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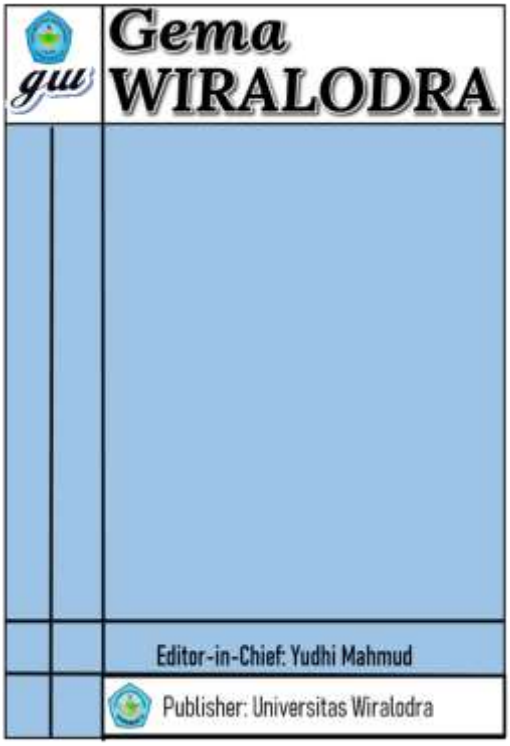

THE BEST STRATEGY FOR DEALING WITH BUSINESS CONFLICTS: STRATEGIC CHOICES IN DRAFTING CLAUSES IN ARBITRATION AGREEMENTS AND THE APPLICATION OF EXPEDITED PROCEDURES

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Orginal Article

The Best Strategy For Dealing With Business Conflicts: Strategic Choices In Drafting Clauses In Arbitration Agreements And The Application Of Expedited Procedures

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Abstract
Arbitration or the root word in (Latin) "arbitrare" means "the process or method of deciding a dispute through an independent arbitrator or referee". This definition is one of them because legal experts have different opinions or views even though their opinions have the same meaning. Talking about arbitration or arbitration institutions, there has actually been and has been practiced throughout the centuries for the first time introduced by the Greek community before Christ. As for Indonesia, arbitration is known and recognized by citizens as an alternative to problem solving through non-litigation. Alternative dispute resolution, such as arbitration and mediation, is now a popular choice in resolving business conflicts. The method used to collect data is by conducting literature searches published in scientific research articles and journals. The literature search was conducted using several loaded search engines, such as Google Scholar, Pubmed, and Science Direct. This method is an alternative that is considered more effective and efficient than going through the courts, because the process is faster, lower costs, and the resulting decisions are final and binding. The purpose of this study is how to choose a strategy in drafting clauses in the Arbitration agreement for dispute resolution.
Keywords: Arbitrase,Expedited Procedure,dispute

1. Introduction

In the business world, arbitration is more often used as an alternative option to resolve business disputes between the parties involved rather than through litigation or judicial institutions. This happens because currently almost every trade contract includes a dispute resolution clause through arbitration (Bachmid, A. 2018). Arbitration is a popular and recommended dispute resolution institution compared to other dispute resolution institutions.

Basically, arbitration is a specific type of court. An important point that distinguishes courts from arbitration is that courts use a permanent or standing court, whereas arbitration uses a court forum specifically designed to do so, Arbitration consists of a clause inserted into an agreed contract so that the parties involved in the contract can resolve their disputes in this way (Putra Dodi, 2022). Therefore, this research will discuss the selection of strategies in drafting clauses in arbitration agreements.

Business people consider various factors in determining how to resolve disputes, including choosing arbitration as an effort to resolve disputes that will or are being faced (Rahman, A.2021). However, the reasons for choosing arbitration as an alternative dispute resolution institution may vary among the disputing parties. Therefore, it is important to understand the parties' reasons for choosing arbitration as an alternative dispute resolution in trade contracts. In the General Elucidation of Law No.30/1999 on Arbitration and Alternative Dispute Resolution, arbitration institutions are considered to have advantages compared to judicial institutions (Husni, M, 2008). Some of these advantages include:

1. Ensure confidentiality of disputes between the parties involved.

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2. Avoid delays caused by complicated procedures and administration.
3. The parties can select arbitrators whom they believe have sufficient knowledge, experience and background regarding the disputed issues, as well as integrity and objectivity.
4. The parties may determine the choice of law for resolving the issues as well as the process and place of arbitration.
5. The arbitrator's award is binding on the parties involved, and may be enforced through simple or straightforward procedures (procedure).

The formation of practical law must be based on legal principles, because legal principles are the basis and guidelines in the formation of positive law. Law formation involves abstract, general, and fundamental thinking known as legal principles, then these principles are realized into legal regulations. This process involves four stages, namely legal principles, legal rules, concrete legal regulations, and jurisprudence (Sudikno Mertokusumo, 2011).

Legal principles have a general scope so that they can apply in various situations, not limited to certain events or situations. Therefore, there are opportunities to make deviations or exceptions that strengthen the application of these general legal principles. In the context of dispute resolution through arbitration, there are several relevant legal principles, including the Principle of Consensualism, the Principle of Autonomy of the Parties, the Principle of Pacta Sunt Servanda, the Principle of Good Faith, and the Principle of Simple and Fast (Ahmad Syofyan, A. S. 2022).

Speed in justice can be defined as resolving disputes as soon as possible. This means that the judicial process must be efficient in the use of time so that justice seekers are not hampered. Speed in the judicial process includes examination in court, completion of the investigation report (BAP), as well as the imposition and execution of decisions (Sudikno Mertokusumo, 1933).

Appropriate strategic options for handling business conflicts include drafting clauses in arbitration agreements and implementing expedited procedures. These strategies include open and transparent communication, clear policies and procedures, recognition and diagnosis, agreeing on solutions, and making logical offers. These strategies can help companies reduce disputes and create a peaceful and productive workplace.

2. Research Methods

In this study using the approach method used in the preparation of this legal research using a normative juridical approach, which sees law as human behavior in society (Peter Mahmud Murzuki,2008). While in applying this approach method, a type of approach is used, namely the approach through the ststue approach (statutory approach), comparative approach (comparative approach), Comparative research that researchers use is to look at a particular case in textbooks with data collection techniques using literature studies or literature studies used to collect data by conducting literature searches published in scientific research articles and journals. Literature searches were conducted using several loaded search engines, such as Google Scholar, Pubmed, and Science Direct.

3. Discussion

Strategy Selection in Drafting Clauses in Arbitration Agreement

One of the characteristics of business or economics in this era of globalization is that it moves quickly which brings changes and shifts in business transactions, quoting from John Naisbitt, namely a change that will face humanity into a global village using a single economic system (a world that moves from trading countries to one economy, one economy, one market) (Naisbitt, J., & Aburdene, P., 1990).

The Indonesian economy has been carried away by the flow of business in the global village, cost markets and free competition, this has resulted in the Indonesian State being unable

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to avoid free market trade and free competition (Setiady, T. (2018). So with this, the process of business transactions in Indonesia is increasing day by day. In the process of business transactions that continue to increase in Indonesia, it is likely to cause a dispute between the parties involved.

The making of international business contracts has a very broad scope which includes objects in the form of movable and immovable objects (Nindyo Pramono, S. H. 2020). tangible and intangible goods, services and others, various business contracts will be made in accordance with the applicable legal system, In international business contracts there are foreign elements related to Indonesian law, in general a lawyer will carefully consider studying a business contract because in international business contracts the validity is assessed from the law where the contract was made (lex loci contractus) or where the contract was executed (lex loci solution). So that in international business contracts in the making there is a choice of law clause and a judicial institution (choice of Jurisprudence) (Ansari, T. S. 2018).

A very significant source of arbitration law is the mandatory existence of an arbitration clause or agreement made by each party. This arbitration clause or agreement is the legal basis for the existence of arbitration. Arbitration only exists if there is an agreement or arbitration clause. An arbitration clause is one of the clauses in a trade agreement or contract that contains the parties' convention to submit their trade disputes to an arbitration institution. An arbitration agreement, on the other hand, is a special agreement that controls the submission of disputes that arise to an arbitration institution or an Ad Hoc arbitration institution (Huala Adolf, 2015).

The principle that if the convention of the parties produces the law and applies to the convention contained in the arbitration clause or agreement, the arbitration clause derived from the convention of the parties is the law of the parties. This agreement determines the function and authority of the arbitration institution. The scope of the law of the parties is to determine the number of arbitrators, the procedure for appointing arbitrators, the limits of the arbitrator's authority, procedural law procedures, and the law applied by the arbitration institution. The following are some characteristics of arbitration clauses in summary (Huala Adolf, 2015). that is:

a. Written Requirements

   The hallmark of a clause or agreement is a written requirement. This requirement is generally applied in legal instruments, whether at the national or international level. Law no. 30/1999 on Arbitration and Alternative Dispute Resolution requires the parties to make a written agreement, as described in Article 1 point 1 of the law, that arbitration is a method of dispute resolution outside the universal judiciary based on an arbitration agreement made in writing by the parties to the dispute.

b. Signature Requirements

   Under Article 2(2) of the New York Convention, the arbitration clause must be signed by the parties. The interpretation of the word "signed" regarding contracts or arbitration clauses has caused confusion. In today's modern trade transactions internationally, it is no longer logical to require a signature because practical needs in international trade transactions have become a habit, such as buying and selling transactions must be fast and efficient, and produce a standardized agreement.

c. Autonomy (Severability) of Arbitration Clause

   Another feature of arbitration agreement clauses is their autonomy. Another term used is the doctrine of severability of arbitration clauses. The recognition of the doctrine of severability of arbitration clauses is relatively recent and has not generated much debate. This means that an arbitration clause is a point in the contract, but the feature of the arbitration clause is not an element or addition to the contract.

   The cancellation or termination of an agreement does not automatically invalidate or terminate the arbitration clause. The doctrine of separability recognizes the parties'

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agreement to resolve their disputes through an arbitral institution even if the contract is no longer in force (Mark Huleat-James and Nocholas Gould, 1996).

Penerapan Prosedur Percepatan Di KPPU Dan SIAC

SIAC first introduced the expedited procedure in Article 5 of the 2010 SIAC Rules, the expedited procedure is an option provided to reduce the time or cost of dispute resolution in accordance with the parties' agreement to use the SIAC Rules (Ji, L., & Ryan, J. K. 2015).

SIAC issued new rules that came into effect on August 1, 2016, the SIAC Rules 2016. The expedited procedure is set out in Article 5 of the SIAC Rules 2016. According to Article 5(1), prior to the constitution of the Arbitral Tribunal, a party may apply to the registrar for the arbitration to be conducted under the expedited procedure if any of the following criteria are met (Singapore International Arbitration Centre Arbitration Rules.2016) Pasal 5(1) states that the application may be filed if:

a. Total costs do not exceed $6,000,000 to be disputed;
b. the parties agree;
c. In cases of extreme urgency.

The parties to an arbitration conducted under the expedited procedure pursuant to that Article shall, at the same time as filing with the Registrar a request for the arbitration to be conducted under the expedited procedure, send a copy of the request to the other party and notify the Registrar that this has been done, specifying the method used and the date on which it will be conducted (Surianty, F. 2014).

Then, Article 5(2) explains that if a party has made a request to the Registrar of the Court and the Chairman under Article 5(1), after considering the views of the parties and taking into account the circumstances of the case, the arbitration procedure will be conducted with an expedited procedure, the following procedure applies.

a. The Registrar may shorten the time limit in this regulation;
b. The case shall be referred to a single arbitrator, unless the President determines otherwise;
c. The Tribunal may, after consultation with the parties, decide whether the dispute is to be decided on the basis of documentary evidence alone, or whether a hearing is required for the examination of witnesses or expert witnesses and also for oral argument.

Within six months from the date of the Tribunal a final decision must be made, unless the Registrar exceptionally allows time for a final decision and the tribunal may state briefly the reasons on which the final decision is based, unless all parties agree that no reasons will be given.

Comparison of Expedited Procedures at the ICC and SIAC

The expedited procedure provisions at the ICC have a difference. The difference is:

First, the KPPU Rules state that the provisions of the expedited procedure automatically apply to disputes that do not exceed US$2,000,000. This is stated in Article 30 Paragraph (2) Letter a and Appendix VI Article 1 Paragraph (2) Meanwhile, the SIAC Rules state that the amount in dispute does not exceed an amount equivalent to S$6,000,000 or US$4,280,000. Listed in Article 5 Paragraph (1).

Second, each party that agrees to arbitrate under the ICC rules automatically agrees that the provisions of that article and its Annex governing expedited procedures shall take precedence over matters inconsistent with the arbitration agreement. Meanwhile, under the SIAC rules, parties may request that the arbitration be conducted under the expedited procedure.

Third, while Article 30 Paragraph (3) Letter C states that the ICC tribunal has an authority not to apply the expedited procedure to a dispute, the ICC rules state that at the request of a party prior to the constitution of the arbitral tribunal, the ICC tribunal may rule that the

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expedited procedure is inappropriate. Meanwhile, the SIAC rules do not give an arbitral institution or tribunal the authority not to use the expedited procedure.

Fourth, Annex VI of the ICC Rules provides in Article 2 paragraph (1) that a sole arbitrator will be appointed for disputes under the expedited procedure, whether or not the parties have agreed to this provision. Meanwhile, disputes will be referred to a sole arbitrator in accordance with article 5 paragraph (2) of the SIAC rules, unless otherwise determined by the President of SIAC.

Fifth, the ICC Rules provide for expedited appointment of arbitrators specifically in Annex VI Article 2 Paragraph (2) which states that the parties may select a sole arbitrator within the time specified by the secretariat and in the absence of such appointment, the appointment of a court of arbitrators as soon as possible, whereas the SIAC rules do not provide for expedited appointment of arbitrators.

Sixth, in the case of urgent or extraordinary urgent needs, there are no provisions in the KPPU regulations that require the use of expedited procedures. Among them, Article 5 Paragraph (1) of the SIAC regulation states that the expedited procedure may be used in cases of urgency or extraordinary urgency even though the value of the dispute is estimated to be.

Seventh, the ICC did not provide a recommended clause. The SIAC now provides recommended clauses, also called model expedited procedure clauses, specifically for arbitrations conducted under the expedited procedure.

Eighth, Annex VI Article 4 Paragraph (1) of the Rules states that the time limit for the final decision of the arbitrators is six months from the management conference. Whereas Article 5 Paragraph (2) of the SIAC rules explains that the final decision must be made within six months from the date of the constitution of the convening session.

Ninth, under Article 32(2) and Annex VI Article 1(1) of the ICC Rules requires that the final decision must be accompanied by a statement of reasons. While, unless all parties have agreed not to give reasons, the tribunal may, under Article 5(2) of the SIAC Rules, briefly outline the reasons on which the final decision is based, the similarities for expedited proceedings at the ICC and SIAC, inter alia, allow the tribunal the discretion to waive oral hearings and decide disputes based on documents, and require a management conference to be held for expedited matters or disputes.

4. Conclusion

The researcher provides comments in this section as a closing statement. This can be in the form of final conclusions from the discussion and analysis as well as recommendations and directions for future research. In this section, the researcher can also express gratitude/appreciation to the people and parties who contributed to his/her research.

In business disputes, it is important to choose an appropriate alternative dispute resolution method to avoid the high cost and time involved in litigation. Some alternative dispute resolution methods that can be considered include mediation, arbitration, negotiation, and expert opinion. In choosing the right alternative dispute resolution method, it is necessary to consider the advantages and disadvantages of each method, as well as the specific characteristics and needs of the business dispute case at hand. Therefore, consult an experienced lawyer or mediator to get the right advice in choosing the right alternative dispute resolution method for the business dispute case at hand.

In choosing the right alternative dispute resolution method, it is also necessary to pay attention to other aspects such as:

1. Interests of both parties: Before choosing an alternative dispute resolution method, consider the interests of both parties involved in the business dispute. Ensure that the chosen method can fulfill the interests and needs of both parties.

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2. Complexity of the case: If the business dispute case is quite complex, then a more formal alternative dispute resolution method such as arbitration may be more effective than mediation or negotiation.
3. Speed and cost: Choosing a quick and effective alternative dispute resolution method can help save costs and time. However, make sure that the method can still result in a fair and mutually acceptable decision.
4. Business relationship: If the parties involved in a business dispute want to maintain a good business relationship, then a more cooperative alternative dispute resolution method such as mediation may be more effective than a more formal arbitration.

In choosing the right alternative dispute resolution method, it is important to conduct a thorough review and analysis by involving experienced legal experts. By choosing the right alternative dispute resolution method, business disputes can be resolved effectively and efficiently without spending a lot of time and money on litigation. In determining a dispute resolution method, many considerations underlie business people in choosing arbitration as an effort to resolve disputes that will or are being faced. This is because dispute resolution through arbitration gives the parties the freedom to determine the dispute resolution method and arbitration institution to be used. In essence, the parties have the autonomy or freedom to choose dispute resolution and determine the institution authorized to resolve the dispute.

The speedy procedure has long been applied in all arbitration institutions, both ad hoc and institutional. This is because the expedited procedure is an implementation of the principle of speed in arbitration. In general, the expedited procedure does not contradict the principle of freedom of contract because it is conducted based on the agreement of the parties, and all decisions return to them. The expedited procedure is also one of the differentiators between arbitration and the courts, because in the expedited procedure, the arbitration process is carried out quickly and briefly, and the decision has permanent legal force (inkracht).

There are some similarities between the expedited procedure provisions at the ICC and SIAC. Both allow the arbitral tribunal to waive oral hearings and decide disputes on the basis of documents, and require a management conference for expedited cases or disputes. However, there are differences in terms of the maximum dispute limit, the application of the expedited procedure, the arbitral institution's discretion not to apply the expedited procedure, the number of arbitrators, expedited appointment of arbitrators, exceptional urgency, the recommended clause, the deadline for granting the final award, and the final award accompanied by reasons.

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