

## DISPUTE RESOLUTION FOR INTERNATIONAL CONTRACT TO ACHIEVE LEGAL CERTAINTY

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### ABSTRACT

*Globalization opens borders between countries to channel each other's industrial influence, economic integration, and enrich the culture, ideas and technology. The existence of relations between nations in this era of globalization requires a good international economic relations. Due to the existence of good international economic relations will further spur the development of the international economy. The existence of the international economy also forcing the world countries to compete in promoting prosperity and development of industry in each country. To achieve the above conditions, there must be legal certainty and agreement as outlined in an agreement called International Contract. An International Contract also poses a potential dispute. Disputes arising out of a contract are mostly due to a provision in the contract that is not fulfilled, or one of the parties violating the terms of the contract that already made. In principle, contracts are made to be adhered to based on the legal principle of the Latin language that describes the legal certainty of Pacta Sunt Servanda. Pacta Sunt Servanda means the treaty made in effect as a rule for those who make it, and if there is a dispute within the contracting exercise, then the judge based on his decision may force the infringing party to carry out in accordance with the obligations and rights in accordance with the agreement. The purpose of this paper is to identify and analyse alternatives that could be undertaken whenever a dispute arises in executing certain International Contract in order to achieve legal certainty. International Contract needs legal certainty in order to ensure that any contractual clause implementation even until the settlement of the dispute proceeds effectively and efficiently. The most important first step to be taken since the making of International Contract drafting is to write down and agree on the clause for the method of dispute resolution within the contract. It is also recommendable to use the method of dispute settlement with hybrid model.*

Key words: International Contract dispute, Hybrid dispute resolution

### INTRODUCTION

The growing interaction of people between countries, increasingly affect the openness between nations through globalization. Globalization opens borders between countries to channel each other's industrial influence, economic integration, and enrich the culture, ideas and technology. The influence is possible to be distributed on a global scale with delocalization and over-territoriality.<sup>1</sup> The development of globalization is increasingly visible in the globalization of the economy. The national economy in each country is growing with the rapid increase in cross-border movement of goods, services, technology, and capital.<sup>2</sup> The existence of relations between nations in this era of globalization requires a good international economic relations. Due to the existence of good international economic relations will further spur the development of the international economy.

International Economics is the largest in scale to study trade relations. Consist of inter- state financial policies, implementation of import-export trade, inter-state economic cooperation. International economics is important in keeping the world economy as the international economy maintains market openness for product transfers, money flows, science and technology.<sup>3</sup> International economy activity consist of International Trade, International Finance, International Monetary Economics, International Macroeconomics, and International Relations.<sup>4</sup> The existence of the international economy also forcing the world countries to compete in promoting prosperity and development of industry in each country.

To achieve the above conditions, there must be legal certainty and agreement as outlined in an agreement called International Contract. The contract itself has a definition that is an agreement between two or more persons and is enforceable by law. A contract obviously must have certain information that binds each party related to it. There are 3 basic principles of contract: freedom of contract principle, bona fide principle, and real connection principle.<sup>5</sup> Because of globalization, now implementation of contract is being carried out throughout the whole world across countries. Contract that is done across countries is called International Contract. International Contract is explained as legally binding agreements between parties which originated from different countries. International Contracts are made in purpose of making the agreements clear. There are many types of International Contract, among them there are: International sale contract, International distribution contract, International agency Contract, International sales representative contract, International supply contract, International manufacturing contract, International services contract, International strategic alliance contract, International joint contract, and International franchise contract.<sup>6</sup>

<sup>1</sup> Cuterela, Sandu. Globalization: Definition, Processes, and Concepts, Revista Română de Statistică. National Defense University. 2012.

<sup>2</sup> Deese, David A. Globalization: Causes and Effects. AshGate, Boston. 2012.

<sup>3</sup> Hutabarat, Roselyne. Transaksi Ekspor Impor. Erlangga, Jakarta. 1991.

<sup>4</sup> Bjørnskov, Christian. Basics of International Economics – Compendium. Christian Bjørnskov & Ventus Publishing ApS, Frederiksberg. 2005.

<sup>5</sup> Goddard, Chris. Basic Principles of Contract Drafting. 2007.

<sup>6</sup> Moss, Giuditta Cordero. International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith, Volume 7, Issue 1. University of Oslo, Oslo. Berkeley Electronic Press. 2007.

An International Contract also poses a potential dispute. Disputes arising out of a contract are mostly due to a provision in the contract that is not fulfilled, or one of the parties violating the terms of the contract that already made. In principle, contracts are made to be adhered to based on the legal principle of the Latin language that describes the legal certainty of *Pacta Sunt Servanda*. *Pacta Sunt Servanda* means the treaty made in effect as a rule for those who make it, and if there is a dispute within the contracting exercise, then the judge based on his decision may force the infringing party to carry out in accordance with the obligations and rights in accordance with the agreement.<sup>7</sup> But in reality not always a contract goes smoothly. It is important to resolve the issue in case of a dispute.

Based on the above background, the existence of an international dispute settlement becomes particularly important in resolving disputes over international contractual disputes. But because of the extent and complexity of international contracts, it is not a simple way to resolve disputes that must be done to solve the problem. This paper will explain about the dispute resolution arising from the existence of international contracts. This paper is entitled DISPUTE RESOLUTION FOR INTERNATIONAL CONTRACT TO ACHIEVE LEGAL CERTAINTY.

## PROBLEM FORMULATION AND PURPOSE

The problem that became the focus of the discussion in this study is: How to resolve disputes in International Contract to achieve legal certainty? The purpose of this paper is to identify and analyze alternatives that could be undertaken whenever a dispute arises in executing certain International Contract in order to achieve legal certainty.

## DISCUSSION AND ANALYSIS

### 1. Contract

A contract is an agreement between two persons or more and is enforceable by law. The power of a contract is in its clauses and informations. There are two forms of contract.<sup>8</sup> First is oral contract, oral contract is a contract which terms has been agreed by spoken communication. Second is written contract, written contract is an agreement declared in a written document and has been signed by each party agreed on the contract. Basically a contract emerges from a condition when a person offers to do one or more specified acts on certain terms and the offer is accepted by another person with mutual provision.

There are two different approach when we study about contract.<sup>9</sup> The first approach of contract is merely identifies the general nature of the ideas and results in proposing narrow contract definitions are based on existence, consistency, and integrity of each party making the contract. The second approach is more complicated than the narrow framework. Its focus is on the identification of exchanges leading to dependence.

A contract contains six essential elements which known as The Six Essential Elements of a Contract. Each of them are offers; acceptance, rejection, and counteroffer; consideration, gratuitous promises, and seals; intention to create a legal relationship; capacity of the parties, and finally legality. There are four requirements that must be fulfilled before a contract is valid. Those four requirements are:<sup>10</sup>

#### a. Definiteness of material terms

One of the requirements for a contract to be considered valid is that the parties to the contract should fully agree on the terms they are making. Material provisions is the most important parts in a contract. Which state's law should be applied in deciding disputes relating to the contract would generally be considered to be a non-material provision.

#### b. Consideration

Consideration can be defined as impulse for a contract, or in other word it's cause, motive, price, and influence that encourages parties in the contract to enter into a contract. A contract results from a bargain, this requires that each party in the contract to give something up in exchange for something from another party. Value of the consideration in a contract does not need to be equal as long as parties included in the contract agree to the clauses of the contract.

#### c. Legality

Third requirement for a valid contract is legality. Legality means the material provisions should be legal. Any contract containing material provisions that are not legal will be ruled to be illegal and unenforceable. Legality of material provisions in a contract is determined by Statutes. Non-material provisions that are not legal may well be disregarded by a court.

<sup>7</sup> Binder, Christina. *The Limits of Pacta Sunt Servanda in International Law*. MaxPlanckGesellschaft. 2013.

<sup>8</sup> Ademi, Flutra. *The United Nations Convention on Contracts for the International Sale of Goods in the Courts and Arbitral Tribunals of the Successor States of the SFRY*. University of Graz, Switzerland. 2014.

<sup>9</sup> Meer, Michael A. *International Contract Manual: Country Handbook Switzerland*. Grüniger Hunziker Roth Rechtsanwälte, Zürich. 2008.

<sup>10</sup> <http://euro.ecom.cmu.edu/program/law/08-732/Types/ContractBasics.pdf> (Accessed 27/9/2017)

d. Competent parties

The last requirements of a contract is competent parties. For a contract to be enforceable it must be made by competent parties. A contract should not be made by a person who has been adjudicated to be insane or otherwise not mentally competent, or with a minor.

## 2. International Contract and International Contract Law

International Contract is a contract which has foreign elements. Foreign elements is the connections of more than one nation's legal system which affect the contract and leads to the choice of law. This choice of law then agreed upon by contracting parties<sup>11</sup>. Theoretically foreign elements could be indicated as such:

- a. Different nationality between parties
- b. Different legal domicile
- c. Selected legal standard is foreign law including regulations and even the principles of international contract
- d. International contract dispute settlement is conducted overseas
- e. The contract signing is done overseas
- f. Material object of contract is located overseas
- g. Language used in the contract is foreign language or internationally well-known language
- h. Foreign currency used as standard of transaction for the contract.

International Contract Law is a part of the International Civil Law which regulates the provisions in business transactions between businesses from two or more different countries through a contractual means made by an agreement by the parties bound in the business transaction. International Contract Law is based on seven forms of law, those seven forms of law are:<sup>12</sup>

- a. National law
- b. Contract documents
- c. International trading cultures
- d. Legal principles of contract
- e. Court decision
- f. Doctrine
- g. International treaty or International Convention about contract

International Convention that become the basis of International Contract are from Contracts for the International Sales of Goods (CISG) and UNIDROIT Principle of International Contract. CISG applies to contracts of sale and purchase of goods whose parties have business premises in different countries. Meanwhile the UNIDROIT Principle is a general principle for international commercial contracts that can be applied to the rule of national law or used by contract makers to govern international transactions as legal choice.<sup>13</sup>

There are few International Organizations that related to International Contract. There are UNCITRAL, UNCTAD, UNIDROIT, ICC, and lastly The Hague Conference on Private International Law.

- a. The United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL was formed by the United Nation General Assembly in 1966. As the core legal body of the United Nation in

<sup>11</sup> Huala, Adolf. Dasar-dasar Hukum Kontrak Internasional. PT. Refika Aditama, Bandung. 2008.

<sup>12</sup> Utama, Meria. Hukum Ekonomi Internasional. Penerbit PT. Fikahati Aneska, Jakarta. 2012.

<sup>13</sup> UNIDROIT. Principles of International Commercial Contracts. International Institute for the Unification of Private Law, Rome. 1994

the field of Law of International Trade.<sup>14</sup> The objective of UNCITRAL is to further promote the harmonization and unification of legal provisions in the field of International Trade.<sup>15</sup> The establishment of UNCITRAL is based upon consideration of the disparity of the various rules of National Law regulating international trade activities will create barriers for international trade flows, otherwise it is expected to UNCITRAL as UN agencies can play a more active role in reducing or getting rid of these obstacles.

b. United Nations Conference on Trade and Development (UNCTAD)

UNCTAD was formed in 1964 to resolve the imbalances and asymmetry in the global economy, in particular in a trading system that obstruct the efforts of developing countries to boost growth and development path that is balanced. To achieve those objectives UNCTAD must deal with the monopoly of economic thinking that dominates various discussions on the international level that has been neglected or marginalized specific needs and interests of developing countries.<sup>16</sup>

c. International Institute for the Unification of Private Law/Institute International Pour L'Unification Du Droit Prive (UNIDROIT)

UNIDROIT is an independent intergovernmental organization based in Rome. The purpose of UNIDROIT is to study the needs and methods for modernization, harmonization, and coordination of private law and especially commercial law between countries and between groups of countries and to formulate legal instruments, principles and uniform rules to achieve the goal.<sup>17</sup> UNIDROIT was formed in 1926, and is an auxiliary organ of the League of Nations. In connection with the dissolution of the League of Nations, in 1940 UNIDROIT reshaped under multilateral agreements.

d. The International Chamber of Commerce (ICC)

ICC is the main international institution in the field of trade which has branches in almost all countries. ICC is also very active in developing rules in the field of international trade. ICC has developed the ICC Model Contract and Clauses, including: commercial agency, confidentiality, distributorship, force majeure, franchising, legal hand book for global sourcing contract, mergers and acquisition, subcontract model, occasional intermediary contract, sale of goods, technology transfer; trademark licensing; turnkey transaction.<sup>18</sup> ICC is also developing ICC DOCDEX (Documentary Credit Dispute Resolution Expertise) offering to international bankers and traders a way fast and cheap dispute resolution in the field of documentary credit.

e. The Hague Conference on Private International Law

The Hague Conference on Private International Law since 1893 has been become a melting pot of various legal traditions have developed and serving various Conventions that respond to International needs such as International protection of children, family and material relations, International legal and litigation cooperation, International Trade and Financing.<sup>19</sup>

Each day in global economic law scale, we are faced with uncertainties of transaction in International Contract. Sometimes a condition where a party in the contract failed to fulfill its part of responsibility adequately. This condition can spark disputes, and cases of dispute is frequently arise from the complexity of International Contract. Parties in the contract can minimize the disruptiveness in this kind of disputes by stipulating in the contract about the method to resolve potential disputes, but this also not always proven easy to do, because contracts involving parties from different countries which each has different law, culture, and perception on ways to solve disputes.<sup>20</sup>

Given the explanation above which shows that resolving International Contract disputes are complicated and not too well known by some, this paper primary objective is to explain and analyze every possible alternatives of resolving disputes for International Contract. Naturally for prudent parties whom committed themselves to the contract, naturally they will agree on specific method for resolving potential disputes which might emerge when executing the contract. These are some International Contract dispute resolution alternatives:

a. Dispute Resolution using Contract Clauses

It is critical to stipulate the method for resolving potential dispute and then legalized altogether within the contract. It is done for a purpose that when a dispute arises, parties in the contract understand how to resolve the dispute, for they know their rights and obligations, and the stipulation of dispute resolution method in the contract will be enforced.<sup>21</sup> Without a dispute resolution

<sup>14</sup> UNCITRAL. Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. UNITED NATIONS, New York. 1988

<sup>15</sup> Jeffrey, Wah-Teck, Chan, SC, "UNCITRAL and E-Commerce", Colloquium on Electronic Commerce, 14- 16 February 2011.

<sup>16</sup> French, Robert. International Commercial Dispute Resolution and the Place of Judicial Power. International Commercial Law and Arbitration Conference, Sydney. 2013.

<sup>17</sup> Brödermann, Eckart. The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice. Uniform Law Review. 2011.

<sup>18</sup> Öncel, Sİnan. International Commercial Arbitration as an Alternative Dispute Solving Mechanism and Its Role in the Turkish Judiciary System. Bilkent University, Ankara. 2006.

<sup>19</sup> HCCH. Principles on Choice of Law in International Commercial Contracts. The Hague Conference on Private International Law Permanent Bureau, Churchillplein. 2015.

<sup>20</sup> Azizah, Siti. Penyelesaian Sengketa Kontrak Internasional. Universitas Lampung, Lampung. 2011.

<sup>21</sup> ICC. Developing Neutral Legal Standards for International Contracts. ICC. 2014.

provision stipulated in the contract, the parties would have to rely on the uncertainties and difficulties of transnational litigation in foreign courts.

Dispute resolution provision in the contract provides alternatives whether negotiation, mediation, arbitration, or even hybrid mechanism. Hybrid mechanism allows settlement and enforcement while keeping the dispute out of litigation processes. This allows parties in the contract to preserve an ongoing business relationship while enjoying flexibility of dispute resolution process without having to worry about formal dispute resolution procedures.

It is not easy to formulate a provision of dispute resolution method in International Contract, its because several factors must be taken into consideration, including the nature of International Contract, the difference in culture of each party, and the expectation of each parties involved in the making of the contract. There are some benefits and drawbacks for each dispute resolution alternatives, but stipulating a dispute resolution in the contract will minimize the dispute to develop wildly and contain it in an enforced dispute settlement method.

#### b. Dispute Resolution using Litigation Method

Parties that form a contract may consent to litigation process to settle dispute. Litigation process involves court of particular city, state, or province to assure impartial adjudication of the dispute.<sup>22</sup>

#### c. Dispute Resolution using Arbitrational Method

Arbitration method is one of the most promising alternative to resolve International Contract disputes. Its because arbitration in general has six distinct advantages that litigation method cannot provide.<sup>23</sup> They are:

##### 1) Predictability

The result of arbitration as dispute resolution method is more predictable than litigation method. Because litigation method is done by a litigator whom heard generally from both parties equally. Arbitrational clause will also provide at least one of the parties with more predictable outcomes.

##### 2) Neutrality

Arbitration main characteristics are neutrality and firmness, because the way of resolving dispute is mutually beneficial and both parties has fair advantages. Arbitration is guaranteed to be neutral because it is conducted by someone outside of both parties and a professional.

##### 3) Enforceability

When an arbitration has been concluded, a prevailing party may enforce the arbitral award in almost all countries. Although many states recognize the principle of comity of judicial awards, only the legislatures of the state are empowered to implement this principle.

##### 4) Confidentiality

Arbitration provides confidentiality to maintain secrecy, particularly to parties that sensitive about public exposure or the disclosure of proprietary information. It is also beneficial for avoiding cost to recuperate commercial reputation.

##### 5) Finality

Arbitration awards are final and binding, also arbitration proceedings are shorter than that of juridical proceedings. Arbitration awards may be enforced to theinfringing party in the contract.

##### 6) Expertise

Parties in the contract can choose arbitrators with certain standard of expertise according to the subject matter of dispute. This enables the arbitrators to prepare for the complexities of the dispute on certain contract.

#### d. Dispute Resolution using Mediation Method

Mediation is a method for settling dispute, but the biggest drawback of this method is its decision is non-binding. Mediation involving third party or commonly called as "mediator" who is neutral.<sup>24</sup> Mediator's job is to find mutually agreeable solution n accordance to win-win principle. Actually many International arbitration institutions also provide mediation services as dispute resolution option.

<sup>22</sup> Peter, Phillips. The Challenges of International Commercial Dispute Resolution. International Institute for Conflict Prevention and Resolution.

<sup>23</sup> International Trade Centre. Settling Business Disputes: Arbitration and Alternative Dispute Resolution: Second Edition. ITC, Geneva. 2016.

e. Dispute Resolution using Hybrid Method (Arbitrations and Mediation)

Hybrid dispute resolution method sometimes called Negotiation- Mediation-Arbitration Model.<sup>25</sup> The concept of this method is each parties is encouraged to try to solve the dispute by themselves first. If the first step of renegotiating contract does not succeed, then proceed by utilizing the mediator as a neutral third party. Then resorting to third party decision maker or arbitrator.

### CASE STUDY AND ANALYSIS

A case of dispute happened in Indonesia in 2014, this case embroiled two great companies of two countries. One company originated from Indonesia, and the other one from South Korea. This dispute arise because of what basically an International Contract. These two companies agreed to bind themselves into three kinds of International Commercial Contracts. The first was Distributorship Contract, second was Supply Contract, and the third was Technical License Contract that signed by both parties in 2006. Unfortunately these contracts does not have dispute resolution method in its clauses. So when a dispute surfaces in these International Contract between two companies, with unilateral decisions, the litigation process with the dispute resolution through the courts is directly pursued.

This case was won by South Korean company at the level of District Court. Then the Indonesian Company file an appeal to the High Court, and Indonesian Company won the case by the Decision of the High Court. Because of that, South Korean Company file a cassation to the Supreme Court. By the Supreme Court decision, the Korean Company won by absolute decision of the Supreme Court. Based on the outcome of inconsistent judicial decisions, it can be concluded that the judge's understanding of the International Contract dispute is still not good enough to ensure the maintenance of justice and has not been able to provide legal certainty. To each party in International Contract dispute, in the absence of legal certainty in law enforcement in the settlement of International Contract disputes through litigation, it will be difficult to obtain justice with only court decisions.

Therefore, it is important to establish a clause concerning the method of dispute settlement in any International Contract agreed upon by the contracting parties. In addition it would be nice if in the clause of dispute settlement method agreed by contracting parties is hybrid dispute resolution method. It is intended that if one method of dispute settlement is unsuccessful, there are still other non-litigation methods that can be pursued in order to unite the understanding in resolving International Contract dispute. Other reason than that the method of International Contract dispute settlement which is hybrid disputes that is done in stages might avoid the arbitrariness of one party to go through the non-litigation process only as a formality just to proceed to the litigation process.

### CONCLUSION AND RECOMMENDATION

International Contract needs legal certainty in order to ensure that any contractual clause implementation even until the settlement of the dispute proceeds effectively and efficiently. The most important first step to be taken since the making of International Contract drafting is to write down and agree on the clause for the method of dispute resolution within the contract in order for the International Contract dispute settlement phase to be clear. It is also recommended to use the method of dispute settlement with hybrid model. The reason is the hybrid dispute resolution method is done in stages might avoid the arbitrariness of one party, another reason is by implementing the hybrid method is because if one method of Alternative Dispute Resolution does not succeed, then there are still other stages that provide an opportunity for both parties to unite the understanding and to avoid and to avoid either party insisting to resolve the dispute directly through litigation.

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