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Arbitration as Settlement of Disputes in Foreign Investments

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Abstract

This study aims to determine and understand the procedures for dispute resolution through arbitration in foreign investment (PMA), and how the development of arbitration is in accordance with positive knowledge and law in relation to dispute resolution in foreign investment (PMA). This research utilizes normative juridical legal research. This study uses a statutory, historical, and conceptual approach. The findings show that the procedure for disputing resolution through arbitration in foreign investment (PMA) has been confirmed in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The development of arbitration is in accordance with positive knowledge and law in relation to dispute resolution in Foreign Investment (PMA), that investors, in this case, not all of them are able to have a positive impact on the progress of society and the Indonesian government, the legal process of arbitration in resolving disputes in foreign investment (PMA) is far from perfect words.

Keywords: *Arbitration; Dispute Resolution; Foreign Investment*

Introduction

For businesmen especially investors, as legal subjects in foreign investment (PMA), experience many legal problems or disputes if they want to be resolved in accordance with the applicable regulations in our country without taking a long time. We need to know together that the method for resolving disputes after customary institutions that has been known and used by the community is the court. However, recent developments have shown that courts are not the only appropriate dispute resolution institution, especially for business people.

Based on Law Number 5 of 1968 in Article 2, the Indonesian Government protects the rights of business actors, especially and / or foreign investors in Indonesia, with the approval of the Convention on the Settlement of Disputes between States and Foreign Citizens Regarding Investment.

If Article 2 is considered, even though Indonesia has agreed to the entry into force of the Convention, not automatically every PMA dispute is subject to the Convention and resolved through the ICSID Arbitration Council Forum. As explained in the general explanation of Law no. 5 of 1968 which

was published in Supplement to the State Sheet No. 2852, although the Convention applies to every country, there is no obligation that any dispute be resolved according to the Convention. An absolute condition for settlement under the Convention is the agreement of the two parties to the dispute.

This study aims to determine and understand the procedures for dispute resolution through Arbitration in Foreign Investment and understand the development of Arbitration in accordance with positive knowledge and law in relation to dispute resolution in Foreign Investment.

Research Methods

This research is categorized as a normative juridical legal research, with a statutory, historical, and conceptual approach. The sources of legal materials used are primary, secondary and tertiary legal materials, with data collection techniques carried out by document study. The analysis employed in this research is done deductively.

Findings and Discussion

A. Implementation of Arbitration in Dispute Resolution for Foreign Investments

Based on the applicable regulations in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, settlement of civil disputes can be submitted to the general court or use arbitration as another alternative.

The development of the business world in general through PMA provides a legal initiative that can be used for the creation of legal security for investors. Even the readiness of the arbitrators themselves in handling many civil problems is faced in the development of foreign capital business. When looking at Law No. 35 of 1999 in Article 48 Paragraph (1) states that the examination of disputes must be resolved within 180 (one hundred and eighty) days after the arbiter or arbitral tribunal is formed.

The real problems faced cannot reduce the inevitable shortcomings of arbitration, that in fact, dispute resolution through arbitration is not capable of dealing with the turmoil of legal inertia in our country in resolving disputes, especially foreign investment.

The presence of arbitration institutions as one of the legal institutions in dispute resolution is influenced by the disappointment of the community, especially business people, with the court's performance which is slow, expensive and does not produce absolute victories. Some matters of money are considered by business people to take advantage of arbitration institutions, among others: 1) The parties to the dispute can choose their own arbitrators and for this purpose, those who have integrity, honesty, expertise and professionalism in their respective fields will be chosen; 2) The administration of the arbitral tribunal is confidential and therefore can guarantee undesirable confidentiality and publicity; 3) An arbitration award in accordance with the wishes and intentions of the parties is a final decision and binds the parties to the dispute; 4) Because the verdict is final and binding, the procedure can be fast, inexpensive and much lower than the costs incurred in court proceedings.

In Law Number 31 of 1999, the arbitration procedure for arbitration is regulated in Articles 27-51. When viewed from the program, it is not much different from civil procedural law. The procedural law that is regulated adopts an open system, meaning that the parties can determine the agenda for themselves or if a certain institutional arbitration institution is used, it follows the procedures of that institution.

If the parties do not determine the agenda themselves then it is subject to the law of procedure in the arbitration law. In the event that the parties determine the law of the procedure themselves, the agreement is stated in writing and is expressly stated and must not conflict with the provisions of the arbitration law.

So that the arbitration authority does not bias in resolving disputes that are not arbitration competencies, it can be referred to the provisions in Article 5 Paragraph (1) of Law Number 30 of 1999 which states: "Disputes that can be resolved through arbitration are only disputes in the field of trade and regarding rights which are the laws and regulations are fully controlled by the disputing parties. "

B. Development of Arbitration and Its Understanding in Foreign Investment

Dispute resolution through arbitration has become increasingly popular with employers. Commercial contracts with foreign parties sufficiently include arbitration clauses in their contracts. Currently the Indonesian National Arbitration Board (BANI). Today the Indonesian National Arbitration Board has become increasingly popular, similar dispute resolution bodies have also been born, including the Indonesian Muammalat Arbitration Board (BAMUI), the Business Dispute Resolution Board and others.

The challenge to the future is the challenge to prove each of these dispute resolution bodies. One measure of the success of dispute resolution bodies through arbitration is the quality of the arbitrator. However, the quality of an arbitration body will be very much influenced by the quality of the arbitrators.

Seeing the culture of our society which is very different from the mind set or mindset of foreigners, results in a very disturbing real obstacle in resolving foreign investment disputes (PMA). Barriers to investment to invest in a country are greatly influenced by the legal culture.

The most fundamental factor that causes foreign investors to hesitate to invest in Indonesia is the factor of confidence in the power of law. The problem most investors complain about is law enforcement. Investors desperately need legal certainty that is manifested through compliance with the work contract made and certainty about the settlement mechanism in the event of a dispute. The role of law in encouraging foreign investment is needed to create legal certainty.

There are at least 5 factors that influence the basis for the development of an arbitration institution as an alternative to dispute resolution in foreign investment in Indonesia, namely1; 1) as an effort to increase competitiveness in inviting investment to Indonesia; 2) community demands for an efficient mechanism capable of fulfilling a sense of justice; 3) efforts to compensate for the increasing critical power of the community coupled with the demand for an active role in the development process; 4) fostering a climate of healthy competition for the judiciary; 5) the desires of business people in resolving disputes can be accommodated in alternative solutions to dispute resolution outside the court with a variety of models that can be chosen by themselves.

M. Yahya Harahap believes that the application of arbitral jurisdiction in generelization and absolute terms without regard to the clause formulated in the agreement is wrong and is not always true.[2]The arbitration authority must be viewed from the formulation of the agreement, if it is in general form such as "any or every dispute arising from this agreement, the parties agree to be resolved by arbitration", then the absolute arbitration authority shall apply. However, if the agreement clause is

[1]Ahmad Sentosa, *Perkembangan Kelembagaan ADR di Indonesia,* Pusat Kajian Pilihan Penyelesaian Sengketa, Padang, 1999.
[2] M.Yahya Harahap, *Beberapa Catatan Yang Perlu Mendapat Perhatian Atas UU Nomor 30 Tahun 1999,* Jurnal Hukum Bisnis, 2002.

limited to certain and detailed disputes, then the arbitration is only authorized for disputes mentioned in the agreement, as a whole it remains the authority of the District Court.

Currently, Indonesia is actively building the national economy by inviting foreign direct investment. In order to increase the confidence of foreign investors in the investment climate of legal certainty in doing business, especially in resolving disputes that may arise, the ICSD convention was ratified.

The recognition and approval of the Indonesian government for the ICSD convention, is also an effort to convince the World Bank (World Bank) and the International Bank for reconstruction and development of the Indonesian government's seriousness in resolving foreign investment disputes through arbitration forums. This gave the World Bank an image that in the matter of foreign investment, the Indonesian side did not intend to win alone by maintaining and enforcing the Indonesian legal system.[3]

One of the Indonesian arbitration institutions, BANI, which provides various services regarding arbitration, is an independent institution whose existence is influenced by the growing development of arbitration in foreign investment, especially in Indonesia. In providing its support for foreign investment in Indonesia, BANI currently exists with more than 100 arbitrators with various professional backgrounds, 30% of whom are foreigners.

It is very clear that Indonesia strongly supports arbitration as a settlement of disputes in foreign investment. This is evidenced by the existence of the Indonesian arbitration institutions referred to above. Apart from that, the parties are also given the freedom to make a choice of law, in a foreign capital agreement the choice of law must also be determined. Choice of forum is an institution or body that is chosen by the parties as the body or institution authorized to resolve disputes that occur.

The choice of jurisdiction (forum) in a country does not mean that the applicable law is the law of jurisdiction (forum) which is chosen or vice versa, where the choice of law of a country does not mean that the country's court has the competence to examine and adjudicate disputes. The choice of this forum is stated in the form of an arbitration clause in the foreign investment agreement. This arbitration clause is in addition to what is known as the accesoir agreement.

The existence of this additional clause does not prevent the fulfillment of the implementation of the principal agreement, therefore the cancellation or defect of this agreement does not result in the cancellation or defect of the principal agreement. The difference is the main agreement can stand alone without any additional agreement, whereas without the principal agreement the parties may not enter into an arbitration agreement. This was in effect prior to the promulgation of Law No. 30 of 1999. After the promulgation of Law no. 30 In 1999, an arbitration agreement would not be canceled because it was due to the termination or cancellation of the principal agreement, therefore this arbitration agreement could stand alone without a principal agreement. All of these things are aimed more because dispute resolution through arbitration must have a strong arbitration agreement basis, so that dispute resolution in its implementation can be more easily understood by not leaving the law and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Conclusions

Based on the description that the author has described above, it can be concluded that there is still a sense of anxiety or a feeling of not being sure to fully rely on the efforts of dispute resolution in the country. Everything related to law is likened to a positive step for the government in its application as a

[3] M. Yahya Harahap, *Arbitrase,* Edisi 2 Cetakan 1, Sinar Grafika, Jakarta, 2001, hlm. 6

developing country. The government still has not been able to prove a definite legal guarantee for local entrepreneurs, especially investors as foreign investment. If examined further, foreign investment has a series of legal problems that should be resolved quickly and do not cost much money, but the fact is explicitly the author explains that the bureaucracy in Indonesia is not as easy as imagined by investors. The legal process for dispute resolution arbitration in foreign investment is still far from perfect, but the government has provided legal certainty by ratifying Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Based on the above Research Results, the author would like to provide suggestions that is expected to be openness from the government in the socialization of the Act that applies to each foreign capital company that develops in Indonesia. Foreign investors are looking forward to the same legal treatment in recognizing rights and obligations in compliance with regulations.

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