

## **Business Dispute Resolution Through Alternative Dispute Resolution (Adr) In Indonesian Legal System Perspective**

<sup>1</sup>Herwastoeti, <sup>2</sup>Prof. Dr. Adi Sulistiyono Sh.,Mh, <sup>3</sup>Moch.Najib  
Imanullah,Sh.,Mh.,

*1*Doctoral Program of Law Science, Sebelas Maret University, Surakarta, Indonesia

<sup>2,3</sup> Lecturer, Faculty of Law, Sebelas Maret University, Surakarta, Indonesia

Corresponding Author : herwastoeti

---

**Abstract:** Business dispute resolution through Alternative Dispute Resolution (ADR) is a non-court settlement of dispute (non litigation). The settlement of disputes outside the court is closed to the public and the secrecy of the parties is guaranteed, as well as the faster and more efficient proceedings. The process of dispute resolution outside this court to avoid the length of time that the procedure and administrative process takes as a result of litigation (in public court). In addition, the purpose of business court settlement outside court is also to reach the peace of the disputing parties so that the win-win solution will be obtained which means that it will not harm any of the parties to the dispute.

**Keywords:** Business dispute, Alternative Dispute Resolution (ADR)

---

Date of Submission: 16-03-2018

Date of acceptance: 31-03-2018

---

### **I. INTRODUCTION**

The development of the world of international business has grown quite rapidly, whether done between individuals and between other legal subjects. The development of international business in Indonesia is influenced by various aspects, including economic, socio-cultural, political and legal of the country concerned. Therefore, in the development of international business, there is often a dispute among the parties involved. This will create a complex problem in resolving disputes, due to differences in the legal system, culture, language, distance, and so forth.

The growing form of business in Indonesia, bringing the consequences of resolving any dispute that may arise quickly, cheaply and as well as possible. With the understanding of the settlement of the dispute does not interfere with the business climate between the parties to the dispute. Therefore the modern business world is turning to the settlement of Alternative Dispute Resolution (ADR) as an alternative dispute resolution because modern business necessities require fast dispute resolution and do not hamper business climate.

Alternative dispute resolution (APS) is an option for non-court settlement disputes (non-litigation). The alternative word indicates that the parties to the dispute are free by mutual agreement to choose what form and ordinance there is in the dispute resolution alternative and will be applied to the settlement of the dispute. (Priyatna Abdurrasyid,, 2002:31) "ADR procedures are alternative to the public judicial system found everywhere. Because private disputants are free to agree a variations to basic ADR procedures including adoption of those procedures and rules found in the public judicial system that can be used in ADR." ( Priyatna Abdurrasyid, 2002: 33)

The APS mechanism regulated by Law Number 30 Year 1999 is consultation, negotiation, mediation, conciliation and expert assessment (Article 1 paragraph 10 of Law Number 30 Year 1999). A dispute settlement through APS does not necessarily require a verdict. It is basically the conspiracy of the parties themselves not to settle the dispute to court, but in the manner referred to in Law 30 of 1999.

The dispute resolution process chosen by the parties to the business dispute has begun to move from a litigation dispute settlement through the Court to a non-litigation settlement known as alternative dispute resolution (Joni Emirzon, 2001: 2). This is because the settlement through litigation takes a long time so it is not beneficial for the business if the business completion must be settled through litigation or in court. (Munir Fuadi, 2003,45).Based on the background of the problems described in the previous section, the problem formulation in this research is to know the perspective of business dispute resolution through Alternative Dispute Resolution (ADR) in Indonesian Legal System.

## **II. METHOD OF RESEARCH**

Methodology in a general sense is a logical and systematic study of the principles that direct a study. Methodology also means the scientific way of seeking the truth. The legal research methodology is the same as the other methodologies of the sciences, which distinguishes it from the method. (Setiono.2010: 3-4). Method research is one of the important factors to support the results of a study. Before determining the method to be used in a study, then the researcher must determine in advance what to look for in the study (Lexy.J.Moleong, 2002, 23). Legal research recognizes two methods, namely doctrinal legal research methods and non-doctrinal or empirical research methods. The method used in this research is doctrinal research.

### **Types of research**

Based on five legal concepts in the opinion of Soetandyo Wignjosoebroto, this study uses the concept of normative law. Normative legal research is a scientific research procedure to find truth based on the logic of legal science from the normative side. The logical logic of normative law research is built on scientific discipline and normative legal science, the law of which the object is the law itself (Johnny Ibrahim, 2017: 57). Normative legal research is often referred to as doctrinal law research, as Terry Hutchinson refers to the definition of doctrinal law research as follows: "Doctrinal Research-Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development"

### **Source of Materials Research**

Terry Hutchinson, as quoted by Jhony Ibrahim, in his description of normative legal research explains: "doctrinal research is library based, focusing on reading and analysis of the primary and secondary materials. The primary materials are the actual sources of law legislations and case law. The secondary materials include the commentary on the law found in the textbooks and legal journals. Often, reference sources such as legal encyclopedia, case digest and case citators are needed to index and access the primary sources. ( Jhony Ibrahim, 2014:65)

### **Research Materials Collection Technique**

Normative legal research does not recognize field research because the research is legal materials, so it can be said as library based, focusing on reading and analysis of the primary and secondary materials. In this research using techniques of collecting research resources in the form of library research techniques (library research) (Soekanto, Soerjono, 2005: 12).

### **Research Analysis Technique**

Analysis of research materials is an activity to solve and describe the problems studied based on the materials that have been collected. The technique of analysis in the writing of this law by using content analysis techniques, which then processed into general premises about general norms, then analyzed deductively. Then all data is analyzed by using Interactive Model of Analysis. This analyst model has been done since data collection, data reduction, data presentation and conclusion drawing / verifying. (H.B. Sutopo, 2002: 96).

## **III. DISCUSSION**

### **Business Dispute Resolution Through Alternative Dispute Resolution In The Perspective Of The Indonesian Legal System**

In Indonesia the choice of dispute resolution through alternative dispute resolution is common, even the first choice. It can be seen that most of the agreements made can be ascertained that the first choice of dispute settlement is by way of consensus for consensus on the principle of kinship. However, so far how the deliberations will be done, normatively in what form, so that binding the two sides still no rules, until the enactment of Article 6 of Law no. 30 of 1999 regulates the procedure of alternative settlement.

The parties may settle the case alternatively if the parties have the good intentions to resolve disputes or differences of understanding (paragraph 1). To solve this case it takes the integrity of the parties to want to admit if wrong and want to improve it by respecting the results of deliberation.

The forms of ADR / APS in Law No.30 of 1999 are consultation, negotiation, mediation, conciliation and expert judgment. Not further elaborated on the meaning of each form of ADR /APS. Arbitration is excluded from the scope of ADR / APS and is given a separate definition, namely: the settlement of a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. Law no. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

The Settlement of business disputes out of court can be done by:

#### **IV. CONSULTATION**

In the early stages can be done in consultation that is by holding a meeting directly from the two different parties opinion. In this consultation meeting is expected to reconcile the previous distance so that each party can find a way out that can solve the case. The role of the consultant in resolving the existing dispute is not dominant at all, the consultant shall only furnish a legal opinion as requested by his client, for which further the dispute resolution shall be taken by the parties themselves, although occasionally the consultant shall also be given the opportunity to formulate settlement forms dispute by the parties to the dispute (Rachmadi Usman, 2002: 51). If in this way the case can be completed or resolved properly then the two parties can then put these agreements in writing or in a document (paragraph 2.) that this document has a legal force in the sense that binding on both sides can be enforced should be requested for recognition and endorsement by the local District Court.

##### **2. Negotiation**

If a consultation is found to be lacking or unclear, an additional negotiation may be required to complete the deficiency or correct the errors that have caused the dispute. The outcome of such negotiations can be set forth in a contract that complements or alters the contracts they have previously agreed upon. The written agreement pursuant to the provisions of article 6 paragraph (7) shall be registered in the District Court within 30 (thirty) days of the date of signature, and shall be conducted within 30 (thirty) days from the registration of Article 6 paragraph (8) Act no. 30/1999.

##### **3. Mediation**

The definition of mediation according to Supreme Court Regulation No. 1 of 2016 on Mediation Procedures in Courts as follows:

"Mediation shall be the settlement of a dispute through the process of negotiation to obtain agreement of the Parties with the assistance of the Mediator".

Mediation is a means of dispute resolution which upon agreement of the disputing parties involves a neutral third party as a mediator in order to accelerate the achievement of peace. Through mediators it is believed will be able to lead the parties towards peace more quickly.

Some of the principles of mediation are:

- Voluntary or subject to agreement of the parties;
- In the civil field;
- Simple;
- Closed and confidential;
- Being a facilitator.

In the mediation process, a mediator has a role:

- a. Bring closer interest and minimize differences of interest;
- b. Creating a meeting of the parties;
- c. Not positioning as a person who decides and does not judge right or wrong;
- d. Identify problems and possible acceptable solutions;
- e. Documenting the deal already generated.

##### **4. Conciliation**

It seems to be consultation, negotiation, and mediation, Law no. 30/1999 does not provide an explicit definition of the meaning or definition of this conciliation. We can not even find a single provision in Law no. This 30/1999 regulates conciliation. The word of conciliation as one of the alternative dispute settlement institutions can be found in the provisions of Article 1 Point 10 and 9th paragraph of the General Explanation of Law no. 30/1999. In contrast to negotiations, the conciliation of the notion given in the Black's Law Dictionary is a preliminary step to peace before a trial (litigation) is held. Even if we look at the provisions set forth in the Civil Code, it means that conciliation can not only be done to prevent the litigation process being carried out, but can also be done by the parties at every level of the ongoing justice both inside and outside the court, with the exception of matters or disputes to which a judgment of a judge which has had a permanent legal power, can't be conciliated.

##### **5. Expert Assessment (Expert Opinion)**

Expert or ordinary judgment also called expert opinion is an information requested by the parties in dispute to a particular expert who is considered more understanding about a matter of dispute. Expert opinion generally aims to clarify the sit-down of issues between those opposed by the parties. The formulation of Article 52 of Law no. 30/1999 on Arbitration and Alternative Dispute Resolution, states that the parties to an agreement are entitled to invoke a binding opinion from an arbitration body on certain legal relations of an agreement. This

provision is essentially an exercise of the notion of the arbitration institution granted in Article 1 number 8 of Act No. 30/1999.

## **6. Arbitration**

As a form of non-court dispute resolution based on the definition provided in Article 1 number 1 of Law no. 30/1999, arbitration is the method of settling a civil dispute outside a public court based on an Arbitration Agreement made in writing by the parties to the dispute. Not all disputes can be resolved by arbitration. What can be resolved through an arbitration institution is merely a dispute in the field of trade and on rights which, by law and legislation, are fully controlled by the parties to the dispute (Article 5 paragraph (1) of Law No. 30/1999). Furthermore, in paragraph (2) it is determined that a dispute that can't be resolved through an arbitration body is a dispute which, according to the laws and regulations, can't be held peace.

There are three things that can be raised from the definition given in Law no. 30/1999:

- a. Arbitration is a form of agreement
- b. The Arbitration Agreement shall be in writing;
- c. The Arbitration Agreement constitutes an agreement to resolve disputes that take place outside the public court. An arbitration agreement in a contract is usually called an arbitration clause. The arbitration clause may be a simple agreement to carry out the arbitration, but may also be a more comprehensive agreement, containing the terms of the arbitration. The arbitration clause is important because it will determine arbitrage, how it is implemented, what substantive law applies, etc. (Widjaja, Gunawan and Ahmad Yani, 2001: 35)

According to Law no. 30/1999 there are two forms of arbitration clause, namely:

### **1). Pactum de compromittendo**

In pactum de compromittendo the parties bind the agreement will settle the dispute through the arbitration forum before a real dispute arises. The form of this clause is regulated in Article 7 of Law no. 30/1999.

How to make the clause of pactum de compromittendo there are two ways:

- a. By stating the relevant arbitration clause in the principal agreement. This is the most common way.
- b. The compromettindo

### **2). The Compromise Deed**

In Law no. 30/1999 the compromise deed is stipulated in Article 9 which reads:

- 1) In the event that the parties choose to resolve the dispute through arbitration after a dispute has occurred, an agreement shall be made in a written agreement signed by the parties.
- 2) In the event that the parties can't sign a written agreement as referred to in paragraph (1), such written agreement shall be made in the form of notarial deed.
- 3) The written agreement referred to in paragraph (1) shall contain:
  - a. Disputed issue;
  - b. Full name and place of residence of the parties;
  - c. The full name and residence of the arbitrator or arbitral panel;
  - d. The arbitrator's place or arbitral panel shall decide;
  - e. The full name of the secretary;
  - f. Term of dispute resolution;
  - g. Statement of the willingness of the arbitrator;
  - h. Statement of willingness of the party to the dispute to assume all costs required for dispute settlement through arbitration.

(4) A written agreement not containing the matter as referred to in paragraph (3) is null and void.

The difference between pactum compromittendo and the compromise deed is only at the time of conclusion. Pactum compromittendo was made before the dispute took place. In terms of agreement between the two there is no difference. (Suyud Margono, 2000: 23).

Internationally, the legal basis for the settlement of international disputes by means of arbitration is contained in Article 33 of the UN Charter, essentially stating that the parties to the dispute, which, if perpetuated, would jeopardize the maintenance of international peace and security. First of all, solutions must be sought by way of negotiation, inquiry, by mediation, conciliation, arbitration, legal settlement through a regional body or arrangement or by any other peaceful means of their own choosing.

Lex- Arbitri is a law relating to the arbitration of the country in which the arbitration is held. This Lex Arbitri determines whether the arbitration agreement is valid; whether a particular dispute can be resolved through arbitration; whether the court will provide provisional / temporary legal remedies; whether there should be a decision based on reasoned considerations; whether the arbitration decision can be reviewed on the material

or other grounds related to material law (Huala Adollf, 2002, 66). Thus, where arbitration rules applied to arbitration can't cover all issues or possibilities arising in arbitration, the arbitral tribunal may use Lex- Arbitri to resolve them. Arbitration as a choice of dispute resolution in theory can be solved at a low cost, but in reality it is expensive compared to the court.

- 1) Ad Hoc Arbitration (Arbitration Voluntary)
- 2) Institutional Arbitration

### **Ad Hoc Arbitration**

Ad Hoc Arbitration (Article 13 of Law No.30 / 1999) is an arbitration forum established to resolve certain disputes. The characteristics or nature of this Ad Hoc arbitration forum are incidental. This means that its existence is only to serve and decide a certain case of dispute only and after its existence and its function ends. A recognizable characteristic that an arbitration forum is Ad Hoc is that the appointment of its arbitrator is made individually and chosen by the parties' consent.

This Ad Hoc arbitration position is not affiliated with any particular Arbitration Body, so that the Ad Hoc arbitration does not have its own rules and ordinances, neither the rules of appointment of its arbiter nor of its ordinance. Therefore, this arbitration forum is fully subject to the rules of procedure prescribed by the Law (for example if in Indonesia it is subject to the provisions of Law No. 30/1999).

However, this principle does not exclude the possibility that Ad Hoc arbitration should be subject to a particular Convention if desired by the parties. For example, the parties want the dispute to be submitted to Ad Hoc arbitration by using the rules of Uncitral or ICC (International Chamber of Commerce) rule. This can be done if in arbitration agreement there is a choice clause of law.

### **Institutional Arbitration**

Institutional Arbitration is a deliberately established and permanent arbitration forum and is intended to deal with contractual disputes arising between parties seeking an out-of-court settlement. In the New York Convention 1958 this forum was called "permanent arbitral body" (Article 1 paragraph (2)).

The Institutional Arbitrage features are:

- 1) Its existence already existed before the dispute arose;
- 2) Permanent, that means standing still despite the dispute;
- 3) The organization, and the provisions on the procedure of how to appoint its arbitrator and the procedures for the examination of its disputes have been established.

Institutional arbitration based on its working area is distinguished in a national arbitration and an international arbitration.

### **Institutional Arbitrations that are national**

This national arbitration institution is intentionally established as a permanent arbitration institution. It is said that the national arbitration because the purpose of its establishment is to meet the interests of a particular nation / country only, and its existence and jurisdiction is only limited to the territory of the country concerned. For example;

- a. BANI (Indonesian National Arbitration Board) initiated by the Indonesian Chamber of Commerce and Industry (KADIN);
- b. Industry (KADIN);
- c. The Indonesian Muamalate Arbitration Board (BAMUI) initiated by the Indonesian Ulema Council (MUI) and renamed the National Syariah Arbitration Board (BASYARNAS);
- d. Indonesian Capital Market Arbitration Board (BAPMI);
- e. Indonesian Commodity Futures Arbitration Board (BAKTI);
- f. Arbitration Board and Intellectual Property Rights Mediation (BAM HKI);
- g. Consumer Dispute Settlement Agency (BPSK);
- h. Indonesian Banking Dispute Resolution Alternative Institution (LAPSPI);
- i. Arbitration Board and Mediation of Indonesian Guarantee Company (BAMPPI);
- j. Indonesian Medium Financing and Financing Agency (BMPPI);
- k. Indonesian Mediation and Arbitration Insurance Agency (BMAI).

### **Choice of Legal Issues**

Where in the arbitration clause the parties have chosen a particular law, then the arbitrator shall use is the law which has been chosen by the parties. So the arbitrator is not free to decide which law to use. The law that the parties first choose at the time of the contract and the consent to settle any dispute which may arise between them through international arbitration means shall be respected by the arbitrator. Regarding the issue of choice of law there is an opinion that the parties may be bound only to its national law or a third state law that has nothing to do with their national law.

What if it turns out that after a few years of the contract there has been a dispute between them and it turns out that the selected law has changed so that the arbiters arise whether the selected law will be used (the law at the time of contract) or the law in force at the time of the dispute. Sudargo Gautama is of the opinion that in the event of such a case, it is advisable to use the current law (at the time of the dispute) with due regard to the existing transitional rules. (Sudargo Gautama, 1996: 34). The parties also have the freedom to decide otherwise. The parties may decide that the selected is the law of a particular country at the time the contract is drawn up, or the parties elect the national law of either party.

However such determination shall be expressly stated in the agreement. Even if parties have made a choice of law, they are still bound by the coercive legal principles of the legal system they choose. In freedom of choice this law can also mean that the parties choose a legal system of a neutral state or may also choose a particular state system that has a prominent role in a special branch of the commodity concerned. Where jurisprudence and trade habits are valued throughout the world as a well-ordered modern system.

Although these parties are free to make choices of law, they are still limited by the limits of not contradicting public policy or open bare order or public order. The principle of this open bare order can rule out the law that has been chosen by the parties. In many ways the use of arbitration in settling a dispute, especially for the business world will bring benefits, among others as follows:

1. The deadline for settling cases

As is well known problem solving with civil lawsuits in the courts often takes a very long time. This means that the law considers that the grace period for the arbitrators to examine and decide cases is no more than 6 (six) months, unless otherwise specified by the parties to the agreement.

2. Expert Witness

In arbitration, the parties may appoint the expert arbitrator (the arbitrator) who knows all about the disputed matter. Thus it is expected that the decision to be taken is supported by a deep knowledge of the disputed matter. In the arbitration forum works also experts from various fields, such as lawyers, insurance experts, banking experts, and so forth. Therefore there is a guarantee that cases submitted to arbitration will be terminated by those who are experts with issues pertaining to disputed matters.

3. Confidentiality of decision

In the arbitration both examination and judgment are done in private (Article 27 of Law No. 30/1999). This is done to ensure the confidentiality of the parties to the dispute in order not to be known by the public. Very harmful if the company's secrets or the balance sheet of a company can be known by the public. Yet the secrecy of a company is very important. And the arbitration award was never published.

## V. CONCLUSION

Based on the results of the discussion on various research findings which are further constructed through the relevant theories, it can be concluded that business dispute resolution among business actors is necessary because litigation in court takes a long time. Another advantage in the settlement through non-litigation (Alternative Dispute Resolution), in addition to the faster time because it is final and binding and its implementation upholds the principle of confidentiality (confidentiality), also the parties freely choose arbiters with consideration of expertise and the parties freely choose the law to be used. Broadly speaking the arbitration is divided into two kinds, ad hoc arbitration and institutional arbitration. Ad Hoc Arbitration (Article 13 of Law No.30 / 1999) is an arbitration forum established to resolve certain disputes. The characteristics or nature of this Ad Hoc arbitration forum are incidental. Institutional Arbitration is a deliberately established and permanent arbitration forum and is intended to deal with contractual disputes arising between parties seeking non-court settlement (non-litigation).

## REFERENCES

- [1] Abdurrasyid, Priyatna. 2002. Arbitrase & Alternatif Penyelesaian Sengketa. Jakarta : Fikahati Aneska.
- [2] Adolf, Huala. 2002. Arbitrase Komersial Internasional. Jakarta : PT Raja Grafindo Persada. Ali, Moch & Aishah Abidin. Abstract & Proceeding 3 rd Conference on Law & Technology. Faculty of Law University Kebangsaan Malaysia and Center for Law and Genetics University of Tasmania Australia.
- [3] Fuady, Munir. 2003. Arbitrase Nasional, : PT Citra Aditya Bakti, Bandung.
- [4] Gautama, Sudargo. 1996. Aneka Hukum Arbitrase, PT Citra Aditya Bakti, Bandung.
- [5] Goodpaster, Gary, Felix Oentoeng Soebagjo dan Fatmah Jatim. 1995. Arbitrase di Indonesia , Ghalia Indonesia, Jakarta.
- [6] Harahap, M. Yahya. 1991. Arbitrase, Pustaka Kartini, Jakarta.
- [7] Hartono, Sri Redjeki. 2007. Hukum Ekonomi Indonesia, Bayumedia Publishing, Surabaya.
- [8] Ibrahim, Johnny, 2014, Teori dan Metodologi Penelitian Hukum Normatif, Bayumedia Publishing, Surabaya.

- [9] Kaufmann, Gabrielle – Kohler Thomas Schultz. 2004. Online Dispute Resolution : Challenges for Contemporary Justice. Kluwer LawInternational.
- [10] Margono, Suyud. 2000. ADR dan Arbitrase, Ghalia Indonesia, Jakarta.
- [11] Mertokusumo, Sudikno. 1999. Mengenal Hukum suatu Pengantar,, Penerbit Liberty, Jogjakarta.
- [12] Moleong, Lexy. J. 2002. Metodologi Penelitian Kualitatif, PT Remaja Rosdakarya, Bandung.
- [13] Mulja, Kartini dan Gunawan Widjaja. 2004. Perikatan yang Lahir dari Perjanjian, PT Raja Grafindo Persada, Jakarta.
- [14] Sheiner, Bruce. 1996. Applied Cryptography 2nd ed, John Willey and Saons Inc., New York.
- [15] Soekanto, Soerjono. 2005. Pengantar Penelitian Hukum,, Universitas Indonesia, Jakarta.
- [16] Subekti. 1981. Arbitrase Perdagangan,, Binacipta, Bandung.
- [17] Sumartono, Gatot. 2006. Arbitrase dan Mediasi di Indonesia, PT. Gramedia Pustaka, Jakarta.
- [18] Usman, Rachmadi. 2002. Hukum Arbitrase Nasional, PT Gramedia Widiasarana Indonesia., Jakarta.
- [19] Widjaja, Gunawan dan Ahmad Yani. 2001. Hukum Arbitrase, PT Raja Grafindo Persada, Jakarta.

**Legislation**

- [20] Code of Civil law Law Number 30 Year 1999 Concerning Arbitration and Alternative Dispute Settlement

IOSR Journal Of Humanities And Social Science (IOSR-JHSS) is UGC approved Journal with Sl. No. 5070, Journal no. 49323.

herwastoeti "Business Dispute Resolution Through Alternative Dispute Resolution (Adr) In Indonesian Legal System Perspective." IOSR Journal Of Humanities And Social Science (IOSR-JHSS). vol. 23 no. 03, 2018, pp. 55-61.