Meaning of Writing in "Arbitration Agreement"; Current Development

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ABSTRACT

"arbitration agreement", in order to be enforceable must be made in writing. The "arbitration agreement" itself can be incorporated in the main agreement as arbitration clause, that made the main agreement must be made in writing; or specifically made in a form of a separate agreement from the main agreement. This research will discuss and elaborate the development of the interpretation of the words "made in writing" of an "arbitration agreement" to be enforceable before the arbitration tribunal as well as in court of justice. This research is a normative legal research. It conducts literature review on the development of court cases with respect to the interpretation of "made in writing" of "arbitration agreement". This research used secondary data which can be used to explain the development of the issue of this research. This research used qualitative approach to elaborate and discuss the data obtained through literature review, to provide the conclusion. Data and analysis proved that "in writing" did not mean the "arbitration agreement" must be signed, however there must be sufficient evidences "in writing" that showed that the intention of the parties was to submit their disputes to an arbitration. The "arbitration agreement" itself must be accompanied with relevant clauses that made it possible for execution.

Keywords: *arbitration clause, "arbitration agreement"*

I. INTRODUCTION

Indonesian history proved that arbitration as institution has developed a long time ago. Article 377 of Indonesian civil procedural law for Java and Madura (HIR = the *Het Herziene Indonesisch Reglement, Staatsblad* 1941:44) and article 705 of Indonesian civil procedural law for outside Java and Madura (*RBg* = the *Rechtsreglement Buitengewesten, Staatsblad* 1927:227) have taken notes, that an institution similar to arbitration has been introduced and co-existed with court of law. Prior to the independency of Republic of Indonesia, both HIR and RBg were only applicable for court of law lower than State Court (*Pengadilan Negeri*). As of the independency, the HIR and RBg are the only procedural law applicable for the first instance court all over Indonesia based on Article II of Transitional Provision of the Constitution of the Republic of Indonesian 1945. They were then confirmed in Emergency Law No.1 Year 1951 (State Gazette 1951 No.9, Sup. No.81) [1].

The procedure of conducting the similar institution with arbitration itself, can be found in article 615 to article 651 of Rv. (*Reglement op de Rechtsvordering, Staatsblad* 1847:52). Rv. was the civil procedural law applicable for State Court prior to the independency of the Republic of Indonesia. After independency, Rv. was only used as guidance. The applicability of article 615 to article 651 Rv. as legal base for arbitration was de facto and de jure recognized by court of law prior to the issuance of Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution (State Gazette 1999 No.138, Sup. No.3872) (the Arbitration and ADR Law) [1].

After the issuance and promulgation of Arbitration and ADR Law, the article 377 HIR, 705 RBg and 615 to 651 Rv. were revoked. Article 1 point 1 and 3, 6 (9), 9, 11, 31 of the Arbitration and ADR Law clearly stated that "to settle disputes through arbitration, an "arbitration agreement" must be 'made in writing'". The similar provision could also be found in article 618 Rv. The "arbitration agreement" itself can be incorporated in the main agreement as arbitration clause, that made the main agreement must be made in writing; or specifically made in a form of a separate agreement from the main agreement [1].

The aim of this research is to elaborate the current development of the meaning of "made in writing" for "arbitration agreement".

II. METHOD AND MATERIALS

This research is a normative legal research with descriptive analytical approach. Data used in this research are secondary data. All data were obtained using "google search" machine using the key words "arbitration agreement" in English. Data obtained consisted of primary legal sources, secondary legal sources and tertiary legal sources.

To analyze the data, the researcher used qualitative method. Discussion were made in order to understand the current development in "arbitration agreement", especially in search of current interpretation of "made in writing" for an "arbitration agreement". Researcher tried to triangulate the collected data by rechecking from its original or reliable sources.

III. RESULTS AND DISCUSSIONS

The requirement of an "arbitration agreement" must be made "in writing" can be found in article II of New York Convention (NYC) (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958). Article II (2) NYC stated that "The term "agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." This paragraph has raised disputes in the interpretation on what kind of document need to be signed when it referred to "in writing". Wang [2], Strong [3] and Daouda [4] pointed out that the US Fifth Circuit Court of Appeal was in the view that only the separate "arbitration agreement" must be signed. However the Second and Third Circuit Court required that to be "in writing" the "arbitration agreement" as whether made in separate agreement or as a clause contained in a main agreement, both must be signed. With respect to the exchange of documents, the Third Circuit Court agreed that the "arbitration agreement" need not to be signed if there were exchanged of a series of letters. There was no exchange of documents if there are only one time documents was sent.

The content of article 7 (2) UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006) (Model Law) provided several conditions for an "arbitration agreement" to be considered made "in writing" [5]:

1. "contained in a (separate) document signed by the parties;
2. contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement;
3. in an exchange of statements of claim and defence (in an arbitration proceeding) in which the existence of an agreement is alleged by one party and not denied by another;
4. reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

Based on the above provision, it is clear that "arbitration agreement", either made in a separate agreement or as a clause in a main agreement, both must be signed by the parties. The parties may not sign the document/ agreement in the event that: "1) there is exchange of telecommunications which made up an agreement; or 2) submission of statement claim with allegation and submission of statement of defense without denial to an arbitration and no party objected to the submission." The content mentioned in point 2 above, exchange of letters, telex, telegrams or other means of telecommunication, was indeed the extension of the statement "exchange of letters or telegrams" as mentioned in the NYC. It can be understood that in 1958, means of telecommunication has not developed as what we can see today. Meanwhile the statement mentioned in point 3 was indeed a new development in interpreting the phrase "in writing" [6]. The third point provided the parties with flexibilities to agree to use arbitration without too much formality. It can be seen as a free interpretation of a single "arbitration" agreement (made) after the occurrence of disputes, only it need not be signed as requested in normal circumstances.

Since the Model Law itself has been adopted in not less than 80 states in 111 jurisdictions and that the enforcement of arbitral awards under NYC must be conducted in the country where execution will take place, we shall also see how is the development of interpretation of "in writing" took place in several countries, as can be read through their laws and legislations.

Section 2A(4) International Arbitration Act Cap. 143A Singapore (IAA) mentioned that an "arbitration agreement" is in writing if "its content is recorded in any form, whether or not the "arbitration agreement" or contract has been concluded orally, by conduct or by other means". This definition was indeed a very broad definition, that made any agreement, as long as it was recorded, and there is an intention to settle the disputes through arbitration, an "arbitration agreement" has existed in writing. Section 2A(6) IAA also incorporated the third point mentioned in article 7(2) Model Law.

Article 1021 of Dutch Civil Procedural Code (DCPC) stipulated that "the meaning of an "arbitration agreement" to be in writing refers to the general terms and conditions as required under article 227a(1) of Dutch Civil Code, which includes contract that has been concluded electronically." According to Bisdet and Pietersz the requirements as stipulated in article 1021 of DCPC are required for prove only. In the event no parties argued on the existence of the "arbitration agreement", agreement may take place [7]. This means that article 7(2) Model Law may apply.

According to article 13(2) Japanese Arbitration Act, Act No.138 of 2003 (JAC), "the arbitration agreement shall be in the form of a document signed by all the parties, exchange of letters or telegrams between the parties, including facsimile or other communication device with a written record, or other written instrument." Under article 13(5) JAC, the arbitral proceedings exchange alleged by one party and not denied by another shall terms the "arbitration agreement" as made in writing, which is in compliance with article 7(2) Model Law.

If we take a look at Arbitration Act 1996 of England (1996 Act), which did not adopted Model Law, in article 5 (2) 1996 Act it is stated that "an agreement is made in writing if a) it is made in writing irrespective it is signed by the parties, b) it is made by exchange of communications in writing, or it is evidenced in writing. Evidence in writing An agreement is evidenced in writing if it was not made in writing but recorded by one party, or by third party, with the authority of the parties to the agreement." Besides, the exchange of submission of statement of claim with allegation of "arbitration agreement" dan submission of statement of defense which do not deny the allegation of the existence of "arbitration agreement" then it can be concluded there is an "arbitration agreement" made "in writing". The facts proved that under current circumstances and environment, the meaning and interpretation of "in writing" for "arbitration agreement" has gone far, however the fact that it must be signed, either in the form of separate single agreement or in form of a clause in a main agreement still become the most important one.

With respect to Indonesia, which also have not adopted Model Law, article 4 Arbitration and ADR Law stated that "the arbitration agreement shall be contained in a document signed by the parties." In the event that "the arbitration is agreed by means of exchange of letters, then the sending of telex, telegrams, facsimile, e-mail or other kind of communications, it shall be accompanied by the parties' receipt note." Article 9 of Arbitration and ADR Law mentioned that "in the event the arbitration agreement is made after the disputes arose, the "arbitration agreement" must be made in writing and signed by the parties. In the event the parties cannot sign the agreement, then the agreement must be made in notarial deed." The provision looked similar to the NYC, and far from Model Law.

From the above facts, it can be analyzed that under current development, the obligation that an "arbitration agreement" made "in writing" did not mean the "arbitration agreement" must be signed by the parties. However according to NYC, "an exchange of letters or telegrams may be acknowledged as made 'in writing' if there is a clear condition that the parties agreed of the arbitration during the exchange of letters or telegrams." The development of tele-communication has been adopted in Model Law, whereby the Model Law acknowledges not only exchange of letters and telegrams, but also other means of telecommunication which provide a record of the agreement, that proved the parties agreed on an arbitration. This however is the reflection of meeting of mind, a final acceptance to an offer, from two parties to settle their disputes through arbitration. The reference to the exchange of telecommunication need not be matters anymore if the states, where the parties in disputes domiciled, has incorporated UNCITRAL Model Law on Electronic Signatures (2001).

The content in Model Law that need not the parties in disputes to prove the existence of an "arbitration agreement" in writing during submission of claim and defense become a huge development in interpretation of "in writing" of an "arbitration agreement". By making submission in writing and signed with the allegation of the existence of "arbitration agreement", and the submission of defense in writing and signed without any denial of the allegation was indeed can be treated as the existence of "arbitration agreement"; because though it is slightly quite different, it can be assumed that the parties in disputes finally agreed to settle their disputes after the occurrence of the disputed through arbitration. The exchange of statement of claim and statement of defense will become sufficient evidence of the agreement "in writing" that the parties agreed to settle their disputes through arbitration. The intention of the parties and the offer-acceptance did not replace the requirement of being "signed in writing" but it modifies the meaning of "signed in writing".

In relation to the enforcement of arbitral awards, it may be hard to revise or renew the content of the NYC to adjust to the current development. However, considering the incorporation of Model Law to become national law, the interpretation of NYC can be referred to the national law of the country where the enforcement of arbitral award will be sought. Indonesian with the content of article 9 (2) Arbitration and ADR Law, the "wide" interpretation of the submission of claim with allegation and submission of defense without denial cannot be accepted as "in writing".

IV. CONCLUSION

The above discussion proved that "in writing" did not mean the "arbitration agreement" must be signed. The exchange of telecommunication shall be sufficient enough as long as the intention of the parties was to submit their disputes to an arbitration is clear. Any kind of telecommunication may not be matter, especially for those countries that have adopted UNCITRAL Model Law on Electornic Signature. The parties event can submit statement of claim with an allegation of "arbitration agreement", and if the statement of deffence do not deny the allegation, those exchange of documents will be suffcient enough to conclude that there is an "arbitration agreement" "in writing". However for being effective the "arbitration agreement" itself must be accompanied with relevant clauses that made it possible for execution, such as the object matter to be settle by arbitration.

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