Kluwer Arbitration Blog

Indonesia: Arbitrability of Tort Claims

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Arbitration is a creature of contract, and hence one may say that any claim or dispute submitted to arbitration must relate to a contract where the relevant arbitration clause is laid down. In contrast, tort claims do not normally arise from a prior contractual relationship. Broad arbitration clauses classically say that *"any and all disputes arising out of or in connection with the contract must be referred to arbitration"*. While this type of arbitration clause can be considered as a catch-all clause, a question still remains: Does such an arbitration clause cover a tort claim? Ultimately, the question is whether a tort claim is arbitrable.

Arbitrability under Indonesian law

Indonesia is a member of the New York Convention, which was ratified through Presidential Decree No. 34 of 1981. In 1999, the Indonesian government enacted the Arbitration Law. Indonesian arbitration is governed by these two sets of rules.

Generally, arbitrability refers to a question whether the subject matter of a dispute is capable of settlement by arbitration. The Arbitration Law expressly provides that only certain disputes are arbitrable. The first criterion of disputes that can be resolved through arbitration are disputes in the commercial sector. Under the Arbitration Law, disputes related to commerce, banking, finance, investment, industry, and intellectual property rights are considered as disputes in the commercial sector.

The second criterion of disputes that can be resolved by arbitration are those where the merits of which concern rights that, according to the law and regulations, are fully controlled by the disputing parties. The Arbitration Law does not provide much detail about this class of dispute. But the Elucidation part of the Arbitration Law does mention that the rights fully controlled by disputing parties are rights founded upon their agreement. Therefore, one may fairly say that the second criterion essentially refers to contractual disputes.

Article 5 of the Arbitration Law suggests that the first criterion (disputes in the commercial sector) and the second criterion (contractual disputes) are cumulative requirements for demonstrating that a dispute is arbitrable.

Is a tort claim arbitrable?

In Indonesia's context, tort claims are rather similar to unlawful act claims. The Indonesian Civil Code provides that every unlawful act that causes losses to another person obliges the wrongdoer

to compensate the losses. There is no statutory definition of the term unlawful act. In practice, the courts, however, have interpreted an unlawful act broadly to include violations of both statutory law and unwritten norms of law, such as propriety, customs, and reasonableness. It can be said that the notion of an unlawful act is open-ended where the courts can give a wide interpretation as to what amounts to an unlawful act.

The dichotomy between contractual and unlawful act claims creates an issue of arbitrability. Some Indonesian litigants try to circumvent arbitration clauses by formulating their contractual claims as unlawful act claims, and then arguing that those claims do not fall within the ambit of the arbitration clauses. Common examples are contract cancellation cases. In this type of case, plaintiffs normally argue that the disputed contract is obtained by the defendants fraudulently and such unlawful (tortious) act of the defendants does not amount to a contractual issue, and hence it is not subject to the arbitration clause set out in the disputed contract. To emphasize the non-arbitrability of the unlawful act claim, a third party would be placed as one of the defendants to suggest that the claim is not contractual in nature, and hence it is not arbitrable. In some cases, Indonesian courts decided to take jurisdiction over those unlawful act claims.

So, is an unlawful act claim arbitrable? As mentioned above, Article 5 and the Elucidation part of the Arbitration Law essentially suggest that disputes capable of settlement by arbitration are contractual disputes. Some other provisions of the Arbitration Law, however, imply that unlawful act claims can also be resolved by arbitration. For instance, Article 1 of the law provides that *"Arbitration means a method of settling civil disputes …"*. It is no question that unlawful act disputes are a type of civil dispute. Moreover, Article 2 of the Arbitration Law provides that *"This law regulates the resolution of disputes or differences of opinion between parties in a particular legal relationship that have entered into an arbitration agreement"*. The use of the unspecific term *"particular legal relationship"*, as opposed to *"contractual relationship"*, suggests that the lawmakers did not only contemplate contractual relationships when writing Article 2, but they also contemplated other recognizable legal relationships under Indonesian law, such as those that arise from unlawful acts. The Presidential Decree on the ratification of the New York Convention suggests the same by declaring that Indonesia will apply the New York Convention to differences arising out of legal relationships considered to be commercial under the Indonesian law, *"whether they are contractual or not"* (see the attachment of Presidential Decree No. 34 of 1981).

In *Government of the Regency of Pasir (Regency of Pasir) v. Samtan Co. Ltd. et al.* [2006], the Indonesian Supreme Court dismissed the Regency of Pasir's unlawful act claim on the basis that Indonesian courts have no jurisdiction over a case relating to an agreement with an arbitration clause. The case concerned the implementation of a divestment clause contained in a coal mining cooperation agreement between P.N. Tambang Batu Bara (a state-owned coal mining company) and PT Kideco Jaya Agung (Kideco), a joint venture company established by a consortium of Korean companies led by Samtan Co. Ltd. The Regency of Pasir claimed that Samtan Co. Ltd being the controlling shareholder of Kideco has committed an unlawful act by not having Kideco implement the divestment clause whereas the divestment is required by Presidential Decree No. 49 of 1981 (on Basic Provisions of Coal Mining Cooperation Agreement between P.N. Tambang Batu Bara and Private Contractors) for the interests of Indonesian government, citizens, or companies. The cooperation agreement between P.N. Tambang Batu Bara and Kideco contained a broad arbitration clause as follows.

> "…, any dispute between the Parties hereto arising before or after termination

> concerning anything related to this Agreement and the application thereof, including contentions that a Party is in default in the performance of its obligations, shall, unless settled by mutual agreement, or by mutually satisfactory conciliation, be referred for settlement by arbitration to the International Centre for Settlement of Investment Disputes …"

A similar position was taken by the Indonesian Supreme Court in *PT Armada Eka Lloyd (Armada) v. Samsung Shipping Corporation (Samsung) et al.* [2006]. Armada and Samsung entered into a time charter of M.V. Master Pioneer on the basis that the latter is the owner of the vessel. But, it was found later that the vessel belongs to another party. Consequently, Armada filed an unlawful act claim against Samsung for fraud. The Indonesian Supreme Court refused to hear Armada's unlawful act claim for the reason that the time charter contained an arbitration clause.

Further, in *Persekutuan Perdata Dermawan Nugroho & Co (DN&C) v. PT Landmark* [2011], the Indonesian Supreme Court decided to dismiss an unlawful act claim filed by DN&C with the reasoning below:

> "Even if it is true that the intention and purpose of the Plaintiff's claim are concerning an unlawful act, i.e. the Defendant's action of withholding an amount of money belonging to the Plaintiff, yet such action still amounts to a dispute that must be settled under the Lease Agreement cq. Article XVI (Arbitration Clause)."

In a recent case, *PT Korindo Heavy Industry (Korindo) v. Hyundai Motor Company (Hyundai)* [2015], the Indonesian Supreme Court again dismissed an unlawful act claim on the basis that Indonesian courts have no jurisdiction to hear a dispute about an agreement the parties to which are bound by an arbitration clause. The case was essentially about unilateral termination of several agreements (a distributorship agreement, supply agreement, and technical license agreement) between Korindo and Hyundai, all of which contained an arbitration clause. Korindo asserted that Hyundai's actions of unilaterally terminating the agreements and refusing to supply spare parts following the termination of the agreements amount to an unlawful act and a breach of certain statutory as well as regulatory provisions.

In view of the foregoing decisions, it appears that the Supreme Court has taken the position that (i) unlawful act claims are arbitrable, and (ii) any unlawful act claim that arises out of or in relation to a contract with arbitration clause must be resolved through arbitration. Former leading Supreme Court judges have opined that so long as the agreed arbitration clause in a contract is a *"general"* arbitration clause (saying that *"all"* or *"any"* disputes arising out of the contract must be referred to arbitration), any unlawful act claim that still relates to the contract must be resolved through arbitration.

As a note, the Indonesian Supreme Court decisions do not formally bind lower courts because like other civil law countries, Indonesia does not follow the rule of binding precedent. Yet, practically speaking, the Supreme Court decisions are persuasive authorities. It is not difficult to find a situation where a lower court follows the Supreme Court decisions.

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