The Role of Arbitration Institutions as a Non-Litigation Alternative in Fair Business Dispute Resolution

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ABSTRACT

Differences of opinion or disputes in the business context often occur, and Indonesia has an alternative dispute resolution institution, namely Arbitration. According to experts, Arbitration is one way of resolving disputes that involves the disputing parties to agree on choosing a judge, or judges who will make a decision, and the parties must also agree to respect the decision taken by the judge. Until now, the dominant dispute resolution, between the parties through the courts (litigation) even though alternative dispute resolution (non-litigation) has been regulated through laws and regulations. The implementation of the Arbitration Institution is based on the principle of non-litigious minded as the resolution of disputes, through deliberation and seeking peace between the parties so as to minimize hostility or resentment from the disputing parties. The problems of this research are first, How is the Implementation of Business Dispute Resolution through Arbitration in Indonesia, based on the Principle of Non-Litigious Minded. Second, How do the Parties Respect the Arbitration Decision on Business Dispute Resolution. This study uses a normative legal method which uses a literature study research data source that uses secondary data sources such as official documents, books, research reports, theses, dissertations, and laws and regulations related to the research object being studied. The legal materials collected, through literature review include: primary legal materials, secondary legal materials, and non-legal materials.

Keywords: Dispute Resolution, Fair, Non-Litigation

ABSTRAK

Beda pendapat atau sengketa dalam konteks bisnis sering terjadi, dan Indonesia memiliki sebuah Lembaga penyelesaian sengketa alternatif yaitu Arbitrase. Menurut pendapat para ahli, Arbitrase merupakan, salah satu cara penyelesaian sengketa yang melibatkan pihak-pihak yang bersengketa untuk sepakat dalam memilih hakim, atau para hakim yang akan mengambil keputusan, dan para pihak juga harus sepakat untuk menghormati keputusan yang diambil oleh hakim tersebut. Hingga saat ini masih dominannya penyelesaian sengketa para pihak melalui peradilan (litigation), meskipun penyelesaian alternatif sengketa (nonlitigation) sudah diatur melalui peraturan perundang-undangan. Implementasi Lembaga Arbitrase berdasarkan prinsip non-litigious minded sebagaimana penyelesaian sengketa secara musyawarah, dan mencari perdamaian para pihak sehingga meminimalisir permusuhan ataupun dendam dari para pihak bersengketa. Permasalahan penelitian ini adalah pertama, Bagaimana Pelaksanaan Penyelesaian Sengketa Bisnis melalui Arbitrase di Indonesia melalui Non-Litigasi. Kedua, Bagaimana Para pihak Menghormati Putusan Arbitrase Terhadap Penyelesaian Sengketa Bisnis. Penelitian ini menggunakan metode yuridis normative, yang dimana menggunakan sumber data penelitian studi kepustakaan, yang menggunakan sumber data sekunder seperti dokumen-dokumen resmi, buku, laporan penelitian, skripsi, tesis, disertasi, dan peraturan perundang-undangan yang berkaitan dengan objek penelitian yang sedang diteliti. Adapuun bahan hukum yang dikumpulkan, melalui kajian pustaka meliputi: bahan hukum primer, bahan hukum sekunder, dan bahan non-hukum.

Kata Kunci: Penyelesaian Sengketa, Berkeadilan, Non Litigasi

A. INTRODUCTION

Arbitration institution is a forum for parties in dispute regarding trade, industry, banking, and intellectual property rights (HKI) with non-litigation settlement, which is regulated by Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. At present, the establishment of an arbitration institution in Indonesia, on the one hand still requires cooperation in the settlement process (formal). The settlement process in question is the existence of parties who agree to resolve disputes through arbitration either domestically (Indonesia) or abroad (outside Indonesia). Before the existence of an arbitration institution as an institution, the parties still resolved through litigation or other dispute resolution institutions such as the Consumer Dispute Resolution Institution (LPSK) regarding business disputes. On the other hand, the Indonesian Court has made 2 dispute resolution arrangements before the court process begins through the Circular of the Supreme Court (SEMA) Number 1 of 2002 concerning the Empowerment of First-Instance Courts to Implement Peace Institutions. Through this Circular, it strengthens the importance of empowering the role of the first, instance court in carrying out peaceful efforts (Lembaga dading), as regulated in Article 130 HIR/Article 154 Rbg, as well as other articles in the applicable procedural law in Indonesia, especially in Article 132 HIR/Article 154 RBg. The parties must make a clause in a written agreement (contract) for settlement through arbitration as regulated in Article 2 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This provision is regulated as the Limitation between dispute resolution through litigation and non-litigation on the basis of Limited Court Involved. The limitation of dispute resolution is regulated through Article 3 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution which stipulates that "The District Court is not authorized to adjudicate disputes between parties who have been bound by an arbitration agreement". Non-litigation dispute resolution has become a tradition of indigenous peoples in Indonesia where it is resolved by mutual agreement by upholding peace without any conflict in the future.

This out-of-court dispute resolution process avoids delays caused by procedures and administration as in general court proceedings and win-win solutions. This out-of-court dispute resolution is called Alternative Dispute Resolution/ APS.[1]

Actually, the spirit of Alternative Dispute Resolution (APS) has existed, since the ancestors of the Indonesian nation. This is as clearly seen in the culture of deliberation to reach a consensus that is still very visible in rural communities in Indonesia, where when there is a dispute between them, people tend not to bring the problem to court, but rather resolve it amicably. If the dispute cannot be resolved between the disputing parties, then they will bring their dispute to the village head. With the

[1] Frans Hendra Winarta, National and International Arbitration Dispute Resolution Law, Sinar Grafika, Jakarta, (2016): 9-11

spirit of "deliberation to reach consensus" that has been rooted in the soul of the Indonesian nation, APS has a very large potential to be developed and used by legal practitioners in Indonesia. The importance of the role of APS in resolving disputes is increasing, with the enactment of Law Number. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.[2] Now, with the enactment of Law Number. 30 of 1999, business actors realize that winning and losing decisions through litigation are not necessarily the best solution, and such decisions make the general goals of the business they do not achieve. Litigation solutions through the district court that wins one party and defeats the other party, this can be said to be a dispute resolution, method that can have a negative effect on the development of a business actor's business.[3]

International arbitration institutions also exist, their numbers are quite large and are found in every country, including the oldest arbitration body in the world that we know as ICSID (International Center for Settlement of Investment Disputes).[4] Like the Minangkabau custom for people who have disputes, either asset ownership or conflicts between the parties, it must be resolved through, the Nagari Customary Assembly (KAN) mediated by the Customary Leader. Non-litigation dispute resolution institutions such as arbitration are of particular concern due to the level of economic growth, the high business interests of the parties, and the Indonesian people are more dominant in resolving through deliberation (non-litigation minded). Like the mediation institution, it is a forum to bring together the disputing parties before continuing to the court stage. Mediation is increasingly being considered as an alternative option to resolve disputes in Indonesia, and this is due to several reasons, namely:

a. Economic Factors, where mediation is more economical and efficient in terms of time and cost;
b. Scope Factor, mediation offers a flexible and comprehensive resolution method;
c. Good Relationship Building Factor, for those who pay attention to the importance of maintaining good relations, between the parties involved in the conflict, both now and in the future, mediation is a very appropriate dispute resolution method;
d. Globalization Era, where a dispute resolution system is needed that is able to follow the increasingly rapid development of the economy, and trade and towards freer competition in the market, so that it requires an institution that is able to accommodate these needs.

Indonesia recognizes the existence of a choice of forum clause where there are parties to choose a forum in resolving business disputes between the parties, both domestically and abroad. Article 1 number 4 3 UNCITRAL states that an arbitration is international if:[5]

[2] Ibid, page 10
[3] Ibid, page 11
[4] Muskibah, Arbitration as an Alternative to Dispute Resolution, Journal of Legal Communication 4.2, (2018)
[5] Cut Memi. (2017). International Commercial Arbitration: Application of Clauses in District Court Decisions.

1. The arbitration agreement involves parties who have their places of business in different countries at the time of signing the agreement; or
2. one of the places related to the agreement is outside the country where the parties have their places of business, namely:
   a. The place where the arbitration will be carried out, if agreed or in accordance with the provisions set out in the arbitration agreement; or
   b. The place where the main obligations in the trade relationship will be carried out; or the place where the main issues of the dispute take place.
3. The disputing parties have clearly agreed that the main issues in the arbitration agreement actually involve more than one country. According to Article 6 paragraph (1) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, it is stated that "Civil disputes or differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by setting aside litigation in the District Court". The level of flexibility of the parties in resolving a business dispute if it is done through an arbitration institution is very good, so that the settlement through a personal approach from the parties will be implemented as the freedom of contract regulated through Article 1338 of the Civil Code. Dispute resolution through, an arbitration institution can achieve a principle of substantive justice. In fact, litigation or non-litigation institutions are only limited to forums to implement formal (law procedures) so that the material values contained in the legislation can be implemented properly. Referring to Article 11 paragraph (1) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, it is stated that "the existence of a written arbitration agreement eliminates the rights of the parties to submit a dispute resolution or difference of opinion contained in the agreement to the District Court". This provision is the basis for the parties to determine a clause, in the written agreement so that dispute resolution is carried out in a non-litigation manner.

An arbitration clause will include a commitment or agreement between the parties to carry out arbitration, the scope of the arbitration, whether the arbitration will be carried out institutionally or ad hoc, the procedural rules to be applied, the place and language to be used in the arbitration, and the choice of substantive law applicable to the arbitration. Therefore, the author sees that the arbitration institution is an appropriate forum for the parties to consistently resolve business disputes through non-litigation on the basis of an agreement between the parties before or after the dispute arises.

Jakarta: Sinar Grafika, pp. 4-5.

Based on the background above, the current digital era has finally, made the author interested in writing with the title "**The Role of Arbitration Institutions as a Non-Litigation Alternative in Fair Business Dispute Resolution**".

B. FOCUS OF PROBLEM

The Formulation of the problem in this research is : How is the Implementation of Business Dispute Resolution Through Arbitration in Indonesia through Non-Litigation Path? and How Do the Parties Respect Arbitration Decisions on Business Dispute Resolution?

C. RESEARCH METHODOLOGY

The research on "The Role of Arbitration Institutions as an alternative dispute resolution outside the court as a just settlement of business disputes" is a research with a normative legal approach. Normative research is a type of research, that relies on secondary data sources as the main reference, consisting of primary, secondary, and tertiary legal materials.[6] To conduct normative research on Arbitration Institutions as an alternative substantively, just settlement of business disputes, quite a lot of references are needed, both in the form of books and laws and regulations, which are the main secondary data sources in the research. To analyze the data, qualitative analysis is used, namely analyzing data, in depth and holistically. This is closely related to the type of research which can be categorized as normative legal research, the approach of which is more abstract-theoretical.

D. FINDING & DISCUSSION

D.1. IMPLEMENTATION OF BUSINESS DISPUTE RESOLUTION THROUGH ARBITRATION IN INDONESIA THROUGH NON-LITIGATION

Arbitration is a dispute resolution method carried out through "private adjudicatory" which produces a final and binding decision. Article 3 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution emphasizes that the District Court cannot resolve disputes, that have been agreed to be resolved through arbitration. Arbitration examines civil disputes, but only a few civil disputes can be resolved through arbitration, which is regulated through Article 5 paragraph (1) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, namely:

[6] Soerjono Soekanto. (2006). Introduction to Legal Research, University of Indonesia, (UI-Press), Jakarta, p. 14.

"Disputes that can be resolved through arbitration are only disputes in the field of trade and concerning rights that according, to law and statutory regulations are fully controlled by the disputing parties". In this case, the Indonesian National Arbitration Board (BANI) is the National Arbitration Institution in Indonesia.

It can be concluded that arbitration is a dispute resolution method that is very suitable for the needs of the business and trade world. The advantages of using arbitration are that the settlement is fast, carried out by experts in the field, and maintains the confidentiality of the dispute.[7] Article 58 of the Judicial Power Law states that "Efforts to resolve civil disputes can be carried out outside the state court through Arbitration and APS". The settlement that 'can' refers to a way or method of dispute resolution, that is optional or not mandatory, but at the same time reflects that the law must pay attention to the expectations of parties who respect and believe in a certain way of resolving disputes, then provide legal recognition for it.

If the applicant is not present at the first hearing of dispute resolution through BANI arbitration, without a valid reason, the application will be deemed to have failed in accordance, with the provisions of the HIR. Furthermore, if the respondent is unable to attend the first hearing, the respondent will be recalled no later than fourteen days later. If the respondent is no longer present, the examination will be continued, without the respondent's presence, and the applicant's claim will be granted, unless BANI considers the claim to be unlawful or unjust. BANI is a national arbitration institution because, it is organized by an organization that was established specifically to handle disputes in agreements, in contrast to ad hoc arbitration which is formed to resolve certain disputes and is not permanent. BANI also has jurisdiction throughout the country and has existed before the dispute arose.

The arbitration clause is a crucial element in arbitration because it determines which disputes can be resolved through arbitration, where the arbitration will be conducted, and which law will be used in the arbitration. Although not required by arbitration law, the arbitration clause must be drafted carefully, accurately, and bindingly so as not to become a weakness for one of the parties who wants to move the dispute to court.

The arbitration clause can stand alone or be separated from the main agreement. Basically, the standard arbitration clause has been regulated by BANI which is as follows:

"All disputes arising from this agreement will be resolved and decided by BANI according to the BANI arbitration procedure regulations, the decision of which is binding on both parties to the

[7] R. Subekti. (1992). Trade Arbitration. Binacipta Pen., second ed., p. 1.

dispute, as a decision in the first and final instance".

Arbitration is a method of dispute resolution carried out outside the general courts, regulated in Article 1 paragraph (1) of Law Number 30 of 1999 concerning Arbitration.

Settlement of disputes by arbitration is based on a written agreement between the disputing parties. Parties who wish to resolve disputes through arbitration can choose one of two methods that can trigger the implementation of arbitration, namely:

a. *Pactum de Compromittendo*

Article 2 of Law No. 30 of 1999 regulates the form of the *pactum de compromittendo* clause, which means an agreement to approve the arbitrator's decision, which reads as follows:

"This law regulates the settlement of disputes or differences of opinion between parties in a certain legal relationship that has entered into an arbitration agreement that 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 alternative dispute resolution."

The provisions of this article emphasize the importance of freedom for the parties who make an agreement to choose a dispute resolution that can be carried out through arbitration or alternative dispute resolution. The arbitration clause is a form of this agreement, which is prepared in advance to anticipate the possibility of disputes in the future. Therefore, the arbitration clause is one way to avoid conflicts that may occur in the future. [8] Although not expressly regulated in Article 2 of Law No. 30 of 1999 concerning Arbitration, the method of making a *pactum de compromittendo* clause can be interpreted and practiced in two permitted ways, namely:

1. Include the *Pactum de compromittendo* clause in the Main Agreement.
2. The *pactum de compromittendo* clause is contained in a separate deed or a deed that is separate from the main agreement.

b. *Compromise Deed*

Article 9 of Law No. 30 of 1999 regulates the second form of arbitration agreement, namely a compromise deed, where the clearer provisions are:

1. The agreement to resolve the dispute through arbitration must be made in writing and signed by the disputing parties.
2. If the disputing parties cannot sign the arbitration agreement directly, then the agreement must be made in the form of a notarial deed in accordance with the provisions contained in paragraph (1).

[8] Frans Hendra Winarta. (2013). Indonesian National Arbitration Dispute Resolution Law and International Arbitration. Jakarta: Sinar Grafika, pp. 38-39.

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3. The arbitration agreement must contain matters relating to the disputed issues, the identities and complete addresses of the parties, the arbitrator or arbitration panel chosen, the place where the arbitration will be conducted, the secretary who will handle the arbitration process, the time limit for resolving the dispute, and a statement of willingness from the arbitrator and the parties to bear the costs associated with the arbitration process. These requirements must be met both in the arbitration agreement signed by the parties and in the notarial deed made if the parties cannot sign it in person.
4. If these matters are not included in the agreement, then the agreement is considered legally void, in accordance with what is meant in paragraph (3).

In accordance with the provisions of Article 9 of Law No. 30 of 1999, it explains that a compromise deed as a form of arbitration agreement is drawn up after a dispute occurs between the parties, so that at the time the agreement is made, there is no previous agreement regarding arbitration. In the context of dispute resolution, a deed of compromise refers to a document containing an agreement that has been agreed upon by the parties regarding how to resolve an ongoing dispute.[9]

D.2.PARTIES RESPECT ARBITRATION DECISIONS REGARDING SETTLEMENT OF BUSINESS DISPUTES.

According to Law Number 30 of 1999, arbitration is a method of resolving civil disputes that is carried out outside the general courts. This is based on a written agreement between the parties in dispute. If the parties have agreed to the arbitration agreement, the district court does not have the authority to handle the dispute. Therefore, the court is obliged to recognize and respect the role and decision of the arbitrator.

An arbitration agreement is only valid if it is based on mutual consent between the parties and meets the requirements of Article 1320 of the Civil Code. Therefore, it is important to remember that voluntariness and mutual awareness are the basis for the validity of an arbitration agreement. The parties are also given the freedom to choose the applicable law in resolving disputes that arise between them.[10]

Article 7 of Law No. 30 of 1999 regulates arbitration arrangements that allow parties to agree to resolve disputes that arise or will arise between them through arbitration by making a written agreement. With the existence of this written agreement, the parties no longer have the right to submit

[9] Ibid, p. 40.
[10] Frans Hendra Winarta. (2013). Law on Settlement of Indonesian National Arbitration Disputes and International Arbitration. Jakarta: Sinar Grafika, p. 37.

a dispute resolution or difference of opinion stated in their agreement to the district court.[11]

The parties involved in a business dispute can make an agreement regarding the use of arbitration at the time of the initial agreement or when the dispute occurs. Article 62 paragraph (4) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution emphasizes that the Head of the District Court does not examine the reasons or considerations of the arbitration decision to ensure that the arbitration decision is indeed final, independent, and binding. However, if one party denies the legal facts regarding the clause that is integrated with the main agreement, the court process will take longer because the parties must resolve the dispute permissively first.

However, if an agreement is made after a dispute has occurred and then one of the parties reneges on the agreement, then the court process will be faster because the period of reneging will be shorter. Therefore, the judge must fulfill the obligation to obey the principles of the realm bound by arbitration and carefully examine the case submitted.

The advantage of using arbitration as a method for resolving business disputes is that the examination process is carried out in a closed and confidential manner. In accordance with Article 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the arbitration decision is final, has permanent legal force, and is binding on the parties. This means that no other legal remedies such as appeals, cassation, or judicial review can be made against the decision. "Final" in this case means that the decision must be implemented without additional legal remedies. The parties can implement the decision voluntarily or through an order from the Head of the District Court at the request of the interested party, and the duration of the arbitration process must be in accordance with that planned by the parties.

However, the meaning of "final" and "binding" of this arbitration decision can shift or be affected by the filing of a request for cancellation. This raises questions about how the two provisions can be harmonized and synergized so that they can produce proper justice, especially considering that the court is not authorized to adjudicate disputes between parties who have been bound by an arbitration agreement.

E. CONCLUSION

Resolving business disputes through an arbitration institution can be done in two ways. First, by using factum de compromittendo, namely including an arbitration clause in the main agreement before the dispute occurs. Second, through a deed of compromise after the dispute occurs, by making an arbitration clause in written form separate from the main agreement. The arbitration decision is

[11] Ibid, p 38

considered final and binding on the parties, although its execution requires the involvement of the District Court. The dispute resolution process through an arbitration institution is regulated in Articles 27 to 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Articles 59 to 64 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution have regulated in detail the process of executing the decision of the arbitration institution in resolving business disputes. The arbitrator must submit the original or authentic copy of the arbitration decision to the Clerk of the District Court within 30 days after the arbitration decision is pronounced. Next, the arbitration award will be registered and tested by the Head of the District Court to ensure that it meets all applicable formal and material requirements. After that, the arbitration award will be recognized and given binding legal force and is final and binding. Thus, the parties involved in the dispute must comply with the arbitration award, although the execution stage still requires the involvement of the District Court.

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