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**Dispute Resolution Process in Asia (Indonesia)**

# **Dispute Resolution Process in Indonesia**

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# PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. The Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) has conducted a three-year project titled “Economic Cooperation and Legal Systems.”

In the first year (FY 2000), we established two domestic research committees: Committee on “Law and Development in Economic and Social Development” and Committee on “Judicial Systems in Asia.” The former has focused on the role of law in social and economic development and sought to establish a legal theoretical framework therefore. Studies conducted by member researchers have focused on the relationship between the law and marketization, development assistance, trade and investment liberalization, the environment, labor, and consumer issues. The latter committee has conducted research on judicial systems and the ongoing reform process of these systems in Asian countries, with the aim of further analyzing their dispute resolution processes.

In the second year (FY 2001), we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. The democratic movements in the 1980’s resulted in the reforms of political and administrative system to ensure the transparency and accountability of the political and administrative process, human rights protection, and the participation of people to those processes. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies.

This year (FY 2002), based on the achievements of the previous years, we carefully reorganized our findings and held a workshop entitled “Law, Development and Socio-Economic Change in Asia” with our joint research counterparts to develop our final outcome of the project. Also, we extended the scope of our joint research and

added some new countries and topics. This publication, titled *IDE Asian Law Series*, is the outcome of latter research conducted by the respective counterparts (Please see the list of publications attached at the end of this volume). The final outcome of the project will be published separately in another series.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

March 2003

**Institute of Developing Economies**

## **Table of Contents**

**Preface**

**Table of Contents**

**General Introduction**

**Scope of the Study**

**Conduct of the Study**

### **Part I**

#### **Overview of the Dispute Resolution Mechanism in Indonesia**

##### **Chapter I**

###### **Dispute Resolution by the Court System**

###### **I.1 Overview of the Court System**

###### **I.1.1 Laws Governing the Court System**

###### **I.1.2 Court Structure**

**i) Jurisdiction of the Courts**

**ii) Hierarchy of the Courts**

**iii) Jurisdiction and Hierarchy Combined**

###### **I.1.3 Flow of Civil Litigation**

###### **I.2 Perception of the Parties on the Court System**

###### **I.2.1 Perception of the Indonesians**

**i) Perception of the Lower-Middle Class**

**ii) Perception of the Middle-Upper Class**

###### **I.2.2 Perception of the Expatriates**

###### **I.3 Problems Surrounding the Court System**

###### **I.4 Direction of Judicial System**

###### **I.5 Other Avenues for Seeking Resolution outside the Court**

## **Chapter II**

### **Alternative Dispute Resolution**

#### **II.1 Scope of the Term**

#### **II.2 Negotiation, Conciliation and Mediation**

##### **II.2.1 Background**

##### **II.2.2 Provisions Governing Negotiation, Mediation and Conciliation**

##### **II.2.3 ADR under the Arbitration Act**

#### **II.3 Arbitration**

##### **II.3.1 Background**

##### **II.3.2 Features of the Arbitration Act**

##### **II.3.3 Arbitration Centers**

###### **i) Arbitration with General Jurisdiction**

###### **ii) Specialized Arbitration**

##### **II.3.4 Problems Surrounding Arbitration Mechanism**

#### **II.4 Mandatory ADR**

##### **II.4.1 Background**

##### **II.4.2 Tax Court (Pengadilan Pajak)**

##### **II.4.3 Commission for Supervision of Business Competition (KPPU)**

##### **II.4.4 Labor Dispute Settlement Committees**

## **Part II**

### **Study on Dispute Resolution Process in Specific Cases**

## **Chapter III**

### **Consumer Dispute Resolution Process**

#### **III.1 Background**

#### **III.2 Nature of Dispute**

#### **III.3 Provisions on Dispute Settlement**

**III.3.1 BPSK as Center for Consumer Dispute Settlement**

**III.3.2 Provisions for Consumer Seeking for Relief**

**i) Categories of Plaintiff**

**ii) Out of Court Settlement**

**III.4 Consumer Dispute Resolution in Practice**

**III.4.1 Court Mechanism**

**III.4.2 ADR Mechanism**

**Chapter IV**

**Labor Dispute Resolution Process**

**IV.1 Background**

**IV.2 Laws Governing Labor Dispute**

**IV.3 Nature of Disputes**

**IV.4 Provisions on Dispute Settlement**

**IV.4.1 Under the Prevailing Laws**

**IV.4.2 Under the Industrial Dispute Settlement Bill**

**i) Negotiation**

**ii) Mediation and Conciliation**

**iii) Arbitration**

**iv) Court**

**IV.5 Labor Dispute Resolution in Practice**

**IV.5.1 Formal Mechanism**

**IV.5.2 ADR Mechanism**

**Chapter V**

**Environmental Dispute Resolution Process**

**V.1 Background**

**V.2 Nature of Dispute**

**V.3 Provisions on Dispute Settlement**

**V.4 Dispute Resolution in Practice**

**V.4.1 Court Mechanism**

**V.4.2 ADR Mechanism**

**Chapter VI**

**Summary**

**Bibliography**

**Appendix**

**Unofficial Translation of Law No. 30 Year 1999**

## **General Introduction**

The purpose of this study is to describe the dispute resolution process in Indonesia. For such purpose, the study will be divided into two parts. The first part will deal broadly on dispute resolution mechanism available in Indonesia. This part will be further divided into two chapters. The first chapter will focus on the court mechanism, meanwhile the second chapter will discuss on the alternative dispute resolution (hereinafter abbreviated as “ADR”) mechanism. The second part of the study will look closely on dispute resolution mechanism in specific areas, which are consumer, labor and environmental dispute mechanism. These three specific areas will be dealt with in three different chapters. The last chapter of this study will form the summary of the study.

Prior to embarking on the discussion of dispute resolution mechanism in Indonesia there are two important issues that have to be made clear from the beginning. The first issue concerns with the type of dispute dealt with in this study as this will affect the scope of the study and avoid unnecessary misunderstanding. The second issue has to do with how this study is conducted.

### **Scope of the Study**

There are many types of dispute, depending on the kind of legal personality involved in the dispute. Legal personality, depending on the area of law being considered can be various. Under private law, natural person and legal entity are the two legal personalities recognized by doctrine and national legislation. In the criminal law, the legal personality consists of the State representing the people and the culprit who is charge with criminal offence. In the administrative or constitutional law, the legal personality is government institutions and the people. In the international law, the legal personality can range from States, International Organizations, etc.

A good understanding of these different legal personalities is important since it has to do with how and where legal personalities seek remedy if dispute arise. If dispute occurs between legal personalities under private law, the dispute resolution and

institution where parties seek for settlement will be different from the dispute between legal personalities under international law.

There are five types of dispute based on the above framework. The first type of dispute is dispute between legal personalities under private law, namely, natural person and legal entity. This type of dispute is commonly referred to as private dispute. The dispute is characterized by the absence of public authorities. The second type of dispute is dispute among legal personalities under criminal law. This type of dispute can be referred to as public initiated dispute or popularly known as criminal case. The dispute concerns with an individual brought to trial at the initiative of the State. The individual is prosecuted and, if proven guilty, will be punished.

The third type of dispute is dispute among legal personalities under constitutional law. This kind of dispute involves dispute among institutions of State. The fourth type of dispute is dispute between State as defendant and individual as plaintiff. Some scholars refer to this type of dispute as public defendant dispute. The last type of dispute is dispute among legal personalities under international law. This is referred to as international dispute to which the resolution, mechanism and institutions are completely different from other types of dispute.

Based on the above four types of dispute, the present study will focus on private dispute. Hence, the study will consider only private dispute resolution process.

### **Conduct of the Study**

This study is conducted based on library and empirical research. The library research is employed mainly to depict the mechanism and institutions of dispute resolution as prescribed by the law.

The empirical research is used to portray the complete picture of dispute resolution mechanism and institutions in Indonesia. Any study on Indonesian legal system that deals exclusively on the written law will doom to fail in providing good understanding. It has to be made aware that in Indonesia, like most countries adopting western legal system, what is written under the law does not necessarily reflect the real world. Many in Indonesia consider the written law as the ‘theory’ not the ‘practice’ or the law in books rather than the law in actions.

Considering the above fact, the study will attempt to cover both aspects. However, it should be noted that the empirical research conducted in this study does not based on method common in social science research. The empirical research is based on what the author has experienced and observed while practicing law and also what is heard from the legal practitioners (judges, lawyers and the like) and those laymen who encounter with mechanism of dispute resolution.

## **Part 1**

# **Overview of the Dispute Resolution Mechanism in Indonesia**

## **Chapter I**

### **Dispute Resolution by the Court System**

#### **I.1 Overview of the Court System**

The court system in Indonesia has some resemblance with the court system in any other countries adopting modern (western) legal system. The resemblance is the direct result of European influence on the existing Indonesian legal system. The influence traces back from the period when the Netherlands colonized Indonesia. Although in those days, the Dutch government had never applied Dutch law to indigenous Indonesians and had made separate court, however soon after Indonesia declared its independence that was not the case.

The newly independent government had adopted the policy of continuing what used to be its colonial laws and institutions. Such kind of policy has been the normal practice for many newly independent States in the world in which it has no luxury of starting from the scratch. For various reasons, newly independent government has to continue whatever the colonial or occupying power had left them. This is one explanation for many countries to have resemblance in their legal system with those of European countries.

##### **I.1.1 Laws Governing the Court System**

Article II of the Transitional Provisions of the Constitution provides basis for the policy of continuing Dutch laws and institutions. The provision states that “(A)ll state institutions and laws shall continue to function as long as new ones have not been established or introduced in accordance with the Constitution.”<sup>1</sup> This article became the basis for continuing the colonial court system, including its rule of procedures. They have continued to be applicable until amending laws are promulgated.

The first attempt to replace the law governing the court system was made in 1948. At the time, the government issued Regulation Number 19 concerning Judicial Bodies

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<sup>1</sup> Article II of Transitional Provision of the Constitution.

within the Republic of Indonesia (*Peraturan tentang Badan-badan Pengadilan dalam Daerah Republik Indonesia*) whereby the court system was structured into three tiers, namely, the District Court (*Pengadilan Negeri*), the High Court (*Pengadilan Tinggi*), and the Supreme Court (*Mahkamah Agung*).<sup>2</sup> Unfortunately, the regulation never takes into effect as the Dutch clamped down on the ‘cessations’ of the colony.<sup>3</sup>

In 1964, the government introduced an Act governing the court system replacing the Dutch colonial’s. The Act is dubbed as the Act on Basic Provisions of Judicial Power (the Act and its amendments will be referred in this study as the “Judicial Power Act”).<sup>4</sup>

The Judicial Power Act divides horizontally the court system into four jurisdictions, namely, the General Tribunal (*Peradilan Umum*), Religious Tribunal (*Peradilan Agama*), Military Tribunal (*Peradilan Militer*) and Administrative Tribunal (*Peradilan Tata Usaha Negara*).<sup>5</sup> The Act further divides the four tribunals vertically into three tiers, namely, the court of first instance, the court of appeal and the court of cassation.

In 1969, the government repealed the Judicial Power Act due to its inconsistency with the Constitution.<sup>6</sup> However, the Act was not followed immediately by the amending Act. The 1969 Act states that repeal would only take effect when amending Act has been promulgated. Thus, theoretically the Judicial Power Act of 1964 at the time it was repealed is still effective.

A little less than one year after the government repealed the Judicial Power Act of 1964 by the 1969 Act, an amending Act on the court system was promulgated. The new Judicial Power Act was promulgated in 1970 and dubbed as Act 14 as it bears number

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<sup>2</sup> See: R. Tresna, *Peradilan di Indonesia dari Abad ke Abad (Indonesian Judiciaries from Century to Century)*, (Jakarta: W. Versluys NV, 1957), 82.

<sup>3</sup> Although Indonesia proclaimed its independence on August 17, 1945, the Dutch government did not recognize this and treated the proclamation by Soekarno and M. Hatta as cessationist movement which it had the authority to take forceful actions under its internal law. It was not until 1949 did Indonesia gain recognition as a full fledged sovereign state when the Dutch government finally recognized as such.

<sup>4</sup> Act Number 19 of 1964, State Gazette No. 107 Year 1964.

<sup>5</sup> Judicial Power Act art. 7 (1).

<sup>6</sup> The Article which is inconsistent with the Constitution is Article 19 which states that, “For the interest of revolution, dignity of State and Nations or the urgent interest of society, the President may intervene in judicial affairs.”

14.<sup>7</sup> The Act amended completely the Judicial Power Act of 1964, although it has maintained some basic principles.

Act 14 of 1970 is currently the law governing the court system in Indonesia. In addition, other Acts have stipulated some provisions of the Act in much detail. The detail provisions on the Supreme Court, for example, are further elaborated under Act 14 of 1985 (“the Supreme Court Act”). The detail provisions on the General Tribunal are provided under Act 2 of 1986 (“the General Tribunal Act”).<sup>8</sup>

The Judicial Power Act of 1970 on several occasions has been partly amended.<sup>9</sup> There are two kinds of amendments on the Act, referred to here as the Act which directly amend the articles of the Judicial Power Act of 1970 and the Act which indirectly amend the Judicial Power Act of 1970. The Act which directly amend the Judicial Power Act is amendment that exclusively deals with amending the articles embodied in the Judicial Power Act of 1970. Meanwhile, the indirect amendment is amendment, which does not directly amend the articles of Judicial Power Act of 1970, but it has been affected by the promulgation of other Acts.

The direct amendment was made in 1999, the first of its kind since the Judicial Power Act was promulgated in 1970.<sup>10</sup> One of the purposes of the amendment is to foster judicial independence. The judicial independence was non-existent under the Judicial Power Act of 1970 as the organization, administrative and financial aspects of the four Tribunals of lower and appellate court were under the purview of the executive branch of the government.<sup>11</sup> The executive branch responsible does not rest in one department, but different court jurisdiction rests in different department. The General and Administrative Tribunal is under the purview of the Department of Justice and Human Rights, the Religious Tribunal is under the purview of the Department for Religious Affairs, and the Military Tribunal is under the purview of Department of Defense.

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<sup>7</sup> Act 14 Year 1970, State Gazette No. 74 Year 1970.

<sup>8</sup> Provision on this matter is provided under article 12 of the Judicial Power Act.

<sup>9</sup> The term amendment here is not limited to actually changing the wordings, but also includes interpretation of the law, be it wide or narrow interpretation.

<sup>10</sup> Act 35 Year 1999 concerning the Amendment of Act 14 on Judicial Power.

<sup>11</sup> Judicial Power Act of 1970 art. 11 (1). The article provides that, “(I)nstitutions carrying out judicial power provided under article 10 (1) are under the purview of each Department.”

The amendments of the Judicial Power Act will effectively transfer the authority currently held by the executive branch to the judiciary. At the initial stage, the Department of Justice and Human Rights became the first executive branch with the obligation to transfer the authority on the General and Administrative Tribunal to the Supreme Court. The transfer is currently underway and has to be completed by the year 2004 as provided under the amending Act.<sup>12</sup> As for other court jurisdiction, the transfer from its respective department to the Supreme Court will soon follow, although no time schedule has been fixed.

The indirect amendment of the Judicial Power Act has occurred several times. To name just a few examples, the Judicial Power Act has been amended by the amendment of Bankruptcy Act of 1998, the introduction of the Human Rights Court Act of 2000, and the promulgation of the Nanggroe Aceh Darussalam Act of 2001.<sup>13</sup>

The Bankruptcy Act of 1998 establishes a special chamber within the District Court referred to as the commercial court. The commercial court, thus far, has jurisdiction on bankruptcy matters and most of the intellectual property rights dispute. However, not all District Court has commercial court. Currently there are five commercial courts in operation within the District Court of Central Jakarta, Surabaya, Semarang, Medan and Makassar. Since 1998 the commercial court in the Central Jakarta District Court has received a quite number of cases. While in the other commercial courts the number of cases has been insignificant, and some have yet to receive any case.

The Human Rights Court Act establishes the Ad Hoc Human Rights Tribunal also a special chamber within the District Court dealing with individuals accused of gross human rights violation. Currently such tribunal has only been established in the Central Jakarta District Court.

The Nanggroe Aceh Darussalam Act establishes the Syari'ah Tribunal (*Mahkamah Syari'ah*) which is different from the Religious Court. The Religious Court

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<sup>12</sup> Amendment of Article 11 of Judicial Power Act. This amendment will also have consequence to General Tribunal Act art. 5 par 2 of which stated that the supervision of organization, administration and financial matters shall rest upon the Ministry of Justice.

<sup>13</sup> The Amendment to the Bankruptcy Act was promulgated in 1998 by virtue of Act No. 4 Year 1998; the Human Rights Court Act was promulgated by virtue of Act Number 26 Year 2000, State Gazette Number 208 Year 2000; the Nanggroe Aceh Darussalam Act was promulgated by virtue of Act Number 18 Year 2001, State Gazette Number 114 Year 2001.

has jurisdiction on family (civil) matters, meanwhile the Syari'ah Tribunal will have jurisdiction on cases involving Muslims who are violating the syari'ah law.

It should be noted that at the time this study is conducted, there is a proposal to amend completely the Judicial Power Act of 1970.

### **I.1.2 Court Structure**

The court structure in Indonesia is complex.<sup>14</sup> It is not as easy as one would imagine after reading the first two paragraphs of Article 10 of the Judicial Power Act. The paragraphs read as follows,

- (1) The power of the judiciary shall rest on the Court within the jurisdiction of (a) General Court; (b) Military Court; (c) Religious Court; and (d) Administrative Court.
- (2) The Supreme Court is the highest State Judicial Tribunal.

Based on the reading of first paragraph one would think that the Court is divided into four chambers. While reading on the second paragraph, the hierarchy of the court is based on a two-tier system as the High Court is not mentioned. Unfortunately, such is not the case.

To understand the court structure, it is important to distinguish between jurisdiction issue, which this study will refer to as 'Tribunal,' and the hierarchy of the court.

#### **i) Jurisdiction of the Courts**

The jurisdiction of courts is divided into four tribunals, namely, the General Tribunal, Religious Tribunal, Military Tribunal and Administrative Tribunal.. These tribunals have their own jurisdictions, which is referred in Indonesian as the '*Peradilan*'. To ascertain the jurisdiction of each tribunal, as general rule, one has to run several tests. The first test is to ascertain whether the dispute is a private dispute. If the dispute were a private one, the next test would be whether the dispute is family law matters between Muslims. The second test is whether the dispute is a public initiated dispute. If that is the case, it has to be ascertained whether the accused is civilian or an active member of the

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<sup>14</sup> For further reading on the history of Indonesian court, **see:** Koerniatmanto Soetoprawiro, *Pemerintahan & Peradilan di Indonesia: Asal Usul dan Perkembangannya* (The Government and Judiciary in Indonesia: The History and Its Development), (Bandung: Citra Aditya Bakti, 1994).

armed forces. The third test will be to ascertain whether the case in question is a public defendant dispute.

Based on the tests, the jurisdiction of the courts can then be decided. Private dispute, except for cases on family law matters between Muslims, falls under the jurisdiction of the General Tribunal (*Peradilan Umum*). The family law matters between Muslims will fall under the Religious Tribunal (*Peradilan Agama*). The distinction in this sense is based on two criteria. First is the nature of the case and second the religion of the disputed parties.

Public initiated dispute, unless committed by member of the armed forces, falls under the jurisdiction of General Court (*Peradilan Umum*). Those who are members of the armed forces will be tried in the Military Tribunal (*Peradilan Militer*) even though the offence is not military in nature. Here the distinction is not on the ground of what offence is committed, rather on the ground of whether or not the culprit belongs to the military.

Amid public criticism of providing military personnel with special status, the Amendment of the Judicial Power Act has amended this rule. As it stands now, the General Tribunal has jurisdiction over military personnel committing offense under the criminal code, unless otherwise decided by the Chief of the Supreme Court.<sup>15</sup>

Last, but not least, any public defendant dispute will fall under the jurisdiction of Administrative Tribunal (*Peradilan Tata Usaha Negara*).

There are two points should be noted when discussing court's jurisdiction. The first point is the categories of dispute the General Tribunal have. From the perspective of General Tribunal it has the jurisdiction to hear both private dispute (civil cases), except for Muslims family law matters, and public initiated dispute (criminal cases), except for criminal offence under the military criminal code.<sup>16</sup>

The second point to be noted is, when determining which court has jurisdiction to a case in question is not as clear-cut as provided under the law. There have been many instances where conflict of jurisdictions between tribunals had occurred. The conflict of jurisdiction has been further worsen by the fact that defendant lawyer's usually made

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<sup>15</sup> Act 35 Year 1999 art. 22.

<sup>16</sup> General Tribunal Act art. 50 provides that the District Court shall have the authority to examine, decide and handle criminal and civil case at the first instance.

argument that certain court has no jurisdiction and the case should be tried in other court's jurisdiction. In addition, a party who fails pursuing at one tribunal will attempt to seek remedy from other tribunal.

In the event there is conflicting jurisdiction between courts, the Supreme Court under the Supreme Court Act has the final say which court has the jurisdiction on a case in question.<sup>17</sup> Of course, it will require time before the Supreme Court finally decides on the issue.

## ii) **Hierarchy of the Courts**

The next issue is with respect to the hierarchy of the courts. Similar to any other country, hierarchy relates to the issue of which court has the higher authority.

Under the Judicial Power Act, the court hierarchy consists of three tiers. The lowest hierarchy is the lower court, which is referred in Indonesian as '*Pengadilan*'.<sup>18</sup> The court of first instance is established based on Presidential Decree.<sup>19</sup>

The next hierarchy is the court of appeal, which is referred to as '*Pengadilan Tinggi*.' The appellate court is established in each province by an Act.<sup>20</sup>

The apex of Indonesian courts is the Supreme Court which is referred to as '*Mahkamah Agung*.'<sup>21</sup> The Supreme Courts is established with an Act. Constitutionally the Supreme Court is at the same level as the President and the House of Representative (DPR). The Supreme Court as court of last instance is vested under the Supreme Court Act with three broad powers.<sup>22</sup> First is the power to examine and decide cassation application.<sup>23</sup> Second is the power to examine and decide conflicting jurisdiction between tribunals.<sup>24</sup> The third is the power to re-open or re-examine a case that has enforceable

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<sup>17</sup> Supreme Court Act art 56.

<sup>18</sup> Jurisdiction and hierarchy is being distinguished by the Judicial Power Act. Reference to jurisdiction in Indonesian is referred to as '*Peradilan*' (with "ra" in the middle) and hierarchy is referred to as '*Pengadilan*.' (with "ng" in the middle).

<sup>19</sup> *Id.* art. 7 provides that the establishment of District Court is based on a Presidential Decree.

<sup>20</sup> *Id.* art. 9 provides that the establishment of High Court is based on an Act.

<sup>21</sup> Judicial Power Act art. 10 (2); Supreme Court Act art. 2.

<sup>22</sup> The Supreme Court is also vested with other powers, such as the judicial review, supervision of courts, supervision of the judges.

<sup>23</sup> Supreme Court Act art 28 (1) a.

<sup>24</sup> *Id.* art 28 (1) b.

verdict, referred to as *Peninjauan Kembali* or request civil in other jurisdiction (hereinafter referred to as “PK”).<sup>25</sup>

### iii) Jurisdiction and Hierarchy Combined

The hierarchy of the court if combined with the jurisdiction of the court will show that each tribunal will have different lower and high court, but they all will have the same Supreme Court.

In the General Tribunal, the courts consist of three tiers. The lowest is the District Court which is referred to as ‘*Pengadilan Negeri*’. *Pengadilan Negeri* has the power to examine, decide and handle criminal and civil cases at the first instance.<sup>26</sup> The appellate court is the High Court which is referred to as ‘*Pengadilan Tinggi*’. *Pengadilan Tinggi* has two powers, namely, to examine criminal and civil cases at the appellate level and to decide conflicting jurisdiction between the courts of first instance under its jurisdiction.<sup>27</sup> The court of last instance is the Supreme Court.<sup>28</sup>

In the Religious Tribunal, the courts consist of three tiers. The lower court is the Religious Lower Court referred to as ‘*Pengadilan Agama*.’ The appellate court is the Religious High Court referred to as ‘*Pengadilan Tinggi Agama*.’ The court of last instance is the Supreme Court.

In the Military Tribunal, the courts consist of three tiers. The lower court is the Military Lower Court referred to as ‘*Pengadilan Militer*.’ The appellate court is the Military High Court referred to as ‘*Pengadilan Tinggi Militer*.’ The court of last instance is the Supreme Court.

Lastly, in the Administrative Tribunal, the courts also consist of three tiers. The lower court is the Administrative Lower Court referred to as ‘*Pengadilan Tata Usaha Negara*.’ The appellate court is the Administrative High Court referred to as ‘*Pengadilan Tinggi Tata Usaha Negara*.’ The court of last instance is the Supreme Court.

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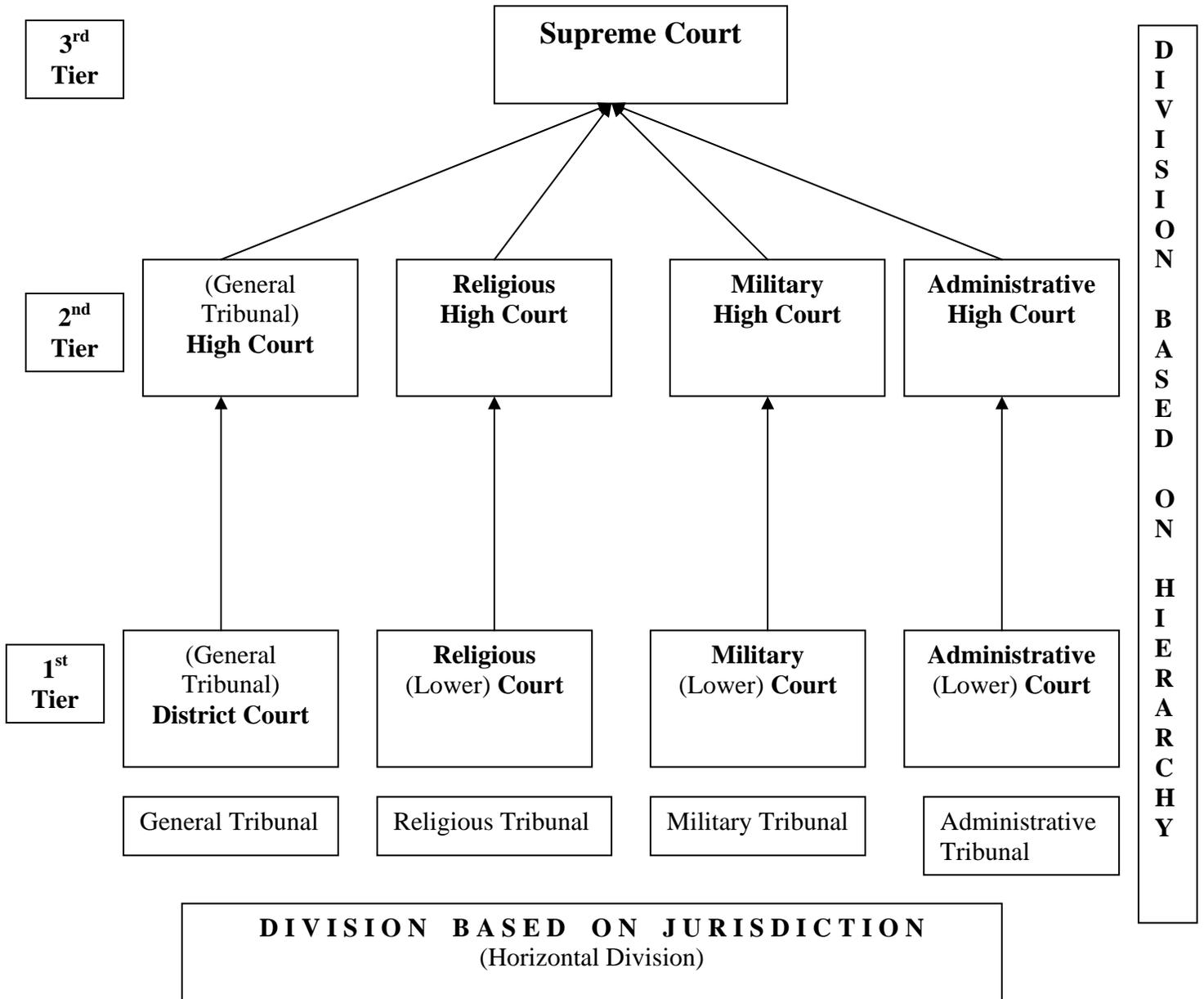
<sup>25</sup> *Id.* art 28 (1) c, art. 67 until 76; Judicial Power Act art. 34.

<sup>26</sup> General Tribunal Act art. 50.

<sup>27</sup> *Id.* Art 51 (1) and (2).

<sup>28</sup> Under General Tribunal Act art. 3 (1) it is stated that the Judicial Power in the General Tribunal will be exercised by (a) the District Court, and (b) the High Court. Furthermore, under Article 3 par 2 it is stated that the apex of General Tribunal is the Supreme Court as the highest court.

The following is the illustration of court structure based on the jurisdiction and hierarchy.



### I.1.3 Flow of Civil Litigation

This sub-section will depict in a condensed manner the flow of civil litigation process in Courts of General Tribunal.<sup>29</sup> It should be noted from the start that the depiction is an oversimplification of the process. The actual process is more complicated and there are many deviations from what the law stated from one court to another. The intention of providing this sub-section is for the reader to understand the overall process by leaving the nuts and bolts.

Indonesia to date has yet had its own rule of civil procedures. The rule of civil procedures currently used at courts is laws inherited from the Dutch colonial. There are three Dutch civil procedure laws being used, although not wholly of the articles. First is the Revised Indonesian Rule of Procedures or the *Reglemen Indonesia yang Diperbarui* (RIB) or in Dutch, *Het Herziene Indonesisch Reglement* (HIR).<sup>30</sup> Second is the Rule of Procedures for the Overseas (outside Java) or the *Regelemen Daerah Seberang* (RDS) or in Dutch *Rechtsreglement voor De Buitengewesten* (RBg).<sup>31</sup> The third is *Reglement op de Rechtsvordering* (Rv).<sup>32</sup> These three rule of procedures become the basis for civil litigation process in court.

There are two forms of civil litigation. First, is the civil litigation in the form of claim, and second is in the form of petition.

Claim is a lawsuit between, at least, two parties in adverse or contentious manner. A claim is initiated by a plaintiff against a defendant.

Petition, on the other hand, is a request from petitioner to the court to exercise its power, such as person's birth or death. However, there are petition processes whereby the court may hear objection from the respondent connected with the case. In a bankruptcy case, if creditor makes the request for the court to declare debtor bankrupt, the court will

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<sup>29</sup> For this purpose the study used the following books on the Law of Civil Procedure: R. Soepomo, *Hukum Acara Perdata Pengadilan Negeri* (The Law of Civil Procedure in District Court), (Jakarta: Percetakan Penebar Swadaya, 2002); Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek* (The Law of Civil Procedure in Theory and Practice), (Bandung: Alumni, 1986).

<sup>30</sup> State Gazette 44 Year 1941.

<sup>31</sup> State Gazette 227 Year 1927.

<sup>32</sup> State Gazette 52 Year 1847 and State Gazette 63 Year 1849.

hear the argument from the debtor as respondent. In such case, it can be argued that the petition process is also adversarial.

A typical civil case begins when plaintiff registers its claim to the registrar of certain District Court. Subsequently, the head of the District Court will decide whether to form a single or panel of judges. Most cases are heard by panel of judges. The head of District Court then will appoint the judge or judges who will sit for hearing, examination and, finally, issue decision. In addition, the court will then schedule the date of the first hearing and will summon the defendant to appear before the court on such date. The court will request the bailiff to give the summon letter in person or, if the address is unknown, advertise such summon in the newspaper.

There are eight hearings in the court proceedings after registration until the judge or panel of judges renders its verdict.

At the first court hearing, if the plaintiff and defendant attend the session, the panel of judges will ask both parties whether they have employed negotiation or conciliation prior appearing before the court. If the parties have not employed the amicable settlement, the panel of judges have the obligation to mediate or conciliate the two contending parties.<sup>33</sup> At this point of time the court session will be temporarily discontinued for parties to reach amicable settlement.

If the effort is successful, the parties will draw an amicable agreement (*Akta Perdamaian*).<sup>34</sup> The amicable agreement will have the same effect as court judgment, in the sense that it can be enforceable. If amicable settlement failed, the first court hearing will proceed.

In the event the defendant or its attorney does not appear, the panel of judges will schedule another day and ask the defendant to be properly summoned. The panel of judges, however, may issue default judgment in the absence of the defendant. In the event the plaintiff or its attorney fails to appear on the scheduled day, the judge or panel of judges will declare the lawsuit as null and void.

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<sup>33</sup> Article 130 HIR and 154 RBg.

<sup>34</sup> An amicable agreement, however, can be challenged by third party even though it has been in the form of enforceable verdict. **See:** Victor M. Situmorang, Perdamaian dan Perwasitan dalam Hukum Acara Perdata (Amicable Settlement and Arbitration under the Law of Civil Procedure), (Jakarta; Rineka Cipta, 1993) 51.

The first court hearing starts with the plaintiff stating its case, the argument, the legal basis and statement of what the court should decide. The plaintiff does so by reading the written lawsuit. Reading lawsuit is common in litigation process in Indonesia as the process is more of ‘paper’ process rather than oral. After hearing the plaintiff’s lawsuit, the panel of judges will give opportunity for the defendant to rebut in which the hearing enters to its second court session. However, it is rare for the defendant to rebut on the same day. The judge or panel of judges will postpone the rebuttal session so to give the defendant time to prepare the written rebuttal. The judge or panel of judges will schedule the time for the defendant to rebut.

The second court hearing, the court will hear the defendant read its written rebuttal, referred to as *konpensasi*. At this point of time the defendant while stating its rebuttal has the option to file a fresh lawsuit related to the case against the plaintiff referred to as *rekonpensasi*. This is when the process becomes complicated, since the defendant becomes the plaintiff at the same time. The judge or panel of judges in this kind of process will have to issue two verdicts but at the same time, hearing the court.

The third court hearing will hear the plaintiff’s rebuttal against the argument made by the defendant on the last court hearing. At the fourth court hearing, the panel of judges will hear the defendant argument based on the plaintiff’s rebuttal. The fifth and sixth court session are dedicated to examining evidence, including presenting and hearing the witnesses and, if any, expert witnesses. The plaintiff will be given the first opportunity to present evidence. The subsequent session is given to the defendant.

The seventh court hearing is for the court to hear both parties to give each of their conclusions of the case. The eighth and last court hearing is when the panel of judges read its verdict.

In a regular court hearing, one will not expect to receive court verdict, at the earliest, seven to eight months after a lawsuit is submitted. This is irrespective of circular letter from the Supreme Court requesting court to issue verdict not more than 6 months.<sup>35</sup> The long process is usually due to postponement in each of the court hearing for various reasons, such as the judge is taken ill, the defendant or plaintiff asks more time to prepare

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<sup>35</sup> Circular Letter of the Supreme Court Number 6 Year 1992.

the written pleadings. However, the delay has in many occasions been used as outright strategy from lawyers in an attempt to slowdown the proceedings.

The court verdict once issued will not immediately take effect and become enforceable. The verdict will take effect only after the lapse of 14 days provided no appeal is submitted. If parties submit appeal, which is often the case, the verdict does not take effect and is unenforceable.

An appeal to the High Court will take another 6 to 8 months. The High Court will review the case on the basis of materials submitted by parties at the District Court. In this regard, the High Court procedure is more of lawyer's game. The parties in dispute will not be physically involved. The High Court's verdict will take effect and become enforceable within 14 days if no cassation to the Supreme Court is submitted. Again, parties, in particular the losing party, will most certainly submit cassation. Currently, there are no strict restrictions, except time expiration, to challenge a verdict of the High Court's verdict to the Supreme Court.<sup>36</sup> In addition, there is no mechanism to examine the admissibility of cassation based on sound legal grounds.

The Supreme Court can overrule a verdict of its lesser court based on three grounds. The first ground is whether the court that had examined a particular case in question lacks jurisdiction or had acted beyond its jurisdiction.<sup>37</sup> Second, whether the court had applied the law incorrectly or violated the prevailing law.<sup>38</sup> Lastly, whether the lesser court had neglected in satisfying requirements imposed by certain law to which such law provides that failing to do so will have the consequences of nullification of the verdict.<sup>39</sup>

A review of a case at the Supreme Court will be based on materials presented at the District Court. In this process, the Supreme Court will not admit new evidence. The process at the Supreme Court is the same as in the High Court to which parties in dispute will not be physically involved.

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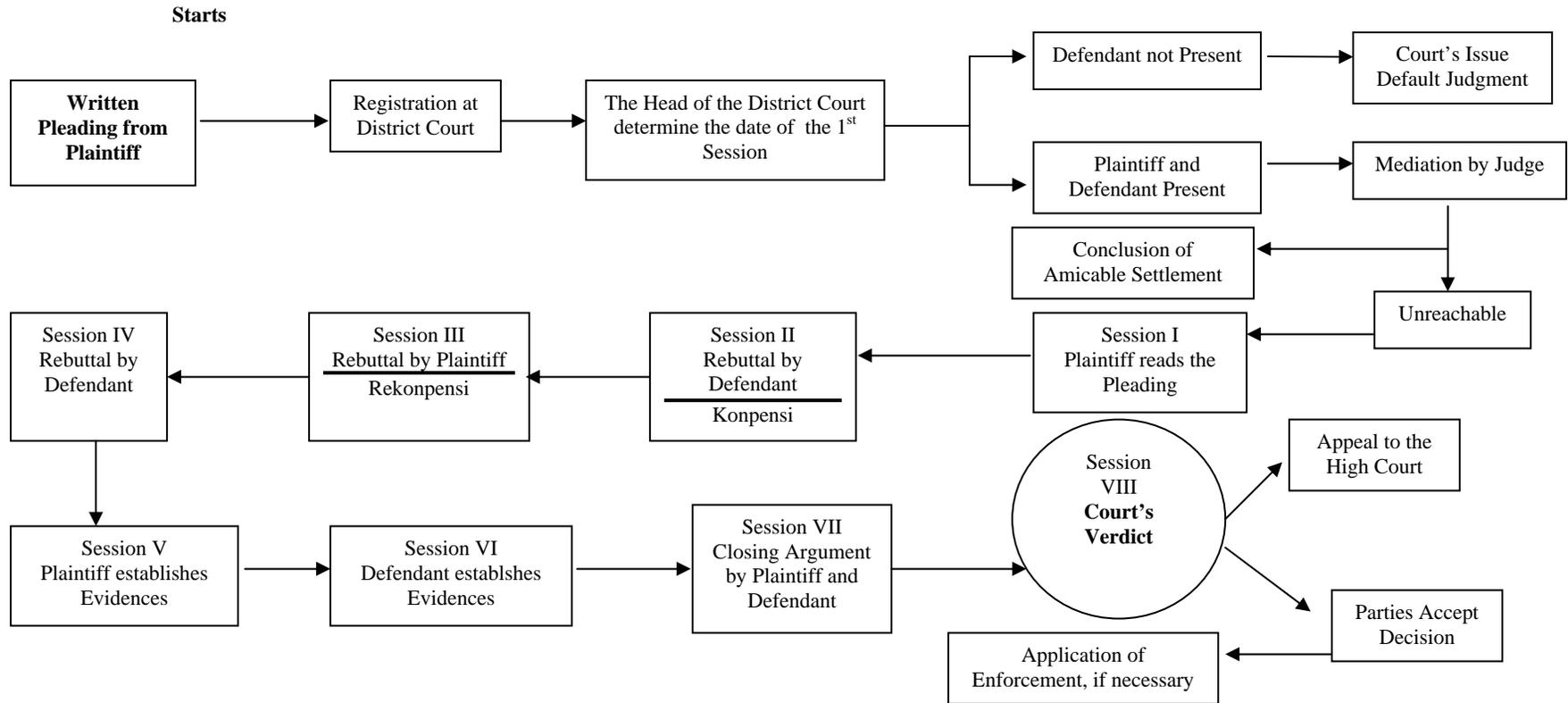
<sup>36</sup> Recently there is a suggestion being discussed to impose rigorous requirement for cassation so to avoid backlog cases at the Supreme Court.

<sup>37</sup> Supreme Court Act art. 30 (a).

<sup>38</sup> Supreme Court Act art. 30 (b).

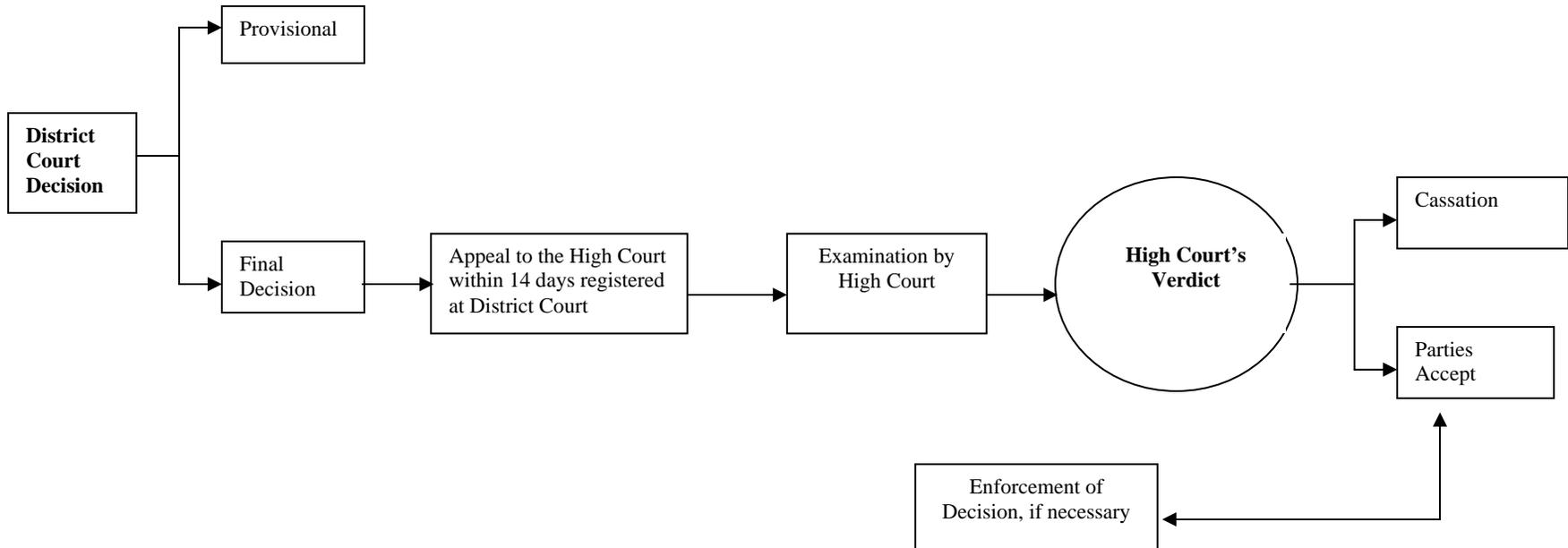
<sup>39</sup> Supreme Court Act art. 30 (c).

## Flow of Civil Litigation

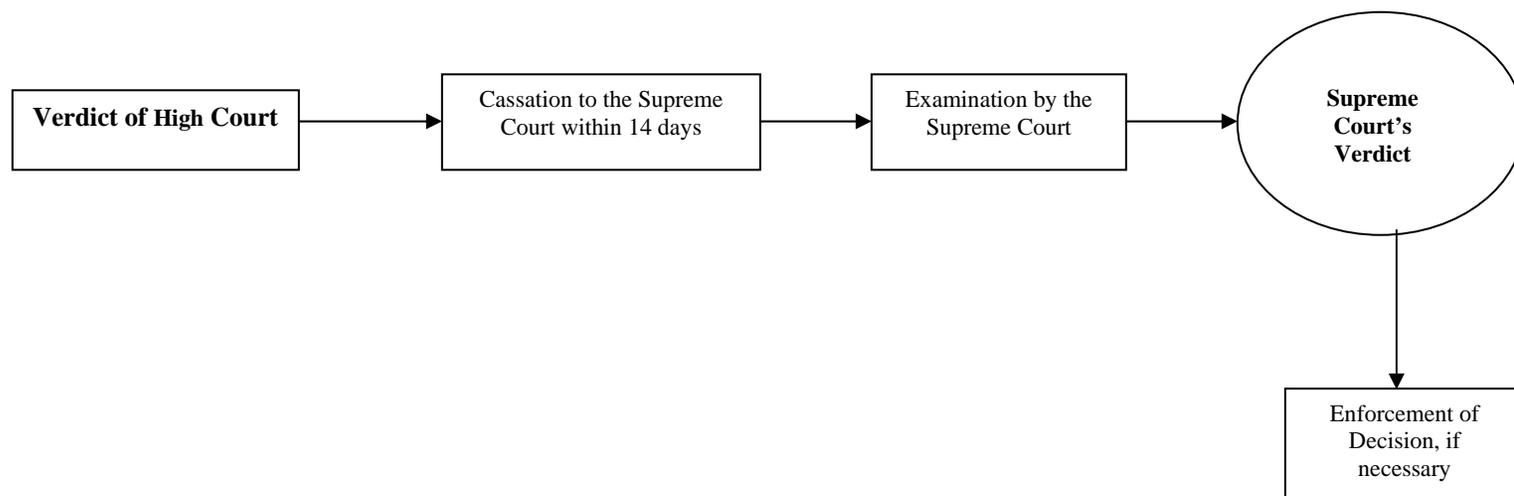


## APPEAL

### 1. APPEAL TO THE HIGH COURT



## 2. CASSATION TO THE SUPREME COURT



The duration for the Supreme Court to review a case submitted for cassation can take much longer than District or High Court. This is because there are too many pending cases at the Supreme Court.

A case will not necessarily end once the Supreme Court renders its verdict. The next challenge is to enforce the verdict. There had been occurrence whereby enforcement is delayed because the Chief Justice of the Supreme Court requested the enforcing court to do so. The difficulty of enforcement can also derive from the indecisiveness of the judge enforcing the judgment, especially when other legal actions are being pursued on the executed assets. Other source of difficulty stems from the fact that some persons or legal entities facing execution are just too powerful and above the law that they can just ignore execution. In addition, bribes from the losing party have been suggested as another source of difficulty in enforcement.

A case that has enforcement effect can be requested for PK by one of the parties in dispute provided such party furnishes new evidence that has bearing in reverting the decision. Although PK is an extraordinary legal recourse, almost all of the losing party will attempt to do so. It should be noted that PK, under the law, does not impede enforcement of a judgment. Nonetheless, in practice, submission of PK may delay enforcement.

All in all settling private dispute through court mechanism can be very exhaustive and painstaking experience.

## **I.2 Perception of the Parties on the Court System**

In this section, ‘perception of the parties’ will be divided into two categories. The first category is the perception of Indonesians and the second category is the perception of foreigners conducting business in Indonesia (hereinafter referred to as the “Expatriates”).

### **I.2.1 Perception of the Indonesians**

Although in the last 3 to 5 years the number of cases brought to court in big cities have steadily increased, however it has not changed much the attitude of the general public in Indonesia toward the court as a place to settle dispute.

Indonesian society, like most Asian societies, is not familiar and accustomed to the concept of law, legal procedure and court system. It can be argued that the Indonesian society belongs to a non law-minded society as opposed to most Western societies who are law-minded society. Law as conceived by the Western societies is not the same as Asian societies. In addition, the modern legal system does not have its root on the Asian societies. These societies tend to maintain harmony to which dispute will be settled not by determining who is right or who is wrong. Instead, the contending parties in solving the dispute will base themselves on common understanding, or the parties in dispute just follow what their community leader has to say. Therefore, dispute settlement employing the law and court system is foreign to the non-law minded society.

Unfortunately, in recent times the 'Asian way' of settling dispute has been plaguing with many deficiencies. The reasons, among others, are abuse by the person looked up as leader, the shift in the mind set of younger generation, the distrust toward traditional system as opposed to modern one. Indonesian society is by no means an exception. The society at this stage is in the transition period of shifting from non law-minded society toward law-minded society. The society is torn between the past and the future, the non law-minded and law minded, the traditional system and the modern system, even the Asian value and Western value. Indonesian society is in ambiguity. As such, it has to be noted that it is difficult to make generalization of the perception of Indonesians toward law and the court system.

Therefore, this study will sub-divide the Indonesian society into two categories, namely the lower-middle class and the middle-upper class. Most population in Indonesia belongs to the lower-middle class who live in villages with some basic education, but often none at all. In contrast the middle-upper class mostly live in the cities and enjoy sufficient education, at least, high school level.

The study argues that most Indonesians dislike and, if possible, avert settlement through court. For them court settlement is not the first option for settling dispute, rather it is the last alternative if other means is not available or have failed. For this purpose, the present section will analyze the reasons behind such reluctance on the two classes.

**i) Perception of the Lower-Middle Class**

Indonesia is a huge country with many remote areas unreachable by transportation and, sometimes, mass media. It has many provinces and regencies where economic, social and education gaps between them existed. Against this backdrop, the lower-middle class does not have good exposure or awareness of the formal legal system. People who belong to this class conceive law more of a sanction above other meanings of law. For this reason, they felt that they have to keep away from the law.

In their understanding when they relate to law, they will think of the government. Law is nothing but an act of government. As such, they never think that law could settle their dispute. If they have dispute, they will settle it amongst themselves or refer it to community and religious leaders.<sup>40</sup> This has been the tradition when they settle dispute for many years. They feel there is no reason to find other possibilities of settling dispute. It is not surprising if in a remote area a District Court only handles 20 to 30 cases per year and mostly public initiated dispute (criminal case).

The low awareness of the court system and legal procedure has been another reason for the lower-middle class in exploring formal legal remedies for their dispute. To start with, they have lack of knowledge of what to do under the law if dispute arises. If they know that court is an alternative, they will assume that their dispute is unworthy of court resolution. According to them, the court is a place where the have settle their dispute.

The lowe-middle class people are deterred by many physical attributions of the court. First of all, the judges are wearing robes and formal attire. Secondly, there is formal procedure to be followed. Third, the presence of police officer and prosecutor wearing uniform can be easily seen, as the District Court handles civil and criminal cases. Lastly, even the court's buildings look scary, as there is a place for restraining person accused of criminal offence waiting for his/her case to be heard.

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<sup>40</sup> According to Ohorella and Salle, "(I)f dispute arises among villagers, the disputes are rarely brought to court for settlement. The parties in dispute will be much happier and prefer most to settle their dispute in forums available within the village community and settle the dispute amicably." H.M.G. Ohorella and H. Aminuddin Salle, "Penyelesaian Sengketa Melalui Arbitrase pada Masyarakat di Pedesaan di Sulawesi Selatan (Dispute Settlement through arbitration in Village Community in South Sulawesi)," in: Agnes M. Toar et. al., *Arbitrase di Indonesia* (Arbitration in Indonesia), (Jakarta: Ghalia Indonesia, 1995), 106.

Furthermore, the people of lower-middle class will be reluctant to enter courthouse with plain clothes and wearing sandals. Indeed the court is unfriendly to them and they would not dare to settle their dispute by this mechanism.

In addition, those who belong to this class have prejudged that settling dispute through court would require a lot of money. Moreover, they do not know how to initiate legal process in court or who to approach. For them, access to justice is minimal or even unreachable.

Culture has partly played a role for the lower-middle class in avoiding court settlement. They usually believe that dispute resolution through court may have the consequence of damaging relationship with the contending party whom they know from childhood and interact with on a day-to-day basis. The court mechanism is just not suitable with the people's belief that harmony and peaceful relationship should be maintained. They even have concern that the court process may cause greater problems, instead of solving problem. They are afraid that their family may be socially affected. Moreover, they may have to face isolation by surrounding neighbor who disapproves court settlement. This is as result of many middle-lower class people who are unable to distinguish between civil and criminal cases. They will assume that those who go to court are criminals. In addition, the parties in dispute are also fear of losing face when they lost the case.

In view of the above, the lower-middle class will avoid going to the court at all costs. However, those who seek to resolve their problem through the court, it is more because they have no other choice. Their problem has to be submitted to court for remedy.

## **ii) Perception of the Middle-Upper Class**

Perception of the middle-upper class toward court dispute settlement is strikingly different from the lower middle class. This is due to legal awareness among people in the cities is much higher compared to those who live in remote area. In addition, the familiarity towards law, thanks to the mass media, has been improving in the last 10 years or so. Hence, they have become accustomed to the concept of law and the court system. They can easily distinguish between criminal and civil matters. They are not deterred to

come to the courthouse. They also have good understanding of where to go if they want to settle dispute through court. In some instances, they will solicit lawyers, although there are occasions where lawyers approach them. The people who belong to the middle-upper class do not have any problem with access to justice.

Culture also played an important role. As the middle-upper class becomes more and more individualistic, they have no hesitation to settle their dispute through court. They are not worried if court settlement may jeopardize relationship with their contending party. In addition, they are less concern of how the society views them by going to court. There are several reasons to this. To start with, people in the cities do not care much of what others are doing or minding other people's business. Second, since people can distinguish between civil and criminal cases, those who settle their dispute in court will not be considered as criminals.

The private dispute settled though court is limited. Most cases are in the area of breach of contract and tort. The plaintiff often only seeks compensation for material injury. They will not seek compensation for immaterial injury that may be sustained.

Nevertheless, the middle-upper class, whenever possible, will avoid court settlement. They see court settlement as a last resort, not a first priority to be pursued. The reason behind this is their knowledge that settling through court system is not the best and efficient alternative. Even a retired judgwhen faced to settle his/her dispute would not go to court if he/she could avoid it. They know that court settlement involves tangled regulatory and legal environment. It also involves time so one needs to be very patient. In addition, court settlement would require a huge amount of money for legal fees and, most of the times, bribes and other irregular payment. Lastly, they also have doubt whether court can render a fair decision due to lack of credible justice system.

Lawyers play an important role when the middle-upper class is faced with the decision of going to court for settling dispute. The middle-upper class will listen to their lawyers' advice and let either their egos die down or the opposite.

Lawyers who are pragmatic and have full knowledge of the difficulty in settling dispute through the court system tend to discourage their client of going to court if unnecessary. However, lawyers who are hungry of clients and litigation works may

advice otherwise. This kind of lawyers, recently, has put negative image to the profession in the society.

In sum, the middle-upper class, although have reasons different from that of the lower-middle class, also avoids court settlement.

## **I.2.2 Perception of the Expatriates**

Indonesia has long been considered as a place for investment by foreign investors. Recently, however, due to safety issue, legal uncertainty, increasing labor cost, high cost economy and many other reasons, foreign investments have been declining.

In discussing the perception of Indonesians toward court system as a means to settle dispute, the perception of the expatriates cannot be left out. Although they are not Indonesian national, their presence in Indonesia forms another perception that cannot be categorized under the perception of Indonesians.

The perception of expatriates toward Indonesian court is similar to those of Indonesians, although under different set of reasons. The expatriates will try to avoid resorting Indonesian court for settling their dispute; instead, they will resort to local or foreign arbitration or even foreign court that is much more credible according to them.<sup>41</sup>

There are many reasons why expatriates are not comfortable in choosing Indonesian court as a means to settle their dispute. To begin with, businesses do not prefer court settlement. Many, if not all, international contracts, agreements and the like concluded between foreign and local investors have chosen arbitration as forum for settling dispute. The choice is made irrespective of the local investor's having stronger bargaining position.

The Second reason, local counsels have been advising their foreign clients for not settling their dispute in an Indonesian court. In many instances, they have been discouraging their client to do so. Third, investors have great doubt on the ability of Indonesian judges when faced with complex transactions under an English contract. Fourth, investors often question whether the court can act impartially when nationalism

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<sup>41</sup> It should be noted, however, that Indonesian court under article 436 Rv will not recognize foreign court judgment. Dispute settlement through court outside Indonesia can only be pursued if enforcement is not sought in Indonesia. This is not the case with respect to settlement through foreign arbitration. Indonesian court in principle will recognize foreign arbitral awards as Indonesia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

comes to fore. Fifth, investors have been, or made, aware that the court system is not compliant with western or international standards.<sup>42</sup> Lastly, the judiciary is not credible as corruption is pervasive. Hence, foreign investors see the court system in Indonesia is not an alternative of recourse.<sup>43</sup> They will not consider it as an alternative, even for a last resort.

However, investors shying away from choosing Indonesian court do not necessarily mean that they can get away from appearing in Indonesia court. Some have experienced appearing before the Indonesian court. They have been compelled to appear before the court based on lawsuits not related to the content of the contract. For example, foreign investors have to appear before the court in a case of annulment of contract.<sup>44</sup> Other example is a case concerning foreign arbitration award seek to be annulled by Indonesian court. The investors have also to appear before the court if Non-Governmental Organization (hereinafter referred to as “NGO”) accused them of polluting the environment or producing defective products.

From their experience of going through the Indonesian court, they have many complaints. Some say the process is time consuming, full of corruption, and the procedure is difficult to follow. Others complain about the partiality of the judge when faced with local issues and interest. In addition, the court’s verdict does not deliberate the dispute in thorough and comprehensive manner.

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<sup>42</sup> One advice for those foreigners investing in Indonesia for the first time describes as follows, “The Indonesian court system has been said to be patrimonial in nature. Whether or not that is true, it seems to be the perceived condition by international investors. Patrimonial judicial authority is where the judicial office and its attendant powers are appropriated by the office-holder. In such a situation, judicial authority is exercised on the basis of specific and personal relationships between the individuals involved, not necessarily on the basis of law or fact.” **See:** <http://www.expat.or.id/business/twostepsforward.html> access on 23 January 2003

<sup>43</sup> Hikmahanto Juwana, “A Survey on the Influence of International Economic Policy on Indonesian Laws: Implementation and Problems,” **in:** Koesnadi Hardjasoemantri and Naoyuki Sakumoto (eds.), Current Development of Laws in Indonesia, (Tokyo: Institute of Developing Economies-Japan External Trade Organization, 1999), 217.

<sup>44</sup> To take an example PT. Paiton Energy, an Indonesian company owned mostly by foreign investor, had to appear before the Central Jakarta District Court to face a legal suit initiated by PT. Perusahaan Listrik Negara (‘PLN’), a state owned enterprise, even though the two had agreed for dispute to be settled in arbitration. The lawsuit was filed to annul the power purchase agreement the two parties had entered. **See:** Registrar of the Central Jakarta District Court Number 517/PDT.G/1999/PN.JKT.PST. However, the court did not issue its final verdict as PLN withdrew its legal suit.

### I.3 Problems Surrounding the Court System

This section will consider problems that have been surrounding the court system for many years. The problems pointed out, however, will be limited to those having connections with court as mechanism for dispute resolution.

There are many problems plaguing the court system in Indonesia. Yet, it is misleading to say that problems only arise recently. Problems surrounding the court have developed long before the *reformasi* era.<sup>45</sup> But, prior to the *reformasi* era, most of the problems are kept under the carpet. Under the Soeharto administration, no one dares to discuss openly about negative image of the government, including the judiciary.

In addition, the judiciary was a government branch, which had been secluded from the country's development, as legal development was not seen as priority. Law serves only a symbol without any significant implementation. Power and authority was the order of the day. Hence, most people just disregard if there are problems within the judiciary, as it rarely has been employed. Furthermore, people in those days would just assume that there were no problems within the judiciary. They assume that the judiciary remains unchanged since the Dutch colonial period. At that time judges were very knowledgeable, some became law professors, maintained high integrity, and enjoyed high social status within the society.

The first major problem that has been persistently faced by the judiciary is the fact that it has not reflected the principles embedded in Judicial Power Act. The principles referred to are the principle to uphold the law and justice<sup>46</sup> and the principle that the court process is simple, fast and inexpensive.<sup>47</sup> People feel that the judiciary only upholds the interest of the government, the wealthy and the powerful. It has long been forgotten the business of upholding law and justice for all. People also experience that court settlement is not simple, fast and inexpensive. On the contrary, it is complicated, time-consuming

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<sup>45</sup> Reformation era is an era dubbed after Soeharto was forced to resign from presidency, a position which he held for more than 30 years.

<sup>46</sup> Judicial Power Act art. 1 which provides that the 'Judiciary Power is an independent State power to conduct judiciary to uphold the law and justice based on Pancasila, in order to implement the rule of law of Indonesia

<sup>47</sup> *Id.* art. 4 (2) which provides that 'The tribunal shall be conducted in simple, fast and inexpensive.'

and expensive. People have shunned away from court when it comes to settling their dispute.

The second problem is the slow proceedings of courts until a decision can reach an enforceable verdict. It can take years before an enforceable verdict will be issued.<sup>48</sup> Most of the time the verdict is issued by the court of last instance. Nevertheless, this does not mean the end of it. The difficulty of enforcement and the lurking of PK by party to a dispute have added to the slow proceedings.<sup>49</sup> Even a verdict of a PK can be requested for another PK. To this end, many have wondered when a case is going to an end in Indonesia.

The slow proceedings have also been created by backlog of cases at the Supreme Court. In 1999/2000 there are 13.746 carry over cases and 10.189 new cases being requested for cassation.<sup>50</sup> The carry over cases from the previous years consist of private or civil cases which amounts to 10.810, criminal cases which amounts to 1.296 cases, military criminal cases which amount to 56 cases, land law cases which amount to 795 cases, administrative cases which amount to 691 cases and commercial (bankruptcy) cases which amount to 3 cases.

The new cases consist of private or civil cases amounting to 5.796, criminal cases amounting to 2.742 cases, military criminal cases amounting to 75 cases, land law cases amounting to 965 cases, administrative cases amounting to 685 cases and commercial (bankruptcy) cases amounting to 88 cases.

The cases that have been rendered decisions on that year are as follows; private or civil cases amounting to 8.375, criminal cases amounting to 3.082 cases, military criminal cases amounting to 114 cases, land law cases amounting to 145 cases, administrative cases amounting to 583 cases and commercial (bankruptcy) cases amounting to 23 cases. The cumulative number of cases awarded with judgment is 14.208

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<sup>48</sup> Sudargo Gautama, a law professor who is also practicing lawyer, said that in average a case would take 8 to 9 years before an enforceable judgement is issued. **See:** Sudargo Gautama, Undang-undang Arbitrase Baru 1999, (Bandung: Citra Aditya Bakti, 1999), 3.

<sup>49</sup> From January 1999 until June 2000 there are 1734 civil cases carry over from the previous year and 929 new civil cases that need to be re-opened by the Supreme Court. Depicted from Laporan Kegiatan MARI (Activities Report of the Supreme Court) 1999-2000, p. 117.

<sup>50</sup> Depicted from *Laporan Kegiatan MARI* (Activities Report of the Supreme Court) 1999-2000, p. 117.

out of 23.915 cases. In that year there are 9.706 cases left which become carry over the next year.

The highest number of cassation cases is private or civil dispute. The reason for its high number is that there is no limitation for private cases to be submitted for cassation at the Supreme Court.

The following will illustrate the backlog cases at the Supreme Court for fiscal year 1995-1999.

No.Title	Types of Case											
	Common Civil Cases		Common Criminal Cases		Military Crime Cases		Religious Civil Cases		Administrative Cases		Civil Commercial Cases	
	Cassation	Re-Opened	Cassation	Re-Opened	Cassation	Re-Opened	Cassation	Re-Opened	Appeal	Re-Opened	Appeal	Re-Opened
1. left over	8549	1563	940	125	15	2	672	157	744	99	4	0
2. Decide	6418	1563	2170	46	94	3	674	47	378	38	46	26
3. Accept	16,96%	4,1%	11%	6,09%	5,47%	0	17,3%	7,65%	17,96%	10,52%	17,82%	10%
4. Reject	75,58%	86,59%	51,81%	79,67%	84,40%	100%	64,87%	75%	63,09%	68,36%	22,17%	10%
5. Refused	7,71%	9,31%	36,22%	14,23%	10,12%	0	17,75%	17,33%	18,94%	21,10%	0	0

Types of Case	Cassation %			Re-Opened %		
	Accept	Reject	Refused	Accept	Reject	Refused
1.Civil Cases	16,69	75,58	7,71	4,1	86,59	9,31
2.Criminal Cases	11,96	51,81	36,22	6,09	79,67	14,23
3.Military Crime	5,47	84,40	10,12	0	100	0
4.Religious Civil	17,37	64,87	17,75	7,65	75	17,33
5. Administrative	17,96	63,09	18,94	10,52	68,36	21,10
<b>Summation</b>	69,45	339,75	90,74	28,36	409,62	61,97
5.Division Number	:5	:5	:5	:5	:5	:5
.Index	13,89	67,95	18,148	5,67	81,92	12,39

Source: Henry.P.Panggabean<sup>51</sup>

<sup>51</sup> Henry P. Panggabean, *Fungsi Mahkamah Agung Dalam Praktik Sehari-hari* (Function of the Supreme Court in Daily Practice), revised ed. (Jakarta: Sinar Harapan, 2002), 138-139.

The third problem faced by the court system is the classic issue of corruption. A large number of judges and supporting staff are believed to be tainted with corruption and collusion, better known in Indonesian as *Korupsi, Kolusi dan Nepotisme* or abbreviated as “KKN.”<sup>52</sup> Bribery, irregular payments and other collusive practices have influenced on judicial decisions. Court decisions can be bent because of money.<sup>53</sup> Many are of the view that the court system is corrupt. This cannot be blamed solely on the judges. A low salary is sometimes identified as the cause of corruption problem.

The following will illustrate some types of improper behavior of the judges and clerks. It should be noted, however, that the actual number may be greater than the statistic given.<sup>54</sup>

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<sup>52</sup> Trimoejla D. Soerjadi a prominent Indonesian lawyer stated that the corruption in the judiciary goes back as far back as 1950. **See:** Trimoejla D. Soerjadi, “Korupsi di Lembaga Peradilan (Corruption in the Judiciary)” paper presented at Anti Corruption Workshop held by Partnership for Governance Reform on 10-12 October 2000 access at [http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Anticor-3Moel/\\$File/3moelja.pdf](http://wbln0018.worldbank.org/eap/eap.nsf/Attachments/Anticor-3Moel/$File/3moelja.pdf) on 21 January 2003.

<sup>53</sup> Goodpaster has the following to say, “It is widely accepted in Indonesia that the judiciary is largely corrupt; that there are many corrupt lawyers willing to pay for decisions; and there is serious corruption among Indonesia’s prosecutors and police as well.” **See:** Gary Goodpaster, “Reflections on Corruption in Indonesia,” **in:** Tim Lindsey and Howard Dick (eds.), *Corruption in Asia*, (Sydney: The Federation Press, 2002), 96.

<sup>54</sup> This is because the statistic was made from 1990-1997 when the government was unwilling to accept and recognize corruption or other illegal acts done by government officials.

### Classification of Improper Behavior of the Judges and Clerks in the year 1990-1997

<b>The Improper Behavior</b>	<b>Number of Judges</b>	<b>Clerks</b>
Imposing illegal charges	4 persons	8 persons
Bribes	8 persons	3 persons
Accepting gifts	2 persons	1 persons
Misuse of power	21 persons	23 persons
Violation of official rules	7 persons	15 persons
Negligence in performing duty	5 persons	24 persons
Immoral action	23 persons	20 persons
Second Marriage without permission	None	2 persons
Pre-marital life	1 person	4 persons

### Classification of Actions taken for the Improper Behavior for Judges and Clerks in the year 1990-1997

<b>The Improper Behavior</b>	<b>Number of Judges</b>	<b>Clerks</b>
Written Reprimand	14 persons	18 persons
Written dissatisfaction from the superior	17 persons	24 persons
Delay for increase salary for 1 year period	8 persons	6 persons
Salary decrease	8 persons	7 persons
Delay for promotion for 1 year	7 persons	9 persons
Demotion of rank 1 level lower for 1 year	13 persons	7 persons
Discharge from duty	2 persons	20 persons
Dismissal	None	6 persons
Fired	2 persons	3 persons

Source: Henry.P.Panggabean<sup>55</sup>

<sup>55</sup> Henry P. Pangabean, Fungsi Mahkamah Agung Dalam Praktik Sehari-hari, p. 166

The fourth problem is the loss of public confidence towards the court system. Public has lost its confidence because they cannot expect what is expected from the court: delivering justice.<sup>56</sup> The court was not trusted as a credible institution to render justice. In recent years, this has caused problem to the society. People are taking justice into their own hands. They will confiscate ownership of others by the use of force without resorting to court, and, in criminal offense, the suspect may be burned to death.<sup>57</sup> This has led the belief of many that the court system has dysfunctions.

The fifth problem stems from the fact that judges have lack of knowledge on complicated issues and on new laws and regulations. The cause of the problem is the weak human resources recruited as judge at the very early stage of recruitment.<sup>58</sup> Those wanting to be a judge have to pay bribes to be accepted. The judiciary has failed in attracting good graduates from prestigious universities.<sup>59</sup> The tarnished image of the judiciary, in addition to low salary has discouraged bright students to enter the profession. The ultimate result is mediocre human resources lacking in integrity.

The sixth problem is the lack of transparency in court decision. Court decision is hard to obtain. If it is obtained it requires unofficial payment. In addition, there are no comprehensive law reports. This has created the non-transparency of court judgment. Public are unable to scrutinize the decision of a judge, such as whether the legal basis is correct, the argument is convincing, etc. Some have suggested that without any transparency the judges will easily get away with pre-arranged decision.

The seventh problem is the inconsistency of decisions on similar cases. This of course is common to countries that do not follow the precedent principle: a judge is free

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<sup>56</sup> Public outcry has been pervasive toward controversial cases brought to the court, including Suharto trial, Akbar Tanjung the Chairman of Parliament, trial of Indonesian Chinese conglomerates suspected of embezzling State's money.

<sup>57</sup> According to Jakarta Post in 1999, the growing number of people killed and burned by people taking the law into their own hands by the fifth month of 1999 amounted to 65 people. **See:** Jakarta Post, December 24, 1999.

<sup>58</sup> This issue has been acknowledged by public official, such as the Director General for the Protection of Human Rights of the Ministry of Justice and Human Rights when he was quoted as saying, "There is a need to improve the Judge Recruitment System." **See:** Tempo, "Dirjen Perlindungan HAM: Perlu Pembinaan Sistem Rekrutmen Hakim (Director General for the Protection of Human Rights: A Need To Improve Judge Recruitment)," access at <http://www.tempo.co.id/news/2002/12/3/1,1,21,id.html> on 21 January 2003.

<sup>59</sup> Bedner said, "... the best law students do not choose a judicial career." **See:** Adrian Bedner, *Administrative Courts in Indonesia: A Socio-Legal Study*, (The Hague: Kluwer Law International, 2001), 197.

of what he/she wants to decide. From the perspective of those who seek justice this has created more legal uncertainty. They have said that court decision cannot be predicted.

#### **I.4 Direction of Judicial System**

This section will deal solely with the direction of judicial system that has relations with court as mechanism of dispute resolution.

Policy makers in Indonesia recognize the multi-interconnected problems of the court system. One report said Indonesia's legal system is 'desperate but not hopeless.'<sup>60</sup> To this end, there have been various efforts to deal with the problems. The Supreme Court and other government branches, such as the House of Representative, Ministry of Justice and Human Rights have taken various and sessions efforts to reform the judicial system. NGOs and donor countries have also taken similar steps.

The ultimate aim of the many efforts is to restore public confidence in the court system, including in its dispute resolution function. Here the study will spell out the judicial reform, which has been underway since the *reformasi* era began.

The first reform has been the introduction of non-career justices at the Supreme Court and the District Court special chambers, namely, the commercial court and human rights tribunal. The appointment of non-career justices is an important step as the position of justices have been exclusively and dominated by career justices. The purpose of this effort is to have individuals assuming the position of justices that are credible and untainted by the image of corruption. In addition, the effort is pursued to improve the quality of human resources within the judiciary. For this purpose, many non-career justices are academicians. It is expected that this effort will restore the public's faith in the judicial system.

The second reform is to empower the judiciary as an independent branch of the government by transferring the authority of justices' administration and budget proposal to the Supreme Court. It is expected that the judiciary will be able to enforce the rule of law, free from interference.

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<sup>60</sup> This was said by an Indonesian prominent scholar, Mochtar Kusumaatmadja, when describing the Indonesian legal system. See: Firoz Gaffar & Ifdhal Kasih (eds.), Reformasi Hukum di Indonesia: Hasil Studi Perkembangan Hukum – Proyek Bank Dunia (Legal Reform in Indonesia: Diagnostic Assessment of Legal Development in Indonesia – World Bank Project), (Jakarta: Cyberconsult, 1999), 145.

The third judicial reform is the effort to eradicate corruption and collusion at all levels of courts. This is carried out by making courts more transparent and their decision more accessible by the public. The chief justice even issued instruction to prohibit lawyers from coming to the Supreme Court to meet with the justices, especially for discussing their client's case. Chief Justice Bagir Manan disclosed openly to the public the fact that lawyers' maintain 'permanent' staffs of the Supreme Court as 'liaison officer' between the lawyers and the justices.<sup>61</sup> The eradication of corruption and collusion is a significant step to change and correct people's perception that courts only deliver justice on the ground of money and power, but never on law and fairness.

Fourth, the reform has been carried out to make the courts' administration efficient. The Inefficiency of court administration has been one of the causes of slow proceedings for settling disputes. At the Supreme Court as pointed out earlier, there are many backlog cases.

Another effort in resolving the backlog cases has been to ask the courts of first instance to maximize the role of their judges as mediator between the disputed parties. To this end, the Chief Justice of the Supreme Court has issued circular letter to all head of the District and Religious Courts to remind them of court-administered mediation.<sup>62</sup> The circular letter explicitly mentioned that court-administered mediation is being encouraged in order to overcome substantially the backlog cases at the Supreme Court.<sup>63</sup> The Chief Justice has asked judges to put real effort in mediating dispute, and not just treat mediation as a matter of formality. Judges will be given 3 months to mediate the dispute and such time can be extended with the approval from the head of the court. The Judges who are successful in its effort to mediate will be given credit points for their career review.

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<sup>61</sup> *Kompas*, 20 December 2002.

<sup>62</sup> Circular Letter Number 1 Year 2002 concerning the Empowerment of Court of First Instance to Apply Pacific Settlement (Article 130 HIR/154 RBg) dated 30 January 2002.

<sup>63</sup> Sutantio and Oeripkartawinata have other opinion of court-administered mediation. They say, "Amicable decision has good meaning to the society at large and, in particular, those seeking justice. Dispute will once for all settled, fast settlement and inexpensive, apart from that the animosity amongst the disputed parties will be lessened. This is by far is better than if the dispute has to be decided by regular decision, in which case the defendant lost the case and enforcement of decision is carried out in forceful manner." See: Retnowulan Sutantio and Iskandar Oeripkartawinata, Hukum Acara Perdata dalam Teori dan Praktek (The Law of Civil Procedure in Theory and Practice), (Bandung: Alumni, 1986), 24.

## **I.5 Other Avenues for Seeking Resolution outside the Court**

As argued earlier, most Indonesians perceive court system as the last, instead of the first, alternative to settle dispute. Indonesians will just not consider court as their first priority when facing dispute.

As people are hesitant to settle their dispute in court, they have found other workable avenues. One of them is what popularly known as ADR. In the next chapter, the study will look closely into the Indonesian ADR mechanism. However, formal ADR, such as arbitration is not common to people.

People have been accustomed to their own avenues. Unfortunately, all of them are extra-judicial. There are many forms of this kind of avenues. Here, the study will only discuss three avenues.

First, people who are tangled with private dispute will look for relatives or close friends working in the military, the government or the judiciary. The purpose is to ask their assistance, often times in its negative meaning. People believe that those who have power will prevail. The higher the position of the acquaintance, the better the possibility of 'justice' being done. Having connection to the right person, thus, plays an important role.

The other form of extra-judicial avenue is by employing military personnel or members of gangster. These people are referred to as 'debt collector'; and debt collecting has become a lucrative illegal business. In many loan transactions when the loan becomes bad debt, the service of mafia-like debt collection has been frequently employed. Respectable banks and financial institutions have not been an exception.

Debtors who cannot pay their debt are forced to settle their debt or face the consequence of being harassed by the debt collector. The form of harassments can be as simple as telephone threat; the debt collector waits day and night in front of the debtors' house; but on occasions actually uses physical force. The demand is of course for the debtors to pay the loan. If they fail to do so, they are frequently asked to surrender their valuables as payment of their debt.

The third means is by causing public nuisance or disturbances to third party not involve in the dispute. This means is employed if it involves a massive scale of people

who is in dispute with certain entity. This means has been frequently used by labors who demanded an increase of salary from their employer. The labors will stage demonstration in expressway or taking on the streets. By doing so, the labors expect to draw attention from the public, government and the media. This will put pressure to the employer. Many see this as a form of threat by the labor to the employer.

## **Chapter II**

### **Alternative Dispute Resolution**

#### **II.1 Scope of the Term**

ADR can mean three things depending on the answers to the question of alternative to what dispute resolution being considered. If court system is the answer, the alternative to court mechanism will be negotiation, mediation, conciliation and arbitration. Here the meaning of ADR is private dispute settlement mechanisms outside the court that is pursued on voluntary basis among parties to a dispute. This will form the first meaning of ADR.

However, if the answer to the question is settlement other than by adjudication process, then ADR has a much narrower scope than the first meaning. ADR will not include arbitration, as it involves adjudication process similar to the court system. ADR within this meaning only covers negotiation, mediation and conciliation. This forms the second meaning of ADR.

The third meaning of ADR has much wider scope than the first and second meaning. The meaning of ADR will consist of voluntary and mandatory means of settling dispute outside the court. Mandatory since according to some laws the dispute has to be settled by certain government agencies that is outside the court. However, challenge on the decision will subsequently go to court.

In this study, the third meaning of ADR will be used. For such purpose, this chapter will be divided into three parts. The first part will discuss matters concerning negotiation, mediation and conciliation. The second part will discuss matters concerning arbitration. The last part will discuss some of mandatory ADRs.

Two notes need to be made aware beforehand. First, the study will discuss ADR mechanism both as provided under the law and the so-called informal ADR, which lacks legal basis. The informal ADR is the most practiced dispute resolution in Indonesia.

The other note is with respect to what will not be dealt in this study. The study will not concern itself with criminal offence settled outside the court. Although Indonesian law does not recognize plea-bargaining, however, there have been instances where criminal offence is settled outside the court. An example often cited, is a driver

unintentionally hits someone who dies as a result. That driver often will not be charged with a criminal offence by the police on the ground the victim's family has agreed on outside court settlement.

## **II.2 Negotiation, Conciliation and Mediation**

### **II.2.1 Background**

In Indonesia, most private dispute has been resolved by negotiation by the parties in a dispute to achieve common agreement to a solution. This process is referred to as *musyawarah mufakat*, which literally means dialog to reach consensus.

There are many reasons for the parties in a dispute to opt *musyawarah mufakat*. First, *musyawarah mufakat* is a settlement that likely maintains good relation among the disputed parties. Maintaining good relation for many Indonesians is very important. They see dispute have caused damage to a good relation, and it will become much worse, if such dispute is not settled amicably based on *musyawarah mufakat*.

Second, settling dispute by *musyawarah mufakat* is seen by many to have prospect of resolving dispute without any confrontation. Formal mechanism, especially court, is seen more of face-to-face confrontation. In addition, the contending parties will argue each other based on his or her own perspective without any consideration of the opponent party.

Other reason for opting *musyawarah mufakat* is the mechanism consistent with traditional practice of settling dispute. Indonesians believe *musyawarah mufakat* has rooted in their culture.

In addition, *musyawarah mufakat* is cost efficient since the process does not involve money. Parties, however, may compromise compensation in form of money.

Furthermore, in *musyawarah mufakat* the parties are in control in deciding the form of settlement, from a simple apology to money compensation settlement. In this sense, justice is decided by parties to a dispute themselves, and not by other third party. Many Indonesians have considered this as the most appropriate dispute resolution mechanism.

If for some reasons dispute cannot be reached through negotiation, the parties will refer the dispute to a third party. The third party will hear and try to find acceptable settlement for parties to a dispute. This is what is referred to as mediation or conciliation.<sup>64</sup> In the mediation or conciliation process, the principle of *musyawarah mufakat* is also used. The mediation or conciliation is commonly used in the village justice.<sup>65</sup> The third parties acting as mediator or conciliator include, among others, leaders of the community, religious leader or a senior respected person within community not holding position as leader.

## II.2.2 Provisions Governing Negotiation, Mediation and Conciliation

In 1999, the mechanisms for negotiation, mediation and conciliation process provided under the Arbitration and Alternative Dispute Resolution Act (hereinafter referred to as “Arbitration Act”).<sup>66</sup> Nevertheless, such ADR mechanisms is only limited to a dispute of commercial nature. ADR in a much wider meaning has not been provided in an act.

Once there was an effort from the Ministry of Justice and Human Rights to initiate an Act exclusively governing negotiation, mediation and conciliation dubbed as ‘*Rancangan Undang-undang tentang Alternatif Penyelesaian Sengketa*’ or Draft Law on Alternative Dispute Resolution. There are two important objectives pursued on the initiative. First is to recognize the existence of negotiation, mediation and conciliation as practiced by many Indonesian, in addition to give sound legal basis for such mechanisms.

The other aspect is to recognize the amicable agreement resulted from negotiation, conciliation and mediation to have enforceable effect. This is because under the prevailing law only amicable agreement mediated and drawn before the court that has enforceable effect. Amicable agreement concluded outside the court does not have enforceable effect.

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<sup>64</sup> The term mediation or conciliation in this study will be used interchangeably as long as the process involves third party who has no power to render decision.

<sup>65</sup> Hooker describes village justice as a ‘system of voluntary mediation under which villagers submit dispute to some indigenous form of settlement process.’ See: M.B. Hooker, Adat Law in Modern Indonesia, (Kuala Lumpur: Oxford University Press, 1978), 140

<sup>66</sup> Act Number 30 Year 1999. State Gazette Number 138 Year 1999

Unfortunately, the draft law has never been processed to a much higher authorities. One reason is that at the time the Draft Law was being discussed, the House of Representative passed the Arbitration Act. There was a feeling among the drafters that the proposal to introduce separate Act on ADR would be conceived as redundant by many, as the Arbitration Act also mentions “ADR”.

### **II.2.3 ADR under the Arbitration Act**

The definition of ADR under the Act is “(A) resolution mechanism for disputes or differences of opinion through procedures agreed upon by the parties outside the court, namely, consultation, negotiation, mediation, conciliation, or expert assessment.”<sup>67</sup>

Under the Arbitration Act, article 6 is the only article dealing with ADR. Article 6 consists of nine paragraphs. In paragraph 1 it states that, “(D)isputes or differences of opinion that are not of a criminal nature may be resolved by the parties through ADR based on their good faith by setting aside resolution based on litigation at the District Court.”<sup>68</sup>

The Act also provides that ADR shall be carried out not later than 14 days to which the outcome has to be agreed in writing.<sup>69</sup> If for some reasons the process failed, the parties may request in writing the assistance from one or more advisors or a mediator to solve the dispute.<sup>70</sup> The Act further provides that in the event after the lapse of 14 days, the dispute is not resolved, parties may request for an arbitration center or an ADR institution to appoint a person acting as mediator to mediate or conciliate the dispute.<sup>71</sup> The difference with the former is the mediator has to be appointed by certain institution.

The mediator has to begin the mediation process at least 7 days (presumably, after his/her appointment, which the Act does not clearly mention).<sup>72</sup> Within 30 days, a written

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<sup>67</sup> Arbitration Act art. 1 (1). Under the elucidation of the Arbitration Act it is stated that, “ADR is a dispute settlement institution based on procedure agreed by the parties, namely, outside court settlement by consultation, negotiation, mediation, conciliation or expert opinion.” This meaning of ADR if referred to earlier discussion on the meaning of ADR will conform with the second meaning of ADR.

<sup>68</sup> *Id.* art 6 (1).

<sup>69</sup> *Id.* art. 6 (2).

<sup>70</sup> *Id.* art. 6 (3).

<sup>71</sup> *Id.* art. 6 (4).

<sup>72</sup> *Id.* art. 6 (5).

resolution has to be signed by all parties concerned.<sup>73</sup> The amicable agreement has to be registered at the District Court within 30 days after its signing.<sup>74</sup> The Act further provides that within 30 days after registration the resolution has to be executed.<sup>75</sup>

If amicable settlement through ADR failed, the Act provides that parties may submit the dispute to be heard at institutional or ad hoc arbitration based on written agreement.<sup>76</sup> However, it is not clear under the Act whether the ADR process in this provision is compulsory or voluntary in nature before submission to arbitration.

## **II.3 Arbitration**

### **II.3.1 Background**

Arbitration is understood as a process by which parties to a dispute agree to submit their differences to one or more impartial persons for a final and binding decision. Arbitration as one of dispute settlement mechanisms has its long history in Indonesia. The Dutch colonial law had recognized arbitration by providing in the law of procedure.<sup>77</sup>

Since Indonesia's independence, works on amending the Dutch colonial arbitration law had been initiated as early as 1979.<sup>78</sup> It is not until 1999, did the effort come to a success. On that year the Arbitration Act, has been promulgated and replaced the Dutch colonial Arbitration laws.<sup>79</sup>

The Arbitration Act consists of 9 chapters and 82 articles. The Arbitration Act is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

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<sup>73</sup> *Id.* art. 6 (6).

<sup>74</sup> *Id.* art. 6 (7).

<sup>75</sup> *Id.* art. 6 (8).

<sup>76</sup> *Id.* art. 6 (9).

<sup>77</sup> Act on Rules of Civil Procedures, Staatsblad 1847:52. Under such Act the provisions on arbitration starts from Article 615 until 651.

<sup>78</sup> Sudargo Gautama, *Undang-undang Arbitrase Baru 1999* (The New Arbitration Law 1999), (Bandung: Citra Aditya Bakti, 1999), v.

<sup>79</sup> Under Arbitration Act art. 81, it is stated clearly that the Act of Rules of Civil Procedure that concerned with arbitration is revoked completely.

### II.3.2 Features of the Arbitration Act

The Arbitration Act provides the legal basis for arbitration procedure in Indonesia replacing the Dutch colonial provisions.<sup>80</sup> It becomes the Indonesian *Lex Arbitri*. The Act defines arbitration as “(A) mechanism of settling private disputes outside the General Tribunal based on arbitration agreement entered in writing by parties to a dispute”.<sup>81</sup>

Under article 5 of the Arbitration Act, the dispute that can be arbitrated is limited to, “dispute of commercial nature, or those concerning rights which under the law fall within the control of the disputed parties.”<sup>82</sup> The article further elaborates that, “(D)ispute which may not be resolved by arbitration is dispute which according to prevailing regulations cannot be settled by amicable means.”<sup>83</sup>

Dispute can only be arbitrated, if and only if, the parties to a dispute have agreed in writing for settlement through arbitration.<sup>84</sup> The agreement, however, can be executed before or after dispute arises.<sup>85</sup>

The Arbitration Act provides exclusive jurisdiction once parties have submitted their dispute to arbitration. A court should consider itself as having lack of jurisdiction to settle a dispute that has been agreed by the parties to be settled in arbitration.<sup>86</sup> Further the Act states that, “(T)he existence of arbitration agreement in writing shall negate the right of parties to submit resolution of dispute and difference of opinion provided under the agreement to the District Court.”<sup>87</sup> If the District Court were to receive such dispute, it would have to refuse and restraint from intervening from the dispute, except otherwise

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<sup>80</sup> The Arbitration Act apart from providing rules for ADR and arbitration, also provides binding opinion from arbitration institution. Nonetheless, the provisions are very brief and general. One important point is binding opinion, once issued, may not be appealed.

<sup>81</sup> *Id.* art. 1 (1).

<sup>82</sup> *Id.* art. 5 (1).

<sup>83</sup> *Id.* art. 5 (2).

<sup>84</sup> *Id.* art. 2. The article provides as follows, “This Act shall govern the resolution of disputes or differences of opinion between parties having a particular legal relationship who have entered in an arbitration agreement which explicitly states that all disputes or differences of opinion or which may arise from such legal relationship shall be resolved by arbitration or through alternative dispute resolution.”

<sup>85</sup> *Id.* art. 9 (1) provides that, “In the event the parties select resolution of dispute by arbitration after a dispute has arisen, their agreement to arbitrate has to be drawn in a written agreement signed by the parties.”

<sup>86</sup> *Id.* art. 3.

<sup>87</sup> *Id.* art. 11 (1).

provided under the Act.<sup>88</sup> This provision is intended to eliminate the problem that has been occurring time and again whereby court will examine cases brought to it, even though parties to a dispute have concluded arbitration agreement.

The Act also provides the qualification of arbitrators. An arbitrator has to satisfy five qualifications.<sup>89</sup> First, the nominated arbitrator has the ability to act under the law. Second, arbitrator has to be at the age of not less than 35 years. Third, arbitrator may not have any family relationships with the parties to a dispute. Fourth, the arbitrator must not have any financial or other interests in the arbitration award. Lastly, the arbitrator should have 15 years experience and knowledge in the area of matters being disputed. An active judge, prosecutor, court clerk or other judicial officials may not be appointed as arbitrator.<sup>90</sup>

The Act provides detail provisions on forming the arbitration and the appointment of arbitrator.<sup>91</sup> For example, the arbitration can be formed in a single or panel of arbitrators depending on the agreement concluded by the parties. If parties are unable to decide the selection or composition of arbitrators, the head of District Court will determine on this issue.<sup>92</sup> There is also provision on immunity of the arbitrator examining a case.<sup>93</sup>

In chapter III of the Arbitration Act, the parties to a dispute have the right to refuse arbitrator selected to sit in the arbitration. Article 22 paragraph (1) provides that, “(A) request of refusal may be submitted against an arbitrator if it is found sufficient cause and authentic evidence which gives doubt of an arbitrator in its performance of partiality and will take side in rendering the award.”<sup>94</sup> Paragraph (2) of the same article further states, “(R)equst for refusal of an arbitrator may also be made if it is proven there is family, financial or working relationship with one of the party or his/her proxy.”<sup>95</sup>

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<sup>88</sup> *Id.* art. 11 (2).

<sup>89</sup> *Id.* art. 12 (1).

<sup>90</sup> *Id.* art. 12 (2).

<sup>91</sup> *Id.* art. 12 until 21.

<sup>92</sup> *Id.* art. 13 (1).

<sup>93</sup> *Id.* art. 21 provides that, “The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceeding to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was bad faith in the action.”

<sup>94</sup> *Id.* art. 22 (1).

<sup>95</sup> *Id.* art. 22 (2).

Rule of procedures is another provisions that the Arbitration Act elaborates in great length. The rule of procedures governing arbitration, in principle, is free to be determined by parties to a dispute, as long as it does not contradict with the provisions of the Act.<sup>96</sup> The Act states that all hearing of arbitration are closed to the public.<sup>97</sup> The language used in the arbitration has to be in Indonesian language, unless otherwise agreed by the parties and approved by the arbitrator.<sup>98</sup>

Parties to a dispute are free to agree on the substantive law governing the examination of their dispute.<sup>99</sup> The arbitrators have the discretion to decide the place of arbitration, unless parties to a dispute decide otherwise.<sup>100</sup> An attorney can represent each of the disputed parties.<sup>101</sup>

A third party, a non-contracting party to an agreement, may become a party in the arbitration process if such party has related interest in the dispute. The intervention by a third party has to be agreed by parties to a dispute and further approved by the arbitrators.<sup>102</sup>

The Arbitration Act recognizes two kinds of award. First, is the final award and the second is the provisional award. Provisional award is issued if requested by one of the contending parties.<sup>103</sup> The Act goes as far as in stipulating provision on a final arbitration award. The final award, at least, has to consist the following:

- (1) at the heading of the award there should be a sentence stating “For the Justice based on One Almighty God”;
- (2) there should be names and addresses of the parties to a dispute;
- (3) the case position;
- (4) the argument of each parties;
- (5) the consideration and conclusion of the arbitrators;
- (6) the opinion of each of the arbitrators in case of any dissenting opinion;

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<sup>96</sup> *Id.* art. 31 (1). The article provides as follow, “The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided it does not conflict with the provisions of this Act.”

<sup>97</sup> *Id.* art. 27.

<sup>98</sup> *Id.* art. 28.

<sup>99</sup> *Id.* art. 56 (2).

<sup>100</sup> *Id.* art. 37 (1).

<sup>101</sup> *Id.* art. 29 (2).

<sup>102</sup> *Id.* art. 30.

<sup>103</sup> *Id.* art. 32 (1).

- (7) the decision of the arbitrators;
- (8) the place and date of the award issued; and
- (9) there should be signature of the arbitrators.<sup>104</sup>

The Arbitration Act states that in taking decisions, the arbitrators have to abide by the law or justice and reasonableness.<sup>105</sup>

The final award can be amended for administrative mistakes or things can be added or taken out, if requested by the parties, provided it is done within 14 day after the parties received the award.<sup>106</sup>

The Act provides that examination of a case should not take longer than 180 days starting from the arbitration tribunal is formed.<sup>107</sup> Such duration, however, can be extended if agreed by parties to a dispute.<sup>108</sup>

Another important feature of the Arbitration Act is the provisions on enforcement and annulment of arbitration award.

The Arbitration Act provides mechanism for the enforcement of foreign arbitral awards.<sup>109</sup> This is as consequence of Indonesia becoming a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>110</sup>

The Arbitration Act defines foreign arbitral award as an award rendered by a permanent or ad hoc arbitration outside the jurisdiction of Indonesia, or according to Indonesian law, the award is considered foreign.<sup>111</sup>

The Central Jakarta District Court is the only court that has jurisdiction for a request on recognition and enforcement of foreign arbitral awards.<sup>112</sup> There are five requirements for foreign awards to be recognized and enforced by the court.<sup>113</sup>

First, the arbitration is carried out in a country that is a party to a bilateral or multilateral treaty that reciprocate recognition and enforcement of Indonesian arbitration awards. Second, the award concerns with matter that is commercial in nature under

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<sup>104</sup> *Id.* art. 54 (1).

<sup>105</sup> *Id.* art. 56 (1).

<sup>106</sup> *Id.* art. 58.

<sup>107</sup> *Id.* art. 48 (1).

<sup>108</sup> *Id.* art. 48 (2).

<sup>109</sup> *Id.* Chapter VI Part II.

<sup>110</sup> Indonesia ratified the Convention in 1981 under Presidential Decree Number 34 Year 1981.

<sup>111</sup> Arbitration Act art. 1 (1).

<sup>112</sup> *Id.* art. 65.

<sup>113</sup> Arbitration Act art. 66.

Indonesian law. The third requirement is the award has obtained exequatur from the Central Jakarta District Court. Fourth if one of the parties to a dispute is the government of the Republic of Indonesia, the order of exequatur must be obtained from the Supreme Court.

The Act provides that enforcement of foreign arbitral award has to be requested by the arbitrator or its proxy, instead of party to a dispute. This is uncommon to many arbitration laws around the world. In practice, however, the request is made by one of the parties to a dispute, in particular the party desiring the enforcement, and the court will allow it.

The arbitrator or its proxy has to register the award at the Central Jakarta District Court before submitting application for enforcement.<sup>114</sup> The application for enforcement is submitted in the form of petition. Yet, the contending party may object the application submitted by party requesting for enforcement. The contending party becomes respondent in the process and the application becomes adversarial between party applying for enforcement and party who request the court to refuse enforcement.

If the Central Jakarta District Court issued decision in favor of enforcement, an appeal to the High or Supreme Court by the party whose assets is being executed will not be entertained.<sup>115</sup> However, if the enforcement is refused by the District Court, such decision can be appealed. The appeal goes directly to the Supreme Court.<sup>116</sup>

The Supreme Court has to render its decision not more than 90 days after appeal is received.<sup>117</sup> Once the Supreme Court renders its decision parties may not seek other legal actions.<sup>118</sup>

If enforcement of foreign arbitral award is granted, the Central Jakarta District Court will issue instruction for the bailiff to take necessary measures. If the assets were to be outside the jurisdiction of the Central Jakarta District Court, the court will delegate the instruction to enforce the award to the appropriate District Court where enforcement is being sought.<sup>119</sup>

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<sup>114</sup> *Id.* art. 67 (1).

<sup>115</sup> *Id.* art. 68 (1).

<sup>116</sup> *Id.* art. 68 (2).

<sup>117</sup> *Id.* art. 68 (3).

<sup>118</sup> *Id.* art. 68 (4).

<sup>119</sup> *Id.* art. 69 (1).

Annulment of arbitration award applies only to award rendered by arbitration carried out in Indonesia.<sup>120</sup> The Arbitration Act provides three reasons for annulment.<sup>121</sup> First, if there is suspicion that letters or documents submitted for examination, after award has been issued, are found forged or declared as forged. Second, if there is suspicion after the award has been issued that crucial documents were found and such documents were concealed by one of the parties. Third, the decision has been issued based on certain fraud committed by one of the parties to a dispute.

An application for annulment of an arbitration award has to be made in writing within 30 days after the award is registered at the District Court.<sup>122</sup> The District Court that has jurisdiction to annul is the District Court where the arbitration process is held. The application for annulment is addressed to the head of certain District Court.<sup>123</sup> The District Court has 30 days to issue its decision.<sup>124</sup> Decision by the District Court can be appealed to the Supreme Court.<sup>125</sup> The Supreme Court will have 30 days to issue its decision.<sup>126</sup>

### II.3.3 Arbitration Centers

In Indonesia, there are several arbitration centers. These centers can be divided into two categories. First is the arbitration center dealing with general jurisdiction and the second is the arbitration center with limited jurisdiction. The later is commonly referred to as specialized arbitration. Here it will describe the centers in general.

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<sup>120</sup> Recently there was a case where an foreign arbitration award is requested to be annulled by the Central Jakarta District Court. Although the Central Jakarta District Court lack of jurisdiction it issued annulment judgement. The case is now being appealed to the Supreme Court.

<sup>121</sup> *Id.* art. 70. The reasons provided under article 70 is somewhat limited if compared to the Civil Law Procedure or Rv. According to such law the reasons are 10 reasons to annul arbitration award, such as the award has cover more than what has been agreed by the parties, the award was based on expired arbitration agreement, the award was issued by unauthorized arbitrators. In this connection it is questionable whether the Court is limited to apply the three reasons stated in article 70 or it may interpret those reasons outside the Arbitration Act.

<sup>122</sup> *Id.* art. 71.

<sup>123</sup> *Id.* art. 72 (1).

<sup>124</sup> *Id.* art. 72 (3).

<sup>125</sup> *Id.* art. 72 (4).

<sup>126</sup> *Id.* art. 72 (5).

**i) Arbitration with General Jurisdiction**

**BANI**

The oldest arbitration and has very wide jurisdiction is *Badan Arbitrase Nasional Indonesia* or the Indonesian National Board of Arbitration and abbreviated as “BANI.” BANI was formed by the Indonesian Chamber of Commerce in 1977.

BANI has a head office in Jakarta and maintains a branch office in Surabaya, East Java. BANI handles both domestic and international disputes. A reference of a dispute to BANI must be in writing, either in an arbitration clause, or in a contract or by subsequent agreement by the parties to a dispute.<sup>127</sup>

**BAMUI**

In 21 October 1993 at the initiative from the Indonesian Council of Religious Ulemas (Majelis Ulemas Indonesia) a new arbitration center was formed. The arbitration is named *Badan Arbitrase Muamalat Indonesia* or the Indonesian Muamalah Board of Arbitration and abbreviated as BAMUI. BAMUI is set up with the intention to provide a forum for the settlement of disputes arising from business transactions primarily among Muslims, or Islamic transaction. BAMUI also provides binding opinion if requested.<sup>128</sup>

**ii) Specialized Arbitration**

To date, there exists only one specialized arbitration. The specialized arbitration is arbitration center dealing exclusively on capital market. The center was formed in August 2002. The arbitration is named *Badan Arbitrase Pasar Modal Indonesia* or the Indonesian Capital Market Arbitration and abbreviated as BAPMI. BAPMI was founded by capital market societies.

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<sup>127</sup> BANI suggests parties wishing to make reference to BANI for dispute settlement use the standard clause in their contracts as follows, “All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules.” See: Brochure of BANI.

<sup>128</sup> Articles of Associations of BAMUI art. 4.

There are three ADR mechanism offered at BAPMI. First is providing binding opinion when requested by parties to a dispute.<sup>129</sup> Second is settling dispute through mediation and conciliation.<sup>130</sup> Third is settling dispute through arbitration.<sup>131</sup>

#### **II.3.4 Problems Surrounding Arbitration Mechanism**

There are many problems surrounding arbitration as a means of dispute resolution. First of all arbitration may be popular within the business circle, but it does not enjoy the same popularity for non-business society. Even the businesses that understand arbitration are limited. Hence, it is not the best mechanism available to solve private dispute.

The second reason has to do with cost. If compared to court mechanism, the cost may arguably less. However, for most Indonesian if they see the cost of going to arbitration they would be astonished.<sup>132</sup> Most Indonesian cannot relate that arbitration is inexpensive mechanism for settling dispute. Some parties to the dispute have backed down from pursuing arbitration mechanism on the ground of cost.

The third reason has to do with human resources. Simply said, only small numbers of qualified individuals have the capacity and willingness to become arbiter.

The fourth reason is the presence of arbitration centers are not within easy reach of the people. Indonesia is a vast and large country, but BANI has only head office in Jakarta and branch office in Surabaya. BAMUI and BAPMI currently still maintain offices in Jakarta. It would be too costly for parties outside Jakarta to take up their case at the existing arbitration centers.

Lastly, although arbitration awards rendered in Indonesia have never been refused for enforcement by court, however, that is not the case with respect to foreign arbitral awards.<sup>133</sup> Expatriates are frustrated when it comes to enforcement of foreign arbitral

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<sup>129</sup> BAPMI Articles of Association art. 6 (a).

<sup>130</sup> *Id.* art. 6(b).

<sup>131</sup> *Id.* art. 6(c)

<sup>132</sup> The cost for registration fee as of 2 January 2001 is IDR 2 million. The administration/hearings fee and arbitrator's fee will depend on how much amount of money is being claimed. If it is less than IDR 500 million the administration/hearings fee is 10% and if the amount is over IDR 500.000 million the administration/hearings fee is 0.35%.

<sup>133</sup> Since 1990 until 2002 the registrar of Central Jakarta District Court recorded 29 applications for the enforcement of foreign arbitral awards. Out of those numbers only 9 have been granted enforcement. However, out of 9 applications, there are enforcement being postponed.

awards in Indonesia. Their complaint is directed toward judges who have lack of understanding, corrupt judicial system and is not a convenient forum. If they can avoid enforcing foreign awards in Indonesia, they will do so.

## **II.4 Mandatory ADR**

### **II.4.1 Background**

In Indonesia, there are disputes that have to go to special government agencies for remedy. The legal dispute is not exactly private dispute among individuals. It has two features. The first is the public defended dispute, whereby an individual complaining against government or its officials where compensation is seek. Tax issues fall under this category. The second is individuals or the public complaining to State against other individuals. The State becomes referee, although the parties to a dispute do not face each other like in a civil case.

These agencies have attributes as judicial power based on two grounds. First, these agencies are intended by their framers to act on judicial bodies. Second, their decision, if appealed has to be submitted to courts.

### **II.4.2 Tax Court (Pengadilan Pajak)**

Pengadilan Pajak or the Tax Court is established as improvement of Badan Penyelesaian Sengketa Pajak or the Board of Tax Dispute Settlement. The Tax Court was established by virtue of Tax Court Act of 2002.<sup>134</sup>

Under Article 2 of the Tax Court Act, the court is a judicial body for taxpayer who seeks justice on tax dispute.<sup>135</sup> Tax dispute is defined as dispute that arises in the area of tax between taxpayer and public officials with respect to the issuance of certain decree.<sup>136</sup>

The Act provides that a decision of the Tax Court can be re-opened and reviewed by submitting PK. The authority entrusted to review the decision is the Supreme Court.<sup>137</sup> This provision is uncommon. The provision places the Tax Court to be the first

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<sup>134</sup> Act 14 Year 2002.

<sup>135</sup> Tax Court Act art. 2.

<sup>136</sup> *Id.* art. 1 (5).

<sup>137</sup> *Id.* art. 77 (3).

and final instance. As a body of final instance, it contradicts with the Judicial Power Act, which provides the Supreme Court as the court of last instance for any judicial bodies. It is uncertain whether the Act meant of re-opening a case is actually appealed for cassation. If it is re-opening a case the question is whether it involves something that is extraordinary since PK is an extraordinary legal actions. A case can only be re-opened if such case has been decided with verdict having enforceable effect.

In addition, the Tax Court Act does not mention any introduction of new evidence. The Act may mean appeal to which the term is used is 're-open.'

#### **II.4.3 Commission for Supervision of Business Competition (KPPU)**

Competition dispute between businesses or against businesses is mandatory to be examined and settled outside the court. The institution dealing with the examination and issuing decision is the *Komisi Pengawas Persaingan Usaha* or the Commission for Supervision of Business Competition (hereinafter referred to as the "Commission").

Although the Commission has the duty to handle dispute between businesses, however, the nature of dispute is not exactly the same as dispute in civil case. The Commission when summoning, examining and deciding a case is not based on adversarial manner between plaintiff and defendant. The Commission when it takes up the case, it will make its own enquiry on the party who is complaint and if found guilty, will impose sanction.

The Act provides that the Commission may only investigate cases that do not have criminal elements. If monopoly practices or unfair competition possesses any level of criminality then it is the responsibility of both the police to investigate and the public prosecutor to prosecute at the District Court.

#### **II.4.4 Labor Dispute Settlement Committees**

The Labor Dispute Act of 1957 (hereinafter referred to as "Labor Dispute Act"),<sup>138</sup> imposed obligation to the Minister in charge of labor to establish the *Panitia Penyelesaian Perselisihan Perburuhan Daerah* (the Regional Labor Dispute Settlement Committees) or the Regional Labor Dispute Settlement Committee (hereinafter referred

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<sup>138</sup> Act 22 Year 1957.

to as “Regional LDSC”).<sup>139</sup> The Regional LDSC is a tripartite institution that consists of person nominated by the government, labor and employer. Any labor dispute dealing with working conditions has to go to Regional LDSC. In 1964 LDSC has widen its jurisdiction so it can examine termination of employment cases.

The 1957 Act also establishes the *Panitia Penyelesaian Perselisihan Perburuhan Pusat* or the Central Labor Dispute Settlement Committee (hereinafter referred to as “Central LDSC”) which has its sitting in Jakarta.<sup>140</sup> Similar to the Regional LDSC, the Central LDSC is also a tripartite institution.

The two tribunals and their procedures will be dealt extensively in chapter IV of this study.

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<sup>139</sup> Labour Dispute Act art. 5 (1).

<sup>140</sup> *Id.* art. 12.

## **Part 2**

### **Study on Dispute Resolution Process in Specific Cases**

## Chapter III

### Consumer Dispute Resolution Process

#### III.1 Background

Most Indonesian consumers have very low awareness of their rights under the consumer protection. Individual consumer rarely considers defective products or mundane services as an issue that would end up as dispute. If they buy defective products or receive mundane services, they usually just accept them. Some may return the defective goods to the store, but they never actually take the dispute to formal machinery, such as court. Therefore, it is not surprising why consumer disputes have not been many.

Several NGOs whose concern is consumer protection has assisted consumers in exercising their rights. A notable NGO in this area is *Yayasan Lembaga Konsumen Indonesia* or The Foundation for Indonesian Consumers Institute (hereinafter abbreviated to “YLKI”). YLKI has been active in advocating consumers’ rights, and in many occasions has represented consumers in their fight against producers.

#### III.2 Nature of Dispute

The object disputed by consumer can be divided into two categories, namely dispute on goods and dispute on services.

Goods are disputed for various reasons. There have been cases where the goods sold were simply defective. In addition, there have been cases where goods sold were found to have effect that can endanger human lives. There also have been disputes over deceptive *halal*<sup>141</sup> label in certain product. Moreover, there have been also disputes on product that contains substance that is not properly mentioned in the information label. There have also been disputes over product that has not given sufficient information to consumers of possible side effect.

The disputes over services arise from mundane services. The most frequent dispute involves household services, such as electricity and telephone. These services have been monopolized by State enterprises which consumers do not have alternatives to

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<sup>141</sup> Halal food is food prepared in accordance with Islamic Syari’ah Law

choose from if they are offered with mundane services. The electricity company has been frequently complained because of its regular blackouts. The telephone company has been complained due to its limited ability in providing lines, overcharging monthly bill and mistakenly charging connections.

In addition, there have been disputes over cellular phone services. Consumers have been complaining on the blank spots. They have also accused certain provider on deceptive calculation of charges.

Moreover complaint also arises from transportation services, such as buses and trains, in particular when accidents occur.

Banking services have also been complained, due to mismatch of money withdrawn from the automated teller machine, overcharging credit cards and mistakenly deducting current or saving accounts.

YLKI recorded 798 complaints of goods and services between January to June 2000 in greater Jakarta.<sup>142</sup> The complaints are categorized into 10 categories, namely, complaints on electricity related matters, complaints on telephone related matters, complaints on banking services, complaints on housing related matters, complaints on electronic products, complaints on prizes offered by producer, complaints on water related matters, complaints on insurance related matters, complaints on transportation related matters and complaints on leasing services.<sup>143</sup>

### **III.3 Provisions on Dispute Settlement**

The laws and regulations protecting the consumer protection have not been historically strong. One reason is the lack of comprehensive rules that provide legal protection for consumers. In the past, legal protections for the consumer have been provided in piecemeal manner. Many Acts have stipulated in broad and general term some protection for the consumers. To name few examples, there are provisions on consumer protection in the Hygiene Act of 1966,<sup>144</sup> the Health Act of 1992,<sup>145</sup> the Food

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<sup>142</sup> Greater Jakarta consists of areas in Jakarta and some West Java area surrounding Jakarta, namely, Bekasi, Bogor and Tangerang.

<sup>143</sup> Consumer Complaints Data 1995-2001 published by YLKI.

<sup>144</sup> Act 2 Year 1996

<sup>145</sup> Act 23 Year 1992.

Act of 1996<sup>146</sup> and the Banking Act of 1998.<sup>147</sup> Unfortunately, due to its broad and general term, many of these provisions are inoperative. Hence, the provisions on consumer protection in these various laws are rarely used as ground for lawsuit by consumers if they take the case to the court. The most common legal basis for consumer lawsuit is tort as provided under article 1365 of the Civil Code.

Although there had been discussions on the need of comprehensive rules to protect the well-being of consumers, it was not until 1999 did Indonesia has its first Consumer Protection Act.<sup>148</sup> The Act contains 15 chapters and 65 articles and some of the articles deal exclusively with dispute settlement.

Provisions on consumer dispute settlement are stipulated under chapter 10 of the Consumer Protection Act. The provisions can be argued to be a replica of dispute settlement provisions under the Environmental Act of 1997. Many resemblances between the two can be concluded. The reason for such similarities is that the drafter of Consumer Protection Act had used provisions of the same found under Environmental Act as reference and replicates them almost completely. The only striking difference between the two is the Consumer Protection Act requires the government to establish dispute settlement centers referred to as *Badan Penyelesaian Sengketa Konsumen* or the Consumer Dispute Settlement Board (hereinafter abbreviated to as “BPSK”).<sup>149</sup> Meanwhile the Environmental Act does not obligate the same, it only states that the government, or public, may establish such center.

### **III.3.1 BPSK as Center for Consumer Dispute Settlement**

Under Article 49 paragraph 1, the government has the obligation to set up BPSK at the regency level.<sup>150</sup> For this purpose, the government has initially established some BPSKs, namely, in Medan, Palembang, Central Jakarta, West Jakarta, Bandung, Semarang, Yogyakarta, Surabaya, Malang and Makassar.<sup>151</sup> Unfortunately, even though

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<sup>146</sup> Act 7 Year 1996.

<sup>147</sup> Act 7 Year 1992 as amended.

<sup>148</sup> Act Number 19 Year 1999 State Gazette Number 42 Year 1999.

<sup>149</sup> Consumer Protection Act chapter XI.

<sup>150</sup> *Id.* art. 49 (1)..

<sup>151</sup> Presidential Decree Number 90 Year 2001.

it has been a little over a year since its establishment, none has been in operational. The problems confronting the establishment and operational of BPSK are, at least, two folds.

First, finding capable human resources to fill the position at BPSK has been extremely challenging. To start with there are only small number of people who understand the legal concept, let alone the required skill necessary to settle dispute. The situation is worsen by the fact that there will be so many BPSKs established as Indonesia has many regencies and it is uncertain whether human resources are available.

The second problem has to do with who has the responsibility of funding BPSK. Under the Act, it is unclear whether the local or central government has the funding responsibility. If local government has to fund BPSK, it may refuse such responsibility on the ground that BPSK is more of a cost rather than profit center. The local government may also have other more important priorities than maintaining BPSK. This is because many local governments have not understood that pursuing the policy of protecting consumers is important.

On the other hand, if the central government has to fund BPSK, the budget allocated for such purpose will incredibly be huge. The central government may not be able to find and sustain the budget. Hence, the obligation to establish BPSK at the regency level may become rhetoric rather than effective provision. This exemplified poor law making in Indonesia. A provision is drafted without making thorough research on the supporting infrastructure.

Article 52 provides the duties of BPSK, which consists of thirteen duties. The first duty is to handle and settle consumer dispute through mediation conciliation or arbitration mechanism.<sup>152</sup> The second duty is to give consultation on consumer protection issues. Third, is to oversee standard provisions in contracts. The next duty is to report to the investigators if there are violations against the Act by the businesses. The fifth is to accept written or oral complaints from the consumers of any violations on the consumer protection. Another duty is to look into and examine consumer dispute. The seventh is to summon businesses suspected of violating on consumer protection.

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<sup>152</sup> The drafters may not know for sure the difference between mediation, conciliation and arbitration.

To summon and present witnesses, expert witnesses and those persons who have knowledge of the businesses violating the Act, is also the duty of BPSK. BPSK has the duty to request investigator to have the presence of businesses, witnesses, or expert witnesses who are unwilling to come based on summon by BPSK. The next duty is to obtain, look into or assess letters, documents or other evidences for investigation or examination purposes. The eleventh duty is to decide whether there is injury from the consumers. The twelfth duty is to inform the decision it has issued to the businesses found violating the consumer protection. The last duty is to enforce administrative sanctions on businesses that have been found violating the Act.

From the above duties, as an independent body it can be concluded that BPSK assume various roles with respect to the law enforcement of the Act.

First, BPSK can be considered as an adjudication body since it handles and settles consumer disputes, even enforcing administrative sanction.

Second, BPSK assumes the role of consultancy body as it gives consultation to consumers. The two roles can be questioned whether they are not in contradiction with each other. An institution which gives consultation at the same time acting as adjudicator can result in conflict of interest, unless different persons within the institution assume the two roles.

Third, BPSK assumes the role of monitoring body. It monitors whether there are standard clauses in contracts that violated the Consumer Protection Act. It also monitors in general whether there are violations by the businesses on the Act.

Fourth, BPSK assumes the role of the police and public prosecutor. It receives complaint of any violation to the Act, examines documents and summons those who are suspected of violating.

These many roles assumed by BPSK are uncommon under Indonesian legal system. BPSK has been vested with so many and wide-ranging powers. The reason behind it may be because the drafter at the time of drafting put too much emphasis on protecting the consumers that many of the provisions contravened with various legal doctrines and principles.

### III.3.2 Provisions for Consumer Seeking for Relief

#### i) Categories of Plaintiff

There are four categories of plaintiff recognized under the Act.<sup>153</sup> The first category is individual consumer or his/her heir who sustained injury. The second is a group of consumers within the community who have the same interest. This is commonly referred to as community's class action.<sup>154</sup> The third category is NGO who has legal standing to file lawsuit. The last category is the government or its related agencies if the goods or services consumed have resulted in material injury or causing massive scale of victims.

The Act provides that, plaintiff when filing a lawsuit has to submit their claims to the District Court except for individual consumer who has the choice of settling its dispute.<sup>155</sup>

An individual consumer sustaining injury has the option of filing lawsuit through BPSK or court.<sup>156</sup> The choice of where to settle the dispute is made by the parties to a dispute on voluntary basis.<sup>157</sup> The Act, however, stop short in providing provisions in situation where agreement cannot be reached between the contending parties. Furthermore, the Act can be criticized because of its inconsistency with the legal doctrine that the choice of settling dispute through court does not have to be agreed by the parties. This is to say that the agreement to settle dispute only applies to out of court settlement, not settlement through the court. Settlement through court does not require agreement between the contending parties to avoid deadlock.

The community, as opposed to individual, sustaining injury filing a lawsuit has been relatively new practice under the Indonesian rules of procedure, although it has been recognized under the Consumer Protection Act. Its novelty has caused the concept being rejected by the judiciary. Most people in Indonesia, including those in the legal

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<sup>153</sup> Consumer Protection Act art. 46 (1)

<sup>154</sup> Class action lawsuits are a new phenomenon in Indonesia. Currently there are three other Acts which allow class action suits, namely The Environmental Act, the Forestry Act, and the Construction Service Act.

<sup>155</sup> Consumer Protection Act art. 46 (1)

<sup>156</sup> *Id.* art. 45 (1).

<sup>157</sup> *Id.* 45 (2).

profession, are not accustomed to the concept of class action. Thus far, there have been quite number of cases brought to the court, but only few were accepted. Judges have opposed class action suits on the ground that such concept derives from the common law system and not from the civil law system. The first admissible class action case was in October 2001 at the Central Jakarta District Court.

Amid the wide misperception and rejection of class action lawsuits by the judiciary, the Supreme Court has issued regulation (known as the *Peraturan Mahkamah Agung* or the Supreme Court Regulation) that clarify the procedure of filing class action suits. With this regulation, the judiciary has accepted the class action concept. The regulation took effect in 26 April 2002 and became the guidance for District Court when examining class action lawsuit.

As to the right of NGO to file lawsuit as permitted under the Consumer Protection Act, the judiciary has also found this as new concept. In the past courts have rejected lawsuit filed by NGO. Many judges have difficulty accepting the idea of NGO to have legal standing to file lawsuit because the NGO is not the one, or is representing a party, who sustained injury.

In 1994, the Central Jakarta District Court became the first court who accepted NGO to have legal standing to file lawsuit. The case was on environmental dispute between an environmental NGO filing a lawsuit against company who is suspected of damaging the environment.<sup>158</sup>

Of course, not all NGO will have legal standing of filing lawsuit. The Consumer Protection Act recognizes this fact and places limitations. NGO initiating legal action before the court must qualify three requirements.<sup>159</sup> First, the NGO has to be an organization having legal personality. The second requirement is the articles of association of the NGO have to mention that the objective of its establishment is for the purpose of protecting the well-being of the consumers. The last requirement is the NGO has been involved in activities as stated in its articles of association. This last requirement in fact becomes the decisive requirement in limiting which NGO can have legal standing.

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<sup>158</sup> The case became a landmark case and known as the *Walhi v Inti Indorayon Utama* which will be dealt in this study later in chapter V.

<sup>159</sup> *Id.* art. 46 (1) (c)

The requirement depends greatly on the interpretation of the court. To date, except for YLKI, there are no other NGOs having legal standing.

## ii) **Out of Court Settlement**

Individual consumer as said earlier, may settle their dispute with producer outside the court. The objectives, are “... to achieve agreement in the form and size of compensation and for certain measures to be undertaken to ensure consumer will not sustain the same injury.”<sup>160</sup>

The Act confirms the legal doctrine adhered under Indonesian legal system that settlement on private dispute will not set aside criminal offences. Article 45 paragraph 3 provides that settlement of private dispute shall not negate any criminal responsibility should there be any criminal offence.<sup>161</sup>

An out of court settlement, does not necessarily negate the possibility of court settlement. Paragraph 4 of article 45 provides that once the parties to a dispute have agreed outside court settlement, a fresh lawsuit to the court would still be possible. However, the Act provides requirement on such admissibility. The requirement is one of the parties has to declare that out of court settlement is unsuccessful.

Unfortunately, this provision is somewhat confusing. To start with there is no exclusive jurisdiction once parties have agreed to out of court settlement. Second, it is uncommon for one of the parties to a dispute to declare that their resolution is unsuccessful. It is questionable whether such arbitrary decision becomes sufficient ground to declare that out of court settlement is unsuccessful. In short, the out of court settlement will be overshadowed by one party declaring the settlement as unsuccessful and the dispute has to go to court. This, of course, will discourage parties to settle their dispute outside the court, as there is no incentive.

The Act provides that BPSK when handling a case has to establish a panel.<sup>162</sup> The members of the panel should be at least three persons and each representing the element of government, the consumers and the businesses.<sup>163</sup>

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<sup>160</sup> *Id.* art. 47.

<sup>161</sup> *Id.* art. 45 (3).

<sup>162</sup> *Id.* art. 54 (1).

<sup>163</sup> *Id.* art. 54 (2).

The decision from the panel will be final and binding.<sup>164</sup> The Act seems to give the same legal effect of BPSK panel's decision with arbitration's decision, in the sense that decision may not be appealed. However, the decision of the panel can be objected (*keberatan*) to a court.<sup>165</sup> The word 'objection' under this Act seems to have different meaning from appeal. This conclusion is made because under the elucidation of Article 53 paragraph 3 it is stated that the panel's decision cannot be appealed.<sup>166</sup> This confusion again showed how poor the Act was drafted. It was drafted without realizing there are contradictions, or at least vagueness, between the articles.

The panel examining a case must issue its decision within 21 working days after a lawsuit is accepted.<sup>167</sup> At the latest 7 days after the panel issues decision, the businesses that are found guilty must take whatever action as provided under the decision.<sup>168</sup> Parties in dispute may submit objection to the District Court within 14 days after decision of the panel is made.<sup>169</sup> The District Court has 21 working days to issue its decision.<sup>170</sup> If not satisfied with the District Court decision, the parties can further object the decision to the Supreme Court within 14 days after decision is issued by the District Court.<sup>171</sup> The Supreme Court has 30 days to issue its decision.<sup>172</sup>

The hierarchy of objection by the parties pursuing their case at BPSK is similar to the hierarchy of appeal at any regular court. This means out of court resolution will not give any incentive to the parties in dispute. Furthermore, the time limit imposed by the Act at each stage can be questioned whether it will bind strictly the District or Supreme Court. This is because there is no sanction imposed if the District or Supreme Court does not adhere to the time limitation. In reality, it would be difficult for the District, or the Supreme Court to speed up consumer dispute against other disputes they handle.

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<sup>164</sup> *Id.* art. 54 (3).

<sup>165</sup> *Id.* art. 56 (2).

<sup>166</sup> *Id.* elucidation of art. 53 (3).

<sup>167</sup> *Id.* art. 55.

<sup>168</sup> *Id.* art. 56 (1).

<sup>169</sup> *Id.* art. 56 (2).

<sup>170</sup> *Id.* art. 58 (1).

<sup>171</sup> *Id.* art. 58 (2).

<sup>172</sup> *Id.* art. 58 (3).

The settlement of dispute through formal institution, BPSK or court, does not set aside the possibility for parties to settle amicably.<sup>173</sup> Parties, at any time or stage, may conclude amicable settlement.

A point needs to be noted in the dispute settlement provisions of the Act is the treatment of private law matter into the criminal law with regard to non-observance of enforceable decision. The Act provides that if businesses were found guilty and it did not observe the decision within the time prescribed, such non-observance will become a criminal act.<sup>174</sup> In such event, BPSK may request investigator to begin its investigation.<sup>175</sup> Furthermore, the Act provides that the decision of BPSK if not observed, will be sufficient preliminary evidence to start investigation.<sup>176</sup>

This provision has converted private dispute to become public initiated dispute (criminal case). This conversion is a phenomena of several Acts promulgated in 1999, such as the Antimonopoly Act.<sup>177</sup>

### **III.4 Consumer Dispute Resolution in Practice**

#### **III.4.1 Court Mechanism**

Settlement through court by individual consumer has been rare. If consumer individual pursue court it usually involves substantial lawsuit and initiated by consumer who belongs to middle-upper class.

To give an example, a case arises between Anny R. Gultom as plaintiff who lost her car while parked and under the supervision of the defendant, PT. Securindo Packatama Indonesia, a company providing car park services. The case was registered at the Central Jakarta District Court on 15 December 2000 and the court issued its verdict on 26 June 2001.<sup>178</sup> The plaintiff blamed the defendant for not providing expected services causing her car to be stolen. The plaintiff requested the court for the defendant to pay compensation for her lost car and stress she had experienced.

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<sup>173</sup> *Id.* Elucidation of Article 45 (2).

<sup>174</sup> Enforcement effect means the decision is not being appealed and it can be enforced by the court of law.

<sup>175</sup> Consumer Protection Act art. 56 (4)

<sup>176</sup> *Id.* art. 56 (5)

<sup>177</sup> **See:** Antimonopoly Act Article 44 par 4 and 5

<sup>178</sup> Civil Case Number 551/PDT.G/2000/PN.JKT.PST

The court ruled in favor of the plaintiff and the defendant has to pay compensation for damages. The award covers two compensation of damages. The first compensation was awarded on her stolen car, which the court decides the plaintiff will get seventy five percent what is being requested. The second compensation was awarded on the stress she had experienced for ten percent of what is being requested. The defendant did not accept the ruling and appeal to the High Court.

There are several things to be noted on the case. First, the plaintiff did not use the Consumer Protection Act as the basis for compensation from the defendant. The plaintiff used the Civil Code as the basis for the lawsuit.

The second thing to be noted is the plaintiff and defendant belong to the middle-upper class. Hence both of them may have some familiarity to court mechanism to resolve dispute.

The third thing, is court mechanism was selected after negotiation between the two ends in failure. This is to reconfirm that in Indonesia parties to a dispute will not pursue court settlement, prior to any negotiation.

The fourth thing is the duration of the case is relatively fast. It took a little over 6 months for the court, from the registration until verdict is issued, to complete the process.

The fifth is it is common for the losing party to not accept the verdict of the court and for that reason submit appeal to the High Court. This indicates one out of two things. First, the court is considered unable to do its function of delivering justice. The second, the losing parties just cannot accept losing a case. Many Indonesians went to court not prepared to loose a case.

Another case of consumer dispute that went to court is a case involving a price increase of liquefied petroleum gas (LPG) between consumers represented by certain class of consumers and the producer of LPG, Pertamina, a state owned enterprise.

The consumers are divided into several classes of plaintiff based on regency in greater Jakarta area, namely, the Central, South, North, East and West Jakarta, Bekasi, Bogor, Tangerang and Depok. The consumers filing the lawsuit are not all laymen, such as housewives, but also NGO activists. Attorneys representing the consumers come from various NGOs, such as YLKI, Indonesian Center for Environmental Law (ICEL), the

Legal Aid Institute (LBH), Association of Legal and Human Rights Assistance (PBHI). The case was registered at the Central Jakarta District Court on 15 December 2000.<sup>179</sup>

The basis for the lawsuit is the defendant's arbitrary decision to increase 40% of the price of LPG without any prior notice. There are four legal grounds used as the basis for the lawsuit. First is the Consumer Protection Act, second the Pertamina Act of 1971, the third Antimonopoly Act of 1999 and fourth tort under the Civil Code.

In examining the case, the court has to consider first whether the lawsuit initiated by community based on class action is acceptable. In this respect, the court decided that the class action is admissible on the ground of Article 46 of the Consumer Protection Act.

The court then decided on the substance of dispute, which are two folds. First whether the defendant has the right to increase the price of LPG without any prior notice; and second whether the plaintiffs entitle to receive compensation.

The court in its decision ruled that the defendant has committed tort by increasing the price of LPG arbitrarily without any prior notice. Furthermore, the court declared the decree issued by Pertamina to increase the price is invalid, and therefore instructed the defendant to lift the decree. In addition, the court ruled that plaintiffs entitle to compensation. The court also instructed for the establishment of a committee to pay compensation that consists of three representatives from the plaintiffs and two from the defendant.

Looking at the case, the issue in dispute will not be court-worthy if filed by an individual consumer. The plaintiff has to be massive. The plaintiff in this type of case is not represented by commercial attorneys, but by various NGOs. In the absence of NGO this type of case, again, will not be court-worthy.

### **III.4.2 ADR Mechanism**

In the out of court dispute settlement, YLKI has been frequently asked by consumer to be mediator. YLKI has become the center to solve consumer dispute, as BPSK has yet take effect.

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<sup>179</sup> Civil Case Number 550/PDT.G/2000/PN. JKT. PST.

In one case involving metal object in a sausage, Mrs. Shokoofeh Darwis as claimant came to YLKI and lodged a complaint against the producer, PT. Pure Foods Suba Indah as respondent.

The case started when claimant bought sausages produced by respondent. The claimant then prepared the sausages for her son to eat. While eating and swallowing one of the sausage, for some reason the sausage had injured the son's throat. At this point, claimant was not sure what was the cause of her son's throat injury. They went to the doctor and soon found out that the sausage contained metal object causing the injured throat.<sup>180</sup>

Based on what had happened to her son, the claimant came to YLKI to make complaint to respondent and asked YLKI's assistance to mediate the case. Immediately after receiving the complaint YLKI summon respondent for mediation. In the mediation process, YLKI acted as mediator by appointing one of its staffs, Muhammad Ihsan. At the first session of mediation process, apart from the disputed parties, the staff from the Indonesian Association of Food and Beverages Businesses attended the hearing.

The mediation process consisted of three formal meetings and one informal meeting. The informal meeting between the claimant and respondent was carried out at the claimant's place. The purpose of the informal meeting was to examine claimant's son by respondent's medical doctor.

After three formal sessions of mediation, the mediation ended up in failure mainly because the parties could not reach compromise on the size of compensation. The claimant demanded IDR 250 million for compensation, meanwhile the respondent only agreed to compensate IDR 2 million, in addition to replacement of the contaminated products. The claimant then states that she will pursue lawsuit against the respondent in court.

Based on the report made by the mediator, the source of failure of the mediation was the unwillingness of the parties to come to a compromise on the size of compensation. In addition, the report stated that the demand from the consumer was

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<sup>180</sup> This case is based on report made by Muhammad Ihsan of YLKI who acted as mediator/conciliator in Mrs. Shokoofeh Darwis dated 18 May 2001.

unrealistic. The report further, suggested that consumer should be advised beforehand on realistic compensation before entering negotiation.

Another case that had attracted the public and the media is the Ajinomoto controversy, which occurred in late 2000. Ajinomoto is a trade name of monosodium glutamate (MSG) product that is popular seasoning among every household in Indonesia. An Indonesian established, but owned by Japanese company, PT. Ajinomoto Indonesia, manufactures Ajinomoto.

The controversy surfaced when the Food and Drug Analysis Body of the Council of Religious Ulemas (LPPOM MUI) said it had found evidence that pig products had been used in the manufacture of Ajinomoto. Later, a senior company official admitted the manufacturer had used bactosoytone, extracted from pork, in place of polypeptone, which is extracted from beef, as a medium to cultivate bacteria that produces enzymes needed in the production of MSG. However, the pork enzyme used in the production was merely a catalyst that disappeared during processing and the final product was entirely pork-free. But, this explanation was rejected by many religious leaders.

The controversy became politicized as majority of Indonesian are Muslims and the then President, Abdurrahman Wahid, openly said the MSG is halal irrespective of bactosoytone being used.<sup>181</sup> The statement is made to avert the risk of losing thousands of employment opportunities of investment capital.

In addition, the legal issues had become public initiated dispute (criminal case).<sup>182</sup> Some senior officials from the company are detained for questions. However, due to insufficient evidence, they were released and the case was never submitted to the prosecutor for criminal trial.

In the private dispute, YLKI initiated a lawsuit based on class action to PT. Ajinomoto. The lawsuit, however, died down after it has not attracted public attention similar to the faith of many controversial cases in Indonesia.

Currently, the controversy has never been discussed in the public. The company, however, made a public apology soon after the incident. In addition, the manufacturer

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<sup>181</sup> <http://www.tempo.co.id/harian/fokus/56/2,1,21,id.html> access on 31 January 2003.

<sup>182</sup> <http://www.tempo.co.id/harian/fokus/56/2,1,28,id.html> access on 31 January 2003.

had pulled out its controversial products. Now Ajinomoto has received halal certification from the MUI for MSG derived from a soybean enzyme.

## Chapter IV

### Labor Dispute Resolution Process

#### IV.1 Background

Under the Soeharto administration, the number of labor disputes is relatively low. This was not because relations among labors and employers are in harmony. The oppressive measures against labor movement by the government have been the reason for the low number of labor disputes. The government had used the military and police to keep labor from staging strike and protest against employer, even for the purpose of defending their normative rights.<sup>183</sup> Attracting foreign investors with cheap labor and lack of respect on human rights were the reasons behind such oppressive actions.

Currently, however, the situation has been in a sharp contrast. Labor and employer frequently involved in disputes. The government cannot freely intervene in the dispute as it used to be. Military actions have not been employed and police actions are limited amid more respect on human rights of the labor. As a result labor disputes have been on the rise.

The Labor in many occasions has demanded employers to pay them properly, saying that they are paid relatively low compared to company's profit, in addition to improved working conditions. The government has also been the target of labor protest as it has the responsibility of setting the minimum standard wage. The government has lately setting much higher minimum standard wage compared to before. Labor protested if the minimum standard wage is below the Consumer Price Index or did not take consideration of inflation.

On the other hand, employers claim that labor are demanding too much, and have failed to increase productivity. Furthermore, the reason for disagreeing for much higher minimum standard wage is because employers try to minimize their labor costs. They have criticized the government's move saying it will hurt the operation of the company.

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<sup>183</sup> A. Uwiyono said "(T)he employer will use every available means to overcome strike in the company. In Indonesia, the means amongst others are by requesting government to intervene, the military, the police, by reporting as a criminal case, lawsuit or by hiring other people who fight against labour." See: A. Uwiyono, Hak Mogok di Indonesia (The Right to Strike in Indonesia). (Jakarta: Universitas Indonesia Fakultas Hukum Program Pascasarjana, 2001), 160.

In recent years, labors taking on the street to stage protests, after negotiation failed with the employer, have become common and widespread.

## **IV.2 Laws Governing Labor Dispute**

The current provisions on labor dispute are stipulated under the Labor Dispute Act of 1957,<sup>184</sup> and the Termination of Employment Act of 1964.<sup>185</sup> The 1964 Act has been further elaborated with implementing regulations. The last implementing regulations were issued in 2000, which created a lot of controversies.<sup>186</sup> The point of controversy was the employer has to pay severance money to labor, who resign on their will provided they have worked for at least three years. This of course is supported by the labor, but opposed by the employers.

Currently the government is discussing with the House of Representative a draft law on the settlement of industrial relations dispute referred to as *Rancangan Undang-undang tentang Penyelesaian Perselisihan Hubungan Industrial* (hereinafter referred to as “Industrial Dispute Settlement Bill”). The Bill has almost been agreed, but the labor unions and employer associations protested some provisions of the Bill resulted in the delay. The Bill is now under reconsideration, in particular on provisions that have been opposed by the labor unions and employer associations. Once promulgated, the Bill will replace the Labor Dispute Act of 1957 and Termination Act of 1964 altogether.

## **IV.3 Nature of Disputes**

Under the Labor Dispute Act of 1957 and Termination Act of 1964 there are three categories of labor dispute. The first category of dispute is dispute concerning rights (*perselisihan hak*) under contract, regulations or laws (hereinafter referred to as “disputes concerning labor rights”). The dispute has been the result of differences of opinion between labor and employer or violations of rights and obligations

The second category is dispute that arises because of interests (*perselisihan kepentingan*), such as working conditions and demand for better salary (hereinafter

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<sup>184</sup> Act 22 Year 1957. State Gazette Number 42 Year 1957.

<sup>185</sup> Act 12 Year 1964, State Gazette Number 93 Year 1964.

<sup>186</sup> Minister of Labor Decree Number 150 Year 2000.

referred to as “disputes concerning labor interests”). This kind of dispute may stem from dissatisfaction of working conditions complaint by the labor union to the employer.

The third category of dispute has to do with termination of employment (*perselisihan pemutusan hubungan kerja*). This dispute occurs if employer intends to terminate an individual or massive labor (hereinafter referred to as “dispute concerning termination of employment”). This kind of dispute involves matters, such as the conditions for terminating labor, calculation of severance pay, calculation of bonus and the like.

Currently, under the Industrial Dispute Settlement Bill a fourth category of dispute is introduced. The dispute is not between labor and employers, rather it arises from dispute between labor unions (hereinafter referred to as “dispute among labor unions”). This category of dispute had never occurred previously. This category of dispute is introduced because now in Indonesia labor is free to form their union even within a company. Hence, in one company, there can be several labor unions and it can be anticipated that a dispute arises among them.

#### **IV.4 Provisions on Dispute Settlement**

This sub-section will be divided into two parts. The first will deal with the prevailing laws. The other part will deal with the draft law, which will in the near future take effect.

##### **IV.4.1 Under the Prevailing Laws**

The Labor Dispute Act defines labor as a person working for employer who receives salary (*upah*),<sup>187</sup> whereas employer (*majikan*) is defined as a person or a legal entity that employs labor.<sup>188</sup> The Act also provides definition of labor dispute, which is dispute between employer or association of employer against labor union or a number of labor unions concerning disagreement on working relations, working and labor conditions.<sup>189</sup>

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<sup>187</sup> Labour Dispute Act art. 46 (1).

<sup>188</sup> *Id.* art. 1 (1) (a).

<sup>189</sup> *Id.* art. 1 (1) (c).

For dispute concerning labor rights, two institutions can be requested to settle the dispute. First, the court, in this case the District Court can be requested to settle the dispute. Alternatively, it can be settled by Regional LDSC.

For dispute concerning labor interests, the Labor Dispute Settlement Committee is the only authority to settle such dispute.<sup>190</sup>

If labor dispute arises, according to Article 2 paragraph 1 of the Labor Dispute Act, the labor union and employer should first find amicable resolution through negotiation.<sup>191</sup> Any agreement concluded in the negotiation will become amendment to the labor agreement.<sup>192</sup>

If negotiation fails, and parties to a dispute do not opt for arbitration, then one of the parties may notify the public official within the Ministry in charge of labor to start mediation.<sup>193</sup> Such notification is considered as request for good offices from the official. The official will then act as mediator or conciliator.<sup>194</sup> The official will proceed with examination of the dispute and within 7 days since the notification will begin the mediation process.<sup>195</sup> If in the opinion of the official the mediation process is unsuccessful, then he will refer the case to the Regional LDSC by informing the parties in dispute.<sup>196</sup>

If the labor union or the employer is considering taking certain actions, such as the labor going strike or the employer pursuing lock out, that actions has to be informed to the head of regional LDSC and the contending party involved in the dispute.<sup>197</sup> The actions may take effect once such letter is received by the contending party.<sup>198</sup>

The LDSC when referred to a case shall first offer good offices to settle the dispute.<sup>199</sup> If, negotiation fails, the LDSC will examine and give decision. The decision can be in two forms. First is decision in the form of recommendations addressed to the

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<sup>190</sup> Abdul Rachman Budiono, Hukum Perburuhan di Indonesia (The Labor Law in Indonesia), (Jakarta: Rajagrafindo Persada, 1995), 158.

<sup>191</sup> Labour Dispute Act art. 46 (1).

<sup>192</sup> *Id.* art. 2 (2).

<sup>193</sup> *Id.* art. 3 (1).

<sup>194</sup> *Id.* art. 3 (2).

<sup>195</sup> *Id.* art. 4 (1).

<sup>196</sup> *Id.* art. 4 (2).

<sup>197</sup> *Id.* art. 6 (1).

<sup>198</sup> *Id.* art. 6 (3).

<sup>199</sup> *Id.* art. 7 (1).

parties in dispute.<sup>200</sup> The second is decision that has binding effect to the disputed parties.<sup>201</sup> Such binding decision is given if dispute is considered too difficult to be resolved with only recommendations.

The decision of LDSC will be enforceable if within 14 days after the decision is issued, there is no request for appeal.<sup>202</sup> If necessary, an enforceable decision against the employer can be imposed by requesting as such to the District Court.<sup>203</sup>

The decision of Regional LDSC can be challenged by one of the parties to the Central LDSC.<sup>204</sup> Other than that the Central LDSC, has the right to intervene and take up the case being examined by Regional LDSC if the matter being examined has bearing on the State's or public interest.<sup>205</sup>

The decision of Central LDSC will have enforceable effect within 14 days after the decision is issued, provided the Minister in charge of labor will not revoke or postpone the decision.<sup>206</sup> The Minister in charge of labor may revoke or postpone the decision of Central LDSC if in his/her opinion it is necessary to maintain public order and protect the interest of the State.<sup>207</sup>

The decision of the central LDSC, if necessary, can be imposed to the losing party by requesting the District Court to do so.<sup>208</sup>

With respect to labor dispute concerning termination of employment. In principle, the employer should make strenuous effort not to terminate employment with the labor.<sup>209</sup> Termination of employment is prohibited by the law if labor is in the middle of his/her sickness or fulfilling the duties required by the State.<sup>210</sup>

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200 *Id.* art. 8 (2).  
201 *Id.* art. 8 (3).  
202 *Id.* art. 10 (1).  
203 *Id.* art. 10 (2).  
204 *Id.* art. 11 (1).  
205 *Id.* art. 11 (3).  
206 *Id.* art. 13.  
207 *Id.* art. 17 (1).  
208 *Id.* art. 16 (1).  
209 Termination Act art. 1 (1).  
210 *Id.* art. 1 (2).

In the event the employer cannot avoid termination, then he/she has to negotiate of the intention to terminate with the labor union or with the individual labor, if such individual does not belong to any labor union.<sup>211</sup>

If agreement is unreachable, the employer may terminate the labor only after he/she obtains permission from the Regional LDSC provided it only involves individual labor. If it involves termination of massive scale of labors, the employer has to obtain permission from the central LDSC.<sup>212</sup>

The decision to allow termination can be appealed to higher authorities. In the case of the Regional LDSC, the appeal goes to the Central LDSC.<sup>213</sup> The decision of the Central LDSC can be challenged to the Administrative High Court within 90 days after decision is issued. The decision from the Administrative High Court can be appealed to the Supreme Court within 14 days after decision is issued.

Apart from settling dispute through the LDSC, the Act provides the possibility of settled dispute by arbitration. Under Article 19 paragraph 1 of the Act it is stated that, “(E)mployer and labor who are in dispute may on the basis of their will or proposed by the Regional LDSC to settle their dispute through arbitration.”<sup>214</sup> If parties in dispute agree to settle their dispute through arbitration, such intention should be made in writing to the local LDSC.<sup>215</sup>

The Act further provides that parties have to agree on the appointment of arbitrator(s) and the rule of procedures governing the arbitration.<sup>216</sup> The official of Regional LDSC who acts as mediator can be nominated by parties to a dispute to be the arbitrator.<sup>217</sup>

The award issued by the arbitration has to be approved by Central LDSC and once approved has the same legal effect as award issued by the Central LDSC.<sup>218</sup> The award

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<sup>211</sup> *Id.* art. 2.

<sup>212</sup> *Id.* art. 3 (1).

<sup>213</sup> *Id.* art. 8.

<sup>214</sup> Labour Dispute Act art. 19 (1).

<sup>215</sup> *Id.* art. 19 (2).

<sup>216</sup> *Id.* art. 19 (3).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* art. 19 (4).

issued by arbitration may not be appealed.<sup>219</sup> The award, if necessary, can be imposed to third party upon request to the District Court.<sup>220</sup>

#### **IV.4.2 Under the Industrial Dispute Settlement Bill**

The Industrial Dispute Settlement Bill, once enacted, will abolish the existence of Regional and Central LDSC. As replacement, the Bill establishes the *Pengadilan Perselisihan Hubungan Industrial* or the Court in charge of Industrial Relations Dispute (hereinafter abbreviated as “PPHI”). PPHI will be a special chamber within certain District Court.<sup>221</sup> PPHI, once established, will consist of career judges and ad hoc judges representing employers and labor.

##### **i) Negotiation**

Article 3 of the Industrial Dispute Settlement Bill obligates parties in dispute to seek solution through bipartite negotiation.<sup>222</sup>

A bipartite negotiation to settle dispute will be based on *musyawarah mufakat*.<sup>223</sup> If resolution is achieved, the parties will have to draw an agreement.<sup>224</sup> Such agreement has to be registered at the PPHI of the District Court where parties draw the agreement. If for certain reason, one of the parties refuses to abide by the agreement, the other party has the right to request for enforcement of the agreement by PPHI.<sup>225</sup> This particular provision has made amicable settlement agreement concluded outside the court to have the same legal effect as amicable settlement agreement concluded within the court. This provision is an important step for recognition of amicable settlement agreement concluded outside the court.

In the event dispute cannot be resolved amicably, the Bill provides different mechanisms for the four categories of dispute.

For dispute concerning labor rights, such dispute will be settled at PPHI and the decision issued will be final.<sup>226</sup>

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<sup>219</sup> *Id.* art. 21.

<sup>220</sup> *Id.* art. 22.

<sup>221</sup> Industrial Dispute Settlement Bill art. 53 .

<sup>222</sup> *Id.* art. 3.

<sup>223</sup> *Id.* art. 6.

<sup>224</sup> *Id.* art. 8 (1).

<sup>225</sup> *Id.* art. 8 (5).

<sup>226</sup> *Id.* art. 4.

For dispute concerning labor interests and dispute on termination of employment, such disputes will be settled by either mediation, conciliation, arbitration or PPHI.<sup>227</sup>

For dispute arising between trade unions, such dispute can be settled by arbitration based on a written agreement.<sup>228</sup> If parties in dispute cannot agree on the out of court settlement, the dispute will then be resolved at PPHI.<sup>229</sup>

## ii) **Mediation and Conciliation**

The mediation and conciliation process under the Bill is similar. The only distinction between the two is in mediation the third party acting mediator has to be an official from the Ministry in charge of labor,<sup>230</sup> meanwhile in conciliation the third party is not have to be public official as long as such person is registered as conciliator at the Ministry in charge of labor.<sup>231</sup>

The mediation process begins when parties to a dispute request mediator to settle their dispute.<sup>232</sup> The mediator is selected from a list of mediator maintained by the office of the Ministry in charge of labor.<sup>233</sup> The person acting as mediator has to be agreed by the parties to a dispute.<sup>234</sup>

Within 7 days from the date of request to mediate, the mediator has to start examining the dispute and immediately call for a meeting.<sup>235</sup> The mediator has to complete its task at the latest 40 working days since request for mediation is received.<sup>236</sup>

The mediator can call on witness or expert witness to be present at the mediation meeting.<sup>237</sup>

If an amicable settlement is reached, parties have to draw amicable agreement.<sup>238</sup> The agreement will be registered at the PPHI of the District Court where parties draw the agreement.<sup>239</sup> Once registered, the agreement will have an enforceable effect.<sup>240</sup>

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<sup>227</sup> *Id.* art. 5 (1).

<sup>228</sup> *Id.* art. 5 (2).

<sup>229</sup> *Id.* art. 5 (3).

<sup>230</sup> *Id.* art.1 (11) which provides, ‘...mediator is official at government agency in charge of manpower...’

<sup>231</sup> *Id.* art. 25 (1) which provides, “Conciliator must be registered at government agency in charge of manpower...”

<sup>232</sup> *Id.* art. 9 (2).

<sup>233</sup> *Id.* art. 9 (3).

<sup>234</sup> *Id.* art. 9 (2).

<sup>235</sup> *Id.* art. 11.

<sup>236</sup> *Id.* art. 16.

<sup>237</sup> *Id.* art. 12 (1).

If the mediation failed, the mediator will issue recommendation in writing to the parties.<sup>241</sup> Parties have to respond whether they agree or disagree with the recommendation within 14 days after receiving such recommendation.<sup>242</sup> In the absence of respond from one of the parties within the required period will mean that such party refuses the recommendation.<sup>243</sup> If the disputed parties agree on the recommendations suggested by the mediator, the mediator will assist the disputed parties to draw the amicable agreement.<sup>244</sup>

If the disputed parties refuse mediator's recommendation, the dispute concerning labor interests and dispute concerning termination of employment will be settled at PPHI.<sup>245</sup>

### iii) Arbitration

Under Article 29 of the Industrial Dispute Settlement Bill, the jurisdiction of arbitration is confined to examining dispute concerning labor interests, dispute concerning termination of employment and dispute between labor unions within a company.<sup>246</sup>

The arbitrator that can be selected by the parties to a dispute is also limited. The Act states that only arbitrator who is registered at the Ministry in charge of manpower can be selected as arbitrator.<sup>247</sup> This provision has made arbitration provided under the Act to be a specialized arbitration.

Settlement of dispute through arbitration has to be on the basis of agreement between the parties to a dispute.<sup>248</sup> The parties in dispute have the option to establish a single or a panel of arbitrators.<sup>249</sup> Panel arbitrators may not exceed three persons.<sup>250</sup> The

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<sup>238</sup> *Id.* art. 14 (1).  
<sup>239</sup> *Id.* art. 14 (1).  
<sup>240</sup> *Id.* art. 14 (3) (b).  
<sup>241</sup> *Id.* art. 14 (2) (a).  
<sup>242</sup> *Id.* art. 14 (2) (c).  
<sup>243</sup> *Id.* art. 14 (2) (d).  
<sup>244</sup> *Id.* art. 14 (2) (e).  
<sup>245</sup> *Id.* art. 15 (1).  
<sup>246</sup> *Id.* art. 29.  
<sup>247</sup> *Id.* art. 30.  
<sup>248</sup> *Id.* art. 32.  
<sup>249</sup> *Id.* art. 33 (2).  
<sup>250</sup> *Id.* art. 33 (2).

Act provides that if parties fail to appoint arbitrators, the dispute will then be submitted to PPHI.<sup>251</sup>

A dispute that is under examination or has been settled by arbitration is not allowed to be submitted to the PPHI.<sup>252</sup>

Arbitrator(s) has the obligation to settle dispute within 30 working days since the parties to a dispute signed the agreement to appoint arbitrator(s).<sup>253</sup> The time limit can be extended only once and limited to a maximum of 14 working days.<sup>254</sup> It is questionable whether such time limit will be sufficient if the dispute is complex. In addition, it is uncommon for a certain law to limit the time for arbitration process.

The Bill provides that the arbitrator(s) has the obligation to try to settle dispute amicably prior to any proceedings.<sup>255</sup> The Act further elaborates if parties can reach amicable settlement mediated by the arbitrator. These provisions are not common to any arbitration law. It is because those who have agreed to arbitrate had exhausted amicable settlement, but failed.

Arbitration decision will be binding and final on the parties to a dispute.<sup>256</sup> However, the decision may be requested for PK to the Supreme Court.<sup>257</sup> This provision may be interpreted as the possibility for an arbitration decision to be challenged. Actually, it is not. The Bill may mistakenly use the word ‘re-open’ instead of ‘annulment’ since the grounds for re-opening a case under the Bill are similar to the grounds for annulment of arbitration decision under the Arbitration Act.

#### **iv) Court**

There are four types of dispute that can be settled through PPHI.<sup>258</sup> First, is the dispute concerning labor rights. In such dispute, PPHI will act as the court of first and final instance to examine and decide the case.<sup>259</sup> The second is dispute concerning labor

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<sup>251</sup> *Id.* art. 33 (5).

<sup>252</sup> *Id.* art. 51.

<sup>253</sup> *Id.* art. 38 (1).

<sup>254</sup> *Id.* art. 38 (3).

<sup>255</sup> *Id.* art. 42 (1).

<sup>256</sup> *Id.* art. 49 (1).

<sup>257</sup> *Id.* art. 50 (1).

<sup>258</sup> *Id.* art. 78.

<sup>259</sup> *Id.* art. 78 (a).

interests. In such dispute, PPHI will act as the court of first instance to settle the dispute.<sup>260</sup> The third is dispute concerning termination of employment. In such dispute, PPHI will act as the court of first instance to settle the dispute.<sup>261</sup> The fourth dispute is dispute between labor unions. In this kind of dispute, PPHI will act as the court of first and final instance.<sup>262</sup>

The Bill obligates panel judges at PPHI to settle dispute within 50 working days counting from the first hearing.<sup>263</sup>

The dispute arises concerning labor interests and termination of employment can be challenged for cassation to the Supreme Court.<sup>264</sup> The Supreme Court when examining the case has to establish a panel that consists of one Supreme Court justice and two ad hoc Supreme Court justices.<sup>265</sup> The panel has 30 working days since application is made to issue decision.<sup>266</sup>

## **IV.5 Labor Dispute Resolution in Practice**

### **IV.5.1 Formal Mechanism**

Disputes concerning termination of employment have been the most frequent among other labor disputes. The dispute is usually brought to the Regional LDSC by either the labor or the employer.

In one case, an employer, PT. Nusantara Plywood, acted as plaintiff against Ch. Setiawan as defendant.<sup>267</sup> The plaintiff requested the Surabaya LDSC to grant permission to terminate the defendant. The ground for such request is the defendant had used the plaintiff's car for family purposes and the car was stolen when it is still under the defendant possession. The Surabaya LDSC in its decision of 1 May 2000 grant such

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<sup>260</sup> *Id.* art. 78 (b).

<sup>261</sup> *Id.* art. 78 (c).

<sup>262</sup> *Id.* art. 78 (d).

<sup>263</sup> *Id.* art. 90.

<sup>264</sup> *Id.* art. 96.

<sup>265</sup> *Id.* art. 99 Industrial Dispute Settlement Bill. The Bill introduced ad hoc judges at the Supreme Court as provided under Article 55 (2). These ad hoc judges are nominated by employer associations and labor union which then selected by the Supreme Court for appointment by the President.

<sup>266</sup> *Id.* art. 101.

<sup>267</sup> Decision of Surabaya LDSC Number 61/686-3/XIII/PHK/05-2000.

permission to the plaintiff and calculated a sum of money as severance money in the amount of IDR. 2.7 million (currently around USD 300).

However, the plaintiff was not satisfied with the decision, in particular the severance money that it has to pay. The plaintiff then challenged the decision to the Central LDSC in Jakarta. In 9 January 2001, the Central LDSC upheld the decision of the Surabaya LDSC.

The above case is an example of a case handled by the LDSC. The LDSC is requested to grant permission to terminate employment. If granted, the LDSC has to calculate the severance pay for the labor. A simple case handled by regional LDSC will take about 6 to 8 months. At the central LDSC, the time requires is almost the same. Time wise, the decision issued by LDSC is time consuming.

Another problem is with respect to appeal at Central LDSC since it only sits in Jakarta. Appeal will require money, which may be larger than what is being claimed by the labor. The drafter of the Industrial Dispute Bill may have realized this problem and may have provided remedy to which under the Bill, PPHI established at every District Court in Indonesia.

Another interesting labor dispute case is the Shangri-La Hotel case. The case has attracted local and international public.

The Shangri-La Hotel case started in September 2000 arising from dispute between PT. Swadharma Kerry Satya, the company which has the right to operate hotel under Shangri-La chain in Jakarta, and approximately 600 of its employees. The point of dispute is the company and labor union when negotiating the terms of new collective labor agreement cannot reach an agreement.<sup>268</sup> The negotiations entered into a deadlock and strike was staged by Shangri-La employees.

The case was taken up by Shangri-La to the Central LDSC to have permission to terminate some of its employees based on their illegal strike and causing Shangri-La to close down. In defence, the employees argued that they had no intention to cause the closure of Shangri-La.

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<sup>268</sup> Under Indonesian labor law, an employer who employs certain number of employees must conclude an agreement referred to as collective labor agreement. The employees or labours is usually represented by a labor union.

The Central LDSC in its decision of 1 May 2001 granted Shangri-La permission to terminate its 414 employees.<sup>269</sup> It held that the employees' spontaneous strike was illegal because it was carried out without permission from the Regional LDSC. The Central LDSC also decides that Shangri-La has to pay severance money to some of its employees.<sup>270</sup> All but 79 of the employees accepted this ruling and settled with Shangri-La.

The 79 who refused to settle immediately appealed the decision of the Central LDSC to the Administrative High Court in Jakarta.

At the time the when Central LDSC issued its ruling, Shangri-La lodged a lawsuit at the South Jakarta District Court against employees who have caused loss to Shangri-La. Although the case brought to the South Jakarta District Court was not labor dispute, however it had close connections with the labor dispute. This is where court mechanism can be used for 'labor related civil dispute'. Shangri-La was seeking damages of approximately IDR 8 billion from its former employees suspecting of causing damage and loss to Shangri-La.

On 1 November 2001, the judge at the South Jakarta District Court ruled that seven union officials has to pay IDR 20.7 billion for damage to reputation, damage to hotel facilities and losses suffered due to the closure of Shangri-La. Throughout the judgment the court made reference to the illegal strike. The company later offered to withdraw the order for damages if the employees would withdraw their appeal on the Central LDSC ruling and not make any counterclaims.

The employees, however, declared that they would continue with their appeal. They have submitted the appeal to the High Court.

On 26 March 2002, on the issue of termination of employment, the Administrative High Court found in favour of the employees. The court annulled the rulings of the Central LDSC.<sup>271</sup> The court in its decision has ordered Shangri-La to reinstate its former employees.

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<sup>269</sup> Decision of the P4P Number 602/358/63-5/IX/PHK/5-2001 of 1 May 2001.

<sup>270</sup> Ibid.

<sup>271</sup> Decision of the Administrative High Court Number 227/G/2001/PT.TUN.Jkt of 26 March 2002.

Based on the ruling of the Administrative High Court, the Central LDSC and Shangri-La appealed to the Supreme Court.

On 23 October 2002, the Supreme Court issued its decision with respect to termination of employment. The Supreme Court overruled in part the decision of the Administrative High Court.<sup>272</sup> The Supreme Court upheld the decision of the central LDSC of granting Shangri-La the right to terminate its employees. However, the Supreme Court disagrees with the compensation granted by the Central LDSC to former Shangri-La's employees. The Supreme Court gave more compensation to the employees.

Nevertheless, the 79 employees and their attorney are not satisfied with the Supreme Court ruling.<sup>273</sup> They found that the ruling was unfair. To this end the employees have submitted for the decision to be re-opened by the Supreme Court.

All in all the case has taken almost 2 years, but it has not come to an end. Time wise, the process starting from the permission lodged to the Central LDSC to the Supreme Court has been relatively fast compared to other labor dispute that has to go to court. One reason for the speedy process is the case has attracted public and international attention.

As to the appeal of the South Jakarta District Court ruling, the High Court has issued its verdict on 27 August 2002. The verdict stated that the appeal will not be entertained and declared null due to procedural matters. The employees, according to the High Court, failed to submit their appeal within 14 days as provided under the law of procedures. This means the decision of South Jakarta District Court will have enforceable effect.

The lesson that can be learned from the Shangri-La case is labor dispute can be pursued by various mechanism. The important thing is to find the legal basis so that the court or LDSC will entertain the case. This is despite the labor law has made distinction of which categories of dispute can go to which dispute resolution. In addition, if necessary, the various mechanism can be pursued simultaneously.

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<sup>272</sup> Decision of the Supreme Court Number 250K/TUN/2002 and 251K/TUN/2002 of 23 October 2002.

<sup>273</sup> Tempo Interaktif, "MA Dinilai Merekonstruksi Fakta Baru dalam Kasus Hotel Shangri-La (The Supreme Court has been Considered of Reconstructing New Facts in the Shangri-La Hotel Case)" See: <http://www.tempo.co.id/news/2002/12/23/1,1,22,id.html> access on 31 January 2003; Press release by Serikat Pekerja Mandiri Shangri-La Hotel can be found in <http://www.asianfoodworker.net/shangri-la-lbh.htm> access on 31 January 2003.

Labor dispute brought to court usually concerns with contractual obligations or tort. A labor will sue his/her employer on the ground that certain action's of the employer has caused injury to the labor. The labor initiating this kind of process usually comes from the middle-upper class labor. The intention is to obtain much higher compensation, higher than what the LDSC would grant for severance pay.

Labor dispute settlement through court system, however, is a very long process. In average initiating labor settlement through court will take about 5 years before enforceable verdict is obtained.<sup>274</sup> Hence, labors who have insufficient fund will avoid settling dispute through court since they do not want to lose out from their employer.

#### **IV.5.2 ADR Mechanism**

Although unrecorded, there have been settlements of dispute between labor and employer based on mutual goodwill through bipartite negotiations. There have also been successful settlements assisted by third party acting as mediation or conciliator.

In mediation or conciliation process apart from official at the Ministry of Labor, there have been occasions in which other institutions are asked to assist. The National Commission of Human Rights, for example, has played a role as mediator for some of labor disputes. The Commission successfully mediated *PT Duta Busana Danastri* labor and the management.<sup>275</sup> The Commission assistance came after the Department of Labor has failed to resolve the dispute. The Commission went so far as to draw up the settlement agreement, which the two parties eventually concluded.<sup>276</sup>

In labor dispute, arbitration is rarely used. One reason is arbitration has not been popular among labors or, even, employers. The parties in dispute are not familiar to such mechanism.

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<sup>274</sup> Uwiyo stated that it takes 5 years and 1 month from the decision of District Court to the decision of Supreme Court. **See:** A. Uwiyo, Hak Mogok di Indonesia (The Right to Strike in Indonesia), 205.

<sup>275</sup> 1994 National Human Rights Commission Report. **See:** [http://www.komnas.go.id/english/report/1994/ar\\_txtc10b.html](http://www.komnas.go.id/english/report/1994/ar_txtc10b.html) access on 31 January 2003.

<sup>276</sup> Ibid.

## **Chapter V**

### **Environmental Dispute Resolution Process**

#### **V.1 Background**

In 1982, Indonesia has its first environmental Act with the promulgation of Act Number 4 on Basic Principles of Environmental Management.<sup>277</sup> In 1997, the Act was entirely amended, as there has been growing awareness on environmental issues.

Different from the 1982 Act, the Environmental Act of 1997 provides provisions on dispute settlement between the polluters and those sustaining injury due to the damage and destruction of the environment. The Act become the first Act in Indonesia, which allows class action lawsuit and basis for the NGO to have legal standing to file lawsuit.

#### **V.2 Nature of Dispute**

The environmental dispute can be divided into two categories. First is the dispute concerning unmanaged waste from production process that resulted in damage to the environment. Manufacturing companies, have been in the past accused of damaging the environment. The second category of dispute concerns with massive scale exploitation of natural resources that resulted in the destruction of the environment. Many companies holding concession to exploit forest and mining have been accused of destructing the environment.

Acting as plaintiff in an environment dispute is the community. Individuals rarely become plaintiff. The community will claim that their environment have been damaged or destructed by certain companies. In such claim, the community will seek compensation for the damage caused and demand the same will not occur again imposing those found guilty to take certain measures. Apart from the community NGO may also act as plaintiff, as will be discussed later.

As for the defendant, there are two categories of defendant. First, those who are suspected of damaging or destructing the environment, namely, the companies. The companies for this matter can be divided into those who own plants or factories and those

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<sup>277</sup> Number 12 of the State Gazette of 1982, Supplement to State Gazette Number 3215

who are involved in the exploitation of natural resources, such as forestry, mining, oil and gas. Foreign companies have also been brought to court as defendant. These foreign companies are mostly those who take advantage of lax environment law enforcement in Indonesia. Apart from that, mining companies have also been brought to court even though they have taken environmental protection measures. However, many environmental activists saw that the measures are not sufficient in protecting the environment.<sup>278</sup>

The second category of defendant is government agency. Government agency has often times entangled in the dispute. The reason for this is the agency is responsible in issuing permits and licenses for the company's operations. If the court decides in favor of the community, by having government agency as defendant, the court may decide to instruct such agency to revoke the granted permits and licenses. As to compensation, the court will not impose any compensation against the government agency.

### **V.3 Provisions on Dispute Settlement**

Environmental Act of 1997 defines Environmental dispute as “A disagreement between two or more parties, which arises as a result of the presence, or suspected presence, of environmental pollution and/or damage.”<sup>279</sup> The Act further provides that environmental disputes can be settled through court or out of court mechanism based on agreement by the parties.<sup>280</sup> The Act, however, does not stipulate what if the parties cannot reach such agreement. It does not elaborate further which mechanism prevails. Nevertheless, that does not mean a claim will end up in deadlock. A Party claiming compensation may take legal actions to court, since dispute settlement through court does not have to be agreed by the contending party.

The agreement to settle dispute outside the court does not eliminate the possibility of one party to refer the case to the court. Under Article 30 paragraph 3 of the

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<sup>278</sup> On 2001, PT. Freeport Indonesia, the subsidiary of Freeport McMoran, is being sued by Walhi for suspicion of violating the Environmental Act.

<sup>279</sup> Environmental Act art. 1 (19).

<sup>280</sup> *Id.* art. 30 (1).

Environmental Act it is stated that, “Court settlement can be pursued even though parties have agreed out of court settlement if such settlement is declared unsuccessful by one of the parties to a dispute.”<sup>281</sup> Hence, if one party is not satisfied with the out of court settlement during or after the process, such party may declare the settlement unsuccessful. This will trigger the out of court process to be abandoned; and, subsequently, one of the parties initiates court settlement.

Although this provision has never created a problem in practice, as there have been no such cases, however such provision will discourage parties to resolve their differences outside the court due to three reasons. First, parties to the dispute may feel there would be no incentive if there is no exclusive jurisdiction to the out of court settlement. Second, it would be too biased if only one party who calls the settlement unsuccessful. Third, the court will overshadow the process of out of court settlement at each and every stage.

The out of court settlement only applies to private or civil dispute. The Act reconfirms this legal doctrine, which states that settlement outside the court does not include criminal offence.<sup>282</sup>

The Act further provides that the purpose of outside court settlement will be for parties in dispute to agree on the form and size of compensation and imposing certain party to take actions to ensure the negative impact on the environment will never occur again.<sup>283</sup>

The out of court settlement can be in the form of mediation and conciliation, or it can take the form of arbitration.<sup>284</sup>

The Act further provides that the government or public may establish an independent and impartial center for the settlement of environmental dispute.<sup>285</sup> To date there has yet been any such center established.

The Act stipulates that settlement of environmental dispute through court has to be on the ground of tort by a party causing pollution or damage to the environment

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<sup>281</sup> *Id.* art. 30 (3).

<sup>282</sup> *Id.* art. 30 (2).

<sup>283</sup> *Id.* art. 31.

<sup>284</sup> *Id.* art.32.

<sup>285</sup> *Id.* art. 33 (1).

resulting others to sustain injury.<sup>286</sup> If proven, such party has the obligation to pay compensation to the injured and has to take measures to avoid the same occurrence in the future. The judge in its decision may instruct the polluter to pay certain amount of money for each day the polluter fails to observe the decision.<sup>287</sup>

The Environmental Act of 1997 allows lawsuit initiated based on class action. Under Article 37 paragraph 1 it states that, “(T)he community has the right to bring a class action to court or report to the law enforcers on environmental issues that resulted in the lost of basic community life.”<sup>288</sup> Furthermore, the Ministry in charge of the environment can act in the interest of the community, if such Ministry has knowledge that the community has suffered from the environmental pollution or damage.<sup>289</sup>

The Act also stipulates that NGO have legal standing to initiate lawsuit in the interest of sustaining the environment against suspected polluter.<sup>290</sup> The lawsuit, however, is restricted only to demand that polluter takes certain measures. The lawsuit may not demand polluter to pay financial compensation, except real expenses that have been incurred by NGO for initiating the lawsuit.<sup>291</sup> This provision has its importance to avoid NGO who only seek financial gain rather than for the good cause of protecting the environment. In addition, it avoids from other complexities, such as who will have entitlement of the compensation and how the compensation will be distributed, since the NGO is not the injured party.

Not all NGOs can have legal standing to initiate a lawsuit against a party suspected of polluting the environment. The Environmental Act provides only NGO that satisfies three requirements will have legal standing.<sup>292</sup> The first requirement is the NGO has to be in the form of legal entity or foundation. The second requirement is the articles of association of such NGO, has to mention clearly that the objective for its establishment is to preserve the environment. The third requirement is the NGO has been carrying out activities consistent with its objective.

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<sup>286</sup> *Id.* art. 34 (1).  
<sup>287</sup> *Id.* art. 34 (2).  
<sup>288</sup> *Id.* art. 37 (1).  
<sup>289</sup> *Id.* art. 37 (2).  
<sup>290</sup> *Id.* art. 38 (1).  
<sup>291</sup> *Id.* art. 38 (2).  
<sup>292</sup> *Id.* art. 38 (3).

These three requirements are important for distinguishing between the genuine NGOs who are most concern and dedicated with environmental issues and NGOs that have other purpose having nothing to do with environment. The later is, of course, excluded from possessing legal standing. Nevertheless, the three requirements are very broad and have to be interpreted. In practical terms, it is the judge handling the case that has to interpret these three requirements. The judge will decide whether certain NGO has legal standing.

## **V.4 Dispute Resolution in Practice**

### **V.4.1 Court Mechanism**

In many environmental disputes through court mechanism, the plaintiffs have been the community, sustaining injury caused by pollution. Public interest lawyers have been taking part in representing the community. In the absence of NGO and public interest lawyer, the dispute would not proceed as high as court. There are several reasons to this. To begin with, the defendant by far has more power than the plaintiff does. The community will just settle with the company suspected of polluting even if it means the company is treating them unfairly. The defendants have been companies suspected of polluting the environment.

The situation becomes worst with the involvement of the government. The government seldom takes neutral stand on the dispute. In many instances, it has taken side with the company. The two may have common interest for disregarding the environmental issues. The company wants to cut the production cost by not taking any consideration of environmental issues. For the company, to concern with environmental issues will mean more cost on production. The government, on the other hand, is not to keen with environmental issues because it wants to attract businesses to the region. Many officials within the government think that imposing environmental laws and regulations strictly will scare businesses away.

An example of a case, which is brought by the community based on class action to certain company, is the pollution of Way Seputih River located in Central Lampung in around 1999.<sup>293</sup> The community as plaintiff is represented by classes of people living in

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<sup>293</sup> Civil Case Number 04/Pdt.G/2000 PN.M

the villages where the river is running. These classes are represented by attorneys from the Lampung Legal Aid Institute. They lodged a lawsuit against three companies operating near the river who are suspected of causing pollution by dumping their production wastes to the river. The three defendants are PT. Vewong Budi Indonesia, a company producing cooking seasoning, PT. Sinar Bambu Mas, a company producing paper and PT. Budi Acid Jaya, a company producing cassava flour.

The lawsuit was registered at Metro (Lampung) District Court on 23 February 2000. The suit is initiated on the ground of tort by the defendants. The defendants were accused of causing pollution and destruction to the environment and therefore, under article 34 paragraph 1 of the Environmental Act, have the obligation to pay compensation and take certain measures. For such purpose, the plaintiff had requested the court to order the defendants pay compensation in the amount of a little over IDR 5 billion for material and immaterial damage, in addition to temporary closure of the plants.

The three defendants, of course, refuted all arguments as put forward by the plaintiff. They argued that they have managed the waste and make sure that the waste did not cause pollution to the environment.

In 4 September 2000 the court decided that the lawsuit as invalid because the plaintiff brought the defendants who had no relationship whatsoever with each other, at the same time. The court cites a Supreme Court decision of similar situation where defendants were brought at the same time who had no relationships; such lawsuit was declared invalid.<sup>294</sup> By declaring the lawsuit invalid, the court had not deliberated the substance of claim by the plaintiff. In sum, the claim was unsuccessful due to procedural matters.

An example whereby an NGO having legal standing initiated a lawsuit against company suspected of causing pollution is the landmark case of PT. Inti Indorayon Utama Pulp Company (hereinafter referred to as “IIU”). Many considered this as a landmark case because for the first time, prior to the existence of 1997 Environmental Act, court in Indonesia had allowed Wahana Lingkungan Hidup (hereinafter referred to as “Walhi”), an environmental NGO, to have legal standing to initiate lawsuit against suspected polluter, IIU.

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<sup>294</sup> Supreme Court Decision Number 343K/Sip/1975 of 17 February 1977.

On 30 December 1988 when Walhi registered its lawsuit at the Central Jakarta District Court against IIU and five government agencies as defendants.<sup>295</sup> The government agencies were the Investment Coordinating Board, the Ministry for Home Affairs, the Ministry of Industry, the Ministry of Environmental Affairs and the Ministry of Forestry.

The plaintiff requested the court, among others, to declare invalid permits that have been issued allowing IIU to operate. In effect, the plaintiff demanded the halt of pulp factory operations. The ground for such demand was the factory would cause further damage and destruction to the environment. To this end, the defendants had violated and failed to comply with the Environmental Act of 1982, as the case occurred prior to the promulgation of Environmental Act of 1997.

The court at the initial stage had to decide whether Walhi had legal standing as plaintiff as it does not sustain injury from the defendants' actions nor it represents an injured party. The court on this issue had ruled that Walhi has legal standing to initiate lawsuit and, therefore, can act as plaintiff even though there is no direct relations between the plaintiff and the defendants.<sup>296</sup>

The court then proceeded with the substance of the dispute. In one of its rulings, the court had refused the demand by the plaintiff to declare IIU had caused destruction to the environment and, for such reason, make available funds for restoring the damaged environment. The court further said that since damage was not proven, the defendants cannot be declared as negligence in forming an independent team to assess the damage of the environment.

Irrespective of the decision made by the court, but amid strong opposition from surrounding people where the plant is located and environment activists, the Abdurrahman Wahid administration had closed down IIU operations. However, recently under the Megawati Soekarnoputri administration, it has announced that IIU would

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<sup>295</sup> Civil Case Number 820/PDT.G/1988 PN.JKT.PST.

<sup>296</sup> Walhi ever since has initiated lawsuits against many companies around Indonesia. In 1995 at Surabaya for example, Walhi filed a law suit against PT. Surabaya Meka Box, PT. Surabaya Agung Industri Pulp dan Kertas and PT. Suparma who were suspected of causing gross pollution to Surabaya river. The court decision on case is the lawsuit is declared as invalid or unacceptable. Again in 1998 at Palembang, Walhi filed a lawsuit against PT. Pakerin et. Al. who were suspected of causing haze in the South Sumatera Province between September to November 1997. The court decision on this case is the defendants found guilty of certain acts which caused haze.

resume its operations of paper pulp production. By this time, IIU has changed its name to Toba Pulp Lestari to reflect government policy of stopping rayon fiber production.

#### **V.4.2 ADR Mechanism**

There have been many examples where ADR is being employed in environment dispute. People who sustain injury have frequently asked NGO to act on their behalf to negotiate settlement with the company suspected as polluter and the government. The settlement outside the court sometimes can be successful, but in other times, it may simply fail.

To give example of a case where the out of court settlement had been successful is the Kali Tapak case.<sup>297</sup> The case involved village community at Tapak village in Semarang, Jawa Tengah who complained about environment pollution on their small river, Kali Tapak.

A company who had been producing raw materials (calcium citrate) for soft drinks was suspected to be responsible for the pollution since 1976. The company had disposed production waste to Kali Tapak without going through a proper waste management. As a result, the waste had contaminated the village community fishing ponds. The ponds had significantly deteriorated and the cultivation of fish and shrimp of the village community had substantially declined.<sup>298</sup>

In 1977, the village community had asked the head of the Semarang Regency to look into the matter. However, the government refused to take any actions since the location had been approved for such industry. The village community then turned to Semarang Legal Aid Institute to take their case. The Legal Aid Institute, at the initial stage explored the mediation process between the village community on the one hand, and the company and the government on the other.

The three parties then concurred with the mediation process to which a series of meetings was held. At the end, the three parties reached an agreement. The three had agreed that the company should pay contribution to manage the waste, in addition to

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<sup>297</sup> The report of this case can be read in, Mas Achmad Santosa, et. al., Mediasi Lingkungan di Indonesia: Sebuah Pengalaman (Environmental Mediation in Indonesia: An Experience), (Jakarta: Lembaga Pengembangan Hukum Lingkungan Indonesia, 1998), 5-15.

<sup>298</sup> Hadimulyo, "Study on Alternative Dispute Resolution for Land, Labor and Environmental Dispute," The Institute for Policy Research and Advocacy, paper, without year.

managing the waste in accordance with government standard. They had also agreed that the community village withdraws the lawsuit against the company. The NGOs even agreed not to boycott the company and other surrounding companies suspecting of polluting the Kali Tapak. Mediation in this case has been successful as parties abandoned to take up the case before the court.

An example of where out of court settlement failed is the Tembok Dukuh case.<sup>299</sup> This case occurred in 1990 in Surabaya. The case concerns a company who was suspected of polluting water at the village of Tembok Dukuh. The village community turned to NGO for assistance. The NGO then proposed mediation to the local government. The proposal was agreed to which the village community, the company suspected of polluting, and the local government held meetings. However, after a series of meeting, the parties cannot reach any agreement and the mediation had come to failure.

As a result, the village community represented by the NGO took the case to the court. At the court, there was another effort for mediation. The judge examining the case acted as mediator. Unfortunately, it failed again. The lawsuit was then continued and the village community lost their case. They appealed to the Supreme Court, however the Supreme Court found there was not enough basis for the village community to file a lawsuit since, according to the Supreme Court, mediation process had not been thoroughly employed.

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<sup>299</sup> The report of this case can be read in, Mas Achmad Santosa, et. al., Mediasi Lingkungan di Indonesia: Sebuah Pengalaman (Environmental Mediation in Indonesia: An Experience), (Jakarta: Lembaga Pengembangan Hukum Lingkungan Indonesia, 1998), 75-90.

## Chapter VI

### Summary

Most people in Indonesia will try to avoid dispute. If they face dispute, they will settle it through informal negotiations. Most are successful as Indonesian are non-law minded society. If they fail, they usually opt for extra judicial dispute resolution rather than resolve their dispute through formal mechanism. Therefore, eventhough the formal mechanism for settling dispute is not efficient, it had not caused significant problem in the society.

Overall, the formal mechanism of dispute resolutions in Indonesia be it court or out of court, is considered to be not efficient and sometimes complicated. The various dispute resolutions mechanisms are not people-friendly. The institutions, such as court, arbitration, even formal mediation and conciliation, do not have roots within the majority of Indonesian. They have little knowledge of the mechanism. For this reasons formal mechanism is not being pursued or, even, becomes an alternative for resolving dispute. This conclusion, however, may not apply to Indonesian living in the cities, which have a degree of familiarity. Nevertheless, for them dispute resolution mechanism will be used as a last resort rather than to be pursued at initial stage of dispute.

It can be concluded that for most Indonesian court dispute resolution if possible is being averted. Many felt that court is not the best mechanism for settling dispute. The reasons, among others, are time consuming, very costly in particular with irregular payment, and only protects the powerful.

Formal ADR mechanism, such as arbitration is also not a panacea for settling dispute in Indonesia. Arbitration is an institution not widely known to many Indonesian. Only a limited number of people know the institution, such as the business circle.

There are several points to be noted based on the study on consumer protection, labor and environmental disputes resolution mechanism.

The first finding is provisions on dispute settlement provided under Consumer Protection Act, Labor Dispute Act and Environmental Act have not yet been proven to be effective. Some provisions contradict with the principles of law, such as the non-

exclusivity once parties in dispute choose arbitration or a similar institution. In addition, the provisions are sometimes confusing and difficult to understand. Such as what is meant by 'objection' and whether it is the same as 'appeal.' Furthermore, the Acts have put too much burden to the Supreme Court as every case will end up there. The Acts do not give any role to the High Court to review objection in the out of court mechanism. This is unfortunate since if all cases have to be reviewed by the Supreme Court there will be more backlog cases in the Supreme Court.

Second, the study showed that most disputes in the area of consumer protection, labor and environment are settled through negotiations. If, disputes are settled through formal mechanism it is because parties do not have other choice. In the consumer protection and environmental disputes, those who sustain injury will pursue formal mechanism if only they are assisted by NGO. It is a rare for individual to litigate in consumer and environmental issues in court or arbitration, as it requires money and time. If individual litigate through court and arbitration without any assistance from NGO, the individual is most certain mostly belongs to the middle-upper class.

As for labor dispute, most are settled through the LDSC, as it is compulsory for labor and employer. There have not been too many labor cases that are brought to court or arbitration. Only the middle-upper class or group of labors that will choose court mechanism to resolve their dispute. In many occasions, the employer instead of the labor pursues the court mechanism.

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**Appendix**  
**Unofficial Translation of Law No. 30 Year 1999**

**Law No. 30 Year 1999**

**CONCERNING**  
**ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION**

**WITH THE GRACE OF GOD ALMIGHTY**

**THE PRESIDENT OF THE REPUBLIC OF INDONESIA**

Considering that:

- a. whereas, under prevailing regulations having the force of law, civil dispute resolution besides being submitted to the public courts also has the possibility of being submitted to arbitration and/ or alternative dispute resolution;
- b. whereas, the current regulations having the force of law applicable to dispute resolution by means of arbitration are no longer sufficient to address developments in the business world and law in general;
- c. whereas, based on the consideration specified in points a and b, above, it is necessary to stipulate and Act concerning Arbitration and Alternative Dispute Resolution

In View of:

1. article 5 paragraph (1) and article 20 paragraph (1) of the 1945 constitution;
2. basic Provisions of Judicial Authority Act (Law No. 14 of 1971 State Gazette Book Number 74 of 1970, Supplement Number 2951);

With the approval of

**THE PEOPLE'S LEGISLATIVE ASSEMBLY OF**  
**THE REPUBLIC OF INDONESIA**

**HAS DECIDED:**

To promulgate this:

**ARBITRATION and ALTERNATIVE DISPUTE RESOLUTION ACT**

## **CHAPTER I GENERAL PROVISIONS**

### **Article 1**

In this act following the terms have the following meanings:

- (1) Arbitration shall mean a mechanism of setting civil disputes outside the general courts based upon an arbitration agreement entered into writing by the disputing Parties;
- (2) Parties shall be legal entitles, based upon civil and/or public law;
- (3) Arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, on a separate written arbitration agreement made by the parties after a dispute arises.
- (4) District Court shall mean the District Court having jurisdiction over the Respondent.
- (5) Claimant shall mean the party submitting the request for resolution of the dispute by arbitration.
- (6) Respondent shall mean the party opposing the Claimant in the resolution of the dispute by arbitration.
- (7) Arbitrator(s) (or arbitrator (s)) shall mean one or more person designated by the parties in dispute or appointed by the District Court of by an arbitration institution to render an award regarding the particular dispute submitted for resolution by arbitration.
- (8) Arbitration Institution shall mean a body designated by the parties in dispute to render an award with regard to a particular dispute. This institution may also give a binding opinion concerning a particular legal relationship where a dispute has not yet arisen.
- (9) International Arbitration Award shall mean awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution of individual arbitrator(s) which under the provisions of Indonesian law are deemed to be International arbitration awards.
- (10) 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.

## **Article 2**

This Act shall regulate the resolution of disputes or differences of opinion between parties having a particular legal relationship who have entered into an arbitration agreement which explicitly states that all disputes or differences of opinion arising or which may arise from such legal relationship will be resolved by arbitration or through alternative dispute resolution.

## **Article 3**

The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement.

## **Article 4**

- (1) In this event the parties have previously agreed that disputes between them are to be resolved through arbitration and have granted such authority, the arbitration are competent to determine in their award the rights and obligations of the parties if these matters are not regulated in their agreement.
- (2) The agreement to resolve disputes through arbitration , as specified in paragraph (1), shall be contained in a document signed by the parties.
- (3) In the event the agreement for resolution of disputes by arbitration is contained in an exchange of correspondence, including letters, telexes, telegrams faxes, e-mail, or any other form communication, the same shall be accompanied by a record of receipt of such correspondence by the parties.

## **Article 5**

- (1) Only dispute of commercial nature, or those concerning rights which, under the law and regulations fall within the control of the disputing parties, may be settled through arbitration.
- (2) Dispute which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible.

**CHAPTER II**  
**ALTERNATIVE DISPUTE RESOLUTION**

**Article 6**

- (1) Dispute or differences of opinion that are not of a criminal nature may be resolved by the parties through Alternative Dispute Resolution (“ADR”) based on their good faith, by waiving such resolution by litigation in the District Court.
- (2) Resolution of disputes or differences of opinion through ADR, as contemplated in paragraph (1), shall be carried out through a direct meeting of the parties not later than fourteen (14) days and the outcome shall be set out in a written agreement.
- (3) In the event the dispute or difference of opinion cannot be resolved, as contemplated in paragraph (2), then by a written agreement of the parties may be resolved through the assistance of one or more expert advisors or mediator.
- (4) If the parties fail to reach an agreement as to the resolution of such dispute within fourteen (14) days with the assistance of one or more expert advisors or a mediator, or the mediator is not successful in reconciling the parties concerned, such parties may request an Arbitration or ADR Institution to appoint in a mediator.
- (5) After the appointment of the mediator by such arbitration or ADR institution, the mediation process shall be commenced within seven (7) days.
- (6) Efforts to resolve disputes or differences of opinion through mediation, as contemplated in paragraph (5), shall be undertaken in confidentiality. The settlement reached shall be set out in a written agreement, signed by all parties concerned, within thirty (30) days.
- (7) The written agreement of such resolution of the dispute or difference of opinion shall be final and binding on the parties concerned, shall be implemented in good faith, and shall be registered in the District Court within no more than thirty (30) days after it has been signed.
- (8) The agreement for resolution of the dispute or difference of opinion contemplated in paragraph (7) shall be completely implemented within no more than thirty (30) days after its registration.
- (9) If attempts to reach an amicable settlement, as contemplated in paragraphs (1) to (6), are unsuccessful, the parties, based on a written agreement, may submit the matter to resolution by an arbitration institution or ad-hoc arbitration.

**CHAPTER III**  
**CONDITIONS OF ARBITRATION, APPOINTMENT OF ARBITRATORS,**  
**AND RIGHT OF REFUSAL**

**Part One**  
**Conditions of Arbitration**

**Article 7**

The parties may agree that a dispute which arises, or which may arise between them shall be resolved by arbitration.

**Article 8**

- (1) In the event that a dispute arises, the Claimant shall inform the Respondent by registered letter, telegram, telex, fax, e-mail, or by courier that the conditions for arbitration to be entered into by the Claimant and Respondent are applicable
- (2) The notification of Arbitration, as contemplated in paragraph (1), shall expressly state at least the following:
  - a. The names and addresses of the parties;
  - b. Reference to the applicable arbitration clause agreement;
  - c. The agreement or matter being the subject of the dispute.
  - d. The basis for the claim and the amount claimed, if any;
  - e. The method of resolution desired; and
  - f. The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number.

**Article 9**

- (1) In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, their designation of arbitration as the means of resolution of such dispute to this must be given in a written agreement signed by the parties.
- (2) In the event the parties are unable to sign the written agreement as contemplated in paragraph (1), such written agreement must be drawn by a Notary in the form of a notarial deed.
- (3) The written agreement contemplated in paragraph (1) must contain:
  - a. The subject matter of the dispute;
  - b. The full names and addresses of residence of the parties;
  - c. The full name and place of residence of the arbitrator or arbitrators.
  - d. The place the arbitrator or arbitration panel will make their decision;
  - e. The full name of the secretary;
  - f. The period of in which the dispute shall be resolved;

- g. A statement of willingness by the arbitrator(s) and
  - h. A statement of willingness of the disputing parties that they will bear all costs necessary for the resolution or the dispute through arbitration.
- (4) A written agreement not containing the matters specified in paragraph (3) will be null and void.

### **Article 10**

An arbitration agreement shall not become null or void under any of the following circumstances:

- a. the death of one of the parties;
- b. the bankruptcy of one of the parties;
- c. novation;
- d. the insolvency of the parties;
- e. inheritance;
- f. effectivity of requirements for the cancellation of the main agreement;
- g. if the implementation of the agreements is transferred to one or more third parties, with the consent of the parties, who made the agreement to arbitrate; or
- h. the expiration of voidance of the main contract.

### **Article 11**

- (1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.
- (2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this act.

## **Part Two Conditions of Appointment of Arbitrators**

### **Article 12**

- (1) The parties who may be appointed or designated as arbitrators must meet the following requirements:
  - a. Being authorized or competent to perform legal actions;
  - b. Being at least 35 years of age;
  - c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties;

- d. Having no financial or other interest in the arbitration award; and
  - e. Having at least 15 years experience and active mastery in the field.
- (2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.

### **Article 13**

- (1) In the event the parties cannot reach agreement on the choice of arbitrators or no terms have been set concerning the appointment of arbitrators, the Chief Judge of District court shall be authorized to appoint the arbitrator or arbitration tribunal.
- (2) In an ad-hoc arbitration, where there is any disagreement between the parties with regard to the appointment of one or more arbitrators, the parties may request the Chief Judge of the District Court to appoint one or more arbitrators for resolution of such dispute.

### **Article 14**

- (1) In the event the parties have agreed that a dispute arising shall be heard and decide upon by a sole arbitrator, the parties must endeavor to reach an agreement concerning the appointment of such sole arbitrator.
- (2) The Claimant shall propose to the Respondent, by registered letter, telegram, telex, e-mail or courier service, the name of person eligible to be appointed as sole arbitrator.
- (3) If the parties have not reached agreement as to the sole arbitrator within fourteen (14) days after the Respondent receives the Claimant's proposal contemplated in paragraph (2), then at the request of one of the parties, the Chief Judge of the District Court may appoint the sole arbitrator.
- (4) The Chief Judge of the District Court shall appoint a sole arbitrator from a list of names submitted by the parties or obtained from the arbitration organization or institution contemplated in Article 34, with due consideration of the recommendation of or objections to the person concerned submitted by the parties.

### **Article 15**

- (1) The appointment of two arbitrators by the parties shall constitute authority to the two arbitrators to elect and appoint a third arbitrator.
- (2) The third arbitrator contemplated by paragraph (1) shall be appointed as the chair or the arbitration tribunal.
- (3) If within no more than thirty (30) days after notification is received by the Respondent as contemplated in Article 8 paragraph (1), one of the parties has failed to appoint a person as member of the arbitration panel, the arbitrator chosen

- by the other party shall act as sole arbitrator and his/her award shall be binding upon both parties.
- (4) In the event the two arbitrator appointed by the parties contemplated in paragraph (1) do not succeed in appointing a third arbitrator within fourteen (14) days after the last arbitrator was appointed, then at the request of one of the parties the Chief Judge of the District Court may appoint the third arbitrator.
  - (5) No attempt may be made by the Chief Judge of the District Court as contemplated in paragraph (4)

#### **Article 16**

- (1) An Arbitrator appointed or designated may accept or refuse the appointment of nomination.
- (2) The parties must be advised by the arbitrator(s), in writing of the acceptances or rejection of the appointment, as contemplated in paragraph (1) within fourteen (14) days from the date of the appointment or designation.

#### **Article 17**

- (1) By the appointment of one or more arbitrators by the parties in writing and the acceptance in writing of the appointment by the arbitrator(s), there is a civil contract between the appointing parties and the arbitrators accepting the appointment.
- (2) The appointment contemplated in paragraph (1) shall have the effect that the arbitrator or arbitrators will render an award fairly, justly, and in accordance with the prevailing stipulations (of law and contract), and the parties will accept such award as final and binding as mutually agreed.

#### **Article 18**

- (1) A prospective arbitrator asked by one of the parties to sit on the arbitration panel shall be obliged to advise the parties of any matter which could influence his independence or give rise to bias in the award to be rendered.
- (2) Anyone accepting an appointment as arbitrator as contemplated in paragraph (1) shall inform the parties of his appointment.

#### **Article 19**

- (1) In the event that arbitrator states his/her acceptance of the appointment or designation as contemplated in Article 16, the arbitrator concerned may not withdraw his/her acceptance except with the approval of the parties.

- (2) In the event the arbitrator contemplated in paragraph (1) who has accepted the appointment of designation, wishes to withdraw, such arbitrator shall submit a written request to the parties.
- (3) In the event the parties may consent to the request to withdraw contemplated in paragraph (2) the arbitrator concerned may be released from his/her duties as arbitrator.
- (4) In the event the request for withdrawal does not receive the consent of the parties the Chief Judge of the District Court may release such release of the arbitrator from his/her duties.

### **Article 20**

In the event an arbitrator or arbitrators panel without valid reason, fails to render its an awards within the period specified, such arbitrator(s) may be ordered to pay to the parties compensation for the cost and losses caused by the delay.

### **Article 21**

The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was a bad faith in the action.

## **Part Three Right of Refusal**

### **Article 22**

- (1) A demand for refusal may be submitted against an arbitrator if there is found sufficient cause and authentic evidence to give rise to do out that such arbitrator will not perform his/her duties independently or ell be biased rendering an award.
- (2) Request for refusal of an arbitrator may also be made if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.

### **Article 23**

- (1) Application for refusal of an arbitrator appointed by the President of a District Court concerned.
- (2) Application for refusal of a sole arbitrator shall be submitted to the arbitrator concerned.
- (3) Application for refusal of a member of an arbitration tribunal shall be submitted to the arbitration tribunal concerned.

#### **Article 24**

- (1) An arbitrator who was not appointed by the Court may only be recessed for a reason which become known to the party applying for such refusal after the appointment of the arbitrator concerned.
- (2) An arbitrator appointed by the Court may only be refused for a reason which became known to the Court after acceptance of such appointment.
- (3) The party objecting to the appointment of an arbitrator made by the other party must submit its demand for refusal within fourteen (14) days after the appointment.
- (4) In the event that matters, as contemplated in Article 22 paragraph (1) and (2), become known at a later date, the request for refusal must be submitted not more than fourteen (14) days after such matters become known.
- (5) The demand for refusal must be submitted in writing either to the other party or to the arbitrator concerned, stating the reason for the demand.
- (6) In the event the demand for refusal submitted by one of the parties is consented to by the other party, the arbitrator concerned must resign and a replacement arbitrator shall be appointed in accordance with the procedures set out in this Act.

#### **Article 25**

- (1) In the event the request for refusal submitted by one of the parties is not consented to by the other party and the arbitrator concerned is unwilling to resign, the party concerned may submit its request for refusal to the Chief Judge of the District Court, whose decision on the matter shall bind the two parties, and shall not subject to appeal.
- (2) In the event the Chief Judge of the District Court decides that the request for refusal, contemplated in paragraph (1), is well founded, a replacement arbitrator shall be appointed in the manner applied to the appointment of the arbitrator to be replaced.
- (3) In the event the Chief Judge of the District Court rejects the demand for refusal, the arbitrator shall continue to perform his/her duties.

#### **Article 26**

- (1) An arbitrator's authority shall not nullified by the death of the arbitrator and the authority shall thereupon be continued by a successor arbitrator appointed in accordance with this Act.
- (2) An arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful conduct, which must be legally proven.
- (3) In the event that during hearing of the dispute an arbitrator dies is incapacitated, or resigns, and so is unable to meet his/her obligations, a replacement arbitrator shall be appointed in the manner applicable to the appointment of the arbitrator concerned.

- (4) In the event a sole arbitrator or the chair of the arbitration tribunal is replaced, all hearings previously held shall be repeated.
- (5) In the events a member of the arbitration tribunal replaced, the hearing or the dispute shall only be replaced among the arbitrators themselves.

## **CHAPTER IV PROCEDURES APPLICABLE BEFORE THE ARBITRATION TRIBUNAL**

### **Part One Arbitration Procedures**

#### **Article 27**

All hearings of arbitration disputes shall be closed to the public

#### **Article 28**

The language to be used in all arbitration proceedings is Indonesian, except with the consent of the arbitrator or arbitration tribunal, the parties may choose another language to be used.

#### **Article 29**

- (1) The parties in the dispute shall have the same right and opportunity to put forward their respective opinion.
- (2) The parties in dispute may be represented by counsel, pursuant to special power of attorney.

#### **Article 30**

Third parties outside the arbitration agreement may participate and joint themselves into the arbitral process, if they have related interests and their participation is agreed to by the parties in dispute and by the arbitration tribunal hearing the dispute.

#### **Article 31**

- (1) The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided this does not conflict with the provisions of this Act.
- (2) In the event that the parties do not themselves determine the procedures to be applied, and the arbitrator or arbitration tribunal has been constituted in accordance with Articles 12,13,and 14, All disputes which have be so referred to the arbitrator or arbitration tribunal shall be heard and decide upon in accordance with the provisions in this Act.

- (3) In the event, the parties have chosen an arbitration contemplated in paragraph (1). The time frame and venue of the arbitration must be agreed upon, and if these have not been so determined by the parties, they shall be decided upon by the arbitrator or arbitration tribunal.

### **Article 32**

- (1) At the request of one of parties, the arbitrator or arbitration tribunal may take a provisional award or other interlocutory decision to regulate the manner of running the examination of the dispute. Including decreeing a security attachment, ordering the deposit of goods with their parties, or the sale of perishable goods.
- (2) The period of implementation of the provisional award or other interlocutory decision contemplated in paragraph (1) shall not be counted into the period contemplated in Article 48.

### **Article 33**

The arbitrator tribunal has the authority to extend its term of office if:

- (1) A request is made by one of the parties in specific special circumstances;
- (2) As result of a provisional award or other interlocutory ruling being made; or
- (3) It is deemed necessary by the arbitrator or arbitration tribunal in the interests of the hearing.

### **Article 34**

- (1) Resolution of a dispute through arbitration may be referred to a national for international arbitration institution if so agreed upon by the parties.
- (2) Resolution of a dispute through arbitration institution as contemplated in paragraph (1) shall be done according to the rules and procedures of such designated, except to the otherwise agreed upon by the parties.

### **Article 35**

The arbitrator or arbitration tribunal may order that any document or evidence be accompanied by a translation into such language as determined on by the arbitrator or arbitration tribunal.

### **Article 36**

- (1) The arbitral hearings of the dispute shall be done by written documents
- (2) Verbal hearings may be conducted with the approval of the parties concerned or if necessary by the arbitrator or arbitration tribunal.

### **Article 37**

- (1) Unless the parties have themselves determined the venue of the arbitration, the same shall be determined by the arbitrator or arbitration tribunal.

- (2) The arbitrator or arbitration tribunal may hear witness testimony or hold meetings, if deemed necessary, at a place or places outside the place where the arbitration is being held.
- (3) Examination of witness and expert witnesses before the arbitrator or arbitration tribunal shall be carried out in accordance with the provisions of the Code of Civil Procedure.
- (4) The arbitrator or arbitration tribunal may conduct examination of property in dispute, or some other matter connected with the dispute at the location of such property, if such is deemed necessary the parties shall be property summoned so that they may also be present at such examination.

### **Article 38**

- (1) The Claimant shall submitted its statement claim to the arbitrator or arbitration tribunal within the period of time as determined by the arbitrator or arbitration tribunal.
- (2) The statement of claim shall contain at the least :
  - a. The full name and residence or domicile of the parties;
  - b. A short description of the dispute, accompanied by evidence; and
  - c. Clear contents of the claim being asserted.

### **Article 39**

After receiving the statement of claim from the Claimant, the arbitrator or arbitration tribunal shall forward a copy of such claim to the Respondent, accompanied by an order that the Respondent must file its response in writing within period of not more than fourteen (14) days as from Respondent's receipt of the copy of Claimant's claim

### **Article 40**

- (1) Immediately upon receipt of the response from the Respondent, the arbitrator or arbitration tribunal shall provide a copy of thereof to the Claimant.
- (2) At the same time, the arbitrator or arbitration tribunal shall order the parties or their representatives to appear in an arbitration hearing fixed for no more than fourteen (14) days from the issuance of the order.

### **Article 41**

In the event that the respondent has not responded to Claimant's claim within the fourteen (14) days period contemplated in Article 39, the Respondent shall be summoned to a hearing pursuant to the provisions set out in Article 40 paragraph (2).

### **Article 42**

- (1) In the response or no later than the first hearing Respondent may submit a counterclaim and the Claimant shall be given an opportunity to respond thereto.

- (2) Any counterclaim, as contemplated in paragraph (1), shall be heard and decided upon by the arbitrator or arbitration tribunal together with the main dispute.

#### **Article 43**

If on the day determined as contemplated in Article 40 paragraph (2) the Claimant for no good reason does not appear after being duly summoned, the statement of claim shall be declared null and void and the mandate of the arbitrator or arbitration tribunal deemed to have been complete.

#### **Article 44**

- (1) In on the day determined pursuant to Article 40 paragraph (2) the Respondent for no good reason does not appear, but has been duly summoned, the arbitrator or arbitration tribunal shall immediately summon the Respondent again.
- (2) If the Respondent for no good reason still does not appear at the hearing, within ten (10) days after receipt by it of the second summons, the hearing shall continue without the presence of the Respondent and the Claimant's claim shall be granted as a whole, unless the claim is unfounded or contrary to law.

#### **Article 45**

- (1) In the event that the parties appear on the day determined, the arbitrator or arbitration tribunal shall first endeavor to encourage an amicable settlement between the disputing parties.
- (2) In the event such attempt at amicable settlement, as contemplated in paragraph (1), is successful, the arbitrator or arbitration tribunal shall draw up a deed setting out such amicable settlement, which deed shall be binding on both parties to comply with the terms of such amicable settlement.

#### **Article 46**

- (1) The hearing(s) on the merits of the dispute shall proceed if the attempt at amicable settlement, as contemplated in Article 45 paragraph (1), should not prove successful.
- (2) The parties shall be afforded a final opportunity to explain in writing their respective positions, and to submit evidence deemed necessary to support such position, within such time limitation as shall be determined by the arbitrator or arbitration tribunal.
- (3) The arbitrator or arbitration tribunal shall be empowered to require the parties to provide such supplementary written submissions of explanations, documentary or other evidence as may be deemed necessary, within such time limitation as shall be determined by the arbitrator or arbitration tribunal.

#### **Article 47**

- (1) before there has been any response from Respondent, the Claimant shall be entitled to withdraw its request for dispute resolution by arbitration.
- (2) In the event that there has already been a response from the Respondent, an amendment or supplement to the Claimant's statement of claim shall be allowed only upon the consent of the Respondent, and any such amendment or supplement may only involve matters of fact and not the legal basis of the claim.

#### **Article 48**

- (1) The hearings on the dispute must be completed within not more than one hundred eighty (180) days from the formulation of the arbitral panel.
- (2) Such time limitation may be extended upon consent of the parties, if required in accordance with the provisions of Article 33 hereof

### **Part Two Witness and Expert Witnesses**

#### **Article 49**

- (1) Upon the order of the arbitrator or arbitration tribunal or at the request of the parties, one or more witnesses or expert witnesses may be summoned to give testimony.
- (2) The costs of summoning such witnesses, or expert witnesses, and their travel expenses shall be borne by the party requesting such testimony.
- (3) Any such witnesses or expert witnesses shall testify upon oath, given prior to such testimony.

#### **Article 50**

- (1) The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.
- (2) The parties shall be required to provide all details of information that may be deemed necessary by such expert witnesses
- (3) The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.
- (4) In the event that any matters opined upon by any such expert witness is insufficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in hearing before the arbitrator(s) and the parties, or their legal representatives.

### **Article 51**

Minutes of the hearings, and examination of witnesses, shall be drawn up by a secretary and shall cover all activities in the examination and arbitration hearings.

## **CHAPTER V OPINION AND ARBITRAT AWARD**

### **Article 52**

The parties to an agreement have the right to request a binding opinion from an arbitration institution concerning any particular legal point or points contained in or concerning their agreement.

### **Article 53**

No appeal whatsoever may be field against any binding opinion, as contemplated in Article 52.

### **Article 54**

- (1) An arbitration award must contain:
  - a. A heading to the award containing the words “*Demi Keadilan berdasarkan Tuhan Yang Maha Esa*” (for the sake of Justice based on belief in Almighty God).
  - b. The full name and addresses of the disputing parties;
  - c. A brief description of the matter in dispute;
  - d. The respective position of each of the parties;
  - e. The full names and addresses of the arbitrators;
  - f. The considerations and conclusions of the arbitrator or arbitration tribunal concerning the dispute as a whole.
  - g. The opinion of each arbitrator in the event that there is any difference of opinion within the arbitration tribunal;
  - h. The order of the award;
  - i. The place and date of the award; and
  - j. The signature(s) of the arbitrator or arbitration tribunal.
- (2) The effectivity of the award shall not be frustrated by the failure of one arbitrator (where there are three) if such failure to sign is caused by illness or demise of such non-signing arbitrator.
- (3) The reason for the failure of such arbitrator to sign is as contemplated in paragraph (2), must be set out in the award.
- (4) The award shall state a time limitation within which the award must be implemented.

### **Article 55**

When the examination of the dispute is complete the hearing shall be concluded and a date shall be fixed for the rendering of the arbitration award.

### **Article 56**

- (1) The arbitrator or arbitration tribunal shall render its decision based upon the relevant provisions of law, or based upon justice and fairness.
- (2) The parties are entitled to designate the choice of law to be applied to the resolution of disputes which may arise, or which have arisen, between or among them.

### **Article 57**

The award shall be rendered not later than thirty (30) days after the conclusion of hearings.

### **Article 58**

Within not more than fourteen (14) days after receipt of the award, the parties may submit a request to the arbitrator or arbitration tribunal to correct any administrative errors and/or to make additions or deletions to the award in a matter claimed has not been dealt with such award.

## **CHAPTER VI ENFORCEMENT OF THE ARBITRATION AWARD**

### **Part One Domestic Arbitration**

### **Article 59**

- (1) Within thirty (30) days the date the arbitral award is rendered, the original or an authentic copy of the award shall be submitted or registration to the Clerk of the District Court by the arbitrator(s) or legal representatives of the arbitrator(s).
- (2) The submission and registration, as contemplated in paragraph (1), shall be carried out by recording and signature at the end, or on the margin, of the award by the Clerk of the District Court and by the arbitrator or his/her representatives and, such submission shall constitute a deed of registration.
- (3) The arbitrator(s) or legal representative(s) shall deliver the original, or authentic copy, of award and of the instrument of appointment of such arbitrator(s) to the Clerk of the District Court.
- (4) Failure to comply with the requirements set out in paragraph (1) above shall render the arbitration award unenforceable.
- (5) All costs connected with the making of deed of registration shall be borne by the parties.

### **Article 60**

The arbitration award shall be final and binding upon both parties to the dispute.

### **Article 61**

In the event that the parties voluntarily to implement the arbitration award, the award may be enforced on the basis of an order from the Chief Judge of the District Court at the request of one of the parties to the dispute.

### **Article 62**

- (1) The order referred to in Article 61 shall be issued not later than thirty (30) days after an application for execution of the award is submitted to the Clerk to the District Court.
- (2) Prior to issuance of the order of execution, the Chief Judge of the District Court contemplated in paragraph (1) shall examine whether the arbitration award fulfills the requirements set out in Articles 4 and 5, and is not in conflict with public morality or order.
- (3) In the event the arbitration award does not meet the requirements set out in paragraph (2) above, the Chief Judge of the District Court shall reject the request for execution and shall not order such execution and they shall be no recourse whatsoever to the judgment of the Chief Judge of the District Court.
- (4) The Chief Judge of District Court shall not examine the substantive reasons or consideration upon which the arbitration award was based.

### **Article 63**

The order of the Chief Judge of the District Court shall be set out in writing upon the original text and authentic copy of the arbitration award.

### **Article 64**

An arbitration award bearing an order of execution from the Chief Judge of the District Court shall be enforced in accordance with provisions on execution of judgment in civil cases which are final and binding.

## **Part Two International Arbitration**

### **Article 65**

The District Court of Central Jakarta shall be the court vested with the authority to handle letters of the recognition and enforcement of International Arbitration Award.

## **Article 66**

International Arbitration Awards will only be recognize and may only be enforced within the jurisdiction of the Republic of Indonesia if they fulfill the following requirements:

- a. The International Arbitration Award must have been rendered by an arbitrator or arbitration tribunal in a country which, together with the Republic of Indonesia is a party to bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards.
- b. International Arbitration Awards, as contemplated in Item (a), above are limited to award which under the provisions of Indonesian law, fall within the scope of commercial law.
- c. International Arbitration Awards, as contemplated in Item (a) above, may only be enforced in Indonesia if they do not violate such order.
- d. An International Arbitration Award may be enforced in Indonesia only after obtaining an order of Exequatur from the Chief Judge of the District Court of Central Jakarta.
- e. An International Arbitration Award, as contemplated in item (a), in which the Republic of Indonesia is one of the parties to the dispute, may only be enforced after obtaining an order of Exequatur from the Supreme Court of the Republic of Indonesia, which order is then delegated to the District Court of Central Jakarta for execution.

## **Article 67**

- (1) Application for enforcement of an International Arbitration Award shall be made after the award is submitted for registration to the Clerk to the District Court of Central Jakarta by the arbitrator(s) or the legal representatives thereof.
- (2) The submission of the file of the application for enforcement, as contemplated in paragraph (1) above, must be accompanied by:
  - a. the original text of the International Arbitration Award or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with official translation of the text thereof into the Indonesian language;
  - b. the original text of the agreement which is the basis for the International Arbitration Award, or a copy authenticated in accordance with the provisions on authentication of foreign documents, together with an official translations of the text thereof into the Indonesian language;
  - c. a certification from the diplomatic representative of the Republic of Indonesia in the country in which the International Arbitration Award was rendered stating that such country and I the Republic of Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards.

### **Article 68**

- (1) No appeal to either the High Court of the Supreme Court may be lodged against a decision of the Chief Judge of the District Court, as contemplated in Article 66 (d), above recognizing and enforcing an International Arbitration Award
- (2) An appeal may be filled with the Supreme Court against a decision of the Chief Judge of the District Court contemplated in Article 66 (d) refusing to recognize and enforce an International Award.
- (3) The Supreme Court shall consider and rule upon appeal submitted to it, as contemplated in paragraph (2) above within a period of no more than ninety (90) days after the application for appeal has been received by the Supreme Court.
- (4) No appeal may be submitted against a decision of the Supreme Court, as contemplated in article 66 (e)

### **Article 69**

- (1) After the Chief Judge of the District Court of Jakarta Pusat has issued a writ of execution, as contemplated in Article 64, further enforcement shall be delegated to the Chief Judge of the District Court having jurisdiction to enforce it.
- (2) An order of attachment may be made upon such assets and property of the party against whom the award was rendered as shall be requested in the application for such order.
- (3) The procedures for seizure and attachment in enforcement of the award shall follow the procedures therefore as set out in the Code of Civil Procedures.

## **CHAPTER VII ANNULMENT OF ARBITRATION AWARDS**

### **Article 70**

An application to annul an arbitration award may be made if any of the following conditions are alleged to exist:

- a. Letters or documents submitted the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;
- b. After the award has been rendered documents are founded which are the decisive in nature and which deliberately concealed by the opposing party;  
or
- c. The award was rendered as a result of fraud committed by the one of the parties to the dispute

### **Article 71**

An application for annulment of an arbitration award must be submitted in writing within not more than thirty (30) days from the date such arbitration award was submitted for registration to the Clerk to the District Court.

### **Article 72**

- (1) An application for annulment for an arbitration award must be submitted to the Chief Judge of the applicable District Court.
- (2) If the application as contemplated in paragraph (1) above is granted the Chief Judge of the District Court shall determine further the consequences of the annulment of the whole, or a part, of the arbitration award.
- (3) The decision on the application for annulment shall be made by the Chief Judge of the District Court within not more than thirty (30) days from receipt of the aforesaid application.
- (4) An application for an appeal against the decision of the District Court may be made to the Supreme Court, which latter shall decide the matter as the court of final instance.
- (5) The Supreme Court shall consider and decides upon any such application to appeal, as contemplated in paragraph (4) above, within not more than thirty (30) days after such application to appeal is received by the Supreme Court.

## **CHAPTER VIII THE TERMINATION OF THE ARBITATOS MANDATE**

### **Article 73**

The mandate of the arbitrator(s) shall terminate under the following circumstances:

- a. An award has been rendered with the respect to the matters in dispute;
- b. The time limitation, as determined in the arbitration agreement, including any extension thereto agreed upon by the parties, has expired; or
- c. The parties mutually agree to rescind the arbitrators' appointment

### **Article 74**

- (1) The death of one of the parties shall not cause the mandate of the arbitrators to terminate
- (2) The term of the mandate of the arbitrator as contemplated in Article 48, may be postponed for a period of not greater than sixty(60) days from the death of one of the parties.

### **Article 75**

- (1) In the event that one of the arbitrators passes away, or demand for refusal or dismissal of one or ore arbitrators is granted the parties must appoint a replacement arbitrator
- (2) If the parties are unable to reach an agreement as to the appointment of the replacement arbitrator, as contemplated in paragraph (1) above, within thirty (30) the Chief Judge of District Court shall add the request of the interested party, appoint one or more replacement arbitrators.
- (3) The replacement of arbitrators shall have the duty to continue the resolution of the dispute concerned based on the most recent conclusion drawn.

## **CHAPTER IX ARBITRATION FEES**

### **Article 76**

- (1) The arbitrators shall determine the arbitration fee
- (2) The fee contemplated in paragraph (1) above, shall include:
  - a. The arbitrators honoraria;
  - b. Travel expenses and other costs incurred by the arbitrators;
  - c. The costs of witnesses and Expert witnesses require in the hearing of the dispute; and
  - d. Administrative costs

### **Article 77**

- (1) The arbitration shall be charged to the losing party
- (2) In the event that is claimed is only partially granted, the arbitration fees shall be charged to the parties equally

## **CHAPTER 10 TRANSITIONAL PROVISIONS**

### **Article 78**

Disputes which have already being submitted to an arbitrator or arbitration tribunal by the time this Act come into effect, but for which no hearings have as yet been held, shall be resolved based upon the provision of this Act.

### **Article 79**

Dispute which have already being submitted to an arbitrator or arbitration tribunal by the time this Act come into effect, but for which no award has as yet been rendered, shall be resolved based upon the laws and regulation prevailing prior to the enactment hereof.

### **Article 80**

Disputes with respect to which an award has already been rendered by the time this Act comes into effect, which award have been invested with permanent legal force, shall be implemented based upon the provisions of this Act.

## **CHAPTER XI CLOSING PROVISIONS**

### **Article 81**

Upon the coming into effect of this Act. Article 615 through 651 of the Civil Procedure Rules (Reglemenn Acara Perdata (Reglemen of the Rechtsvordering), Staatsblad 1847:52), Article 337 of the Renewed Indonesian Rules (Reglemen Indonesia Yang Diperbaharui (Het Herziene Indonesisch Reglemen, Staatsblad 1941:44), and Article 705 of the Procedural Rules for Areas Outside Java and Madura (Reglemen Acara untuk Daerah Luar Jawa dan Madura (Rchstrereglemen Buitengewesten, Staatsblad 1927: 227) are declared null and void.

### **Article 82**

This Act shall come into effect as of the death of its promulgation.

For public notice, it is ordered that the enactment of this Act be announced in the State Gazette of the Republic of Indonesia.

Done in Jakarta  
On August 12<sup>th</sup> 1999  
PRESIDENT OF THE REPUBLIC OF INDONESIA

- signed -

**BACHRUDIN JUSUF HABIBIE**

Enacted in Jakarta  
On 12<sup>th</sup> August 1999

MINISTER OF STATE FOR THE STATE SECRETARIATE  
OF THE REPUBLIC OF INDONESIA

- signed -  
**MULADI**

STATE GAZETTE OF THE REPUBLIC OF INDONESIA 1999 No. 138

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