the structure in the sense of the institutional structure, between arbitration and the court is very different. The enforcement of the arbitral award is carried out voluntarily and if the parties are not willing to comply with the voluntary implementation of the arbitral award, the arbitral award can be enforced by force. The content of the arbitration clause must be about dispute resolution issues relevant to the subject matter of the agreement. Investment dispute resolution through an arbitration institution as an alternative to out-of-court dispute resolution. It is basically no different from the process of examining disputes through the courts in general, but the structure in the sense of institutional structure, between arbitration and the court is very different.

1. Introduction

The progress of Indonesia's national economy is increasing rapidly, this is due to the government's policy in national development which is directed at increasing the efficiency of domestic and foreign trade and supporting every increase in export production and employment expansion. The most prominent government policy that has a very important role in economic growth is to open up to foreign investment as a complement to domestic capital by issuing Law No. 1 of 1967 concerning foreign investment. This growth brings many positive things, but also has a negative impact. Business relationships or agreements in the world of trade do have a positive impact, but on the other hand there is always the possibility of differences of understanding, disagreements or conflicts or disputes as a result of one of the parties disputing the trade contract. The occurrence of disputes and disputes is often caused when one of the parties does not carry out the agreement that has been made properly or because there is a party who is in default, thus



harming the other party which then arises the feeling to demand a settlement which is usually resolved through legal channels (courts).

A trade dispute can arise at any time and anywhere between parties involved in business or trade activities. If a dispute arises in trade activities, the parties to the dispute can demand a quick and appropriate resolution and dispute resolution. The parties involved in a trade dispute can freely choose the means of settlement and the law to be used in accordance with the agreement agreed in the contract. Dispute resolution in trading activities can not only be done through the courts (litigation) but can also be done through alternative dispute resolution outside the court (non-litigation). Out-of-court dispute resolution for the Indonesian people has been a philosophy of the Indonesian nation since ancient times, only the naming does not use the sentence Out-of-Court Dispute Resolution. Dispute resolution is a philosophy of the ancestors of the Indonesian nation that has developed in the midst of society, for example, people between regions who are at war prioritize resolving it in the form of deliberation.

The birth of the out-of-court dispute resolution model is inseparable from a longer time if dispute resolution is carried out through the court. In the midst of the collapse of public trust in the judiciary, it is necessary to make improvements, both in the laws and regulations and in the facilities and infrastructure, including the morality (this is perhaps the most important) human resources who are directly involved in the judiciary. The Alternative Dispute Resolution Institution is basically a form of dispute resolution outside of court, which is based on the agreement of the parties to the dispute. For the developed world, arbitration is considered an alternative dispute resolution. This is because the resolution of business disputes through official courts generally takes a long time due to the procedural factors of the judicial system being very complex. In addition, the business world thinks that business dispute resolution is less understood by judges when compared to those who are engaged in the business world itself. Currently the most common alternative forms of dispute resolution are negotiation, mediation, conciliation, and arbitration.

As a consequence of the agreement of the parties to the dispute, the Alternative Dispute Resolution is voluntary and therefore cannot be enforced by one party on the other party to the dispute. Arbitration is a term used to resolve disputes in a peaceful manner so as to achieve a certain result that is legally final and binding. The main prerequisite for an arbitration proceeding is the obligation on the parties to make a written agreement or arbitration clause and then agree on the laws and procedures on how they will terminate the settlement. Outside of arbitration, usually in resolving disputes, the parties appoint a lawyer to resolve through or attempt to resolve themselves directly.





2. Research Method

The specification of this study is descriptive. Descriptive research is intended only to describe or systematically explain the legal rules related to the role of arbitration institutions in resolving investment disputes. The approach method is to use the normative juridical method. The normative juridical approach method is used to study laws and regulations related to the role of arbitration institutions in resolving investment disputes.

3. Results And Discussion

The settlement of investment disputes through an arbitration institution as an alternative to out-of-court dispute resolution must follow the established procedures. "The procedure is to proceed at the Indonesian National Arbitration Board if the parties submit their case to be resolved through the Indonesian National Arbitration Board and request that the regulations of the Indonesian National Arbitration Board apply".

The procedure for the event through the Indonesian National Arbitration Board is as follows:

1. Commencement of arbitration proceedings

The arbitration event began with the registration of a letter of application to hold arbitration in the register of the Indonesian National Arbitration Board by the secretary of the Indonesian National Arbitration Board.

2. Letter of application to hold arbitration

In order for a case to be examined by the Indonesian National Arbitration Board, a letter of arbitration must be submitted. According to the procedural regulations of the Indonesian National Arbitration Board for the application letter to be accepted, the conditions that must be met as stipulated in Article 38 paragraph (2) of Law 30 of 1999 concerning Arbitration and Alternative Dispute Resolution states as follows:

- a. The application letter must at least contain the following:
 - (1) The full name and residence or place of residence of both parties.
 - (2) A brief description of sitting a dispute case
 - (3) What is demanded
- b. Along with the application letter is also attached a copy of the arbitration contract or the contract text that specifically submits the dispute to arbitration.
- c. If a power of attorney is submitted from the parties, then a special power of attorney is also attached along with the application letter.





- d. In the application letter, an arbitrator can be selected or submit the appointment of an arbitrator to the chairman of the Indonesian National Arbitration Board.
 - e. Before registration for an arbitration application is made, the registration and examination administration fees must first be paid in full.
3. If the application for settlement to arbitration is rejected
- Before the case material is examined, the Indonesian National Arbitration Board may declare that it rejects (does not accept) the arbitration request if the arbitration contract or arbitration clause is considered not strong enough to be the basis for the authority of the Indonesian National Arbitration Board. In this case, the decision to reject the arbitration application by the Indonesian National Arbitration Board must be notified to the arbitration applicant within a maximum period of 30 days. The examination fee in this case must also be returned to the applicant.
4. Procedure for appointment of arbitrators
- Regarding the appointment of this arbitrator, there are various possibilities, namely:
- a. The most common is that each party chooses its own arbitrator and the third arbitrator will know the examination is appointed by the chairman of the Indonesian National Arbitration Board on the proposal of each arbitrator appointed by the parties.
 - b. Each party chooses its own arbitrator and the third arbitrator is an outsider of the Indonesian National Arbitration Board appointed by each arbitrator. The appointment of a third arbitrator from outside is possible as long as there is permission from the chairman of the Indonesian National Arbitration Board.
 - c. The applicant appointed the arbitrator, but in its answer, the arbitration respondent did not appoint the arbitrator. So in this case the second arbitrator will be appointed by the chairman of the Indonesian National Arbitration Board.
 - d. The applicant or respondent did not appoint an arbitrator. So in this case, the chairman of the Indonesian National Arbitration Board will appoint a three-person arbitration team to handle the case concerned.
 - e. If in simple cases, each party does not appoint its arbitrator, then the chairman of the Indonesian National Arbitration Board will appoint one arbitrator who will be the sole arbitrator to handle the matter.
 - f. One or both parties appoints its own arbitrator but asks the chairman of the Indonesian National Arbitration Board to appoint a third arbitrator from the Indonesian National Arbitration Board.





5. Order before the Indonesian National Arbitration Board

If the answer from the arbitration respondent has been submitted, then at the same time as the answer is submitted to the applicant, both parties are called to appear in front of the Indonesian National Arbitration Board. "The hearing of the Indonesian National Arbitration Board must be held no later than 14 days from the issuance of the order to face the chairman of the Indonesian National Arbitration Board".

6. If the respondent does not provide an answer

In this case, if 30 days have passed after the order to face the chairman of the Indonesian National Arbitration Board but the respondent has not yet submitted his answer, then the chairman of the Indonesian National Arbitration Board will summon both parties to appear.

7. Counterclaim

As in a trial in a general court, in an arbitration trial it is also known as a counterclaim. The procedural regulations of the Indonesian National Arbitration Board also recognize and regulate counterclaim claims.

8. If the respondent does not appear for the hearing

In this case, the chairman of the Indonesian National Arbitration Board will order that the respondent be summoned once more at the rescheduled hearing, but the second determination of the first hearing day shall be no later than 14 days from the issuance of the order.

9. If the applicant does not come to face

If within the stipulated day the applicant is unable to face even though he has been duly summoned, then the arbitration panel will drop the arbitration application. So if the applicant is not present to face, there is no second call. This is reasonable considering that the applicant as the party who called the initiative to litigate, he should still be ready to receive a summons from the arbitration.

10. Applicant's resistance

If the decision is rendered without the applicant's presence, then a legal remedy against the decision can be filed by the respondent concerned. The submission of the opposition must be made within 14 days after the decision is notified. The arbitration is conducted in the same manner as an arbitration application but is free from registration fees and other examination/administrative fees.

11. Efforts for peace by arbitration

As in a general judicial hearing, in an arbitration session by the Indonesian National Arbitration Board, peace between the two parties is also first sought by the arbitrators. If this peace effort is successful in the sense that the parties make peace in front of the arbitration, then the arbitration tribunal will make a deed of *dading* (deed of peace) and punish both parties for fulfilling and complying with



the peace. However, if peace is not successfully achieved by the parties, the arbitration panel will continue the examination of the dispute material.

12. Proofing process

Regarding the evidentiary process in front of the Indonesian National Arbitration Board, what applies in principle is the law of proof in general. So the evidence in the general evidentiary law still applies. Including proof through witnesses, expert witnesses or letter evidence.

13. Examination of witnesses/expert witnesses

As already mentioned, in the evidentiary process, witnesses or expert witnesses can be heard. According to the Indonesian National Arbitration Board, the hearing of witnesses or expert witnesses is carried out with the following conditions:

- a. The hearing of expert witnesses is conducted on the order of the Indonesian National Arbitration Board or at the request of interested parties
- b. The fee of witnesses or expert witnesses is charged in advance to the payment must first be made to the secretary of the Indonesian National Arbitration Board.
- c. Witnesses or expert witnesses are asked to take an oath first before giving their statements.
- d. All examinations of witnesses or expert witnesses are carried out behind closed doors to the public.

14. Closed door inspection

Actually, not only the examination of witnesses or expert witnesses in front of the Indonesian National Arbitration Board must be carried out behind closed doors, but all events in the proceedings of the Indonesian National Arbitration Board must be carried out behind closed doors. The same is true for almost all arbitrations in the world.

15. Revocation of the arbitration application

As in the process of proceedings in the general court, it is permissible to litigate in front of arbitration as well as the revocation of the case that has been submitted to the arbitration. The Indonesian National Arbitration Board also regarding the procedure for revoking the arbitration application by the applicant. In this case, the Indonesian National Arbitration Board determined that the revocation of the application was permissible as long as a decision had not been rendered. However, if the respondent parties have provided the answer, the revocation of the application can only be done if there is approval from the respondent.

16. Arbitration fees if the application is withdrawn



Regarding the examination fee that has been given to the arbitration in the event of the revocation of the arbitration application, the Indonesian National Arbitration Board determines as follows:

- a. If the examination has not started, then the examination fee is fully refunded to the applicant.
- b. If the examination has started, the examination fee will be partially refunded, the amount of which will be determined by the chairman of the Indonesian National Arbitration Board.

17. Closing of the inspection

If the examination has been completed and the arbitration panel considers it sufficient, then the examination is immediately declared closed by the chairman. Thus, there will be no more checks in any form against anyone.

18. Decision-making and pronouncement

At the time or after the examination is closed by the chairman, the chairman sets the day of the hearing to pronounce the decision taken. In this case, in order to maintain legal certainty, according to the Indonesian National Arbitration Board, the arbitration panel must have taken and pronounced a decision within a period of one month after the closing of the examination.

19. Execution of an arbitration award

The procedure for execution according to the Indonesian National Arbitration Board is first of all for the losing party to implement the arbitration award itself. However, of course, in practice, the losing party, especially if they are not satisfied with the arbitration award, will not implement the award voluntarily. It may even slow down or hinder the verdict. Therefore, in the decision on the arbitration application concerned, the period of fulfillment of the implementation of the award is also determined. If within the specified period of time the decision has not been implemented by the parties who are obliged to implement the decision, then the chairman of the Indonesian National Arbitration Board will submit the decision to the District Court to implement the decision, if necessary forcibly in accordance with the procedural law applicable to the execution of a general court. So the power of execution of an arbitration is the same as the power and consequence of a decision of the general court.

20. Arbitration fees

The components of costs that must be incurred for an arbitration are as follows:

- a. Application application application fee
- b. Administrative fees/examination conventions/counterclaims.
- c. Arbitrator fees/fees
- d. Costs of summoning and travel of witnesses
- e. Travel expenses by arbitration



f. Execution fees.

21. Parties who bear the burden of costs

The party that must bear the burden of administrative costs applies to the following conditions:

a. Borne by the respondent.

According to the Indonesian National Arbitration Board, administrative fees and examination fees are charged entirely to the respondent in the event that the application is granted by the arbitral tribunal or the applicant's standing is fully justified.

b. Borne by the applicant

If the applicant's claim is rejected by the arbitration panel, all costs will be charged to the applicant.

c. Carried jointly by the applicant and the respondent.

However, sometimes the demands of the arbitration applicant are partially accepted and partly rejected, then in such cases the burden of administrative and examination costs is borne by both parties according to the provisions considered fair by the Indonesian National Arbitration Board.

Thus, as the basis for the appointment of an arbitral body in resolving disputes is based on the agreement of both parties to the dispute to be resolved through the arbitration body. With the existence of an arbitration agreement in writing, it negates the right of the parties to submit dispute resolution or differences of opinion contained in the agreement to the District Court.

It can be said that there is already an agreement among legal practitioners, that arbitration agreements are outlined in written form. Arbitration agreements in the form of oral, are considered invalid and non-binding. An arbitration agreement is considered to have never *existed*.

According to M. Yahya Harahap, the arbitration agreement must be held in written form. What is meant by a written agreement is as follows:

a. Arbitration clauses included in the principal agreement

b. The provisions contained in the arbitration agreement are separate from the principal agreement in the form of:

1) Letters sent on record.

2) Expedition books

3) Telegram or telex exchange between the parties.

The arbitration agreement contains clauses that are about the matters that may be included in the arbitration agreement.

4. Conclusion

Investment dispute resolution through an arbitration institution as an alternative to out-of-court dispute resolution. It is basically no different from the process of examining disputes through the courts in general, but the structure in the sense of institutional structure, between arbitration and the court is very different. The enforcement of the arbitral award is carried out voluntarily and if the parties are not willing to comply with the voluntary implementation of the arbitral award, the arbitral award can be enforced by force. The legal force of the arbitral institution's award against the disputing parties is binding and must be implemented by the parties voluntarily. If the parties are not willing to comply with the voluntary enforcement of the arbitral award, then the arbitration award shall be enforced. In order for the arbitration award to be enforced, the award must first be registered in the registration deed at the District Court clerk.

References

- Advendi Simangunsong and Elsi Kartika Sari., *Law in Economics*, Gramedia Widiasarana Indonesia, Jakarta, 2024.
- Eman Suparman., *Choice of Commercial Dispute Arbitration Forum for Enforcement of Justice*, PT. Tata Nusa, Jakarta, 2024
- Felix Oentoeng Soebagjo. *Basic Principles of Arbitration and Alternative Dispute Resolution*. Faculty of Law, University of Indonesia, Jakarta, 2017.
- Gunawan Widjaya and Ahmad Yani., *Arbitration Law*, PT. Raja Grafindo Persada, Jakarta, 2021.
- Gunawan Widjaya, *Alternative Dispute Resolution*, Rajawali Press, Jakarta, 2021
- Gunawan Widjaya and Almira Prajna Ramaniya, *Mutual Funds and Roles, and the Responsibilities of Investment Managers in the Capital Market*, Kencana, Jakarta, 2016
- Huala Adolf, *Arbitration of ASEAN Countries*, National Legal Development Agency, Ministry of Law and Human Rights of the Republic of Indonesia, Jakarta, 2019
- Hamid Shahab., *Law Number 30 of 1999 and Alternative Settlement Routes*, Djambbatan, Jakarta, 2022
- I Putu Gede Ary Suta, *Towards a Modern Capital Market*, Sad Satria Bhakti Foundation, Jakarta, 2020
- Joni Emirzon, *Alternative Dispute Resolution Outside the Court*, Gramedia Pustaka Utama, Jakarta, 2021
- M. Husein and A. Supriyadi., *Alternative Dispute Resolution Outside Court*, PT. Gramedia Pustaka Utama, Jakarta, 2020.



Munir Fuady, *Contract Law from the Perspective of Business Law*, PT. Citra Aditya Bhakti, Bandung, 2021

M. Yahya Harahap., *Arbitration*, Sinar Grafika, Jakarta, 2021.

Nazarkhan Yasin., *Getting to Know Construction Claims and Construction Dispute Resolution*, PT. Gramedia Pustaka Utama, Jakarta, 2014

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Pasaribu, A. S. ., Akhyar, A. ., & Purba, N. (2023). Law Enforcement Against Narcotics Addicts and Abusers According to Law Number 35 of 2009 concerning Narcotics (Study of District Court Decision Number 296/Pid.Sus/2021/PN. Kis). *Journal of Meta Law*, 2(3), 1-17. <https://doi.org/10.47652/jmh.v2i3.445>

Arianto, A., Mustamam, M., & Marlina, M. (2023). Legal Protection of Children Victims of Sexual Abuse (Study at the Subulussalam Resort Police). *Journal of Meta Law*, 2(3), 18-33. <https://doi.org/10.47652/jmh.v2i3.446>

Siburian, M. R., Marzuki, M., & Putra, P. S. . (2023). Restorative Justice on the Handling of Narcotics Abuse Crimes (Study at the Asahan Police). *Journal of Meta Law*, 2(3), 50-62. <https://doi.org/10.47652/jmh.v2i3.460>

