THE ARBITRATION AND THE LITIGATION : SETTLING THE CONFLICT ON THE INTERNATIONAL TRADE PROBLEM

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ABSTRACT

Pelaksanaan hubungan dagang antarnegara sangat berguna dalam memenuhi kebutuhan suatu negara, di samping mendatangkan uang atau devisa bagi negara yang saling berdagang. Meskipun demikian, tidak selalu pelaksanaan hubungan dagang antarnegara berlangsung secara mulus, karena seringkali perdagangan antarnegara menyebabkan terjadinya konflik, yang tentu saja harus dicari jalan pemecahannya. Pemecahan yang biasa dilakukan melalui cara yang dikenal dengan arbitrase dan cara litigasi. Tulisan ini akan membahas bagaimana upaya Indonesia dalam memecahkan konflik yang terjadi dalam masalah hubungan dagang dengan negara lain dengan mempergunakan arbitrase dan litigasi, yang biasa berlaku pada hukum perdagangan Internasional.

Key Word : Arbitration, Litigation, International Trade.

I. INTRODUCTION

One way to settle the dispute between the two parties in the trade contract is by using the alternative dispute resolution (ADR) such as arbitration and litigation. Although the ADR way is more efficient to solve the dispute between the two parties in the international trade in Indonesia, it is still not common in Indonesia to use alternative dispute resolution to solve the problems. People prefer to use the courts to settle the dispute in the contract among them.

Right now in Indonesia people are starting to use the ADR in order to settle a dispute in the trade contract. Usually the parties put the dispute settlement clause in their contract, so if there is any dispute between the two parties they both can settle it by using the dispute settlement clause. The two parties usually choose the arbitration way to settle the dispute, then and if they can not reach the settlement they use the litigation way.

This paper attempts to describe how Indonesia use Alternative Dispute Resolution and Litigation to settle a dispute in the trade contract

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II. INTERNATIONAL ARBITRATION

A. What is International Arbitration

Arbitration recently become the most important method of dispute resolution for international transactions. This is due to a number of factors. Firstly, important international conventions, particularly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or what we know as the New York Convention have done much to make arbitration more effective internationally. Secondly, in arbitration both parties have the freedom to adopt any of the international rules such as the UNCITRAL Arbitration Rules or the ICC Arbitration Rules.

Arbitration is a method to resolve an international commercial dispute. Usually in the case of commercial agreements, especially in the joint venture, the two parties often use the dispute settlement clause through arbitration to settle the dispute between the two parties.

The arbitration clause in international commercial contracts are not only predominant but also nowadays almost universal. It is a part of the duty of any competent lawyer to provide in advance for the means of resolving disputes in international commercial law cases, an arbitration clause is the obvious solution.

B. The Differences between Arbitration and another ADR

Arbitration is different compared to other Alternative Dispute Resolutions like negotiation and mediation. In arbitration there is a third party who acts as the judge, this people refer to as the arbitrator or the judge. These people who called the arbitrator have the duty to solve the problems and show the way to resolve the problems between the two parties. If no arbitration clause has been agreed upon by the parties, the arbitrators who have accepted their appointment cannot withdraw from their function unless by reasons to be approved by the court who has the jurisdiction over the matter. The arbitrator also has the liability to give the decision within the time limit which is fixed for that purpose. Everybody who is capable can be an arbitrator but still there are certain people who can not be an arbitrator such as judges, prosecutors, secretaries and assistance secretaries of the court. The arbitrators need to know where they are going to sit and what system of law they will apply. According to the article 2 section 6 of the

International Chamber of Commerce, where the court is to appoint a sole arbitrator or the chairman of an arbitral tribunal, it shall make the appointment after having requested a proposal from a National Committee of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time-limit fixed by the Court, the Court may repeat its request or may request a proposal from another appropriate National Committee.

There are two international bodies who deal with the problem of using arbitration to settle the dispute, which are the International Chamber of Commerce and UNCITRAL. Both bodies produce the international arbitration rules. The arbitration rules from International Chamber of Commerce are produced in Paris.

From Article 1 section 1 of the International Chamber of Commerce one can see the meaning of The Court of Arbitration of the International Chamber of Commerce. The Court of Arbitration of the International Chamber of Commerce is the international arbitration body attached to the International Chamber of Commerce. Members of the Court are appointed by the Council of the International Chamber of Commerce. The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these rules.

As mentioned above there are two international bodies who deal with the arbitration. The ICC has already been discussed, now arbitration which is in the UNCITRAL Arbitration Rules will be discussed.

According to Article 15 Section 1 of the UNCITRAL Arbitration Rules, subject to these rules, the arbitral tribunal may conduct the arbitration in such a manner it considers appropriate, provided that the parties are treated equally and that during any stage of the proceedings each party is given a full opportunity of presenting his case.

III. THE ADVANTAGES OF ARBITRATION

There are two reasons why people are starting to use the arbitration way. Firstly, the technical reason, which consists of effectiveness, flexibility, privacy and confidentiality, personnel, and secondly, the organic factors.

To be discussed now is the technical reason, which consists of effectiveness, flexibility, privacy and confidentiality, and personnel. The

meaning of effectiveness is to make it easier for both parties who live in the different countries, and have their business in the different countries too. In the matter of an international dispute, there are many problems such as the jurisdiction problem, because the court's judgment can only be executed in the territory of the court concerned, and it can not be executed out of the territory of the court. This jurisdiction problem is the biggest problems that every party should deal, and there is also law. If both parties agree to choose the arbitration law, they would not be affected by the problems above.

Another reason, flexibility, means to settle the dispute in a contract and it will be more flexible to bring the dispute to the arbitration than to bring the dispute in the court of law because by bringing the dispute to be settled with the arbitrator both parties will have the freedom to choose the procedure. Both parties have the freedom to choose the provision which they both want in their contract, and even have the freedom to choose the number of arbitrators, the qualifications and also the methods of selection. This kind of freedom is very important in international transactions where the parties may come from different legal systems and want to devise a procedure with which they are both comfortable.

The other reason why people in international transaction prefer to use an arbitration way is because in the arbitration, both parties have the privacy and the confidentiality for their commercial dispute. This kind of privacy and confidentiality can not be found in the litigation because an arbitrator has the obligation to keep the commercial dispute private and confidential from the third parties and from the media.

The last reason is personnel. This means that both parties have the freedom to choose the number and method of selection of arbitrators. The arbitrator can be selected on the basis of the arbitrator neutrality, their particular expertise or the arbitrator might be the person who has the technical expertise but this is still depends with both parties which way they want to choose in order to settle their dispute.

The next point to be discussed is the organic factor. The organic factor comes into play if there is no truly international court in order to settle an international commercial disputes. There are always many lacking if both parties try to use the litigation way, such as litigation always taking place before a national court which is rooted in a national system of law, and if this national court has their own domestic law, so if both parties choose to use the litigation way there will be no proper way to settle an international commercial dispute.

In arbitration, both parties present their side of the case to an arbitrator who must be an independent third party or parties. Very often, the arbitrator is a person who has a special skills or knowledge which means that the adjudication may be undertaken more quickly and possibly more accurately than if the matter went to a court.

Both parties have lots of freedom by using the arbitration. Besides all the freedom discussed above, the other advantage of using the arbitration way is that, both parties can save a lot of time in order to settle their dispute. Another advantage to using the arbitration way in order to settle the dispute, is that in arbitration, both parties have the freedom to choose which law they are going to use in their contract if there is any dispute between both parties.

IV. THE DISADVANTAGES OF ARBITRATION

Arbitration also has disadvantages. One disadvantage of arbitration is the cost. Arbitration is not a cheap method to settle a dispute, because both parties have to consider the fees of the arbitrators, and these fees must be paid by both parties. These fees are different to the salary of the judge and may be more expensive. Besides the fees of the arbitrators, if both parties choose to use the arbitral institution, both parities also have to pay the administrative fees and expenses of an arbitral institution, but if both parties decide not to use the arbitral institution in order to settle their dispute, both parties have to appoint a secretary or registrar to administer the proceedings, and this also needs to be paid. Finally, to set an arbitration hearing, hoth parties have to hire rooms for the meetings and hearings, and this also needs to be paid.

Besides all the weaknesses above, there is one major weakness of the arhitral process, which is the limited power. An arbitral tribunal must depend for its full effectiveness upon an underlying national system of law. Powers possessed by arbitrators, whilst generally adequate for the purpose of resolving the matters in disputes, fall short of those conferred upon a court of law.

The other weakness from the arbitral process is that, it is not possible to bring more than two parties disputes together before the same arbitral tribunal, as an arbitral tribunal has no power to order consolidation of action.

V. TWO TYPES OF ARBITRATION PROCEEDINGS

There are two types of arbitration proceedings which are the institutional arbitration and the adhoc arbitration. In the institutional arbitration, all the rules are established by the particular institution, such as the ICC, the American Arbitration Association (the AAA), or any other particular institution. The advantages of using the institutional arbitration are that there will be an automatic incorporation of a book of rules, and most arbitral institutions provide trained staff to administer the arbitration. Besides the advantages, there are also the disadvantages in using the institutional arbitration. The major disadvantage of using the institutional arbitration is that the institutional arbitration is an expensive process.

An ad hoc arbitration usually takes place where the arbitration clause is the agreement between both parties. Both parties will have to decide on the procedure to be followed in the arbitration and both parties may construct their own rules. Besides the advantages of the adhoc arbitration, there are also disadvantages. The adhoc arbitration must have the effectiveness of a spirit of cooperation between both parties and their lawyers, and back-up by an adequate legal system at the place if arbitration. The other disadvantage is that it is easy to delay an arbitral proceeding only by raising questions over procedural matters, and if one party can prove the difficulty, there will be no arbitral tribunal in existence and no book of rules available to deal with the situation.

There are four types of international arbitration. The reason why we have to know the four types of international arbitration is to know the development of the process over the years and also to know about the different forms the arbitration may take and the various problems which may arise can be better to understood. The four types of international arbitration are : (1) Arbitration between states, which consists of diplomatic protection, the permanent court of arbitration and the international court of justice; (2) Arbitration where one party is a state, this kind of arbitration consisting of private arbitration at the peace place and international center for the settlement dispute (ICSID); (3) Arbitration where neither party is a state; and (4) Trade and commodity arbitration.

VI. THE REGULATION OF INTERNATIONAL ARBITRATION

There are three kinds of regulation of international arbitration. First-

ly the role of national law, under which it is necessary to ask a court at the beginning of an arbitration procedure to enforce to arbitration agreement or to appoint the arbitral tribunal. We can see the state participation in the arbitral process is that the state will give their assistance to the arbitral process and the state may be regarded as being entitled to exercise a degree of control over the arbitral process, and such control is usually exercised on a territorial basis, (1) over arbitration conducted in the territory of the state concerned, and (2) over awards brought into the territory of the state concerned with the purpose of recognition and enforcement.

The most important thing that one needs to recognize is that the dependence of the international arbitral process upon the national system of law. This must be recognized but not exaggerated.

Secondly, the role of international conventions, the most effective method of creating an international system of law governing international commercial arbitration, has been through the development of international conventions. There are six international conventions which deal with the international arbitration, like : (1) The Geneva Protocol 1923, (2) The Geneva Conventions of 1927, (3) The impact of the United Nations, (4) The New York Conventions of 1958, (5)Conventions after 1958, (6) Latin American Conventions.

Thirdly, the practice-national or international. Because the international conventions only deal indirectly and negatively with the practice, so it would be misleading to think that there is an established international practice of international commercial arbitration.

VII. INTERNATIONAL LITIGATION

The international litigation can be seen from several aspects. From the plaintiff point of view, the inquiry will be center on where the action should be instituted. After the action has been commenced the defendant has the obligation to give its response to the inquiry. In the response the defendant may participate in the litigation and contest the action, may stay away from that proceedings or the defendant may seek to terminate those proceedings·

In the international litigation the plaintiff has the right to choose which court they are going to use. The choice of court is to include the court in the plaintiff's place of residence, the defendant's place of residence and in

some third country (where the defendant has assets or where the subject matter of the action is connected).

There are five aspects that should be considered by both parties in order to settle their dispute by using the litigation way : (1) Effectiveness of the court proceedings; this primarily depends on the jurisdiction of the court and enforceability of any resulting judgment, (2) The choice of law; the plaintiff should consider which court of law they are going to use in order to settle their dispute with the defendant, and where they are going to sue, (3) Convenience; this consideration involves the geographic matter, in that both parties have to consider the residences of the parties and the witnesses, so this considerations also involves legal considerations and language, (4) The quality of the court; there is an inquiry to ensure that the judges are skilled and competent and they must also have a reputation for impartiality, and (5) Time; this consideration is the most important aspects of the international commercial dispute, because the longer the litigation process, the more expensive it becomes and the greater the delay in resolving the dispute.

VIII. THE PROCESS OF INTERNTIONAL LITIGATION

The litigation process starts with a case in the contract. If there is any dispute in the contract, it can be settled through a litigation court. The case in litigation must consist of an international attitude, in that if the person who is involved with the dispute has a different nationality and also the person who involved with the dispute has the same nationality but made the contract in a foreign country, the international litigation must provide a choice of forum for both parties. Now it has been discussed that there must be a foreign element in the contract, the jurisdiction of the litigation. Sometimes an international contract contains a forum agreement or choice of court which provides for the submission of disputes to the court or court of a particular country. Also, both parties have the right to choose which law will be used in the contract.

To bring a dispute into the litigation court, besides the case we also have to bring the evidence to back up the case. If both parties do not bring the evidence to the litigation court, it will be difficult for the court to settle the dispute.

The other problems from the international litigation is the enforcement of the judgment. If there is no convention applied in the contract, one of the parties has to apply for the internal rules of the court in

which enforcement is sought. Under most conventions and in all non-convention cases, the first issue the enforcing court will address is whether the court giving judgment has jurisdiction over the defendant under the rules of the convention or, if none, the enforcing courts own rules, and whether the defendant was given proper notice of the proceedings, whether correct procedure was followed.

There will be no problems in the enforcement of judgments if the defendant is within the jurisdiction of the enforcing the court, or enforcement of a foreign judgment or the prescience of assets within the jurisdiction are grounds for the enforcing court to take jurisdiction over the defendant.

IX. THE ADVANTAGES AND DISADVANTAGES OF LITIGATION

There are lots of advantages of litigation, such as the decision can be enforced for both parties, the decision can be reviewed, the cost of a litigation court might be cheaper than an arbitration tribunal, (because the judge gets the salary from the government), and the decision can be executed for all the assets of the defendant or the loser party.

The litigation process tends to reflect not the interests and values of the disputants but rather the interests of the state and the values of the judges, barristers and solicitors who operate it. Because of this, once a dispute enters the courtroom it is transformed and the commercial realities of the dispute are translated into legal issues.

There are five main disadvantages of using litigation. Firstly, there is cost. Litigation is very expensive and out of reach to ordinary people, because the longer the litigation process, the more expensive it becomes and when mention is made of the cost of litigation it means more than just the private costs which the litigants bear but it also includes the cost of the litigation infrastructure, the public expense of maintaining and operating the courts and also in some cases the cost of the legal aid disbursed by the state. All these costs must be paid by the litigants, which do not make a large contribution to the total cost of running the justice system. Secondly, there is delay. There seems to be a general community acknowledgment that the litigation process is too slow, the plaintiff who has the strong case in the court may have a material disadvantages if there is delay in the court, but on the other hand it may be an advantages for the defendant who has the weak case. Thirdly, there is inflexibility and formality. There are some rules of

procedure that the litigation courts have to follow and sometimes the rules of procedure are illogical to the person and makes them frustrated with these rules of procedure. Fourthly, there is adversarial nature. The litigation process has the tendency to remove the conduct of the case from the client. The case often turns upon points of law with which only the lawyers are familiar, and since they are the ones who seek a resolution for their dispute, this perception is damaging to community acceptance of the litigation system as a means of dispute resolution. Finally, there is restrictions. On claims and remedies, a court of law only decides matters of fact and how the law will deal with them, but a court of law can not decide matters of remedies.

There is no international court available for resolution of private commercial disputes, and litigation can be useful in an international dispute, but there are many situations where it is not a viable or effective option. Litigation in the courts of a third state may not be an acceptable compromise because of anticipated problems with enforcing the judgment.

If the plaintiff wants to bring the dispute to the litigation court there are several factors that the plaintiff's lawyer should consider, such as where the evidence is, in which country the evidence is available, whether the law of the foreign court applies to the country of both parties, with what country either party is connected, how close both parties are connected with that country, and whether the defendants are only seeking procedural advantages or genuinely desire trial in the foreign country. These factors are all important in being considered by the plaintiff's lawyer because if the lawyer does not pay attention to these factors, it will give many advantages to the defendant.

The remedies in the litigation court are easy to attain, because the judgment of litigation has the power to be executed by both parties, and the remedies available in the litigation courts in choice may vary.

Sometimes an international litigation also involves the service of documents outside the forum in another country. Besides the service of documents from outside the forum in another country, an international litigation also needs evidence from outside the forum.

To get the evidence from other countries, the traditional way to do it, is by letter rogatory or letter of request from a court in one country to a court in another country in order to examine the witness. The rules which deal with a letter of request can be seen in chapter one of Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. According to

article 1, paragraph one and two, in civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

In the international litigation, there are two forums which deal with the convenient for both parties. These are the forum convenient and the assumed of the courts, and the forum convenient and the original jurisdiction of the courts. The forum convenient and the assumed of the courts come into play if the court is assumed over defendants not subject to their ordinary jurisdiction. In this situation, the plaintiff applies to the court for leave to serve proceedings out of the jurisdiction. The forum connives and the original jurisdiction of the courts come into play if the court has original jurisdiction, or if the exercise of this type of jurisdiction is, as a rule, not a matter of discretion for the court. In this forum everybody has the rights to go to the courts of competent jurisdiction.

X. THE USE OF ARBITRATION AND LITIGATION IN INDONESIA

Indonesia is a developing country. As a developing country, Indonesia has many joint venture contracts with a foreign countries. A joint venture contract is a high risk contract, especially in the developing countries such as Indonesia, because it involves two countries with many differences such as different cultural attitudes, different laws, different jurisdictional procedures and differences in the way of solving problems. The two problems of a joint venture contract are : (1) If a party entered the agreement with one government and that government is overthrown, the joint venture assets are the national assets, and (2) An existing government may change the rules once the contract has been entered.

The major exports from Indonesia are oil and gas, textiles and garments, and forestry products. In June 1994, the Indonesian government announced a trade deregulation package to reduce manufacturing input costs. Among other things, tariffs were reduced on 739 products, non tariff barriers were removed on 27 commodities, and surcharges were abolished on 108 other items.

In order to control both foreign investment which is under the Foreign Capital Investment Law, and domestic investment which is under the Domestic Capital Investment Law, the Indonesian government in 1973 established the Capital Investment Coordinating Board of BKPM.

Almost all direct foreign investment into Indonesia is governed by the Foreign Capital Investment Law of 1967, but there are several particular sectors not governed by the Foreign Capital Investment Law of 1967, such as oil and gas or banking and insurance. These kinds of direct foreign investments must be governed under the regulations issued by the relevant departments. The oil and gas foreign investment have to be governed under the regulations from the Departments of Mines and Energy, and the banking and insurance foreign investment has to be governed under the regulations from the Departments of Finance. The domestic investments must be governed under the Domestic Capital Investment Law.

The Indonesian government also renewed the foreign investment rules by excluding 10 types of businesses from the negative list, such as the palm oil refining, the machine-made cigarettes, the aircraft maintenance within airports, the medicines and the motor vehicles. These are now welcomed .

Before the Indonesian government renewed the foreign investment rules by excluding the 10 types of businesses, the applications for foreign investment in Indonesia were approved in accordance with the investment priority list which was published annually. This priority list specified those sectors of the economy where foreign and domestic were permitted with certain privileges.

Indonesia has four legal systems which are a mixture of traditional customary laws which is called the adat law, Islamic law, the old Dutch laws (this is because Indonesia was under influence of the Dutch because the Dutch had occupied Indonesia for 35 ages), and the modern legislation enacted since independence.

Currently, many laws are implemented by government decree and administrative policy. Compared with the nation's economic growth, the development of legal system has been a little bit slow. Currently the Indonesian government is focusing more attention on the development of the legal infracture, and this development of the legal infracture can be seen under the Five Year Plan or Repelita VI.

In Indonesia a commercial dispute can he resolved either through litigation or arbitration. Because of the perception that the judicial process in

Indonesia is inefficient and lacks certainty, some foreign parties prefer to use arbitration rather than litigation in order to settle a dispute in Indonesia.

Indonesia is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In Indonesia there is an official arbitration body, which deals with disputes in the areas of trade, industry and commerce, called the Indonesian National Arbitration Board of Badan Arbitrase National Indonesia (BANI).

The Indonesian regulation on arbitration is to be found in the First Title of Book III of the Code of Civil Procedure. The provisions 615-651 of this Title are similar to the provisions in the former arbitration Title of the Dutch Code of Civil Procedure, which in turn is based on the French Code of Civil Procedure before it was amended in 1981.

Right now the Indonesian Department of Justice has completed a draft of a new arbitration law. In the new Arbitration Law of Indonesia, it is proposed to have the following provisions : "Minors, persons under "curatorship or mental disorders, members of the court, cannot be nominated as arbitrators.

The Foreign Capital Investment Law No.1 of 1967 also provides for arbitration. The Indonesian government must pay the compensation to the foreign investor if the Indonesian government nationalizes a foreign investment, but if the foreign investor receives an unsatisfactory amount from the compensation, the foreign investor may bring the case to arbitration and also the foreign investor can bring the dispute to the ICSID. On the question of the applicable law, the Indonesian government applies to the Article 41 section 1 of the ICSID Convention.

Parties, according to Indonesian Law are given much freedom to enter into arbitral agreements. So we can say that, any dispute that can be submitted to the court can also can be settled by arbitration.

In international cases arbitrators decide upon the applicable law and the substance of the dispute according to what the parties have chosen. The Indonesian government honour the choice of law, but if no law has been chosen by both parties, then the law applicable indicated by the rules of the arbitration institution is that which has been referred to by both parties. The settlement in the Indonesian arbitration can be applied from the new draft Arbitration Law Article 30, which is a draft by the Indonesian Department of Justice.

Regarding the enforcement of foreign arbitral award in Indonesia, a distinction should be made as to whether a treaty applies or not. There are three conventions which are bound to the Indonesian arbitration :

1. The Geneva Convention 1927 for the Execution of Foreign Arbitral Awards and the Geneva Protocol 1937. Indonesia was under the influence of the Dutch, so when Indonesia announced their independence from the Dutch, the Indonesian government also announced the new principles of international law regarding state succession which have emerged since world war II, and Indonesia is no longer bound by treaties acceded to during the colonial time.
2. The New York Convention 1958. According to Article 3, all the contracting States shall recognize arbitral awards as a binding and enforce all the decisions which been made in their territory, but the Indonesian government decided that the courts of Indonesia cannot enforce foreign arbitral awards. In this case, the Indonesian government is not truly following the Convention. The enforcement of the arbitral judgment has to be effected in the same manner as the execution of domestic arbitral awards. The execution will be affected as long as it has the same lines of a normal court decision which is enforced through the District Court of the defendant's domicile. Although the Indonesian government has already decided that the courts of Indonesia cannot enforce foreign arbitral awards, the enforcement of a foreign award of which is sought under the New York Convention can be executed in Indonesia. However, this is not an automatic enforcement. The joining of Indonesia to the New York Convention 1958 was under the Presidential Decree 1981 no. 34.
3. The Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. This convention established the International Centre for Settlement of Investment Dispute (ICSID). This Convention was ratified by the Indonesian government on 28 September 1968.

If no treaty or convention applies, no enforcement in Indonesia can be obtained of foreign arbitral award as such. So as long as the jurisdiction where the arbitration is held is also a signatory to the Convention, the arbitral award handed down there should be capable of enforcement in Indonesia. The courts in Indonesia are entirely free as to whether to follow the pleading and decision of the arbitrators or not.

The Indonesian courts will always take control of the enforcement and the recognition of the foreign award to avoid the contradiction with the Indonesian public policy, so as long as the foreign award is not contrary with the Indonesian public policy it can be recognized and also can be enforced in Indonesia. The Indonesian courts control also have a limit. The control is limited to the grounds for refusal enumerated in Article 5, and also includes the control of the recognition and the enforcement if the foreign award is contrary to the Indonesian public policy.

XI. CONCLUSION

It has been discussed which alternative dispute resolution the Indonesian people choose in order to settle a dispute in the commercial or international trade. The official body for arbitration in Indonesia is called the Indonesian National Arbitration Board (Badan Arbitrase Nasional Indonesia or BANI) which deals with all the disputes in the areas of trade, industry and commerce.

Since Indonesia is a signatory of the New York Convention 1958, as long as the jurisdiction where the arbitration is held is also a signatory to the New York Convention 1958, all the arbitral award handed in that country should be capable of enforcement in Indonesia, although there may be practical difficulties in enforcement in some cases, due to the fact that the courts in Indonesia cannot enforce any foreign arbitral awards.

Currently among the businessmen in Indonesia, it is very popular and more preferable to use an arbitration in order to settle a dispute in their business with their foreign partner, because this will make it easier to execute the judgment from the arbitral tribunal.

Although litigation gives more certainty judgment, but litigation have lots disadvantages than arbitration, this is also the reason why most of businessman in Indonesia prefer to use arbitration rather than litigation.

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