

THE IMPLEMENTATION OF ADR IN INDONESIA

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I. PREFACE

1. A civil dispute can be resolved

- Outside the court
- Before the court

It is the parties who have the right to choose the most suitable dispute resolution method for them.

2. Out of Court Dispute Resolution

- Conducted by way of negotiation between the parties themselves or by assistance of neutral and independent third party appointed by the parties to the dispute (mediators conciliators) → to achieve an consensus

A consensus must be made in written.

- Conducted by an expert and independent third party appointed in writing by the parties to render a binding award to the parties to the dispute → arbitration.

3. a. – Prior to the year 1999, only summary dispute can be resolved through negotiation or mediation, and if such method fails to reach consensus, such dispute then usually be referred to the court.

- Even though the Civil Code provides clear provision on the legal power of consensus made outside the court (art 1851 and art 1858 Civil Code), however, such

method was not popular among the parties to the dispute. This was proven from the ever increasing number of case submitted to the court.

b. Legal basis for application of arbitration, prior to the law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution, was article 615 – 651 Rv (Code of Civil Procedure that applicable *since before the independence*)

4. Dispute Resolution at the Court

- Article 130 HIR (applicable Code of Civil Procedure) requires judges, at the first hearing day attended by both litigants, to make some efforts to resolve the dispute amicably which later put them into an agreement.

Such agreement shall later be submitted to the presiding judge who will then order the litigants to enforce the agreement.

- The Law only give order to the Judge to facilitate the consensus, while does not regulate the procedure to do that.

- To deal with absence of such regulation, the Supreme Court has enacted the Supreme Court Regulation (Perma) Number 02 Year 2003 on Court Connected Mediation Procedure.

The Perma regulates that at the first hearing date attended by both parties, the presiding judge is obliged to inform the parties to firstly go through the mediation process which can be conducted by out of court mediator/conciliator of their preferences, or they may also appoint mediator available in that Court of First Instance, which also a judge in that court, other than the presiding judges.

If within 30 days after the first hearing date, the parties still failed to resolve their conflict, hence the dispute shall be returned to the presiding panel to proceeds with litigation process

II. ARBITRATION

1. At 12 August 1999, government passes the Law Number 30 Year 1999 *Concerning Arbitration and Alternative Dispute Resolution* which replace all arbitration related provisions at the Rv (*Reglement op de Rechtsvordering*) and article 377 HIR (*Het Herzijene Indonesisch Reglement*).

2. According to Article 1 Law No. 30 Year 1999, referred to as ::

- **Arbitration** shall be a mechanism of resolving civil disputes outside the general court which based upon an arbitration agreement made in written by the disputing parties;

- **Arbitrator (s)** shall be one or more person appointed by disputing parties or by the Court of First Instance or Arbitration Institution to render an award regarding particular dispute submitted for resolution through arbitration.

- **Arbitration Institution** shall be a body designated by the parties in dispute to render an award regarding certain dispute; such institution may also provide a binding opinion regarding certain legal relationship where dispute has not yet arises.

3. - Only disputes on commercial matter and regarding the rights, where according to the law and legislation is completely under the control of the parties in dispute, can be resolved through arbitration, however, resolution through arbitration is not possible for disputes where specifically stated by legislations that no accord is possible

- In the elucidation of the Arbitration Law, it is stated that " what is meant by the scope of commercial law shall be activities among other things the following :

commercial;

banking;

finance;

investment;

industry;

Intellectual Property Right."

3. Competence

Law Number 30 Year 1999 has explicitly states that if the parties to the dispute had been bound by arbitration agreement (which is a written agreement made by parties prior to the dispute which contained arbitration clause or a separate arbitration agreement made after the dispute arisen), the court of first instance shall not have any authority to hear the dispute.

In fact, article 11 Law Number 30 Year 1999 states that :

(1) the existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute of differences contained in the agreement through the Court of First Instance.

(2) The Court of First Instance must refuse and not to interfere in resolution of any dispute that has been determined by arbitration, except on particular matters as stipulated in this Law.

4. Appointment of Arbitrators

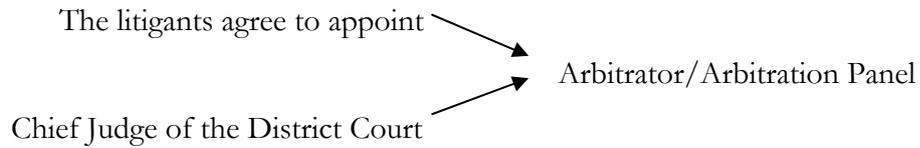
- According to Article 12:

(1) Those who are eligible to be appointed as arbitrator must meet following requirements:

- a. Legally competent to perform legal actions
- b. Being at least 35 years of age
- c. Having no family relationship by blood or marriage up to second degree with either of the disputing parties
- d. Having no financial or other interests of whatsoever in the arbitration award; and
- e. Having at least 15 years of experience and active mastery in his/her field.

(2) Judges, Prosecutors, Registrars, and other court officers can not be appointed or designated as arbitrators.

- There are two ways to appoint arbitrators:



(if the parties to the dispute failed to agree to appoint arbitrator or no provision concerning appointment of arbitrator is made))

- Arbitrator or arbitration panel cannot be held legally responsible for any action taken during the proceedings on the course of carrying out their duties as arbitrator or arbitration panel, unless it is proven that such arbitrator/arbitration panel acted in bad faith.

5. Arbitration Institution

- According to article 34, dispute resolution through arbitration may be conducted using national or international arbitration body based on both parties consent, while applicable rules of procedure for resolution of such dispute shall be the rule of procedure of the relevant arbitration body, unless stipulated otherwise by the parties.

- One of the eminent arbitration institution is BANI (Badan Arbitrase Nasional Indonesia), this institution have their own rules of procedure.

6. Rules of Procedure

- In contrast with civil procedural law applicable for court of first instance, the proceedings by arbitrator or arbitration panel shall be conducted in closed environment and the applicable arbitration procedure shall be decided by both parties in written as long as consistent with provisions of Law No. 30 Year 1999.

In the case where the parties does not determine specific rules of procedure to be applied, while arbitrator or the arbitration panel has been established in accordance with law Number 30 year 1999, all disputes which have been referred to the arbitrator or arbitration panel should be heard and decide upon in accordance with the provision of the Law No. 30 Year 1999.

- The Arbitration award shall be announced no later than 30 (thirty) days after the conclusion of hearings, and no later than 14 (fourteen) days after receipt of the award, the parties may submit request to the arbitrator or the arbitration panel to correct any administrative errors and or to make addition or reduction the award.

Referred to as 'correction to administrative error' according to the elucidation of article 58 Law Number 30 year 199 shall be, any correction to matters such as typos or errors in writing names, addresses of the parties or the arbitrator et cetera, which does not make any change to the substance of the award.

While referred to by "add or reduce the judgment's" shall be that one of the parties may submit objection to the award, if the award, among other things :

- a. grant something that has not been requested by the other side;
- b. failed to incorporate one or more things that has been requested to be awarded; or
- c. contain binding provisions which contradict one to another

7. Enforcement of Arbitration Award

A. Domestic Arbitration Award

- An arbitration award has final and binding nature for parties involved in the dispute. In the case where the parties failed to voluntarily implement the award, thus, at the request of one of the parties, the Chief Judge of the court having the jurisdiction over the respondent's place of residence shall issue an execution order so the award which has already been registered at the registry of the relevant court can be enforced.

- Prior to issue the order, the Chief Judge of the Court of First Instance shall firstly examine whether the arbitration award fulfills the requirements set out in article 4 and 5 and is not inconsistent with public morality or public order.

Arbitration award bearing an execution order from the Chief Judge of Court of First Instance → shall be enforced in accordance with provisions to enforce a final and binding civil case judgment.

- As a final and binding court judgment, no appeal, cassation or special review is possible to an arbitration award.

However, parties may submit a request to annul an arbitration award to the Court of First Instance, if it suspected that the award contains following elements :

a. letters of document submitted to the proceedings, are acknowledged to be false or forged, or are declared to be false or forged after the award has been rendered

b. After the award has been rendered, documents are founded which are decisive in nature and which deliberately concealed by the opposing party; or

c. The award was rendered as result of fraud committed by one of the parties to the dispute.

(Article 70 Law No. 30 Year 1999)

- The question is now, whether the ground to annul an arbitration award is limited only to elements as stipulated by article 70 mentioned above?

The Supreme Court in its decision Number 03/Arb.Btl/2005 dated 17 May 2006 in its consideration made following argument :

Whereas the General Elucidation of the Law Number 30 year 1999 mentioned "that Chapter VII regulate matters regarding annulment of an arbitration award. Annulment is possible due to several reasons, among other things :

a. letters of document submitted to the proceedings, are admitted to be false or forged, or are declared to be false or forged after the award has been rendered

b. After the award has been rendered, documents are founded which are decisive in nature and which deliberately concealed by the opposing party; or

c. The award was rendered as result of fraud committed by one of the parties to the dispute.

The word "among other things" has made possible for plaintiff to submit request to annul an arbitration award on the basis other than those that has been mentioned by article 70 Law Number 30 year 1999, in this case, for the reason of absolute competence as put forward by the applicant;

Whereas both in the *Appointment of General Sales Agent (Passengers)* as well *Appointment of General Sales (Cargo)* it is written that :

" Arbitration:

This agreement shall in all respects be interpreted in accordance with the Laws of the Republic of"

Therefore, resolution of any dispute arise from such agreements must be resolved in accordance with the law of the Republic of, and consequently, (Indonesian arbitration institution) does not have the authority to resolve the dispute between applicant and the respondent;

B. International Arbitration Award

- Referred to as international arbitration award shall be an award rendered by an arbitration institution or individual arbitrator outside the legal jurisdiction of the Republic of Indonesia or an award rendered by an arbitration institution or individual arbitrator which according to the law of the Republic of Indonesia regarded as an international arbitration award.

- Second Part of Chapter VI, deals with International Arbitration, commenced by article 65 Law Number 30 year 1999 which stipulates that the District Court of Central Jakarta shall be the court vested with the authority to hear matters regarding recognition and enforcement of international arbitration award.

- According to article 66 :

- An International Arbitration Award will only be recognized and may only be enforced within the jurisdiction of the Republic of Indonesia if they meet following conditions:

a. The International Arbitration Award must have been rendered by an arbitrator or arbitration panel in a country which, together with the Republic of Indonesia is a party to either bilateral or multilateral agreement on acknowledgement and enforcement of International Arbitration Award.

b. International Arbitration Award as mentioned in letter a, shall be limited only to awards which according to Indonesian Law, falls within the scope of commercial law.

c. International Arbitration Award as mentioned in letter a may only be enforced in Indonesia as long as it does not inconsistent with public order.

d. An International Arbitration Award may be enforced in Indonesia only after obtaining the execution order (Exequatur) from the Chief Judge of the District Court of Central Jakarta.

e. An International Arbitration Award as mentioned in letter a, which involves the Republic of Indonesia as one of the party to the dispute, may only be enforced after obtaining execution order from the Supreme Court of the Republic of Indonesia, which order shall then be delegated to the District Court of Central Jakarta for execution.

- No appeal or cassation is possible for execution order issued by the Chief Judge of the District Court of Central Jakarta which recognize and enforce the international arbitration award.

Cassation is only possible for the Chief Judge of District Court of Central Jakarta decision which refuse to recognize and enforce an international arbitration award.

- Would it be possible to request annulment of an international arbitration award to the District Court of Central Jakarta and what would be the legal basis for that?

- Annulment of arbitration award is regulated under Chapter VII, from article 70 to article 72, while regarding International Arbitration, annulment is regulated under the Second Part of Chapter VI, from article 65 to article 69 which only regulates regarding recognition and enforcement of international arbitration award.

The Supreme Court of the Republic Indonesia in its decision No. 01/Banding/Wasit.Int/2002 dated 8 march 2004 consider that, according to article V paragraph (1) 2. 1958 New York Convention (*Convention on The Recognition and Enforcement of Foreign Arbitral Awards*) which has been ratified by the Republic of Indonesia by the President Decree Number 34 Year 1981, says that:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if etc.;

(e) *The award has not yet become binding on the parties, or **has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.***"

therefore, the District Court of Central Jakarta shall have no authority to hear and decide the petition to annul an international arbitration award. (in this case, the arbitration award was rendered in Geneva)

III. ALTERNATIVE DISPUTE RESOLUTION (ADR)

1. ADR as Out of Court Dispute Resolution Mechanism

- Law Number 30 year 1999 on Arbitration and Alternative Dispute Resolution only contained one article deal with alternative dispute resolution, which is article 6, that says :

(1) Disputes or differences of opinion in civil matters can be resolved by the parties through Alternative Dispute Resolution (ADR) based on their good faith by setting aside settlement through litigation in the court of first instance.

(2) Resolution of disputes or differences of opinion through ADR as mentioned in paragraph (1) shall be carried out through a direct meeting by the parties in a period no later than 14 (fourteen) days and the result shall be set out in a written agreement.

(3) In the case where the disputes of differences of opinion as mentioned in paragraph (2) cannot be resolved, then by a written agreement of the parties, such disputes or differences of opinion shall be resolved through the assistance of one or more expert advisors or a mediator.

(4) In the case where the parties to the disputes within 14 (fourteen) days with assistance from one or more expert advisors or through mediator failed to put both parties, hence the parties to the dispute may contact an arbitration institution or alternative dispute resolution institution to appoint a mediator.

(5) The mediation process must be ready for commencement no later than 7 days after the arbitration institution or alternative dispute resolution appoints the mediator,

(6) The process to resolve disputes or differences of opinion through mediator as mentioned in paragraph (5) shall adhere to secrecy principle, and consensus must be achieved in not more than 30 (thirty) days in written form signed by all relevant parties to the dispute.

(7) Written agreement to resolve dispute or differences of opinion shall be final and binding to all parties to be enforced in a good faith and must be registered to the Court of First Instance no later than 30 days after the signature.

(8) Agreement to resolve disputes or differences of opinion as mentioned in paragraph (7) must be enforced completely no later than 30 (thirty) days after the registration.

(9) If the amicable settlement as mentioned in paragraph (1) until paragraph (6) failed to be achieved, then the parties based on written agreement may propose resolution through an *ad-hoc* arbitration institution.

- From abovementioned article, it can be seen that resolution of civil dispute outside the court may be conducted through negotiation, mediator either by individual mediator or mediator appointed by arbitration institution or alternative dispute resolution institution, to achieve a written agreement for all parties to the dispute. Such written agreement shall be final and bind all parties to the disputes to be enforced with good faith and must be registered to the Court of First Instance in the period no later than 30 days after the signature.

Law also stipulates that such written agreement must be completely implemented in no later than 30 days after the registration.

- The problem is now, what happen if one of the parties to dispute fail to enforce written agreement within the period as stipulated by the Law.

What is possible legal procedure that can be pursued by the other party?

- In constrast with enforcement of an arbitration award, either domestic or international (which in the case where the parties do not enforce the award voluntarily, then the award shall be enforced by the the execution order from the Chief Judge of the Court of First Instance at the request of one of the party to the dispute), the court cannot do anything with regards to written agreement which does not voluntarily enforced by the parties.

What can be done by the party who wish to enforce such written agreement is by taking the other party to Court of First Instance on the basis of default (failure to fulfill written agreement which has been signed and registered to the Court of First Instance).

After the examination at the court, Court shall render its judgment and if such judgment become final, the written agreement shall bear the power of a final and binding court judgment that can be legally enforced.

The lengthy process required to conduct out of court dispute resolution is one of the chief factor that lower the interest of the parties to the dispute to use this method. Therefore, separate regulations concerning ADR from existing Law Number 30 Year 1999 is required.

2. ADR as Court-Connected Dispute Resolution Method

- Article 130 of the HIR obliged the judge on the first hearing day attended by both litigants, to make some efforts to so that both parties to the dispute can resolve their disputes amicably and if such dispute can be resolved, the judge shall produce the minutes of the hearing containing the order to ensure that both of the parties adhere to the content of the agreement prepared.

This minutes shall bear the same legal power and enforced as a final court judgment.

- Written agreement made by the parties to the dispute/resolution agreement facilitated by the court shall have similar power as the final court judgment, which means that if one of the party to dispute does not voluntarily carry out the content of the agreement, at the request of the other party, the Chief Judge of the Court of First Instance may issue an order to enforce such agreement.

- And now the problem is, how to proceed with procedure as mentioned by article 130?

Therefore, in order to provide clear guidance required for proper implementation of justice, the Supreme Court has issued the Supreme Court of the Republic of Indonesia Regulation Number 02 Year 2003 on Court Connected Mediation Procedure. This Perma regulates applicable mediation procedure prior to the court litigation.

- All civil cases submitted to the Court of First Instance must be firstly resolved through mediation procedure with the assistance of Mediator.

At the first hearing day attended by both parties to the dispute, the presiding judge must obligate the parties to firstly resolve their dispute through mediation process.

The parties can appoint either mediator from outside the court or mediator available at the court, and if the parties cannot agree upon the appointment of the mediator, the Chairman of the presiding panel shall have the authority to appoint a mediator from the list mediator available at the court. This kind of mediator shall be judges that have received special training and if he/she is appointed, he/she will act as mediator.

- If mediation successfully leads to a consensus, be it conducted by mediator from outside the court or court mediator, the parties with the assistance from the mediator shall draft the consensus in writing and sign upon such agreement.

At the next determined hearing date (no later than 30 days after the first hearing day) parties shall return back to the judge to inform about the agreement made.

The judge shall then affirm the agreement and issue the agreement certificate, which according to article 130 HIR shall bear the same power with a final court judgment.

- However, if the mediation fail to lead to agreement, the mediator will then make written statement that the mediation process has fail and notify the judge who will the commence with litigation stage.

3. Principal Differences Between :

Out of Court ADR

- a. The dispute resolution process is conducted outside the court and without court involvement.
- b. Dispute resolution can be conducted by way of :
 - negotiation or mediation with the intention to achieve written agreement between the parties to dispute.

Court Connected ADR

- a. Dispute resolution is conducted by the court after the petition is submitted by one of the party to dispute.
- b. Dispute resolution can be conducted by way of negotiation or mediation with mediator from outside the court, or court mediator.

Both negotiation and mediation is intended to achieve written agreement between the parties to the dispute.
- c. Written agreement that has been affirmed by the Judge → an agreement certificate which bears the same power with a final court judgment. No appeal and cassation is possible to such agreement certificate.

Out of Court ADR

- arbitration with the intention to obtain an award to the disputes
- Written agreement among the parties to the dispute can only be implemented at the will of the parties.
- parties can make request to annul the arbitration award in accordance with article 70 Law Number 30 year 1999.

Court Connected ADR**IV. CONCLUSION**

From the above description, it can be concluded that:

1. Dispute resolution through ADR, either out of the court ADR or court connected ADR brings significant benefit to everyone

For the parties to the dispute, dispute resolution through ADR shall save time and money; while for court, resolving a dispute without litigation shall reduce their workload, thus, the court may be able to focus their attention and resources to the most pressing matters that cannot be resolved through mediation.

2. PERMA No. 02 Year 2003 on Court Connected Mediation is very helpful to parties to the dispute to resolves their dispute without litigation, in a simple, expeditious and cost-efficient manner. Therefore, Court Connected Mediation needs to be supported by everyone.

3. Main problems to ADR:

- Lack of governing regulation, considering that only article 6 Law Number 30 Year 1999 provides specific regulation concerning ADR, therefore calls specific needs for specific law on ADR.

- Public at large still does not understand the purpose and benefit of the ADR, therefore it calls for further socialization and public education.