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The Alternative Urgency of Dispute Resolution through Arbitration

Alternatívna naliehavosť riešenia sporov prostredníctvom arbitráže

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Abstract:

This research has an aim to understand the alternative urgency as dispute resolution through arbitration. This research used normative method and the statute approach where this research focuses on the norms of applicable laws and regulations. In addition, other required sources are obtained from literature studies using the topic related to arbitration in the settlement of legal disputes. The results of this study indicated that dispute resolution carried out through arbitration techniques requires agreement and a better resolution from both parties to the exclusion of litigation settlement in District Court. Based on the discussion, it can be concluded that resolution technique of arbitration can be done to resolve the legal dispute in order to establish positive legal pattern as long as it has clear written regulation in relevant dispute resolution agreement.
Keywords: *Alternative, dispute resolution, legal Arbitrary, arbitration, legal disputes*

Abstrakt:

Tento výskum má za cieľ pochopiť alternatívnu naliehavosť ako riešenie sporov prostredníctvom arbitráže. Tento výskum využíval normatívnu metódu a zákonný prístup, kde sa tento výskum zameriava na normy platných zákonov a nariadení. Okrem toho sú ďalšie požadované zdroje získané z literárnych štúdií s témou týkajúcou sa rozhodcovského konania pri riešení právnych sporov. Výsledky tejto štúdie naznačili, že riešenie sporov prostredníctvom rozhodcovských techník si vyžaduje dohodu a lepšie riešenie oboch strán s vylúčením riešenia sporov na okresnom súde. Na základe diskusie možno dospieť k záveru, že na vyriešenie právneho sporu je možné použiť techniku rozhodcovského konania, aby sa vytvoril pozitívny právny vzor, pokiaľ to má jasnú písomnú úpravu v príslušnej dohode o riešení sporu.

Kľúčové slová: *Alternatíva, riešenie sporov, právna arbitráž, arbitráž, právne spory*

Introduction

In this decade, legal development pointed out in their dynamic side. On one side, dynamics of the legal leads to it negative aspect, for example the practice of legal mafia, unfair decisions, wrongful arrests in criminal cases to the phenomenon of article distribution [1]. While on the other hand, legal trend indicate a positive pattern, for example the implementation of restorative justice in criminal cases, including the emergence of alternative dispute resolutions in civil cases.

Alternative dispute resolution or abbreviated as ADR is a form of legal breakthrough that deserves appreciation. This settlement model presents an alternative procedure for the parties to gain more access to justice. So that the disputing parties can choose a dispute resolution path and there is also a rational choice regarding the settlement. Therefore, the disputing parties can choose a dispute resolution path and it rational choice regarding the settlement of a problem.

The litigation settlement model or through the courts is no longer adequate and unable to meet the requirements of legal community. [2]

Even the court seems to ignore substantial justice by prioritizing procedural justice. [3]

Moreover, public disappointment arises because the expectations of court are not fulfilled to realize truth, justice and the realization of peace and benefit. [4] Until now, some people believe that the court is the last way to look for justice. [5] However, public's trust is inversely proportional based on the fact that the court has been decreases. The downturn of court is contrary which the main function of a court is to resolve a conflict.

Court decisions only make procedural fair decisions. [6] Moreover, court decisions seem to be more likely to favor people who have money and power. *acces to justice "Justice, as so administered, has to be available to all, on an equal footing. This is the ideal, but one which has never been attained, due largely to inequalities of wealth and power and an economic system which maintains and tends to increase the inequalities"* [7] it should be evenly distributed to every levels of society which cannot be reached. therefore only higher level of people can enjoy it. As an implication of this situation, the judiciary has become a place for legal mafia and the article distribution [8] for example, the bribery case of Administrative Court judge that involve OC Kaligis. [9]

Thus, alternative arbitration settlement can be considered as an ideal form of settlement model for now. Moreover, this paper will discuss regarding the dispute resolution through Arbitration.

Research Methodology

The method used in this research is a statutory approach and normative approach. Statutory approach is carried out by examining the constitution related to the material needed. [10] As an addition to the analytical material, literature study was carried out

through several other literature sources regarding arbitration techniques in dispute resolution.

Theoretical Framework

The Explanation and Legal Basis of Arbitrary System

Subekti stated that arbitration is the settlement or termination of a dispute by one or more judges based on the following principles below: Agree that both parties will obey the decision made by the judge regarding their choice. [11]

The basis of arbitration law is the arbitration clause. While the regulations are contained in Law Number 30/1999 on Arbitration and Alternative Dispute Resolution (which known as UUAAPS). In UUAAPS it is stated that dispute resolution through arbitration is a way to resolve civil disputes or different opinion by the involved parties through alternative dispute resolutions based on a better way to the exclusion of litigation settlement in District Court. The District Court is not authorized to adjudicate the disputes of the parties who have been bound by the arbitration agreement.

The arbitration clause is an agreement between the disputing parties which is stated in written form contains the agreement to resolve the dispute through the arbitration institution of their choice. [12] In the other words, the arbitration clause is the philosophy and legal basis for every parties to resolve their dispute through arbitration. Therefore, without a legal valid arbitration clause, an arbitration cannot be carried out. [13]

This arbitration clause in General UUAAPS is referred as an arbitration agreement which has the following meaning such as "*Arbitration agreement is an agreement in form of an arbitration clause contained in a written agreement made by the parties before the dispute arises, or after the dispute arises".*

if related to article 1320 on Civil Code regarding the legal requirements of an agreement, then a valid arbitration clause is a clause (agreement) made based on an agreement, the responsible parties should be capable of carrying out legal actions, the object (content) of arbitration clause should be clear and does not violate a lawful cause, such as; law, propriety, justice and custom. [13]

The conditions for agreement validity by R. Subekti are grouped into two groups, namely subjective conditions and objective conditions. [14] Objective requirements on certain matters above, when observed from Constitution Number 30/1999 as contained in article 5 stated that;

1. Disputes that can be resolved through arbitration are only disputes in the trade sector regarding the rights which based on law and regulations are fully controlled by the disputing parties.
2. Disputes that cannot be resolved through arbitration are disputes which according to the laws and regulations cannot be reconciled and resolved.

The definition of trade as referred in the article above can be seen from the explanation of article 66b which stated that disputes that can be arbitrated (as an object) are disputes within the scope of commercial law, as following below;

What is meant by "the scope of trade law" are activities, which consist of several field such as:

1. business;
2. banking;
3. financial;
4. investment;
5. industry;
6. intellectual property rights.

Based on the explanation of Article 66 on constitution number 30/1999, it can be said that the object of an arbitration dispute is only a dispute within the scope of trading law, such as; in a scope of business, banking, financial, investment and industry. If this provision is related to the banking industry, it can be said that several types of banking disputes can be arbitrated.

Discussion

Dispute Resolution Process through Arbitration

Arbitration Procedure

The application for arbitration has also been regulated in Law Number 30/1999 concerning on Arbitration and Alternative Dispute Resolution (Constitution number 30/1999). There are several process of arbitration procedure in Indonesian National Board of Arbitration. The procedure is written as following below:

(1) **The Application of Arbitration**

The arbitration procedure begins with the registration and submission of the Arbitration Application by the party initiating the arbitration process at Indonesian National Board of Arbitration Secretariat. In those applications, the petitioner explains both from the formal side of the petitioner's position in relation to the arbitration agreement, arbitration authority in Indonesian National Board of Arbitration to examine cases, from the procedures that have been taken before deciding any settlements through the arbitration forum.

The Settlement of disputes in arbitration can be carried out based on the agreement of litigants. The agreement can be made before a dispute arises (Pactum De Compromittendo) or agreed by the parties during the resolvement of dispute through arbitration (akta of van compromis).

Before registering the application with Indonesian National Board of Arbitration, the petitioner notifies the Respondent related to the dispute between the petitioner and the Respondent, the petitioner will resolve the dispute through Indonesian National Board Arbitration.

related to the Article 8 paragraphs (1) and (2) of constitution number 30/1999, the notification should clearly contain several points below:

1) Name and address of every parties;

2) a designation to an applicable clause or arbitration agreement;

3) agreement and a dispute problems;

4) claim policy and the amount that can be claimed, if any;

5) the required solution of a problem; and

6) An agreement regarding the number of arbiter or if there is no agreement as what mentioned, the petitioner may state the opinion regarding the desired number of arbitrators is in odd numbers

After receiving the Application for Arbitration and the required documents and registration fees, Secretariat should register the Application to Indonesian National Board of Arbitration register. The Indonesian National Board of Arbitration should examine the application to determine whether the arbitration agreement or clause in the contract has provided a sufficient basis of authority to examine the dispute.

(2) The Appointment of Arbitrator

Basically, every parties could determine whether the arbitration forum will be presided over by a single arbitrator or The assembly. In an arbitration forum that was led by single arbitrator, every parties are obliged to reach an agreement on the appointment of the sole arbitrator, the petitioner should propose to the respondent the name of a person who can be appointed as the main arbitrator. If within 14 (fourteen) days from the time the respondent accepts the petitioner's proposal, the involved parties fail to determine a sole arbitrator, then based on a request from one of a parties, the leader of the Court should appoint a main arbitrator.

In a forum that was led by the Assembly, every appointed Parties will appoint an arbitrator for each forum. In a forum that was led by a leading assembly, arbitrators who have been appointed by every parties should appoint a third arbitrator (who will become the leader of arbitral tribunal). If within 14 (fourteen) days after appointment of the last arbitrator, there is no agreement reached, by the request of a party, the Chairman of the District Court should appoint a third arbitrator.

If within 30 (thirty) days after the notification is received by the respondent and one of the parties does not appoint someone to be a member of arbitral tribunal, the main arbitrator will be appointed by the other party and the decision will be binding on both parties.

(3) Respondent Response

If the Indonesian National Board of Arbitration determines that they has the authority to examine, then after the registration of Application, one or more Secretariat Assembly should be appointed to assist the administrative work of arbitration case. Secretariat should submit a copy of the Application for Arbitration, attach documents to the Respondent, and request the Respondent to submit a written response within 30 (thirty) days.

Within a maximum period of 30 (thirty) days after receiving the submission of Arbitration Application, Respondent is obliged to submit its Answer. Based on that answer, petitioner should pointed out an arbitrator or hand over it to the leader of Indonesian National Board of Arbitration. If they are not appoint an arbitrator, they consider to give the rights to the Leader of Indonesian National Board of Arbitration.

When the leader of BANI is authorized, at the request of Respondent, they need to extend the time for submission on the Answer and the appointment of an arbitrator by Respondent under the valid reasons which provided that the extension of time may not exceed 14 (fourteen) days.

(4) The Counter Claim

If the Respondent intends to file a reconvention or settlement efforts related to the dispute or the demand as proposed by Petitioner, Respondent could file a counterclaim (reconvention) or settlement letter along with the Response Letter at the first trial.

The Tribunal by the request of Respondent, has an authority to allow counterclaim (reconvention) or settlement to be submitted at another date if the Respondent can guarantee that the postponement is justified.

The counterclaim (reconvention) or settlement efforts will be the subject to the separate fees related to the calculation of the administrative costs imposed on the main conventions that should be required by both parties based on the Rules of Procedure and the list of applicable fees determined by the Indonesian National Board of Arbitration from time to time. If the administrative costs for reclaim or settlement effort have been paid by the parties, then the reconvenience or settlement effort will be examined, considered and decided together with the main claim.

The failure of a party to pay administrative fees related to the counterclaims or settlement efforts does not prevent or delay the continuation of arbitration related to the main claim (convention) as long as the administrative costs related to the main claim (convention) have been paid, if there was no counterclaim (reconvention) or attempt to settle the claim. if the Respondent has filed a counterclaim (reconvention) or settlement, the Petitioner (who becomes the Respondent), has the right within 30 days or another period determined by Tribunal, to submit an answer regarding the counterclaim (reconvention) or the solution.

(5) **Examination Session**

In the dispute examination by arbitrator or the arbitral tribunal, it is carried out limited for certain parties. The language they used is Indonesian, in case with the approval of arbitrator or the arbitral tribunal, the parties can choose another language to be used. The disputing parties should be represented by their authority with a certain letter of authority by attorney.

Third parties outside the arbitration agreement can participate and join the dispute resolution process through arbitration, if there are elements of interest involved and their participation is agreed with the disputing parties and approved by the arbitrator or arbitral tribunal examining the related dispute.

By the request of one of the parties, the arbitrator or arbitral tribunal may take a provisional decision to regulate the order of the examination dispute, including the determination of confiscation guarantees. Examination of disputes in arbitration must be done in written text. Verbal examination can be carried out if it agreed by the parties or deemed necessary by the arbitrator or arbitral tribunal. The arbitrator or arbitral tribunal should hear the witness statements or hold meetings which consider as necessary at a certain place outside the place where the arbitration was held.

The examination of witnesses and expert witnesses before the arbitrator or arbitral tribunal is carried out based on the provisions of civil procedural law. The arbitrator or arbitral tribunal may conduct a local inspection of the dispute object or other matters related to the examined problem, and if it consider as necessary, the parties will be legally summoned to attend the examination.

Examination of the dispute should be completed within 180 (one hundred and eighty) days after the arbitrator or arbitral tribunal is formed. [15] The arbitrator or arbitral tribunal is authorized to extend their job duration with several term and conditions such as:

1) As a request submitted by one of the parties regarding certain matters;
2) as a result of stipulating a provisional decision or other interlocutory decision; or
3) consider as necessary by arbitrator or arbitral tribunal for the purposes of examination

In case that every parties come before the appointed day, the arbitrator or arbitral tribunal should first seek reconciliation between the disputing parties. If the reconciliation effort as referred in paragraph (1) can be achieved, the arbitrator or arbitral tribunal should make a deed of reconciliation which has been finalized, binding every parties and instructs the parties to comply with the terms of reconciliation.

If on the intended day, respondent without a valid reason does not come to the court, after they has been regularly summoned, the arbitrator or arbitral tribunal shall immediately summon them again.

By maximum 10 (ten) days after the second summons is received by respondent and without a valid reason the respondent did not come to the court, the examination will be continued without the presence of respondent, the claim of petitioner is granted entirely, unless the claim is unreasonable or not based on legal system.

The tribunal is obliged to make final decision within 30 days after the closing of a trial, unless the tribunal considers that the period needs to be sufficiently extended. Beside, making final decisions, the tribunal also required to make preliminary, intermediate or partial decisions.

(6) **Financial and Cost**

Application for Arbitration must be accompanied by payment of registration and administrative fees in related to the Indonesian National Board of Arbitration provisions. [16] Administrative costs include Secretariat administration fees, case examination fees and arbitrator fees also the costs of arbitral tribunal Secretary.

Regarding this fee, it is also based on the value of the claim stated in the arbitration request, both material and immaterial. Therefore, the arbitration petitioner should be wiser in determining the value of it claims. because the registration of arbitration fee is calculated based on the percentage of the value on the claim and arbitral tribunal will only grant the value of claim that can be proven by the petitioner.

If there is a third party outside the arbitration agreement participate and join in the dispute resolution process through arbitration as referred in Article 30 of constitution number 30/1999, then the third party is obliged to pay administrative fees and other costs related to their participation.

If the Respondent does not provide a response or remains silent, then the arbitration Applicant is obliged to pay for the Respondent's court fees. The examination of arbitration case will not begin before the administrative fees are paid by both parties.

Conclusion

Based on the discussion above, this study discusses about one of the alternative urgency to resolve the dispute problem is Arbitration. Arbitration is a legal method to resolve the dispute out of court based on an arbitration written agreement made by the disputing parties. it can be concluded that resolution technique of arbitration can be done to resolve the legal dispute in order to establish positive legal pattern as long as it has clear written regulation in relevant dispute resolution agreement.

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