

Comparison Of Legal Basis Regarding Alternative Dispute Resolution In Business Competition Between Indonesia And United States Of America

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Abstract

Business activities always allow for a dispute between the parties involved. As a result of such disputes the parties always want a quick resolution. Delays in resolving trade disputes will result in inefficient economic development, decreased productivity, and otherwise increased production costs. This not only hinders the improvement of health and progress of workers, but also harms consumers. To resolve business disputes, the parties have the freedom to choose what dispute resolution forum to choose. Business disputes that arise may not be left alone, but it is necessary to find an alternative solution appropriately so as not to be prolonged and cause substantial losses. Alternative dispute resolution is not only known in Indonesia but also in other countries, one of which is Indonesia, in this paper the author will discuss about alternative dispute resolution in the field of business between Indonesia and America. This paper uses normative juridical approach methods that try to analyze and identify the law related to the Alternative Dispute Resolution in Business Competition between Indonesia and USA. In addition, this paper also analyzes the relationship between one regulation and the other. Therefore, the data used to support this paper is secondary data, namely data obtained from books and data published by law enforcement institutions

KEYWORDS Arbitration, Alternative Dispute Resolution, America, Indonesia



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Introduction

Economic activities are generally carried out by economic actors either individuals who run companies or business entities that have a position as a legal entity or not a legal entity. Economic activities are essentially the activities of running the company, namely, an activity that contains the understanding that the activities in question must be carried out. In the business world, economic activities carried out by market participants can certainly arise a competition. Competition is a condition that is always attached to human characteristics, where humans always have a tendency to outperform each other in many ways. Competition that is intended in that case is competition in the business world. Business competition in the business world is an absolute requirement for the implementation of the market economy. Competition needs to be maintained in order to create efficiency³.

Competition in the business world is *conditio sine qua non* (absolute requirement) for the implementation of the market economy. Competition in the business world gives rise to profits and impacts for businesses to continue to improve the products of goods or services produced and continue to innovate, strive to provide the best products or services for consumers and produce products or services efficiently. On the other hand, consumers have the option of buying certain goods or services at low prices with high quality. ⁴ Without competition, it will not be known whether the performance has reached the optimal level. This is because there is no comparison that can be used as a reference.

With competitors, each party can measure performance by comparing the performance of its competitors. ⁵ The emergence of alternative dispute resolution is motivated by a reality¹, that the settlement of business disputes through the judiciary in recent times has received a lot

¹ Singer, Linda R. *Settling disputes: Conflict resolution in business, families, and the legal system*. Routledge, 2018, p. 104

of harsh criticism from various circles, among others from businesses themselves, academics, professionals, the press and society in general.² The judiciary is seen as already so overloaded. On the one hand, the number, sorts, and types of cases that enter over time continues to increase sharply, while on the other hand, the ability to resolve disputes by the court is not proportional to the number of cases entered, so it cannot be resolved effectively and efficiently. Such a complicated, bureaucratic, and rambling judicial process will obviously have an impact on the length of time, effort, and costly.

This makes it possible to make it easier for the public to resolve business disputes through arbitration. The process of resolving disputes / conflicts in the community is fractured and developed. Then came an alternative dispute resolution (*ADR*). This form emphasizes the development of cooperative methods of conflict resolution outside the court. *ADR* dispute resolution methods are consensus, acceptable to the parties to the dispute (*mutual acceptable solution*) with "informal procedure".

The majority states that arbitration clauses do not need to specifically mention the laws provided to require arbitration of claims arising under the law. But in the application in Indonesia disputes handled by KPPU always go through litigation without any option to resolve business competition disputes through alternative dispute resolution. When comparing with all provisions in the United States regarding the resolution of business competition disputes, the country regulates and implements Alternative Dispute Resolution in business competition disputes.³ The dispute resolution process must also be adjusted to the legal system in force in a country. ⁴ In general, the dispute resolution process is carried out in a

³ Grasia Kurniati, Perbandingan Penyelesaian Sengketa Bisnis dan Penerapannya Antara Lembaga BANI, *Jurnal Ilmiah Hukum*, Vol. 1, No. 2, 2016, p. 203.

⁴ Erni Dwita Silambi, Alternatif Penyelesaian Sengketa Bisnis dan Ekonomi Melalui Arbitrase Internasional (Studi Kasus Karaha Bodas VS. Pertamina), *Jurnal Ilmu Ekonomi dan Sosial*, Vol. 3, No. 6, 2012, p. 299.

certain court following existing absolute competences and relative competencies.⁵ Besides, in the dispute resolution process through the court, the disputing parties must submit at least two pieces of evidence to explain the mistakes committed by the other parties and explain the facts that happened.⁶ So that, the dispute resolution process through the courts is considered to require relatively large costs and a relatively long time.⁷ This has led the public to start thinking about and looking for a dispute resolution process that can be carried out outside the court, that is considered more costly and requires a relatively short time.⁸ With this, the Alternative Arbitration Dispute Resolution is formed and known by the public at large.

The arbitration resolution process for the Indonesian society can be carried out through a national arbitration institution or an international arbitration institution. International arbitration is a process used to resolve civil disputes through a neutral third party, especially disputes in the business field that occur to parties to an international business agreement.⁹ International arbitration may be formed by various arbitration clauses contained in an international business agreement that has been agreed by the parties concerned. This article will discuss the comparison of Legal Basis of Business Competition Dispute Resolution through Alternative Dispute Resolution between in the United States and Indonesia and the Relevance of Alternative Settlement in Business Competition Disputes in USA with in Indonesia.

⁵ Randang S. Ivan, Tinjauan Hukum Tentang Peran Identitas Domisili Dalam Menetapkan Kompetensi Relatif Pengadilan, *Jurnal Lex Privatum*, Vol. 4, No. 1, 2016, p. 24.

⁶ Kunti Kalma Syita, Penerapan Prinsip Pembuktian Dalam Hukum Perdata Formil Pada Arbitrase Berdasarkan Undang-Undang Nomor 30 Tahun 1999, *Jurnal Yuridika*, Vol. 29, No. 1, 2014, p. 22.

⁷ Dewa Nyoman Rai Asmara and I Putu Rasmadi Arsha Putra, Akibat Hukum Pendaftaran Alternatif Penyelesaian Sengketa, *Jurnal Hukum Acara Perdata*, Vol. 6, No. 1, 2020, p. 74.

⁸ I Putu Wisnu Karma and I Ketut Artadi, Arbitrase Sebagai Prosedur Penyelesaian Sengketa di Luar Pengadilan Pada Sengketa Hak Atas Kekayaan Intelektual, *Jurnal Kertha Semaya*, Vol. 6, No. 3, 2016, p. 4.

⁹ Ni Gusti Nyoman Shanti Prameswari, Alternatif Penyelesaian Sengketa Melalui Arbitrase Internasional Bagi Perusahaan Internasional, *Jurnal Kertha Negara*, Vol. 1, No. 5, 2013, p. 3.

Method

This article uses secondary data, namely with legal materials both in Indonesia and in America. With a statutory approach and a comparative law approach, a description of non-litigation dispute resolution can be made. The research method used in this paper is a normative juridical legal research method, using a conceptual approach and literature study. Legal regulations in writing are the primary legal material in this study. The conceptual approach will provide understanding by using doctrine in the form of the opinions of legal experts. This writing is also based on the results of research that has been done previously and also collects data by reviewing, searching the literature, and looking at notes. the approach is carried out by examining the approaches to theories, concepts, reviewing the laws and regulations related to this research or the statutory approach.

Result and Discussions

The comparison of Legal Basis of Business Competition Dispute Resolution through Alternative Dispute Resolution between in the United States and Indonesia

The settlement of Business Competition Disputes in Indonesia Through Alternative Dispute Resolution is reviewed from the Perspective of Business Competition Law in Indonesia.¹⁰ The form of analysis on the settlement of business competition disputes in Indonesia through alternative dispute resolution reviewed from the perspective of business competition law in Indonesia requires a supporting factor that strengthens the legal argument in this study.¹¹ The factors that the researchers will

¹⁰ Ariani, N. V. (2012). Alternatif penyelesaian sengketa bisnis di luar pengadilan. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 1(2), 278

¹¹ Muskibah, M. (2018). Arbitrase Sebagai Alternatif Penyelesaian Sengketa. *Jurnal Komunikasi Hukum (JKH)*, 4(2), 155

discuss will be related to finding an answer to the problem formulation in the previous chapters. In this sub-chapter before going deeper into whether Alternative Dispute Resolution can be done in the settlement of business competition disputes, researchers will analyze how the rules of business competition dispute resolution in Indonesia.¹²

Regarding the analysis of competition dispute resolution regulations in Indonesia a legal argument that supports this research and answer whether in the regulation on the settlement of competition disputes in Indonesia allows or not to be resolved through Alternative Dispute Resolution.¹³ Then the researchers will examine more deeply how the application of business competition dispute resolution in Indonesia which will result in a justification on how to settle business competition disputes through Alternative Dispute Resolution.¹⁴ Regulation on Settlement of Business Competition Disputes in Indonesia Settlement of business competition disputes in Indonesia there are several provisions. Regarding this study, researchers focused on the resolution of disputes conducted by KPPU after the emergence of the decision of KPPU that there are violations and how the existing procedural to resolve the dispute competition itself. In this sub-chapter will simultaneously analyze the concept.¹⁵ Provisions governing the resolution of business competition disputes, as follows;

a. Law No. 5 of 1999 on Prohibition of Monopoly Practices and unfair business competition

Regarding the settlement of business competition disputes in Indonesia that govern widely and become the main basis for handling business competition cases in Indonesia in the provisions governing the

¹² Wibowo, B. R. (2004). *Arbitrase Sebagai Alternatif Penyelesaian Sengketa Perdagangan di Indonesia* (Doctoral dissertation, UNIVERSITAS AIRLANGGA). 12

¹³ Nugroho, S. A. (2014). *Hukum persaingan usaha di Indonesia*. Prenada Media. 12

¹⁴ Rachmadi Usman, *Hukum Persaingan Usaha Di Indonesia*, (Jakarta: Sinar Grafika 2013), hlm. 62.

¹⁵ Nugroho, S. A., & SH, M. (2017). *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*. Kencana. 45

resolution of disputes after the emergence of the decision of KPPU contained in Article 44, which reads;

1. *"Within 30 (thirty) days since the business person receives the notification of the Commission's decision as referred to in Article 43 paragraph (4), the business person shall implement the award and submit the implementation report to the Commission".*
2. *"Businesses can submit objections to the District Court no later than 14 (fourteen) days after receiving the notification of the verdict".*
3. *"Business actors who do not object within the period as referred to in paragraph (2) shall be deemed to accept the commission's decision".*
4. *"If the provisions as referred to in paragraphs (1) and (2) are not executed by business actors, the Commission submits the decision to the investigator for investigation in accordance with the provisions of the prevailing laws and regulations".*
5. *"The decision of the Commission as referred to in Article 43 paragraph (4) is sufficient preliminary evidence for investigators to conduct an investigation."*

From the above provisions, if the report is proven to violate the law of Indonesian business, then the panel of commissions in the dictum will give a ruling that states that the reported legally and convincingly violates the provisions of Law No. 5 of 1999 by mentioning the reason and imposing legal sanctions after the formulation of article 47 of Law No. 5 of 1999. 51 After the decision given by KPPU, the efforts that can be made by businesses that are indicated to commit antitrust violations are to accept the verdict by receiving administrative sanctions from KPPU.

The decision of KPPU is not final and binding as the judicial process of KPPU's decision can be appealed, this is to protect the rights of the parties who feel harmed. In the context of competition law, a reported person who is dissatisfied with the decision of KPPU can appeal to the district court in the place of the reported legal position. If the reported party is not satisfied with the decision of KPPU then, reported given fourteen days from the receipt of the passage of the decision of KPPU along with a copy or after the announcement of the verdict of the reported case on the KPPU website. Objections are submitted through the clerkship of the district court

concerned in accordance with the registration procedure of civil disputes by providing a copy of the objection to KPPU.

That the provisions of the regulations mentioned above if the reported do not feel objection, then the decision of The KPPU will be requested the determination of execution from the District Court and the nature of the ruling has a fixed force. With the above exposure researchers can draw conclusions from the provisions of the regulation on dispute resolution concept in Law¹⁶ No. 5 of 1999 on Prohibition of Monopoly Practices and Unfair Business Competition, from all provisions stipulated do not mention or allude to the settlement of disputes through alternative dispute resolution or non-litigation.

All mechanisms used in dispute resolution can be described through litigation, because from the beginning of the issuance of a ruling by KPPU that can be done by the reported as a business actor who is indicated to commit violations in the provisions of antitrust law is only to make an objection to the District Court. In addition, that can be done by the reported filing a cassation to the Supreme Court.

b. Regulation of the Business Competition Supervisory Commission No. 1 of 2019 concerning Procedures for Handling Cases of Monopoly Practices and Unfair Business Competition

Law No. 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition is not the only regulation that contains provisions on the settlement of business competition disputes. This is supported by the provisions contained in the Regulation of the Supervisory Commission. Business Competition No. 1 Year 2019 On Procedures Case Handling Monopoly Practices And Unfair Business Competition. The regulation becomes a supporting regulation that serves to clarify all provisions of the Act. Some of the provisions in the commission's

¹⁶ Law No. 5 of 1999 on Prohibition of Monopoly Practices and unfair business competition

regulations discuss not much different from the law on unfair business competition, all mechanisms used at the stage after the enactment of the ruling if the reported does not accept the verdict continues to appeal to the District Court and Submit Cassation to the Supreme Court.

Furthermore, the other provisions shall be provided for in Article 202 of the Agreement or award under the Convention, which states that;

"Arbitration agreements or arbitral awards arising out of a legal relationship, whether contractual or not, which are deemed commercial, including the transactions, contracts, or agreements described in section 2 of this heading, are under the Convention. An agreement or award arising out of such a relationship that is entirely between citizens of the United States shall be deemed not to be included in the Convention unless it involves property located overseas, envisions performance or enforcement of law abroad, or has other reasonable relationships with such agreements. or more foreign countries. For the purposes of this part the company is a citizen of the United States if incorporated or has a principal place of business in the United States".

Based on the above presentation on the rules of settlement of business competition disputes and their application in Indonesia can be concluded that in the case of business competition in Indonesia has not used alternative dispute resolution in its settlement. ¹⁷In Indonesia has invited Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which in the regulation regulates the limits that can not be done through alternative settlement sengketa contained in article 5, namely;

- 1) *"Disputes that can be resolved by arbitration are only disputes in the field of trade and concerning rights that under law and legislation are fully controlled by the parties to the dispute".*
- 2) *"Disputes that cannot be resolved through arbitration are disputes that according to the laws and regulations cannot be held peace".*

¹⁷ Antono, A. PENGATURAN TENTANG ARBITRASE AD HOC DALAM UNDANG-UNDANG NOMOR 30 TAHUN 1999 TENTANG ARBITRASE DAN ALTERNATIF PENYELESAIAN SENGKETA. *Badamai Law Journal*, 2(1), 6.

Based on such exposure in the regulation prohibits Arbitration and Alternative Dispute Resolution if prohibited by law or for disputes that cannot be held peace. Regarding this, researchers argue that there is no prohibition on Alternative Dispute Resolution that prohibits business competition cases to be resolved through Alternative Dispute Resolution. This is because in the rules on the settlement of business competition disputes there is nothing prohibiting resolving business competition disputes through Alternative Dispute Resolution, only in its application there has not been a settlement of business competition disputes through Alternative Dispute Resolution.

Competition Dispute Resolution Regulations Through Alternative Dispute Resolution in the United States

Regarding the rules of settlement of business competition disputes, in some Antitrust Laws in the United States such as the Sherman Act, the Federal Trade Commission Act, the Clayton Act and so on only regulates violations of unfair business competition in general. Similarly, the FTC Act and DOJ Act only explain the authority of the two agencies in handling unfair business competition dispute resolution. Alternative dispute resolution regulations in the United States are not within the specific laws governing competition law. The provision is stipulated in a supporting regulation that explains the existence of alternative dispute resolution in the application in the settlement of business competition disputes in the United States.

a. Arbitration Fairness Act 2018

Regarding the regulation of Alternative Dispute Resolution in business competition disputes in the United States that researchers will discuss is the legal force of arbitration in business competition disputes is further strengthened by the Arbitration Fairness Act passed in 2018 with the intention of amending the Federal Arbitration Act or 9 United States Code by adding provisions in chapter 4 that include arbitration in

employment matters , consumer, antitrust, and civil rights. In the arrangement contained in article 2 of the discovery that reads;¹⁸ Congress found the following:

"The Federal Arbitration Act (now enacted as chapter 1 of heading 9 of the United States Code) is intended to apply to disputes between commercial entities with similar sophistication and bargaining power". "A series of decisions by the United States Supreme Court have interpreted the Act so that it now extends to consumer disputes and labor disputes, contrary to the intent of Congress". "Most consumers and employees have little or no adA choice meaning whether to file their claim to arbitration. Often, consumers and employees don't even realize that they're giving up their rights" rights. ¹⁹"Arbitration is obliged to undermine the development of public law due to inadequate transparency and inadequate judicial review of the arbitrator's decision"." Arbitration can be an acceptable alternative when arbitration consent is completely voluntary, and occurs after a dispute arises".

Based on the above disclosures, regarding the findings contained in the rules on dispute resolution in the United States, researchers can conclude that they are sufficient to resolve them through Arbitration. What is stated in the regulation is about the lack of legal options for resolving disputes that people experience to file arbitration. Therefore in the regulationn finally in the amendment by containing the provision that in the settlement of the dispute can be resolved through Arbitration when the consent is completely voluntary and arbitration can be enforced when a dispute arises between the parties.

b. Federal Arbitration Act / 9 United States Code Arbitration

¹⁸ Marks, J. B., Johnson, E., & Szanton, P. L. (1984). *Dispute resolution in America: Processes in evolution* (pp. 28-9). Washington DC: National Institute for Dispute Resolution.

¹⁹ Brunet, E., Brunet, E. J., Speidel, R. E., Sternlight, J. R., Sternlight, J. E., Ware, S. H., & Ware, S. J. (2006). *Arbitration law in America: A critical assessment*. Cambridge University Press.

The Federal Arbitration Act or now referred to as 9 United States Code of Arbitration which discusses alternative dispute resolution will be possible if enacted in the United States. The provisions on the resolution of alternative disputes are explained by stipulated that the FAA is subject to the New York Convention set forth in Chapter 2 of article 201 of the Enforcement of the Convention which reads; ²⁰

"The Convention on the Recognition and Enforcement of Foreign Arbitration Awards of June 10, 1958, shall be enforced in the courts of the United States in accordance with this chapter".

Regarding the application of Alternative Dispute Settlement conducted in the United States, especially in the case of short business competition there is a federal legal policy that supports private legal dispute arbitration. Consistent with that policy, the law in the United States states that domestic and international private antitrust claims may be arbitrated in accordance with the Federal Arbitration Act. Regarding the court will continue to explore the issues surrounding the application of these general rules.²¹

Related to the application conducted by the Federal Trade Commissions and the Department Of Justice Antitrust Division to resolve business competition disputes in the United States. This Alternative Use of Dispute Resolution by United States competition agencies describes the provisions of federal law that authorize the use of arbitration and other Alternative Dispute Resolution. Nonetheless the Department Of Justice Antitrust Division and The Federal, but Trade Commissions are legally authorized to use arbitration or mediation in some states, they have not directly used arbitration to resolve differences between them and the object of their antitrust enforcement process.

²⁰ Oldham, J., & Kim, S. J. (2013). Arbitration in America: The early history. *Law & Hist. Rev.*, 31, 241.

²¹ Wibowo, B. R. (2004). *Arbitrase Sebagai Alternatif Penyelesaian Sengketa Perdagangan di Indonesia* (Doctoral dissertation, UNIVERSITAS AIRLANGGA).

The Relevance of Alternative Settlement in Business Competition Disputes in USA with in Indonesia

Regarding the relevance of alternative dispute resolution arrangements in business competition disputes, researchers will place a concept owned by other countries precisely the United States in the settlement of business competition disputes that will be associated with how it is resolved in Indonesia. If you look at all the provisions contained in the regulations on the settlement of business competition disputes in Indonesia clearly have not supported or regulated the choice of dispute resolution law namely Alternative Dispute Resolution because in reality all business competition disputes led to be resolved through Litigation.²²

In contrast to existing arrangements in the United States, when reviewed from existing regulations allows for an alternative dispute resolution. With the provisions of the Federal Arbitration Act/ 9 United States Code subject to the New York Convention 1958 explains that any dispute containing arbitration clauses can be enforced through arbitration with the support of the court. Then the rule is strengthened by the existence of the Arbitration Firmness Act which explicitly describes the arrangement of arbitration in the case of applicable business competition. In addition, there is an Administrative Dispute Resolution Act that allows the authorities in competition to support alternative dispute resolution in administrative cases with all considerations that have been presented in previous chapters.

In such regard, the author may be able that by looking at all provisions governed by the United States regarding the settlement of alternative disputes can be used as a reference or basis of thought in completing a regulation on Alternative Dispute Resolution in the case of business competition. In fact, the rules were established to cover the community itself. It should be in Indonesia to support or provide a regulation that

²² Sukwanto, B., & Siregar, T. (2010). Pelaksanaan Putusan Arbitrase Internasional Di Indonesia. *JURNAL MERCATORIA*, 3(1), 18

explicitly stipulates that some business competition disputes can be resolved alternatively. Regarding what business competition cases can be resolved in alternative dispute resolution as well as the relevance of Alternative Dispute Resolution in business competition disputes. Researchers will look at the applications made by the United States. Related to this, researchers can relate that the case that can be solved in the case of business competition is private or between competitors in business competition.

In addition, arbitration in competition in the United States uses it for the case of the parties' claim for damages, then the merger has some provisions regarding access to commitments that will be included in what can be resolved through arbitration, but in arbitration it cannot handle class actions. Then regarding a clear international arbitration has a strong bargaining position because of the conventions that have been clarified in the application of the settlement of business competition in the United States.

Based on all of the above explanations, it can be concluded that Indonesia should be able to examine more deeply about the regulations that have been imposed in the United States. Regarding arbitration and alternative dispute resolution whereas in Indonesia has been regulated and enforced all the provisions contained in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution and in Indonesia there has been an institution authorized in handling cases that can be resolved through arbitration. But the polemic that at the same time can be questioned is why the law in Indonesia does not support by making special regulations on Alternative Dispute Resolution in the case of business competition and applying it.

When it comes to all existing regulations and applications in the United States regarding alternative dispute resolution in competition law, researchers conclude that they are highly relevant when applied in Indonesia. Then based on all the analysis that has been described above on

the relevance of business competition dispute resolution arrangements in Indonesia Through Alternative Dispute Resolution is a strong legal argument to prove that Alternative Dispute Resolution can be enforced in Indonesia precisely in business competition disputes.

Conclusion

Business competition disputes in Indonesia cannot be resolved through Alternative Dispute Resolution if reviewed from the perspective of business competition law in Indonesia due to the absence of supporting regulations specifically regulated related to Alternative Dispute Resolution in business competition disputes. But supposedly with the existence of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution allows the application of Alternative Dispute Resolution in business competition disputes to be the choice of dispute resolution law for the parties to the dispute. That the comparison of the concept of Alternative Dispute Resolution regulations in business competition disputes in Indonesia with the United States has a difference that includes; The United States has regulations regarding the resolution of business competition disputes through specially regulated Alternative Dispute Resolution; The United States implemented the Alternative Dispute Settlement in a business competition dispute. Also we can adopted how USA regulates Alternative Dispute Resolution in matter of Business Competition more complete. As it can be concluded that Indonesia should be able to examine more deeply about the regulations that have been imposed in the United States. In connection with that, Alternative Dispute Resolution is a relevant matter when applied in Indonesia related to private disputes of business competition which include mediation for loss claims as well as mass claims, while arbitration for claims for losses and merger or merger disputes. For the government and KPPU in the matter of Regulation regarding Alternative

Dispute Resolution in Business Competition in Indonesia is to comprehensively review the Alternative Dispute Resolution in business competition disputes and determine the direction of policy and establish dynamic legal rules, so as to make Alternative Dispute Resolution as a legal option for dispute resolution for the parties to the dispute just like in the USA.

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