Remittances Review
March 2023
Volume: 8, No: 2, pp. 16 - 24
ISSN: 2059-6588 (Print) | ISSN: 2059-6596 (Online)

Received: 12 January 2023 Accepted: 15 March 2023

DOI: https://doi.org/10.33182/rr.v8i2.02

BUSINESS DISPUTES SETTLEMENT; HISTORY AND DEVELOPMENT OF MEDIATION IN INDONESIA

Gunawan Widjaja[1]

Abstract

Business activities between business partners cannot be separated from disputes that may arise from the business activities themselves. Mediation can be a resourceful tool to settle disputes between parties. The research aims to discuss the history and development of mediation as a means to dispute settlement in Indonesia. This research is normative legal research using secondary data. Findings and discussion proved that mediation has been known since a long time ago in Indonesia. It is the most known alternative dispute resolution to be used in Indonesia.

Keywords: *mediation, alternative dispute resolution, Indonesia, history*

Introduction

Disputes happened all time. There is no way that people may avoid disputes, even he/ she has behaved honestly and prudently and tried to comply with ethics and prevailing laws and regulations. The same applies to business. Sometimes disputes come even when normal people would not expect them. However, when it comes, there is no other option other than to solve the dispute.

[1] Faculty of Law, Universitas Pancasila, Jakarta, Indonesiaemail: widjaja_gunawan@yahoo.com

As a private matter, the dispute must be settled by the people to whom the dispute happened. The state may provide means to settle the dispute when the parties in dispute were not able to settle the dispute among themselves. No one can best understand the dispute matters other than the parties in dispute. The dispute may come from a contractual obligation that was agreed upon before but missing at some point or most likely has no clear meaning that raises discrepancies in interpreting the terms and conditions. Such a dispute may be anticipated before the risks of the dispute may be "transferred".

It may also happen because of some non- contractual obligation, that was never anticipated by one or maybe all parties in dispute. From the short paragraph explained above, it can be seen that disputes are best settled by the disputing parties. Under a common name, it is usually referred to as negotiation. Negotiation is conducted as a means to reach mutual understanding. The result which ended in a form of agreement or contract is also part of dispute settlement. So, in another way, it can be said that negotiation to achieve an agreement is one tool to settle disputes among the disputant, which become the parties in the agreement (Widjaja & Yani, 2000). However, it cannot be denied that under certain circumstances, due to the disputes matters, the parties in disputes need a third party that will lead the way for them to re-discuss the matters in dispute to reach a mutual consensus. This mutual consensus will also take the form of an agreement or contract.

The involvement of the third party is to mediate the parties to come to a common understanding on the dispute matters, leaving emotions aside. The mediators must- have skill, knowledge, arts, passion, patience, and capability to understand not only the object matters of the disputes but also the inner feeling, and the psychology of the disputants.

The mediators shall know when and how to talk with the disputants and give them the moments to re-think to resolve the problems. Besides, the parties, including the businessman, who are in dispute should have knowledge of how the mediation shall be conducted and the way it can be enforced after the settlement is reached. This research aims to discuss the history and development of mediation in Indonesia.

The research will use secondary data, which are data available to the public. Among them are the laws and regulations as primary legal sources, and manuscripts or books written by scholars as secondary legal sources, including dictionaries and other non-legal sources as references.

The analysis will be conducted qualitatively to describe the objectives of the research.

ALTERNATIVE DISPUTE SETTLEMENT

Alternative dispute settlement or also known as alternative dispute resolution is a method of settling disputes outside of court. During teaching in law school, scholars used to introduce the court as an institution whereby the parties in disputes can settle their matters. Disputes were brought to court to be settled by judges and in common law tradition, it was "assisted" by juries.

The teaching of alternative dispute resolution courses, according to the Washington School of Law, was only started in 1986-1987. It was conducted when Jay Folberg came as a visiting professor at Washington School of Law (Vaughn, 1998). Nowadays, Spencer and Altobelli (2005) claimed that in almost all law schools and business schools in Australia, England, and America, dispute resolution courses were taught as electives as well as compulsory subjects for undergraduate students.

The contents of alternative dispute settlement subjects or courses consist of several materials. They consist of negotiation, mediation, conciliation, legal opinion, legal advice, and other kinds of resolutions that focus on the settlement by the parties in disputes, either with or without the assistance of a third party (Widjaja, 2005). Mediation is a means of dispute settlement assisted by a third party that does not provide a decision to the disputants.

MEDIATION IN INDONESIA

The out-of-court settlement has been the nature of Indonesian culture. During the Netherlands Indie Government (NIG) in Indonesia before independency, the NIG had appointed the chief of a village to become the judge that will reconcile the disputant in his village. It was regulated in Article 3a of *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie* (Rules of Court Structure and Judgment Policy) abbreviated as *RO* (S.1933 No. 102). According to the regulation, the chief of a village cannot make any decision, however, in practice, many cases were settled by the chief of village decision (Laudjeng, 2003) (Usman, 2003). According to Soepomo (1984), the chief of any community shall keep and maintain that the laws in the community shall be complied with. Not only to prepare everything concerning administration for the member of the community, but also for the other needs of all persons in the society, including marriage, inheritance, orphans, and others. The regulations that existed in and were made by the NIG, including *RO*, had been revoked one by one after the independence of the Republic of Indonesia. Some may still be enforced, such as *Het Herziene Indonesisch Reglement* (S.1884 No 16, S. 1941 No 44) abbreviated as HIR, the civil procedural law enforced in Java and Madura; and *Reglement voor de Buitengewesten* (S. 1927 No. 227) abbreviated as RBg, the civil procedural law enforced outside Java and Madura. The existence and enforceability of HIR and RBg were also acknowledged in the Circular Letter of Supreme Court No.19 of 1964. This

proved that mediation has existed in the Indonesian community for a long time ago. Until today, mediation in Indonesia has been regulated in several regulations. In principle, there are two kinds of mediation. First, is the mediation in court and second is the mediation outside the court.

Today, the existence of court-annexed mediation after the Independence of the Republic of Indonesia is regulated by Supreme Court in Supreme Court Regulation No.2 of 2003 (PERMA2/2003) regarding Mediation Procedures in Court. Based on PERMA2/2003, before the court trial, the disputants, i.e. the claimant and the defendant shall settle their matters before a mediator, who is also the court judge. The mediator shall be the judge that will examine the case after the mediation process becomes deadlocked. The assistance of the judge as a mediator in the court mediation program and the use of the room in the court for mediation purposes is free of charge. The disputants are not required to pay any extra cost for the mediation process.

The idea of having a court-annexed mediation was inspired by the content of Article 130 HIR or Article 154 RBg. Article 130 HIR/ Article 154 RBg consists of four paragraphs, which read as follows:

(1) "If on the first court hearing day, both parties come, then the district court with the help of the chairman will try to reconcile them.

(2) If such peace can be reached, then at the time of the session, a letter (deed) of agreement is drawn up regarding it, in which both parties are punished to comply with the agreement made, which letter will have to power to force and will be carried out as an ordinary decision.

(3) Such a decision cannot be appealed.

(4) If at the time of trying to reconcile the two parties, it is necessary to use an interpreter, then the following article rules are complied with for that."

Further, it was then discussed by the Second Commission in its Limited National Working Meeting (*Komisi II Rakernas Terbatas*) of the Supreme Court between 26 August to 17 September 2002 in Surabaya (Rakernas). There were at least seven points that were raised during the *Rakernas*. They were as follows:

(1) "The settlement efforts should be carried out seriously and optimally, not just as a formality,

(2) it shall involve appointed judges who can act as facilitators and/or mediators, but not the panel of judges of the case in the court trial (however the results of the national

meeting allow the panel of judges because there is a lack of judges in the area and because they know more about the problem), or the parties concerned ask another party (third) deemed competent to chair the assembly,

(3) if this settlement effort takes a long time, then the examination of the case can exceed the maximum time (6 months) as stipulated in SEMA No. 6 of 1992,

(4) the settlement agreement is made in the form of a court decision (*dading*), and the parties are punished to comply with what has been agreed,

(5) if it is not successful, the judge concerned must report to the chairman of the court/chairman of the panel of judges and the examination of the case is continued,

(6) the facilitator/ mediator must be neutral and impartial, must not be influenced internally or externally, does not act as a judge who determines what is wrong or right, not as an advisor, and

(7) the success of resolving cases through the settlement can be used as a reward for the judge who becomes a facilitator/ mediator."

After the *Rakernas* the Supreme Court introduced the Circular Letter (SEMA) No. 1 of 2002 regarding the Empowerment of the First Instance Court in Implementing a (Peaceful) Settlement Institution. The Circular Letter No.1 of 2002 (SEMA1/2002 was followed by the issuance of the Supreme Court Regulation No.2 of 2003 (PERMA2/2003). The mediation through court initiative was named *court-annexed mediation* and applied to all civil cases which were submitted to the First Instance Court.

I. The PERMA2/2003 was replaced in 2008 by Supreme Court No.1 of 2008 regarding Mediation Procedures in Court (PERMA1/2008). The new regulation was made following the evaluation made of the implementation of PERMA2/2003, with a focus on reducing some technical problems and enhancing the use of mediation to assist in the settlement of cases that were submitted to the court. In PERMA1/2008, the obligation to go through mediation before a court trial becomes something that cannot be refused by the disputants. In addition, the final court decision shall mention that for the case, mediation has been conducted by stating the name of the mediator. If no mediation has been conducted, the decision is null and void, because it is a violation of Article 130 HIR/ Article 154 RBg. Below is the summary of several major points in the PERMA1/2008.

(1) All civil disputes submitted to the First Instance Court must first seek a settlement with the assistance of a mediator, except for cases resolved through commercial court procedures, industrial relations courts, objections to decisions made by the Consumer Dispute Settlement Agency, and objections to decisions made by the Business Competition Supervisory Commission;

(2) Disputants who do not follow the mediation procedure based on this Supreme Court Regulation will result in a null and void decision;

(3) The parties may choose one or more mediators from judges, advocates or legal academics, or non-legal professionals who are deemed to have mastered or experienced in the subject matter;

(4) The fees for the services/honor of the mediator are borne jointly by the parties or based on an agreement, in a condition that the judge who becomes the mediator does not receive payment for services;

(5) The place for mediation is determined by the agreement of the parties, however, when the mediator is chaired by a judge as a mediator, it is not permissible to hold mediation outside the court;

(6) The mediation process is closed for outsiders unless the parties specify otherwise;

(7) The costs of summoning the parties are first borne by the plaintiff, through the down payment of court fees unless there is another agreement determined by the judge.

II. In 2016, PERMA1/2008 was replaced by Supreme Court Regulation No.1 of 2016 with the same title (PERMA1/2016). The PERMA1/2016 added the criteria of good faith during the mediation process and provide legal risks to those who are in bad faith. There were also four criteria as the result of mediation, 1) successful mediation; 2) partly successful; 3) mediation failed; and 4) mediation cannot be conducted. It also allowed the possibility to obtain the Peace Deed as part of a court decision through a court lawsuit from the court in the event the disputants achieve peace outside the court using a certified mediator (not a mediator who is the judge of the court). In the event that the parties have gone through a certified mediator before submitting the claim to the court, then the court can allow the dispute to proceed to the trial in the court of law, with no more obligation to follow the court-annexed mediation. It also shortens the mediation period from 40 days to 30 days.

III. Besides the court-annexed mediation, there is also mediation that can be used to settle disputes outside the court (voluntary mediation). It is regulated in Law No.30 of 1999 regarding Arbitration and Alternative Disputes Resolution (the Arbitration and ADR Law). According to Article 1 point 10 of Arbitration and ADR Law, Alternative Dispute Resolution (or "ADR") shall mean "a mechanism for the resolution of disputes or differences of opinion through procedures agreed upon by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment." The term "mediation" is not defined in the law. The law only stated that in the event that the disputants fail to negotiate, then the disputants may, in writing, agree to appoint a mediator to resolve or settle their problems, discrepancies, or disputes. The provision is then followed further with the provision that states that "In the event, the disputants, after fourteen days, with the assistance of one or more experts or a mediator cannot come into resolution, then the disputants may seek an arbitration institute or alternative dispute resolution institute to appoint a mediator."

IV. The two provisions indicate that mediation can take place two times consecutively while settling a dispute. First, it may be conducted by an independent mediator, and when he/ she fails, the second medication will be conducted by another mediator appointed by an institution. The involvement of the independent mediator to mediate is no longer than 14 days. The institution-appointed mediator shall start mediation within 7 days after he/ she was appointed, and he/ she shall be able to settle the dispute within 30 days after the mediation started. In the event an agreement is reached between the disputants within 14 days by an independent mediator or 30 days by an institution-appointed mediator, the settlement must be made in writing in the form of an agreement and be registered in the First Instance Court where the disputant is domiciled. The law required that the settlement agreement should be performed in good faith by the party within 30 days after registration. On the other side, if the disputants fail to reach an agreement, the law allows the parties to agree in writing to settle the problems through ad-hoc arbitration or institutional arbitration.

V. In relation to business activities, the Arbitration and ADR Law stated that the dispute settlement process regulated in the Law will be applied to commercial activities, which include trading, banking, finance, investment, intellectual properties, and other similar business activities. This means that mediation under the Arbitration and ADR Law will be applied mostly for commercial and business activities. The concept is a little bit different from the process of court-annexed mediation which allows mediation for all aspects of human life, including divorce, separation, and inheritance issues. The court-

annexed mediation is not applicable for bankruptcy (since it has its mechanism to reach composition between the bankrupt debtor and all creditors), human rights issues, corruption, and other matters that have been assigned to a special court.

VI. Until today the use of mediation as a dispute settlement process and mechanism is not popular among businessmen in Indonesia. They prefer to settle through court or arbitration. In some instances, the court-annexed mediation succeeds in mediating the business dispute to reach a settlement agreement. This is because the mediation settlement is made in the form of a court verdict, which makes the mediation settlement can be enforced by court rulings. Because of that, more specific regulations on the mediation process, especially on the execution or enforcement of mediation settlement agreements, that are not attached to the court process, are needed.

CONCLUSION

From the above-mentioned finding and discussion, it can be concluded that mediation has been known and acknowledged as an alternative disputes resolutions mechanism to settle discrepancies or differences or disputes in the Indonesian community. The same has also been applied in business. Today, the government of the Republic of Indonesia has provided regulations and ways to settle disputes through mediation. One is court-annexed mediation, which must be followed and conducted throughout the whole process of settling disputes through court. The other is mediation conducted by the disputing parties without any involvement of the court (voluntary mediation) during the settlement process. However, the effectiveness of the implementation of the results of both successful mediations still requires court assistance. The unsuccessful mediation will go through the court proceedings for court-annexed mediation; meanwhile, for voluntary mediation, the parties may go through arbitration, if it is regulated in the main contract, or in general it will be settled by the court. To enhance and increase the interest for businessmen to directly use mediation as a conflict resolution mechanism, more detailed regulations, especially on the enforcement of the settlement agreement are still required.

REFERENCES

Laudjeng, H. (2003). *Considering Adat Court*. Jakarta: Seri Pengembangan Wacana HUMA.

Soepomo. (1984). *Chapters about Adat Law*. Jakarta: Pradnya Paramita.

Spencer, D. and Altobelli, T. (2005). *Dispute Resolution in Australia: Cases, Commentary and Materials*. Lawbook Co

The Republic of Indonesia. (1884). *Het Herziene Indonesisch Reglement* (S.1884 No 16, S.1941 No 44) regarding The Civil Procedural Law Enforced In Java And Madura.

The Republic of Indonesia. (1927). *Reglement voor de Buitengewesten* (S. 1927 No. 227) regarding The Civil Procedural Law Enforced Outside Java And Madura.

The Republic of Indonesia. (1993). *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie* (S.1933 No. 102) regarding The Rules of Court Structure and Judgment Policy.

The Republic of Indonesia. (1999). Law No.30 of 1999 regarding Arbitration and Alternative Disputes Resolution (State Gazette Of The Republic of Indonesia 1999 No. 138, Supplement No.3872.

The Supreme Court of the Republic of Indonesia. (2003). Supreme Court Regulation No.2 of 2003 regarding Mediation Procedures in Court.

The Supreme Court of the Republic of Indonesia. (2008). Supreme Court No.1 of 2008 regarding Mediation Procedures in Court.

The Supreme Court of the Republic of Indonesia. (2016). Supreme Court Regulation No.1 of 2016 regarding Mediation Procedures in Court.

Usman, R. (2003). *Alternative Disputes Resolution Outside the Court*. Bandung: Citra Aditya Bakti.

Vaugh, L.B. (1988). "Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections", 50 *Fla. L. Rev*. 679, https://digitalcommons.law.uw.edu/faculty-articles/429

Widjaja, G & Yani, A. (2000). *Series in Business Law: Arbitration*. Jakarta: Raja Grafindo Persada.

Widjaja, G. (2005). *Series in Business Law: Alternative Disputes Resolution*. Jakarta: Raja Grafindo Persada.