

Urgency Of Mediation Institutions As One Of The Alternative Dispute Settlements In The Society

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Abstract—When discussing the laws and state institutions that implement the law, it will relate to formal justice that is run and produced by legal processes that are also formal. This is because the legal process carried out by state institutions in the field of law is based on written and codified law, and requires formal legal process. However, the formal legal process has a fact that formal justice is expensive and time consuming. This is what causes many parties to start looking for alternative solutions to the problem, this can be done specifically on civil cases. Mediation is one way of settling out of court, currently, many mediation institutions are growing in Indonesia that can be used as an alternative in society in solving civil cases. Civil cases that occur concerning matters that cause material loss, currently, mediation agencies are perfect for solving civil society problems. In society, civil cases that occur include the problem of broken promises, damage to goods, insurance claims denied, unpaid debts and many other civil problems that cause losses that are not how much its value, but if settled through the court will take a long time and expensive cost. The mediation institute is not complicated and not publicly disclosed. For that it is necessary role of mediation institutions to inform the public about the performance and procedures in resolving disputes.

Keywords— *Mediation institution, dispute resolution, society*

I. INTRODUCTION

Discussing about the law and state institution that enforces the law, we will relate it to the discourse on formal justice carried out and produced by law as well as legal process which is also formal. The legal process undertaken by the state institution in the field of law is based on written and codified law, carried out by authorized state apparatus, and requires standard proceeding. However, in the formal legal process there is the fact that formal justice is often expensive, prolonged, exhausting, does not solve problem and it is full of corruption, collusion and nepotism practices.

Dispute may arise at any time in human life. Dispute may occur from the scope of the family to the scope of the law. Since long time ago, dispute settlement existed in the community as a dispute settlement pattern based on deliberation. In the legal dispute settlement, there are several options in legal dispute settlement. The most common and well-known legal dispute settlement is the dispute settlement through the court. However, the dispute settlement through the court sometimes does not

provide the solution as desired by both parties. The dispute settlement in court is also time consuming and costly enough. In accommodating the desires of these parties, then there are several alternatives to settle the dispute between the parties. The alternative dispute settlement has several advantages, they are; fast and cheap, the parties can control the current process and finally can settle the dispute thoroughly. Based on the above description, then the research problems of this paper are: 1) How is the dispute settlement through mediation in Indonesia? 2) How is the dispute settlement through mediation arrangement in Indonesia?

II. LITERATURE REVIEW

A. Dispute Settlement Occurring in the Community

The dispute settlement by using alternative dispute settlement is now evolving well. The development between one country and another country is different, but always has connection with the social, political, economic, legal, economic and infrastructure conditions (technology and transportation) of the country concerned. Despite the condition may be different, the motivating factor is the same, which is as the result of the businessman's needs for efficient settlement in terms of time and cost, and as the result of the limitation of court and legal democratization, as well as the synergy of these two motivating factors. The mechanisms available in the alternative dispute settlement are more considerable and flexible than the court in which the parties can choose which one is the most preferred, the most suitable in line with their needs, including:

a. Negotiation

In the negotiation process there is no involvement or interference of third party, the negotiation is made directly between the disputing parties. Negotiation is the first way to avoid the problem expansion into more serious dispute. The most important condition of effective negotiation is the equality of bargaining position, if it does not exist, then the party with a stronger bargaining position must listen the other party. There is the possibility of deadlock in negotiation when the parties do not reach a consensus and do not want to continue the negotiation. Negotiation is a process of communication between two parties, each with their own aims and point of view, which seeks to reach an agreement that satisfies both parties on the same issue. This requires the approval of both parties so that there is a process of

mutual giving and receiving something to reach mutual agreement. In negotiations there are at least two parties with different perceptions, needs, and motivations trying to agree on a matter of mutual interest. Based on some understanding of the negotiations, it can be argued that a negotiation process always involves two or more people interacting, seeking a mutual agreement, and achieving the desired objectives with both parties involved in the negotiations. One of the objectives of negotiation is to find a decision or agreement of both parties fairly and can meet the expectations or wishes of both parties. there are four important points to consider before negotiating, including the fact finding especially from parties, making good planning, and selecting and managing the negotiating team. In this case, ADR provides other mechanisms that can be chosen by the parties to continue their dispute settlement, namely binding opinion, mediation and arbitration.

b. Mediation

The advantages of mediation are the presence of mediator to enable the parties to be heard equally, the parties feel that they have equal position, the parties feel actively involved in the negotiation process, and facilitate the achievement of a win-win solution. Those advantages makes the mediation being widely applied to settle existing disputes due to communication stagnation and unequal bargaining position, for example, between consumer and producer, customer and bank, polluter and factory, etc. The governments in many countries deliberately encourage mediation in certain sectors, so the mediation is not only a choice of parties but it is a recommendation from the government. However it does not mean that mediation is only suitable for such cases, mediation also succeeds in the dispute settlement between large corporations. When negotiation fails, mediation should be chosen as long as

- 1) The parties still believe it can resolve the problem based on win-win solution rather than "right or false" by the law
- 2) The parties still want to maintain a good relationship between them, and
- 3) The parties require the presence of the mediator to assist them for the smooth negotiation

Mediation does not always succeed in reaching a mutual consensus; however, there is a deadlock possibility or other conditions, for instance, a mutual consensus may be reached but not obeyed by either party. Mediation is one form of alternative dispute resolution outside the court. The purpose of mediation is to resolve disputes between the parties by involving neutral and impartial third parties.. Mediation can lead third parties to the realization of a permanent peace agreement, since dispute resolution through mediation puts both parties in the same position, no party is won or the defeated . In mediation the parties to the dispute are proactive and have full authority in decision making. The mediator has no authority in decision-making, but he only assists the parties in maintaining the mediation process in order to realize their peace agreement 4. disputes through mediation are greatly benefited, as the parties have reached an agreement that ends their dispute fairly and mutually beneficial. Even in failing mediation, where the parties have not reached agreement, it has actually benefited.. The

willingness of the parties to meet in the mediation process, indicates the willingness of the parties to resolve the dispute, but they have not found the exact format that can be agreed upon by both parties.. The main objective of dispute resolution is the willingness and willingness of both parties to end their dispute. This desire and good will sometimes require the help of a third party in its manifestation. Mediation is one form of dispute resolution involving third parties If it happens, ADR provides another mechanism that can be chosen by the parties to continue the dispute settlement, namely Arbitration.

c. Arbitration

When mediation is in a deadlock state, the arbitration can be elected by the parties to proceed the dispute settlement process as long as (1) the parties are no longer able to continue the negotiation, (2) the parties require a settlement method by legal justification (right or false), but not strict in the application of the law, that is based on appropriateness and decency (ex aequo et bono) principle, not solely on the legal ground, (3) the parties require a final and binding decision but through a more flexible and efficient procedure in terms of time and cost than the court, (4) the parties require that their dispute be examined and decided by an expert personally appointed by them, and (5) the parties require an examination which is closed to the public. The arbitrator holds an important position in the arbitration process because he will examine, adjudicate, and make an arbitral award on the dispute filed to him. The parties to the dispute agree to settle through arbitration can be arranged in the agreement Agreements made between the parties may be made before the dispute arises or after the dispute arises [1]. The arbitration agreement does not matter the issue of the implementation of the treaty, but only concerns the question of the manner and the institution in charge of settling disputes between the pledged party [2] . The arbitrator is appointed on the basis of their expertise and competence. In performing his duties, the arbitrator shall uphold the code of ethic, be fair, neutral and independent, free from any influence and pressure of any party, and free from conflict of interest and affiliation, either with one of the disputing parties or with the relevant dispute. If such principle is violated then the arbitrator concerned shall cease or be dismissed from his duties. In performing its functions, arbitration will produce a decision on the dispute being examined because of the arbitrator, even without the presence of the applicant. The arbitral award is final and has permanent legal force and legally binding to the parties. Arbitration decisions remain confidential.[3]. Therefore, the arbitral award is not subjected to an appeal, cassation or review.

B. Mediation As An Alternative Dispute Settlement

Basically, mediation is an informal settlement of dispute that requires a neutral third party's role to assist the parties to settle the dispute between the disputing parties. In other words, mediation is a form of negotiation between two disputing individuals or groups involving the third party in order to assist them in achieving compromise settlement. Thus, the dispute settlement through mediation cannot be separated from the role of mediator in it. The mediator plays a major role during the mediation process of the dispute settlement. The mediator may act upon his own initiative by offering his service as mediator, accepting the offer to perform his function upon request from

either or both disputing parties, or upon appointment by the authorities. The most important thing is that the mediator must be approved by the disputing parties. Mediator is the neutral party that assists the parties in negotiation process to seek the dispute settlement possibility without making arbitral award or enforcing certain settlement; thus it can be said that in mediation process, mediator plays extremely essential role, as mediation will not be implemented without the mediator's effort to unite the parties's desires and find out solution which is equally beneficial to the problem to be examined. The success of dispute settlement through mediation is also due to the role of mediator because the mediator is very important during the mediation process, the mediator desperately needs a personal ability that enables him to communicate pleasantly with the parties. The most important personal ability is the non-judgmental, impartial, wise attitudes. With all the abilities he/she possesses, the mediator is expected to perform his role to analyze and diagnose the existing disputes. Then design and control the mediation process to guide the parties to reach a consensus. The mediator is in charge of planning or promoting a settlement that can satisfy both parties [4].

III. RESEARCH METHOD

The research method used in this research was normative juridical research method by examining the existing references. Normative legal research is intended to obtain the objective law (legal norm). This study used the statute approach, that is to study all the laws and regulations relating to legal issue being studied.

IV. RESULTS AND DISCUSSIONS

A. Dispute Settlement Through Mediation In Indonesia

Mediation in practice involves the participation of a neutral and independent mediator in a dispute. The objective is to create a direct contact or relationship between the parties [5]. In this case, in order that the mediator can perform its role, then the agreement or consensus is required by the parties as the main requirement. In Indonesia, dispute settlement through mediation has been done but still rarely, especially related to banking sector where some cases from Bank Indonesia reveal dispute between customers and bank. The number of cases increases continuously. The Banking Mediation Directorate of BI stated that in 2010 the cases of dispute between the customer and the bank increased. The Central Bank explained that the cases between the bank and customer are still dominated on payment system, especially credit card. The cases to be complained to Bank Indonesia Mediation are related to credit card, such as the amount of bill which is not in accordance with its use. Some customers feels cheated when paying by credit card. Through Bank Indonesia Mediation, there will be a win-win solution between the bank and the customer, so there will be no more disputes. However, banking mediation has not been optimally used [6].

In relation to the conflict occurring in the community, the settlement through mediation is still very low [7]. Most of dispute cases are resolved in the legal domain through the judicial process. The dispute settlement in Indonesia is still below the 5 percent. This condition is very apprehensive considering that Indonesian people have culture of deliberation

that has been put into practice for a long time. Whereas the mediator should put the formal proof aside and prioritizing mutual consensus as the ultimate goal. The purpose of mediation process is to reach mutual consensus between the conflicting parties or at least communication between the conflicting parties on the issues they are facing. While the mediation function is to plan a settlement which is satisfactory to both parties. As the mediation process requires the presence of both parties, it can be understood that in absentia verdict, it is impossible to do mediation process because the defendant/defendants are never present [8].

B. Dispute Settlement Through Mediation Arrangement In Indonesia

In Indonesian regulation, the mediation process has been regulated in the Supreme Court Regulation (PERMA) No. 1 of 2008 on Mediation Procedures. This rule explains that dispute settlement can be done through the negotiation process of the parties with the assistance of neutral and impartial third parties to help achieve the best possible or alternative dispute settlement and mutual benefit to both parties. Article 1 paragraph 7 describes the method to settle the dispute through negotiation process in reaching mutual consensus of the parties assisted by the mediator. The mediation process takes a short time, less cost and more simple procedure than court litigation. A number of cases that can be resolved through mediation include the disputes of land, health, divorce, banking, finance and trading. The presence of mediator is actually to help the community who needs justice when the justice expectation is increasingly difficult to obtain at the moment. The mediator can be one good alternative to settle the dispute with mediation and deliberation.

In Law Number 30 of 1999 on Arbitration, in article 6 paragraph (6) states that: "The dispute settlement or disagreement through mediator referred to in paragraph (5) by holding strictly confidential, within a maximum of 30 (thirty) days, shall reach the agreement in written form and signed by all the parties concerned." In relation to such mediation arrangements, it is not yet regulated on the duration of the mediation and the fee imposed on the parties, which is why the community has not maximized the use of mediation as an alternative of dispute settlement, while the mediation process is very flexible and the content of the parties' agreement is the written agreement binding on the parties that can be implemented.

V. CONCLUSION

In Indonesia, dispute settlement through mediation has been conducted primarily related to the banking sector, but related to the conflicts that occur in the community, the settlement through mediation is still very needy. In addition, the small number of independent mediator makes the mediation process difficult to be done, especially if the dispute case has entered the legal domain, then the judge in settling the case acts as a mediator by using the formal truth principle.

The dispute settlement arrangement through mediation in Indonesia is governed by Supreme Court Regulation (PERMA) No. 1 of 2008 on Mediation Procedures. Moreover, the dispute settlement through mediation is also stipulated in Law Number 30 of 1999 on Arbitration which states that the dispute

settlement process through mediator by holding strictly confidential, within a maximum of 30 (thirty) days shall reach the agreement in written form and signed by all the parties concerned.

REFERENCES

- [1] Boer Mauna, International Law, Definitions, Roles And Functions In The Era Of Globalization, Alumni, Bandung, 2000, p.226.
- [2] Yahya Harahap, Arbitration, Second Edition Sinar, Grafika, Jakarta, 2001, p.61.
- [3] Akehurst's, Peter Malaczuk, Modern Introduction to International Law, Seventh Edition (New York Routledge), 1999, p.293.
- [4] Harliana, The Rule of Bank Indonesia as Executor of Mediation in Banking Dispute Settlement, <https://media.neliti.com/media/publications>, downloaded at August 10, 2017.
- [5] Ika, Dispute Resolution With Mediation In Indonesia Low, <http://ugm.ac.id/berita>, downloaded at August 10, 2017
- [6] Madhiah, Ainal Dispute Settlement Through Mediation By PERMA No.1 on 2008, Kanun Journal of Legal Studies No. 53, Th. XIII (April 2011).
- [7] Merillis, J.G, International Dispute Resolution, 1986, Translated by Achmad Fauzan, Trisito, Bandung.
- [8] Suwardi, Sri Setyaningsih,, International Dispute Resolution, 2006, UI Press, Jakarta.
- [9] Law Number 30 of 1999 on Arbitration.
- [10] Supreme Court Regulation (PERMA RI) Number 1 Of 2008 On Mediation Procedures.