Application of the alternative dispute resolution model as dispute settlement between investors with the Indonesian government

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APPLICATION OF THE ALTERNATIVE DISPUTE RESOLUTION MODEL AS DISPUTE SETTLEMENT BETWEEN INVESTORS WITH THE INDONESIAN GOVERNMENT

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Investment activities are so large in Indonesia. Both domestic and foreign investment can trigger disputes in implementation in the field, especially between pre-investors and the government. These disputes are caused by differences of opinion or interests of each party, both investors and the Indonesian government. Under Indonesian Law, if there is a dispute between investors and the government, it can be pursued in two ways, namely legal channels through courts and deliberation through arbitration. Present paper is a normative legal research studying the provisions of the law, in this case Law Number 25 of 2007 concerning Investment, especially Article 32. In the event of a dispute in the field of investment between the government and investors, the parties must first resolve this dispute through deliberation and consensus. The results of the study indicate that it is better to settle disputes between investors and the Indonesian government by means of deliberation through arbitration rather through legal channels in the court.

Keywords: alternative dispute resolution, investor, government of Indonesia, arbitration.

ПРИМЕНЕНИЕ МОДЕЛИ АЛЬТЕРНАТИВНОГО УРЕГУЛИРОВАНИЯ СПОРОВ В КАЧЕСТВЕ РАЗРЕШЕНИЯ РАЗНОГЛАСИЙ МЕЖДУ ИНВЕСТОРАМИ И ПРАВИТЕЛЬСТВОМ ИНДОНЕЗИИ

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Инвестиционная деятельность в Индонезии весьма обширна. Реализация внутренних и иностранных инвестиций на местах может спровоцировать споры, особенно между предполагаемыми инвесторами и правительством. Эти споры вызваны различиями во взглядах или интересах каждой из сторон – как инвесторов, так и правительства Индонезии. Согласно индонезийскому

законодательству, если между инвесторами и правительством возникает спор, то его разрешение может быть осуществлено двумя способами – через суд или в арбитраже. Данная статья представляет собой нормативно-правовое исследование, в котором изучается содержание законодательства, в данном случае Закона № 25 от 2007 года «Об инвестициях», особенно статьи 32. В случае возникновения инвестиционного спора между правительством и инвесторами стороны должны сначала разрешить его путем обсуждения и консенсуса. Результаты исследования показывают, что споры между инвесторами и правительством Индонезии лучше разрешать путем обсуждения в арбитраже, а не в судебном порядке.

Ключевые слова: альтернативное урегулирование споров, инвестор, правительство Индонезии, арбитраж.

Introduction

As a developing country, Indonesia requires substantial funds and capital, so that the implementation of sustainable development can continue to be carried out, especially obtained from investment or investment activities. Sustainable economic development will be able to create production activities, create job opportunities, improve people's welfare and increase domestic income so that economic growth will increase [13, p. 2].

Since the enactment of the *Investment Law*, namely Law Number 1 of 1967 concerning *foreign investment* and Law Number 6 of 1968 concerning *domestic investment*, investment activities in Indonesia have entered so rapidly along with the need for sustainable development for the sake of create a prosperous and prosperous Indonesian society. With the existence of this legal instrument, it is hoped that foreign investors, as well as domestic investors, can invest their capital in Indonesia.

Investment activities that are so large can trigger disputes in implementation in the field, especially between investors and the government. Investment provides benefits to all parties, not only for investors, but also for the economy of the country where the capital is invested as well as for the investor's country of origin.

The discussion on aspects of legal certainty in investment activities in Indonesia is very important, because investment is needed as capital for implementing development in the country to encourage high economic growth. It requires large enough capital and is available at the right time, so that the implementation of development can run smoothly fluent.

Even though investors have invested in Indonesia and run their business well, it is possible that their business will cause problems with the government and the surrounding community. For example, the Indonesian government has revoked investment permits from investors, while the investment permits have not expired. Therefore, it can lead to disputes in investment between investors and the Indonesian government or the surrounding community. If it has caused a dispute in investment, it needs a settlement of domestic and foreign investment disputes

The presence of foreign investors in a country has wide benefits (multiplier effect). The benefits in question are the presence of foreign investors can absorb labour in the recipient country of capital; can create demand for domestic products as raw materials; increase foreign exchange, especially foreign investors who are export-oriented; can increase state income from the tax sector; the transfer of technology (transfer of technology) and transfer of knowledge (transfer of know how) [14, p. 8].

The State of Indonesia has actively participated, both in the regional scope by supporting the realization of AFTA (ASEAN Free Trade Area) and APEC (Asia Pacific Economic Corporation) as well as in the global scope with the issuance of Law Number 7 of 1994 concerning ratification of the Agreement of Establishing World Trade Organization (WTO). This will further increase the volume of investment, both foreign investment and domestic investment, which can lead to disputes with the government, so inevitably it is necessary to create a dispute resolution mechanism, that is more effective and efficient. In other words, alternative dispute resolution, especially in business, is an urgent need, considering the intensity of business and investment relationships are getting busier and more complex, conflicts and business disputes are becoming more frequent [2, p. 7].

In Law Number 25 of 2007 concerning investment in Article 32, it is regulated as follows: in the event of a dispute in the field of investment between the government and the investor, the parties must first resolve the dispute through deliberation and consensus. If not achieved, the dispute resolution can be done through arbitration or alternative dispute resolution or court in accordance with the provisions of the legislation. In the event of a dispute in the investment sector between the government and a domestic investor, the parties may resolve the dispute through arbitration based on the agreement of the parties. If the dispute resolution through arbitration is not agreed upon, the dispute resolution will be carried out in court. In the event of a dispute in the investment sector between the government and a foreign investor, the parties will resolve the dispute through international arbitration which must be agreed upon by the parties.

Parties who have differences of opinion so that they are in dispute, including in disputes that arise as a result of investment or investment activities, desire a fair and speedy dispute resolution. The problem lies in determining how to resolve the dispute fairly. This includes determining the legal system to be used in the dispute resolution process. If you use the national legal system of the host country of foreign investment, it is likely that foreign investors will object to it because they are worried that they will be treated unfairly. And if there is a dispute between domestic investors and the government of Indonesia and the surrounding community, the law used is Indonesian law.

Methodology

The methodology used in this study is a normative juridical method, namely research in which the data is obtained from a literature review by examining legal materials, literature, books, scientific journals and statutory regulations that have to do with both domestic and foreign investment. According to Bambang Sugiono quoted by Suratman and Philips Dillah, one of the characteristics of normative legal research is a positive legal inventory, meaning that the data collection technique examines the regulations currently in force in Indonesia, examining the laws and regulations relating to investment, namely the Law Number 25 of 2007 concerning

investment and Law Number 30 of 1999 concerning arbitration. Positive legal inventory must be seen as an initial activity that is fundamental in nature for further research until the discovery of norms, principles, legal theories and doctrines [17, p. 10]. Furthermore, according to Philipus M. Hadjon, the procedure for collecting legal materials can go through several stages [7, p. 133]. That is:

a. Inventory of existing and current arbitration laws relating to investment dispute settlement law between investors and the government.

b. Identifying positive law is a positive law identification technique, especially one that has a close relationship with dispute resolution law and arbitration law to resolve investment disputes between investors and the government. This is done to describe and analyse the substance and structure of the positive law.

c. Analysing the laws and regulations, namely by analysing the laws and regulations relating to investment law and arbitration law as well as the principles of investment dispute settlement between investors and the government.

Results and discussion

The causes of the emergence of investment disputes

There are many things that cause disputes in the implementation of investment in Indonesia, including the following:

1. Default. Default is the implementation of obligations that are not fulfilled or broken promises or negligence carried out by the debtor either because he does not carry out what has been agreed or even does something that according to the agreement should not be done. Default is a breach of contract made by one party of the agreed agreement. Default is regulated in Article 1238 of the Indonesian Civil Code, namely the debtor is declared negligent by a warrant, or by a similar deed, or based on the strength of the engagement itself, i.e. if this engagement results in the debtor, being deemed negligent by the passage of the specified time.

2. Acts against the law. According to Article 1365 of the Indonesian Civil Code, what is meant by an unlawful act is an unlawful act committed by a person, who because of his mistake has caused harm to another person.

3. Loss of one of the parties. The definition of loss according to R. Setiawan is a real loss that occurs due to default. As for the amount of loss, it is determined by comparing the state of wealth after the default with the situation if there was no default [15, p. 107].

Furthermore, the cause of the emergence of investment disputes is due to non-compliance with existing contracts. This happens because there are several reasons. Namely, first, there are differences in interpretation / interpretation of the contents of the contract that has been agreed upon by both parties. Second, there are changes to government policies or changes in laws and regulations that have an impact on the contracts that have been agreed upon by both parties [6, p. 107].

Disputes can be public or civil in nature and can occur both at local, national and international levels. Disputes are divided into 2 types, namely *conflicts of interest* and *claims of truth*. What is meant by a conflict of interest is that it occurs when two people have the same desire for an object that is considered valuable. A conflict of interest arises when two parties fight over an object. While the truth claim is on the one hand and considers the other party guilty, conflicts because truth claims are put in terms of right or wrong. Arguments for these claims will be based on the terminology of truth, not interests, norms and laws. Conflicts of interest are more compromised in their resolution than conflicts due to truth claims.

Dispute resolution is faced with a process that is carried out by the parties without being assisted by other parties who have no interest in the continuation of the existing dispute [3, p. 214]. Dispute resolution is a settlement of cases carried out between one party and another. Dispute resolution consists of two ways, namely through litigation (court) and non-litigation (outside court) or called alternative dispute resolution (ADR). In the process of resolving disputes through litigation, it is the last means (ultinum remidium) for the disputing parties after the non-litigation settlement process does not produce results [9].

The pattern of dispute resolution is a form or framework for ending disputes or disputes that occur between the parties. The pattern of dispute resolution is divided into two types, namely through litigation (court) and non-litigation (out of court) or

called ADR. Dispute settlement through the courts (litigation) is a pattern of dispute resolution that occurs between the disputing parties, where the dispute resolution is resolved by the court. The decision is binding. Understanding ADR is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by means of consultation, negotiation, mediation, conciliation, and expert assessment. Thus what is meant by alternative dispute resolution is an out-of-court dispute settlement system based on the agreement of the parties to the exclusion of litigation dispute resolution in court [8, p. 12].

Investment dispute resolution

Settlement of investment disputes is regulated in Article 32 of Law Number 25 of 2007 concerning Investment, including:

(1). In the event of a dispute in the investment sector between the government and the investor, the parties must first resolve the dispute through deliberation and consensus.

(2). In the event that the settlement of the dispute as referred to in paragraph 1 is not reached, the settlement of the dispute may be carried out through arbitration or ADR, or courts in accordance with the provisions of laws and regulations.

(3). In the event of a dispute in the investment sector between the government and a domestic investor, the parties may resolve the dispute through arbitration based on the agreement of the parties, and if the dispute resolution through arbitration is not agreed, the dispute settlement will be carried out in court.

(4). In the event of a dispute in the field of investment between the government and a foreign investor, the parties will resolve the dispute through international arbitration which must be agreed upon by the parties.

An effective dispute resolution mechanism is also one of the factors taken into account before deciding to undertake investment activities. The effective dispute resolution mechanism includes:

1. Dispute resolution forums, either through national courts, international judicial or arbitration bodies, or other alternative dispute resolution forums.

2. The effectiveness of the applicable law in the dispute.

3. The decision-making process applied in the dispute.

4. Neutralization and professionalism of judges or arbitrators in the decision-making process.

5. Effective implementation of court decisions, arbitration, and other dispute resolution bodies.

6. Compliance of the parties to the resulting decision [10, p. 253].

Settlement of investment disputes through non-litigation and litigation

Settlement of investment disputes is regulated in Law Number 25 of 2007 concerning investment in Article 32, among others:

(1). In the event of a dispute in the investment sector between the government and an investor, the parties shall first settle the dispute through deliberation and consensus.

(2). In the event that the settlement of the dispute as referred to in paragraph 1 is not reached, the settlement of the dispute may be carried out through arbitration or ADR, or courts in accordance with the provisions of laws and regulations;

(3). In the event of a dispute in the investment sector between the government and a domestic investor, the parties may resolve the dispute through arbitration based on the agreement of the parties, and if the dispute resolution through arbitration is not agreed, the dispute settlement will be carried out in court;

(4). In the event of a dispute in the field of investment between the government and a foreign investor, the parties will resolve the dispute through international arbitration which must be agreed upon by the parties.

Settlement of disputes that occur between the government and domestic investors is carried out in two ways to resolve disputes, including:

a. Settlement of disputes through non-litigation or commonly called ADR.

b. Litigation (court).

There are five ways of resolving disputes through ADR, namely:

1. *Consultation*

Dispute resolution by way of consultation is a way to end disputes that arise

between the government and domestic investors, where both parties exchange ideas or consultations to resolve disputes in investment.

2. *Negotiation*

Dispute resolution by negotiation is a way to end disputes that arise between the government and domestic investors, where both parties hold negotiations to resolve disputes in investment between the two.

3. *Mediation*

Dispute resolution by means of mediation is a way to end disputes that arise between the government and domestic investors, where both parties agree to use the services of a mediator to resolve disputes in investment.

4. *Conciliation*

Dispute resolution by way of conciliation is a way to end disputes that arise between the government and domestic investors, where both parties agree to use the services of a conciliator to settle disputes in investment.

5. *Expert Rating*

Dispute resolution by way of expert judgment is a way to end disputes that arise between the government and domestic investors, where both parties agree to use expert appraisers to resolve disputes in investment.

If the five ways cannot be resolved by both parties, one of the aggrieved parties can submit the matter to the court. The procedure that must be followed is that the Domestic Investor submits a lawsuit to the court in the area where the legal action was taken and where the dispute occurred. The court will decide the case.

In article 32 of Law Number 25 of 2007 concerning investment, it has been determined how to settle disputes, in that provision there are four ways to settle investment disputes. The four ways include:

1. *Deliberation and consensus*

Deliberation and consensus is a way of resolving disputes that can be said to be unique to Indonesia, and in accordance with Pancasila. If this method is taken, then there is no party who loses and wins. The two disputing parties sit together, discuss the subject of the dispute to produce an agreement that is considered fair for both of

them. This is in line with the nature of the Indonesian people who generally tend to avoid open conflict [11, p. 142].

Dispute resolution through deliberation and consensus is a way to end disputes that arise between the government and domestic investors, in which a joint discussion is carried out in the settlement with the aim of reaching a decision and agreement on a joint dispute resolution. Dispute resolution through deliberation and consensus is not reached; the dispute resolution can be carried out through arbitration or alternative dispute resolution.

2. *Arbitration*

The method of resolving disputes in the investment sector through arbitration is a popular dispute resolution method in the investment sector and almost all countries choose the method of resolving investment disputes through arbitration. This is because settlement through arbitration is felt to be more practical, fast, and inexpensive. Settlement of disputes through arbitration institutions is a way to end disputes in investment between the government and domestic investors, in which the dispute resolution uses the services of an Arbitrator or Arbitrator Council. It is the arbitrator or the Arbitrator Council who resolves the investment dispute.

3. *Alternative dispute resolution*

Alternative dispute resolution is a dispute resolution institution or differences of opinion through a procedure agreed upon between the government of Indonesia and domestic investors, namely dispute resolution out of court by means of consultation, negotiation, mediation, conciliation and expert judgment.

4. *Litigation (Courts).*

Settlement of investment disputes through the courts is also known as dispute resolution through litigation; this dispute resolution is carried out if the dispute resolution method through deliberation and consensus is not reached. Dispute resolution through the courts is a way to end disputes that arise between the government and domestic investors, where the dispute resolution is carried out in advance and before the court and the court will decide on the dispute. The method of dispute resolution through the courts is considered unfair and less trusted by

investors. Investors tend to think that the settlement method through the courts is not effective and efficient, causing dissatisfaction. There are three levels of court that must be followed by one of the parties, whether the government or domestic investors, namely the District Court, High Court, and the Supreme Court.

Investment dispute resolution model through arbitration

As regulated in Article 1 paragraph (1) of Law Number 30 of 1999 concerning arbitration and ADR, arbitration is the settlement of civil disputes outside the general court based on an arbitration agreement made in writing by the disputing parties. Meanwhile, according to Frank Alkoury and Eduar Elkoury quoted by Salim H.S, arbitration is defined as: "An easy or simple process chosen by the parties voluntarily who want the case to be decided by a neutral bailiff according to their choice, where their decision is based on the arguments in the case the parties agreed from the outset to accept the decision as final and binding" [12, p. 142].

Furthermore, according to Law Number 30 of 1999 concerning arbitration and ADR, dispute resolution through non-litigation (out of court) consists of 5 ways, namely:

1. Consultation, which is an action taken between one party and another party who is a consultant.

2. Negotiation, namely settlement out of court with the aim of reaching a mutual agreement on the basis of more harmonious cooperation.

3. Mediation, namely settlement through negotiations to reach an agreement between the parties with the assistance of a mediator.

4. Conciliation, namely dispute resolution assisted by a conciliator whose function is to mediate between the parties to find a solution and reach an agreement between the parties.

5. Expert assessment, namely the opinion of experts for a matter of a technical nature and in accordance with their field of expertise.

Arbitration is a dispute resolution through an examination and decision-making process by a single arbitrator or a panel of arbitrators from an arbitration institution, either by an arbitration institution with a national or international scope, as well as an

arbitration institution that is permanent or temporary (ad-hoc). Law Number 30 of 1999 states that arbitration is a way of settling a civil dispute outside a general court based on an arbitration agreement made in writing by the disputing parties. Arbitration is the preferred method of dispute resolution, especially by foreign parties entering into an agreement for several reasons.

First, in general, foreigners are not familiar with the legal system of other countries. *Second,* there are doubts about the objectivity of the local courts in examining and deciding cases in which foreign elements are involved. *Third*, foreign parties still doubt the quality and ability of developing country courts to examine and decide cases on an international scale. *Fourth*, the emergence of allegations and impressions that dispute resolution through the formal channels of the judiciary takes a long time [4, p. 4]. The parties to an agreement also choose arbitration because the process is fast, confidential, and handled by arbitrators or referees who are experts in their fields, so that the dispute can be decided according to justice and propriety [16, p. 5].

Arbitration is widely chosen for several reasons, namely:

a. The disputing parties can choose their own arbitrators and for this, of course, those who are believed to have integrity, honesty, expertise and professionalism in their respective fields and do not represent the party choosing them at all. He is independent and not his legal advisor.

b. The arbitral tribunal's proceedings are confidential and can therefore guarantee confidentiality and unwanted publicity.

c. The arbitration award, in accordance with the wishes and intentions of the parties, is a final decision and is binding on the parties for the dispute. It is different with court decisions which are open to a lengthy review.

d. Because the decision is final and binding, the procedure is usually fast, with measurable costs and much lower than the costs incurred in court proceedings.

e. The arbitration procedure is more informal than the court procedure and is therefore open to obtaining and providing amicable and amicable settlement

procedures, providing broad opportunities to continue the commercial relations of the parties at a later date after the end of the dispute resolution process.

f. The disputing parties can choose their own arbitrators and for this, of course, those who are believed to have integrity, honesty, expertise and professionalism in their respective fields and do not represent the party choosing them at all. He is independent and not his legal advisor.

g. The arbitral tribunal's proceedings are confidential and can therefore guarantee confidentiality and unwanted publicity.

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i. Because the decision is final and binding, the procedure is usually fast, with measurable costs and much lower than the costs incurred in court proceedings;

j. The arbitration procedure is more informal than the court procedure and is therefore open to obtaining and providing amicable and amicable settlement procedures, providing broad opportunities to continue the commercial relations of the parties at a later date after the end of the dispute resolution process [1, p. 54].

Parties who choose to resolve disputes through arbitration can also choose whether to use institutional (institutionalized) arbitration or ad hoc (individual) arbitration. Institutional arbitration is a special and appointed institution in the arbitration process, while ad hoc arbitration is temporary arbitration generally formed after a dispute occurs and will get a solution after the issuance of a decision. In this type of arbitration the arbitration is not administered by an institution. Both institutional arbitration and ad hoc arbitration have their advantages. Advantages of ad hoc arbitration:

1. Flexibility, with this flexibility the ad hoc arbitration procedure can be determined based on the agreement of the parties.

2. Fees to be paid and the period of dispute resolution. By choosing ad hoc arbitration the parties do not have to pay the administrative fees charged by most arbitral institutions and the time spent on internal procedures such as the selection of

arbitrators, filing of documents and (as applicable in the ICC) procedures for determining terms of reference and reviewing decisions. The absence of such an internal procedure could shorten the time for dispute resolution [5, p. 79].

Meanwhile, the main advantages of institutionalized / institutional arbitration are:

1. In terms of drafting an arbitration agreement. By choosing ad hoc arbitration the parties no longer need to draft an arbitration agreement but can use institutional regulations designed by professionals in the commercial field and have stood the test of time.

2. Selection of arbitrators, institutionalized arbitration is superior in terms of selection of arbitrators. It is very possible that in ad hoc arbitration the parties choose the same person to be the arbitrator without having to use the services of an institutionalized arbitration. However, in many cases, in ad hoc arbitration, it is very difficult for the parties to reach an agreement on the chosen arbitrator due to the low level of trust in each party so that the appointment of an independent arbitrator by a neutral institution can facilitate the process of forming an arbitral tribunal. Institutional arbitration also has an administrative referee who is in charge of ensuring that all arbitrators including the arbitrator appointed by the parties are truly independent. The institution has the authority to replace arbitrators that are not approved by either party.

3. Institutional arbitration has a secretariat and professional staff who are ready to assist the disputing parties in the arbitration process including serving requests for arbitration including serving requests for arbitration and answering letters, processing fees determination, reminding the parties about the time to provide responses, selecting arbitrators and others.

4. Institutional arbitration has been increasingly recognized by national courts. In general, national courts are more acceptable to recognize trade decisions if there is some kind of assurance that a neutral body such as an arbitral tribunal has fairly resolved controversies both regarding procedural and substantive issues that arose during the conduct of the arbitration.

5. There is a procedure owned by the arbitration institution to continue the examination without the presence of one of the parties if that party has been properly summoned and the arbitrator believes that the summons has been given and has been received but the parties are not present without a valid reason. In such case, the arbitration examination conducted is deemed to have been attended by the parties. This procedure is very important if the absent party is the government of a country or an institution run by the government of a country. Courts that will uphold an arbitration award whose process is not attended by one of the parties (default award) are also more confident if the award is issued by an institutionalized arbitration.

Conclusion

The cause of the emergence of investment disputes due to non-compliance with existing contracts. This happens because there are several reasons. First, there are differences in interpretation of the contents of the contract that has been agreed upon by both parties. Second, there are changes to government policies or changes to laws and regulations that have an impact on contracts that have been agreed upon by both parties.

Dispute resolution through arbitration is the preferred method of dispute resolution, especially by foreign parties entering into an agreement for several reasons. First, in general, foreigners are not familiar with the legal system of other countries. Second, there are doubts about the objectivity of the local courts in examining and deciding cases in which foreign elements are involved. Third, foreign parties still doubt the quality and ability of developing country courts to examine and decide cases on an international scale. Fourth, the emergence of allegations and impressions, dispute resolution through the formal channels of the judiciary takes a long time.

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