



Business Dispute Settlement Through Mediation in State Courts and Arbitration Institutions

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Abstract

In social life, there are often differences in perceptions between humans, causing problems or disputes, whether minor or serious. Likewise, in the relationship of economic activities or more commonly known as business relations. Not infrequently humans experience a clash and differences of opinion that lead to disputes. Various problems will always arise in business as long as humans run their business solely for profit, so there are often differences of opinion because the parties will not be harmed which will eventually lead to disputes. In the end, dispute resolution, especially business disputes, is often resolved through a trial in court through a lawsuit by one of the parties who feel aggrieved. However, what was expected from the settlement turned out to be unsatisfactory for the parties because the settlement through litigation sometimes took a long time to obtain legal certainty so that it actually harmed business people because of the loss of time, energy and materials. As an alternative to resolving business disputes, business actors have a tendency to avoid disputes in court and choose to use mediation or through arbitration institutions. This study will briefly describe the comparison of business dispute resolution through court mediation with settlement through arbitration institutions. The research was conducted through descriptive empirical legal research.

Keywords: *Dispute; Business; Arbitration*

Introduction

Humans are actually from birth there have been differences between them, both differences in race, religion, ethnicity and others. These differences often make people have different views in everyday life, both socially, economically and politically. Especially in economic relations, there are often disputes that lead to conflicts. But with the human mind will always try to find ways to resolve conflicts in order to achieve a position of balance and good relations between each other.

When these differences have led to disputes, especially business disputes, for the continuity of future business relationships, business people have alternative legal dispute resolution through various ways as a way of resolving disputes. The settlement pattern carried out tends to be fast, cheap and of course has benefits for both parties. Through this study, the author tries to compare the settlement of business disputes between settlements through lawsuits in court with mediation or settlement through arbitration institutions first.

Settlement through a court lawsuit that can be preceded by mediation efforts of the parties, but this settlement process is an adversarial decision that has not been able to embrace common interests, because it produces a win lose solution decision, with the winners and losers, on the one hand will feel satisfied but on the other hand feel dissatisfied, so that it can cause a new problem between the disputing parties. Not to mention the slow dispute resolution process, long time, and relatively more expensive costs.

The second settlement is through a dispute resolution process outside the court, resulting in a "win-win solution" agreement because the settlement of disputes outside the court is through agreement and deliberation between the parties so as to produce a joint decision that is acceptable to both parties, and The resulting dispute can be guaranteed the confidentiality of the parties' dispute because there is no obligation for a trial process that is open to the public and published. Dispute resolution out of court is generally known as Alternative Dispute Resolution (ADR).¹

The ADR concept is an answer to the dissatisfaction that arises in people's lives as a solution to community dissatisfaction because dispute resolution through the courts is considered to take quite a long time because of the accumulation of cases in court, thus requiring a large amount of money, often business people are traumatized by the settlement. business disputes through the courts which are considered too formal and rigid in dispute resolution which tends to only judge in terms of evidence and witnesses regardless of the principle of benefit from the dispute resolution in question. Not to mention that sometimes business disputes have complexities caused by the substance of the case which is full of scientific problems or it can also be due to the number and breadth of stakeholders who must be involved.²

In Indonesia, the dispute resolution process through ADR is not something new in the nation's cultural values, because the spirit and nature of the Indonesian people are known for their familial and cooperative nature in solving problems. Various ethnic groups in Indonesia usually use deliberation and consensus to make decisions. Therefore, the inclusion of the ADR concept in Indonesia, of course, can be easily accepted by the Indonesian people. In addition, business actors in carrying out business engagements or agreements prefer the settlement of deliberation and consensus in the engagement.

The term ADR is a brand given to grouping dispute resolution through the process of negotiation, mediation, conciliation and arbitration outside the court. Some interpret ADR as an alternative to litigation in which all out-of-court dispute resolution mechanisms, including arbitration, are part of ADR, while ADR as an alternative to adjudication includes consensus or cooperative dispute resolution as well as negotiation, conciliation and mediation.

¹Racmadi Usman, "*Pilihan Penyelesaian Sengketa di Luar Pengadilan*", PT.Citra Aditya Bakti, Bandung, 2003, hlm. 2-3

²Achmad Sentosa, "*Alternative Dispute Resolution (ADR) di Bidang Lingkungan Hidup*" Makalah ini disampaikan dalam Acara Forum Dialog tentang *Alternative Dispute Resolution (ADR)* yang diselenggarakan oleh Tim Pakar Hukum Departemen Kehakiman dan Asia Foundation, Jakarta, 1995, hlm 1.

One of the dispute resolutions in arbitration institutions through ADR is mediation. Mediation is the process by which the disputing parties appoint a neutral third party to assist them in discussing a settlement and try to persuade the parties to negotiate a settlement and the dispute. The main purpose of mediation is compromise in resolving a dispute.

In Indonesia mediation, the mediation procedure in this court is regulated by Supreme Court Regulation no. 1 of 2016. concerning Mediation procedures in Court.

In Supreme Court Regulation No. 1 of 2016 concerning medias procedures in court, it can be seen that mediation must be carried out by parties who have civil litigations in court which are carried out on the day of the first trial. Mediation is carried out so that the parties can resolve the dispute between them by peace.

This is what motivated the author to try to examine the differences and comparisons of business dispute resolution through district courts with dispute resolution through out-of-court settlements through arbitration institutions.

Discussion

1. Settlement of Business Disputes Through Mediation in the District Court

The integration of mediation in the judicial process is to facilitate, try sincerely to help the parties to the dispute overcome all obstacles and obstacles to achieving a simple, fast and low cost trial through negotiation, deliberation by putting aside the law to reach a peace that is agreed upon by both parties.³ In the context of the court's genuine efforts to assist the disputing parties, Satjipto Rahardjo stated that enforcing the law is not the same as applying laws and procedures. Enforcing the law is law enforcement by mobilizing all the psychological potential in law enforcement.⁴ This means that enforcement is not only adhering to intellectual intelligence (based on written laws or regulations as a source of law), but also by integrating conscience, because the truth is already in the heart or conscience of every human being, which must be understood and owned by every organizer or law enforcer as well as the parties seeking justice. Thus, the essence sought in resolving disputes or cases by integrating mediation into court proceedings is "justice", because the wishes of both parties can be fulfilled, no one feels defeated or humiliated. But the good relationship between each other is more important.

Based on the Supreme Court Regulation Number 1 of 2016 concerning the mediation process in the Court, it contains ten regulatory principles regarding the use of integrated mediation in court (court-connected mediation). The ten principles are as follows. First, mediation must be taken, before the dispute is decided by the judge, the parties must first go through mediation. If the claimant party does not have good intentions to mediate, the judge has the right to declare the lawsuit unacceptable. As stipulated in article 22 (1) of the Supreme Court Regulation no. 1 of 2016 concerning mediation procedures in courts.

Some legal experts may question the principle of mandatory use of mediation because HIR and Rbg which regulate civil dispute settlement procedures in courts do not mention mediation, while this Supreme Court Regulation whose legal status in the statutory order is so low that its contents should not create a new norm.

³Dr. I Made Sukadana, "Mediasi Peradilan: mediasi dalam sistem peradilan perdata indonesia dalam rangka mewujudkan proses peradilan yang sederhana, cepat dan biaya ringan" Prestasi Pustaka,

⁴Satjipto Rahardjo, "ilmu Hukum", PT. Citra aditya Bakti, cet. Ke 6, 2006, hlm 206. Sebagaimana dikutip oleh I Made Sukadana.

However, the Supreme Court understands that efforts to settle disputes or civil cases through mediation are conceptually and essentially the same as peace efforts as required by Article 130 HIR or 154 Rbg. Thus mediation does not deviate from the procedural law regulated in HIR and Rbg, but instead can strengthen peace efforts required by HIR and Rbg.

Second, the autonomy of the parties. The principle of the autonomy of the parties is a principle inherent in the mediation process. Because in mediation the parties have the opportunity to determine and influence the process and results based on a consensus mechanism or consensus of the parties with the help of a neutral party. This principle is known as self-determination, i.e. the parties are entitled or authorized to decide in the sense of accepting or rejecting everything in the mediation process.

Third, mediation in good faith. Mediation is a dispute resolution process through deliberation or consensus of the parties that will work well if it is based on the intention to resolve the dispute.

Fourth, Time Efficiency. The problem of time is one of the important factors in resolving a dispute or case. The concept of time is also related to legal certainty and the availability or utilization of existing resources. The principle of time efficiency in the Regulation of the Supreme Court Number 1 of 2016 can be seen in the arrangement of time limits for the parties in negotiations to select a mediator.

Fifth, mediator certification. Regulation of the Supreme Court Number 1 of 2016 encourages the birth of professional mediators. This tendency can be seen from the provision that in principle “everyone who carries out the function of a mediator is required to have a mediator certificate obtained after attending training organized by an institution that has obtained accreditation from the Supreme Court of the Republic of Indonesia.

Sixth, Mediator Responsibilities. The mediator has duties and responsibilities that are procedural and facilitative. In order to maintain the neutrality of mediation mediators in the Court, the Supreme Court issues guidelines for the behavior of Mediators

Seventh, confidentiality. Unlike the litigation process which is open to the public, the mediation process is basically closed to the public unless the parties wish otherwise. This means that only the parties or their legal representatives and the mediator may attend and play a role in mediation sessions, while other parties may not attend mediation sessions except with the permission of the parties.

Eighth, financing. Financing related to the mediation process at least includes the following: the availability of mediation rooms, the fees of the mediators, the costs of experts if needed, and the cost of transporting the parties who come to mediation meetings or sessions.

Ninth, repetition of mediation. The parties are still given the opportunity to reach peace after the failure of the mediation process at an early stage or at the stage before the case examination begins. the peace process after entering the examination stage is mediated directly by the examining judge.

Tenth, an out-of-court peace agreement. The Supreme Court Regulation Number 1 of 2016 is basically more intended to regulate the principles and procedures for the use of mediation for cases or civil disputes that have been submitted to court (court-connected mediation). However, as an effort to further strengthen the use of mediation in the Indonesian legal system and minimize the emergence of legal problems that may arise from the use of mediation outside the court, the Supreme Court through Supreme Court Regulation Number 1 of 2016 also contains provisions that can be used by parties. disputants who have successfully resolved the dispute through out-of-court mediation to request the court to confirm the out-of-court peace agreement with a peace deed.

In principle, mediation in courts tends to be facultative / voluntary, but with the tendency to accumulate cases in court and for the speed and smoothness of business actors in carrying out their business, mediation in this court requires judges who hear a case to seriously seek peace in the courts between the litigants.

2. Settlement of Business Disputes Through Arbitration Institutions

Arbitration is a way of resolving disputes through “private adjudication”, the decisions of which are final and binding. In the provisions of Article 3 of Law no. 30 of 1999 it is stated that the District Court is not authorized to adjudicate the disputes of the parties who have been bound by the arbitration agreement. The object of Arbitration examination is to examine civil disputes, but not all civil disputes can be resolved through arbitration, only certain fields are mentioned in Article 5 paragraph (1) of Law no. 30 of 1999, namely: "Disputes that can be resolved through arbitration are only disputes in the field of trade (business disputes) and regarding rights which according to laws and regulations are fully controlled by the disputing parties".

The lifeblood of arbitration is the arbitration clause. The arbitration clause will determine whether a dispute can be resolved by arbitration, where it is settled, which law is used, and so on. The arbitration clause can stand alone or separately from the main agreement. There is no requirement in the Arbitration Law that stipulates that the arbitration clause must be made in a notarial deed. The arbitration clause must be prepared carefully, accurately, and binding. The aim is to avoid the arbitration clause being used by one of the parties as a weakness that can be used to transfer the dispute to court.

BANI provides standard arbitration clauses as follows: "All disputes arising from this agreement, will be resolved and decided by BANI according to the rules of BANI arbitration procedure, the decisions of which are binding on both parties to the dispute, as decisions at the first and final level".

Based on the provisions of Article 1 paragraph (1) of Law Number 30 of 1999 concerning Arbitration, arbitration is a method of resolving disputes outside the general court based on an arbitration agreement made in writing by the disputing parties. The parties to the agreement want the settlement of disputes that arise to be resolved through the institution.

The form of this clause is regulated in Article 2 of Law no. 30 of 1999, which reads as follows.

This law regulates the settlement of disputes or differences of opinion between the parties in a certain legal relationship that has entered into an arbitration agreement which expressly states that all disputes or differences of opinion that arise or that may arise from the legal relationship will be resolved by arbitration or through alternatives. dispute resolution.⁵

The important points in the provisions of the article, among others, are the ability to make an agreement between the parties making the agreement, to submit the settlement of disputes that may arise at a later date to arbitration or through alternative dispute resolution. The agreement in question is an arbitration clause. Based on this, it can be concluded that the arbitration clause is prepared to anticipate disputes that may arise in the future.⁶

Although in Article 2 of Law no. 30 of 1999 is not explicitly stated regarding the agreement clause agreeing with the arbitrator's decision.

⁵ Pasal 2 Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian sengketa.

⁶ Frans Hendra Winarta, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Arbitrase Internasional*, Jakarta, Sinar Grafika, 2013, Hal. 38-39.

- Include the arbitration clause in the main agreement. This is the method commonly applied in practice, where the main agreement becomes an integral part of the arbitration clause. The arbitration agreement which contains an agreement that the parties agree to resolve disputes (disputes) that arise at a later date through the arbitration forum, are contained in the main agreement.
- The agreement to agree with the arbitrator's decision (*Pactum de compromittendo*) is contained in a separate deed or separate from the main agreement. If the *pactum de compromittendo* is in the form of a deed separate from the main agreement, the time of making the arbitration agreement must adhere to the stipulation that the arbitration agreement deed must be drawn up before a dispute or dispute occurs. It must be in accordance with the formal requirements for the validity of the *pactum de compromittendo*, it must be made before a dispute arises.

Another form of arbitration agreement is in the form of a deed of compromise as regulated in Article 9 of Law no. 30 of 1999:

- In the event that the parties choose to settle the dispute through arbitration after the dispute has occurred, the agreement regarding this matter must be made in a written agreement signed by the parties.
- In the event that the parties cannot sign the written agreement as referred to in paragraph (1), the written agreement must be made in the form of a notarial deed.
- The written agreement as referred to in paragraph (1) must contain: the disputed issue; The full names and places of residence of the parties; full name and place of residence of the arbitrator or arbitral tribunal; where the arbitrator or arbitral tribunal will make decisions; full name of the secretary; dispute resolution period; a statement of willingness from the arbitrator; and a statement of willingness of the disputing parties to bear all costs necessary for the settlement of the dispute through arbitration.
- A written agreement that does not contain the matters as referred to in paragraph (3) is null and void.

Based on the provisions of Article 9 of Law no. 30 of 1999 above, according to the author in normative juridical terms, it can be seen that the deed of compromise as an arbitration agreement was made after a dispute arose between the parties or in other words in the agreement no arbitration agreement was held. Thus, a compromise deed is a deed that contains rules for resolving disputes that have arisen between the people who promised.

So based on the author's analysis above, based on a normative juridical approach, the settlement of business disputes through an arbitration institution can be done in two ways, namely by *factum de compromittendo*, before a dispute occurs the arbitration clause has been included in the main agreement, and by making a compromise deed after a dispute occurs. the arbitration clause is made in written form separate from the principal agreement. Meanwhile, the dispute resolution process through the arbitration institution according to Articles 27 to 60 of Law Number 30 of 1999. The applicant registers with BANI by completing the administrative requirements, a complete description of the case and the claim, by attaching a deed of agreement according to the arbitration clause and the applicant appoints an arbitrator.

Conclusion

That dispute resolution through mediation in the District Court and settlement through arbitration institutions have similarities and differences in their implementation, where in dispute resolution by means of mediation in court and through arbitration institutions both appoint a third party or mediator as a neutral arbiter with the aim of shortening or speed up dispute resolution.

However, the Mediator at the District Court who served as the mediator who facilitating the negotiation process is only limited to providing input. Meanwhile, at the arbitration institution, the mediator is the arbitrator who can give a decision on the problem. In addition, the results of mediation at the District Court are Win-Win Solution, while the results of arbitration institutions are Win-Lose Judgment;

And the most basic difference is The mediator's suggestion on mediation in the District Court is non-binding, so that the parties determine the best solution. Whereas in arbitration institutions, the results of the agreement of the parties are binding because the arbitrator makes the decision and has executive power.

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