

# Arbitration as an Alternative to Non-Litigation Settlement in Medical Cases

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## ABSTRACT

Medical disputes stem from the patient's dissatisfaction with the actions of the doctor in carrying out his medical practice and extends to the hospital level which is then resolved through mediation. The purpose of the mediation is to find a win-win solution. However, there are weaknesses of the mediation, namely if the agreement reached from the mediation is not stated in the form of a deed, then the agreement in the mediation can be canceled and has no executive power, even though the agreement is final and binding. Therefore, there is a need for other dispute resolution efforts that not only have final and binding properties, but also have executive power. The dispute resolution efforts are through arbitration. This study is normative with secondary data as a data source. Data is examined by means of document studies. Data is analyzed qualitatively. The results of the analysis are presented descriptively. The results showed that arbitration as an alternative to non-litigation settlement in the case of a medical dispute provides many benefits for the parties, namely in arbitration, the parties may choose an arbitrator who is an expert in the disputed field, so the process is faster because it is decided by the truly expert in the field. Arbitration is also held in private only attended by the parties to the dispute, no one else is present. Therefore, arbitration as an alternative to non-litigation resolution in cases of medical disputes can be immediately applied in hospitals as an alternative in resolving medical cases, so cooperation between BANI and IDI is needed to draft special arbitration for medical disputes.

**Keywords:** *arbitration, alternative dispute resolution, medical disputes*

## 1. INTRODUCTION

The Prita Mulyasari case which was in dispute with the Omni International Hospital Serpong - Tangerang, where the Supreme Court granted the Tangerang District Court Public Prosecutor's Appeals the decision of defamation of the Omni International Hospital. At the Tangerang District Court level, criminal charges against Prita Mulyasari were declared purely free. Meanwhile the civil suit against Prita Mulyasari was not granted.

Here can actually be seen the origins of the excitement of medical dispute cases between Prita Mulyasari, which has been going on for years starting from the dissatisfaction of a patient who received medical treatment from hospital health services. As a patient who is dissatisfied because he was not responded to or did not get an adequate explanation from the doctor or hospital, so that his anger in the virtual world through the distribution of e-mail about the treatment of doctors and hospitals that are considered detrimental.

Based on this event, it can actually be seen that there is a poor communication between the doctors

and Omni International hospitals as the Health Provider, the group that provides or provides health services and the Prita Mulyasari as the Health Receiver, the health service recipient group.

From the principle or relationship of patient - doctor (other health workers) - hospital, known as the so-called therapeutic relationship or therapeutic transaction, where there is a contract (though not written) between the patient and doctor in terms of treatment or treatment of the disease and between patients with hospitals in terms of health services by providing standardized health facilities and infrastructure.

In this connection, even though the patient is a layman about health issues, but the doctor and the hospital should fulfill their obligations to provide health services according to service standards, professional standards and standard operating procedures for patients, both requested and unsolicited. Because of the principle of the therapeutic transaction, the health provider and the health receiver are both legal subjects who have equal rights and obligations in accordance with the principle of equality before the law and are stated in Article 1320

of the Civil Code (a legal requirement for an agreement).

Derived from a sense of dissatisfaction is the forerunner of a conflict which continues with what is referred to as a medical dispute, starting from a mild degree where the patient only complains or mumbles meaninglessly, then a moderate degree at which the patient begins to dare to disclose to the doctor or to the hospital and the degree of severity at which the patient begins to demand or sue the doctor or hospital to the authorities or even court to expose it to the mass media and can also report ethically, administratively and in scientific disciplines.

It is very important to communicate well from the doctor or hospital about the patient's health problems in full and in detail so that the patient understands the health condition and his rights as a patient who is also protected by law. Another thing that is beneficial with good communication is that the patient knows that the extent of his health or the severity of the disease is the ability of the doctor to help the problem in accordance with the conditions at the time. [1]

Another open opportunity for the possibility of a medical dispute is that the doctor or hospital lacks understanding of the rules of health law which are an integral part of the National Legal System, which applies standards of right or wrong based on existing rules, while the paradigm that exists in a doctor is to reduce suffering patients or prevent disability or death only on the basis of good intentions, so that many doctors still only talk to the moral order, namely promoting the noble function of the profession to do good to others, although many are not legally justified or prohibited.

In Law Number 29 of 2004 concerning Medical Practices, it is clear that medical disputes are not explicit, but it is explained in Article 66 paragraph (1) that reads "Anyone who knows or has an interest in being harmed by the actions of a doctor or dentist in carrying out medical practice can report in writing to Chairperson of the Indonesian Medical Disciplinary Board so that medical disputes begin with the patient's dissatisfaction with the actions of doctors (general practitioners, dentists, specialists and specialist dentists) in carrying out their medical practices and extending to the hospital level, where hospitals have an obligation to provide facilities and infrastructure in the framework of health services as well as regulating all matters relating to safe, quality, antidiscrimination and effective health services by prioritizing the interests of patients in accordance with hospital service standards (Article 29 of Law Number 44 of 2009 concerning Hospitals t). In other words, a medical dispute originates from a feeling of

dissatisfaction from one of the parties due to the presence of another party who is not fulfilling achievements that have been promised.[2]

Patient's dissatisfaction with hospital services can lead to complaints or protests which if not handled wisely by the hospital will lead to conflicts between the patient and the hospital so that if there are significant losses and the patient such as unclear charging fees, physical losses or psychic suffered by patients who are considered to have originated from the absence or poor communication that exists can cause disputes that arise with the possibility of the patient involving third parties such as the authorities, journalists or the mass media to listen to his complaints.

In an effort to resolve the dispute, based on Article 29 of Law Number 36 Year 2009 regarding Health, stipulates that in the case of health workers suspected of negligence in carrying out their profession, such negligence must be resolved first through mediation.

The purpose of holding the mediation is to find a win-win solution. However, there are weaknesses of the mediation, that is if the agreement reached from the mediation is not stated in the form of a deed, then the agreement in the mediation can be canceled and has no executive power, even though the agreement is final and binding. Therefore, it is necessary to have other dispute resolution efforts that not only have the nature of final and binding, but also have an executive power. Efforts to resolve the dispute are through arbitration.

Arbitration (handing over to third parties as problem solvers). This alternative is very rare in medical disputes, because arbitration is most commonly used in trade disputes that avoid litigation because it takes a long time. However, efforts to resolve disputes through arbitration also need to be applied, as an alternative medical dispute resolution

Based on the above background, the problem in this study is how is arbitration used as an alternative to non-litigation resolution in medical dispute cases?

## 2. METHODS

### 1. *Types of Research*

This research is basically a normative juridical research, because the target of this study is the normative law or method in the form of legal principles and the legal system. Normative research in this study is research that describes or describes in detail, systematic, comprehensive and in-depth about the rationale for arbitration as an alternative non-litigation settlement in medical dispute cases.

## 2. Nature of Research

This research is descriptive because it illustrates the applicable laws and regulations and is associated with legal theories in the practice of its implementation relating to the problem to be examined.

## 3. Data Analysis

The data obtained will be analyzed by qualitative analysis.

# 3. RESEARCH RESULTS AND ANALYSIS

## A. Arbitration as Alternative Non-Litigation Settlement in Medical Dispute Cases

Medical disputes do not just arise, at least there is a problem that is felt to cause a sense of dissatisfaction from one party that is considered detrimental to the other party and the most common is the dissatisfaction of a patient who receives services, treatment or treatment from a doctor or hospital.

Before reaching the level of dispute, usually preceded by a gap or gap between the expected (expected) and what happened (fact) in a patient or his family, so that then raises a problem that blocks in the heart, both interpreted internally (inner conflict) ) or externally to be disclosed out in the form of a complaint (complaint). This is called conflict (conflict).

When a conflict turns into a dispute, it will go through several stages or conditions, namely:

### 1. Pre-Conflict Phase

At this stage there is a feeling of dissatisfaction with an activity or outcome by one party (patient) with another party (doctor and / or hospital), but this feeling is only at the level of being felt. This dissatisfaction will become the predisposing factor that will develop into a dispute. Some possibilities that might be a factor causing dissatisfaction of patients are: the results of treatment or actions of doctors who are considered unsatisfactory and even worsened, unsatisfactory communication between doctor-patients, lack of explanation from the health provider, unsatisfactory services that occur in hospital caused by humans, equipment, or systems and the comfort of the hospital environment.

### 2. Conflict Phase

At this stage, the aggrieved party begins to express or issue complaints about the dissatisfaction or displeasure it receives, even though at this stage it is still subjective with the meaning of the word not necessarily what is complained actually happened or is the fault of others (doctors and or hospital). This complaint can be conveyed directly to those who are

considered harmful or to other parties who want to listen to their complaints. And at this stage also the party that is considered detrimental already knows of any complaints about the actions or services provided.

At this stage, the party that is considered harmful or complained by the patient (doctor, hospital / hospital management) is aware of and tries to approach to find out the source of the problem and clarify the allegations of discomfort felt by the patient. At this stage an intelligent and wise action from the complained party (doctor or hospital) is needed to provide an explanation to those who feel disadvantaged about the position of the problem.

From here also the dispute occurs or does not begin, where if the patient can accept what has been explained with good communication, is clear about the problem and does not throw an error at the patient, then the possibility of the dispute will be reduced. But if communication at this stage fails or does not give satisfaction to the clarity of the position of the problem, then the complaining party will seek justification for what he feels, namely to the third party (family, community, journalists, authorities or writing in the mass media), it will start to enter the dispute stage.

### 3. Dispute Stage

At this stage the conflict has surfaced and may already be in the public area. This can happen because both parties persist in their respective arguments because they feel right with what is done or felt. Because both parties remain adamant with their respective opinions, then at this stage if the dispute does not want to develop or drag on it must be resolved immediately on the awareness of both parties, except if one party is "selfish" who only wants his opponent to lose, even though in principle he is increasingly suffering losses (time, funds, and occupied thoughts).

Dispute resolution at this stage can be with or without the help of a third party. Usually at the initial stage, negotiations are carried out, that is, without involving a third party as an intermediary or referee, whereby each party or representative represents a discussion for reconciliation. At this stage if an agreement is reached, the dispute is over, but if a dead lock is found, the party that feels harmed can (or may) choose several ways or steps to fulfill his dissatisfaction, that is, if only suffer financial loss or loss physically converted to financially, then the patient will file a civil suit to court or ask to be resolved with the help of another third party as an intermediary (arbitration or mediator), if the patient feels that the doctor's actions entered the criminal domain, then the patient can report to the police or n

which results in disputes, as for some bad communication problems generally starting from:

- a) Misunderstanding;
- b) Differences in interpretation;
- c) Unclear rules;
- d) Offense;
- e) Suspicion
- f) Improper actions;
- g) Cheating;
- h) Dishonest, disrespectful, arbitrary, lack of respect, and so forth.

If a conflict has occurred, one of the efforts taken by the patient as an alternative solution is mediation (deliberation assisted by the mediator). This alternative is chosen if in the negotiation phase there is a deadlock without finding a solution or solving a problem, then one party can propose to the other party to be helped by the negotiation process by a mediator. This type of patient can be said to be someone who understands his rights and does not want the commotion to be exposed. Mediation can also be proposed from the doctor or hospital. However, in addition to being resolved through mediation, the parties can also use another alternative dispute resolution, namely arbitration.

According to Article 1 number 1 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, states that arbitration is a way to settle a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute.

Arbitration agreement is an agreement in the form of an arbitration clause stated in a written agreement made by the parties before the dispute arises, or a separate arbitration agreement made by the parties after the dispute arises (Article 1 number 3 of Law No. 30 of 1999). Arbitration agreements do not question the issue of the implementation of the agreement, but only question the problem of ways and institutions that are authorized to resolve "disputes" (disputes settlement) or differences that occur between the parties who made the agreement.

Thus, the focus of the arbitration agreement is solely aimed at the problem of resolving disputes arising from the agreement, not submitted and examined by an official judicial body, but will be settled by a neutral private power agency commonly referred to as "referee" or "arbitration".

Arbitration agreements, commonly called "arbitration clauses", are additions to the principal agreement. That is why it is called the "assessor" agreement. Its existence, only in addition to the main agreement, and in no way affects the implementation of the fulfillment of the main agreement is not hindered. Cancellation or defect of the arbitration

agreement does not result in the null and void of the main agreement. Another case when the principal agreement is flawed or canceled. This immediately results in the arbitration agreement being null and void. The paralysis of the validity of the principal agreement, automatically paralyzes the arbitration clause. Likewise the fulfillment of the main agreement, resulting in the arbitration clause lost its function. If a dispute does not occur between the parties the arbitration clause has no role.

An arbitration agreement is a contract. The agreement can be part of a contract or a separate contract. When the agreement is part of a contract, for example an investment contract or sales contract, the agreement can be separated from the other contract conditions. Therefore, even if the contract is not valid, the arbitration agreement still applies.

In general, arbitration clauses will include:

- a) Commitments / agreements of the parties to carry out arbitration;
- b) Whether the arbitration will take the form of institutional or ad hoc arbitration; if choosing an ad hoc form, the clause must specify the method of appointing the arbitrator or the arbitral tribunal;
- c) Applicable procedural rules;
- d) Place and language used in arbitration;
- e) Choice of substantive law applicable to arbitration;
- f) Stabilization and immunity rights clauses, if relevant.

Thus, it can be said, the arbitration agreement is only an addition that contains special requirements on how to resolve if a dispute arises in carrying out the main agreement. Arbitration agreement is a complement to the main agreement that regulates how disputes that may arise to be resolved by the parties. In this arbitration agreement (clause), the parties agree will choose the path of arbitration to resolve differences of opinion that occur in the future, not through litigation.

The existence of an agreement or arbitration clause which is usually regulated in the agreement / clause of a transaction is a basic requirement for resolving disputes or dissent through arbitration. But in practice, it is not always easy to make an arbitration agreement, so that it often causes problems or disputes. Therefore the arbitration institutions pa and generally provides a standard clause that can be used as a usable basis.

In connection with this Arbitration Clause, the Indonesian National Arbitration Board (BANI) advises parties who wish to use BANI arbitration, to include in their agreements the standard clause as follows:

"All disputes arising from this agreement will be terminated by the Indonesian National Arbitration Board (BANI) according to administrative regulations and BANI arbitration procedure rules, whose decisions bind both parties to the dispute as the first and last level decision".

It should be noted and not to forget that in formulating an arbitration agreement / clause it is emphasized that the arbitration award "binds both parties to the dispute as a decision at the first and last level", so that no appeal, appeal or review can be made. This is also confirmed in Article 60 of Law No. 30 of 1999 which determines:

"The Arbitration Award is final and has permanent legal force and is binding on the parties".

The arbitration clause gives BANI the absolute competence or authority to decide on the first and last level, in accordance with the provisions of Articles 3 and 11 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This means that the District Court has no authority and is obliged to refuse to examine and adjudicate the dispute.

Based on this, the medical dispute resolution through arbitration provides many benefits for the parties, namely in arbitration, the parties can choose an arbitrator who is an expert in the disputed field, so that the process is faster because it is decided by a truly expert in their field. Arbitration is also held behind closed doors only attended by the parties to the dispute, no one else is present.

#### 4. CONCLUSIONS

Arbitration as an alternative non-litigation settlement in medical dispute cases provides many benefits for the parties, namely in arbitration, the parties can choose an arbitrator who is an expert in the disputed field, so that the process is faster because it is decided by a truly expert in their field. Arbitration is also held behind closed doors only attended by the parties to the dispute, no one else is present. Therefore, arbitration as an alternative non-litigation settlement in medical dispute cases can be immediately applied in hospitals as another alternative in resolving medical cases, so it is necessary to establish cooperation between BANI and IDI to create a special arbitration concept for medical disputes.

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