



Comparative Study Of Alternative Settlements in Indonesia And Timur Leste

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ABSTRACT

Alternative Dispute Resolution (ADR) is a procedure in community practice which then gets recognition in the eyes of the law to settle a case between two or more parties by way out of court in a formal manner (litigation). ADR is considered to have more advantages, including easy, cheap, and fast, so it is more efficient and effective than solving cases in court. This paper aims to examine the existence of ADR in legal practice in Indonesia with a comparative review of the state of Timor Leste. The results of this paper reveal that compared to Timor Leste which is still new, Indonesia has first implemented ADR practices within a formal legal framework. Timor Leste actually also uses the ADR scheme in its daily community practice, but its implementation takes into account the elements of custom and society rather than the legal norms. In this article, the author uses a normative legal research method or literature study and uses a comparative approach.

Keywords: Alternative Dispute Resolution; Indonesia; Timor Leste

INTRODUCTION

In the form of business and economic activities, there are often conflicting desires between each actor. In addition to conflicts of differing views, problems can also occur in the form of default or non-fulfillment of obligations in the engagement, abuse of power, to



internal company policy issues. If the problem is not handled properly, it is not impossible that it will result in a business dispute¹.

Disputes are not resolved due to these obstacles can cause the company's economic activity to stall. This can also have an impact on the development of economic development to become inefficient, decrease productivity, and increase production costs. In order to avoid further losses to the company, it is fitting that disputes be resolved immediately. Conventionally, company disputes are resolved through general justice schemes, also known as litigation channels. This settlement is not recommended because of the lengthy process and the bureaucracy that is convoluted, especially the high costs incurred due to the lengthy process of the proceedings. Therefore, the business world is also familiar with Alternative Dispute Resolution (ADR)².

As the name implies, Alternative Dispute Resolution is a service offered by legal institutions for dispute resolution options outside official public channels. The basic principle of settlement of this route lies in the approval and availability of the disputing parties to make a settlement without using a trial. The main purpose of settlement with this method is to provide a win to win solution in which the needs of all parties are met³.

Alternative Dispute Resolution is one of the steps to resolve problems arising from business disputes through steps outside the court (litigation). The fact that ADR is more in demand than litigation measures cannot be separated from its simplicity and process which does not require time and bureaucracy. In addition, ADR is preferred because it can provide a win to win solution where there are efforts to facilitate the needs of all the disputing parties, so it is hoped that the outcome of this ADR is the voluntary acceptance of all parties. Therefore, ADR must in fact provide fast, effective, and efficient service in resolving business disputes.

¹ Pamolango, Jessicha Tengar. "Tinjauan Yuridis Terhadap Kewenangan Arbitrase Dalam Penyelesaian Sengketa." *Lex Administratum* 3.1 (2015).

² Sariono, Joko Nur, and Agus Dono Wibawanto. "Penyelesaian Sengketa Bisnis Melalui Alternative Dispute Resolution (ADR)." *Perspektif* 11.3 (2006): 245-257.

³ Mamudji, Sri. "Mediasi Sebagai Alternatif Penyelesaian Sengketa Di Luar Pengadilan." *Jurnal Hukum & Pembangunan* 34.3 (2017): 194-209.



The discoveries in the world of business law help people in dealing with issues around policy and their application in the practice of everyday life. One of the problems encountered in the business world is dispute resolution. The settlement route is expensive, bureaucratic, and tends to be inefficient, making the existing litigation (court route) unattractive. This use of the litigation route is taken when there is no other way to resolve the dispute. Therefore, another alternative was born to solve the problems that befell business people and the economy through certain methods outside the court (non-litigation)⁴.

Many considerations are needed in the company's economic activity before choosing what steps will be used in resolving the dispute it experiences. For example, company A which is experiencing bad credit and is being hunted down to pay its bills to company B, of course, must consider the economic condition of the company as well. Companies will clearly prefer which settlement they are economically advantageous about. This is in accordance with the main principle in conducting business, namely seeking the maximum profit using the smallest capital.

ADR answers these needs with an easy, fast, and efficient process. Although in reality some ADRs tend to require expensive capital such as arbitration, but the benefits obtained during proceedings in ADR tend to be more than using the litigation route. Therefore, ADR is very popular in developed countries⁵.

There are various types of ADR. Some of the most well-known of these are negotiation, mediation and arbitration. These three methods are most widely used throughout the world because of their good capacity in resolving business disputes⁶. There are many forms of ADR that disputants can take. Most of these are steps to find a win-to-win solution so that all parties involved are expected to profit. The ADR broke through the formal walls of the trial, where the decisions produced by the proceedings were always win-

⁴ Muskibah, Muskibah. "Arbitrase Sebagai Alternatif Penyelesaian Sengketa." *Jurnal Komunikasi Hukum* 4.2 (2018): 139-149.

⁵ Ariani, Nevey Varida. "Alternatif penyelesaian sengketa bisnis di luar pengadilan." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 1.2 (2012): 277-294.

⁶ Soemartono, Gatot P., and P. Gatot. *Mengenal Alternatif Penyelesaian Sengketa Dan Arbitrase*. Jakarta: Universitas terbuka, 2014



to-lose so that one of the parties would be forced to carry out the resulting demands. For this reason, ADR is the right solution and is preferred by business actors in disputes, before thinking about using litigation or trial channels.

Basically, no economic actor wants a dispute to occur. However, in any relationship activity between individuals, individuals and institutions, or between institutions, differences can always occur at any time. These differences can be in the form of differences of opinion, differences in views, differences in attitudes, different interpretations, and so on, which lead to disputes if they cannot be resolved. These disputes became known as disputes.

Forms of dispute resolution through non-litigation channels or ADR are usually carried out by discussing differences that arise between the parties to achieve common goals and agreements in accordance with their respective wishes. The settlement of the dispute depends on how management is able to eliminate differences of opinion between the parties to the dispute. When an agreement to reconcile has been reached, the parties then agree to bind to the agreement as a result of the settlement of the dispute.

Alternative Dispute Resolution or ADR has since become a known practice worldwide. The globalization of the world community which increasingly opens up exchange opportunities across countries is the main factor in how the ADR trend can be popular among various circles between countries.

So, what is the basis that differentiates the implementation of ADR in each country if each ADR has the same concept, namely to both resolve cases through alternative procedures outside the formal trial? This legal writing was carried out in order to provide a study on the differences in the implementation of ADR activities between countries. In this case, the author will take an example to compare it with the application of the ADR procedure in Indonesia, namely the country of Timor Leste. The main purpose of writing this law is to provide an overview of the differences in the implementation of ADR in countries other than Indonesia itself, and therefore it will also be found that correlations will also be related to the implementation of ADR in a scope between countries with different jurisdictions.



METHOD

This research uses a literature study using existing legal materials. The legal materials are in the form of statutory regulations and concepts regarding alternative dispute resolution. Legal materials are analyzed systematically and comprehensively.

RESULTS AND DISCUSSIONS

Implementation of Alternative Dispute Resolution In Indonesian Legal Practices

The existence of ADR in Indonesia is a solution to the problems of domestic judicial procedures which have been deemed ineffective and inefficient, especially for business cases that require time and cost efficiency. Harahap (1997) provides a critique of the court system that occurs in several countries, one of which is Indonesia, where dispute resolution in judicial procedures has several shortcomings, including 1) slow dispute resolution; 2) the court fees incurred are expensive; 3) generally unresponsive judicial practices; 4) the ability of judges who are generalists. Therefore, ADR is here to be able to provide choices) for business people in litigation without the need to use these complicated and inefficient judicial procedures⁷.

The presence of ADR in Indonesia itself is not without a legal basis. The provision of a juridical basis for this practice aims to provide validity in a practical position for the settlement of disputes it carries out. Within the framework of a rule of law, especially in accordance with the legal system adopted by Indonesia itself, the practice of ADR is felt to have juridical legitimacy, and therefore several laws and regulations are regulated to fulfill it.

There are several laws and regulations that provide a legal basis for the practice of ADR in Indonesia itself, among others⁸:

1. Law Number 48 of 2009 concerning Judicial Powers;

⁷ Dinna, Aditya. "Penyelesaian Sengketa Perbankan Melalui Mediasi, Mneurut UUU Nomor 21 Tahun 2011 Tentang Otoritas Jasa Keuangan. *LEX ET SOCIETATIS* 5.6 (2017).

⁸ Ibid.



2. The Civil Code (KUHPerdata) Article 1851;
3. Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution;
4. Law Number 5 of 1968 concerning Indonesia's Agreement on the ICSID Convention (International Convention on Settlement of Investment Disputes Between States and National of other States);
5. Presidential Decree Number 34 of 1981 concerning Recognition and Implementation of Foreign Arbitration Awards in Indonesia;
6. Regulation of the Supreme Court of the Republic of Indonesia (PERMA RI) No. 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards in Indonesia;
7. Supreme Court Rules Number 1 of 2016 concerning Mediation Procedures in Courts;

The first legal basis for implementing ADR in Indonesia is Law Number 48 of 2009 concerning Judicial Power (Law on Justice). This regulation, which is actually intended to regulate judicial and judicial practices in Indonesia, also has the substance of ADR, in which Article 5 states that judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice in life in society. With this provision, it opens up the opportunity for case resolution by other means outside the court, as long as the parties choose it and believe that the process for settling the case they choose is fair. In Article 3 paragraph (1), it can also serve as a guide for the parties to be able to resolve dispute cases without going through a judicial process, and the parties are free to choose what form / instrument of ADR to use as long as both parties mutually agree⁹.

In the Article 10 of the Justice Law also provides the basis for regulating the judicial process by trying to settle civil cases in a peaceful manner, both inside and outside the court. This article was then reaffirmed by the presence of Articles 58-61 of the Justice Law, which stipulates that civil dispute resolution efforts can be carried out outside the state court through arbitration or alternative dispute resolution. As is well known, arbitration itself is a form of ADR. Apart from arbitration itself, there are several other options in dispute resolution, including consultation, negotiation, mediation, conciliation, or expert judgment.

⁹ Albar, Andi Ardillah. "Dinamika Mekanisme Alternatif Penyelesaian Sengketa Dalam Konteks Hukum Bisnis Internasional." *Otentik's: Jurnal Hukum Kenotariatan* 1.1 (2019): 18-32.



This choice must be stated in a written agreement, and the outcome of the ADR process of the parties in the case is final and binding on the parties to the implementation based on good faith (Article 60)¹⁰.

In Chapter XVIII, Articles 1851-1864 of the Civil Code (KUHPerdata) also regulates dispute resolution through ADR. In Article 1851, it is said that, "peace is an agreement in which both parties by handing over, promising or holding an object, terminate a pending case or prevent a case from arising". Peace here refers to the settlement of disputes in which both parties voluntarily end the case that occurs between the two of them, thus it is no longer possible to have further legal remedies. This is reinforced by Article 1858 paragraph (1) which reads, "all peace has between the parties a power like a judge's decision at the last level".

In order to provide a clearer legal basis in regulating ADR, the central government of the Republic of Indonesia then issued Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (ADR Law). This law becomes the juridical basis for the settlement of disputes outside the court, especially arbitration, and underlies every procedure in a formal legal framework. In Article 1 point 10 it is stated that, "Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment". This Law also regulates the procedure for resolving disputes outside the judiciary, as follows¹¹:

1. Both parties must be based on good faith by setting aside litigation in the District Court to resolve disputes that occur between the two;
2. Dispute settlement is settled in a direct meeting by the parties within a maximum period of 14 (fourteen) days and the results are stated in a written agreement.;

¹⁰ Ibid

¹¹ Zaman, Muhammad Rutabuz. "Penyelesaian Sengketa Alternatif (Alternative Dispute Resolution) Pada Layanan Jasa Perbankan." *MIYAH: Jurnal Studi Islam* 11.1 (2017): 71-78.



3. If the dispute cannot be resolved, then with the written agreement of the parties to the dispute or differences of opinion then it is resolved through the help of one or more experts or a mediator.;
4. If within 14 (fourteen) days the mediator fails to reach an agreement, or fails to bring the two parties together, then the parties will contact an arbitration institution or an ADR institution to appoint a mediator.;
5. Within a maximum period of 7 (seven) days after the appointment of the mediator, mediation efforts must have started;
6. Dispute settlement efforts are carried out on the principle of confidentiality and within 30 days an agreement must be reached in a written form signed by all parties concerned;
7. The dispute settlement agreement is final and binding and carried out in good faith and must be registered at the district court within 30 days of being signed.;
8. The agreement must be completed within 30 days from registration;
9. If peace efforts cannot be reached, the parties based on a written agreement can submit a settlement effort through an arbitration institution or ad-hoc arbitration.

Several regulations were deliberately held to provide guidelines for the implementation of ADR in Indonesia. However, each of these rules has similarities in which elaborating alternative dispute resolution as an attempt to reconcile the desires and positions of the two parties outside the court (litigation).

Alternative Dispute Resolution Arrangements in Timor Leste

As a country that has not been established that long, Timor Leste is a little behind in terms of regulating the activities of its citizens in a juridical manner. Until now, there is no legal basis specifically designated as a juridical basis for the practice of ADR in Timor Leste. This is still the concern of the state government, especially the related ministry of justice in Timor Leste, to develop a legal umbrella in the regulation of ADR practices in Timor Leste¹².

¹² Distrito, Ba. *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*. Counterpart International: Timor-Leste, 2016



Conversely, when a semi-public crime is reported, the complainant can withdraw the complaint and / or a judge to try conciliation between the victim and the accused before going to full trial. In such semi-public crime cases, the ADR process can be used to fully resolve the problem if the victim chooses to withdraw his complaint from the prosecutor's office. In cases where ADR has been used but the case has also been tried in court, the Timor Leste Penal Code (Articles 56 & 123) recognizes prior reconciliation between the parties as a potentially reducing sentence. This means that any agreement reached through the ADR could be considered for reduced penalties if the offender is found guilty of committing a public or semi-public crime¹³.

Some agencies are also explicitly empowered under the law to provide ADR services. The New Statute of the Public Defenders (Stipulations UUU No.10 / 2017, Articles 3 & 6) authorizes the Office of the Public Defenders to encourage extrajudicial settlement, in matters of mediation, conciliation and arbitration and to participate in conflict resolution processes in court. Public. They also have the competence to delegate this power, which they have used in delegating certain NGOs to provide mediation on their behalf. In addition, tribal councils (village councils) and, in particular, xefe tribes (village heads), are empowered under the Tribal Law No. 9/2016 to promote the resolution of disputes that occur in the community. The law does not specify the types of disputes it covers or what ADR (mediation or arbitration) modalities tribal leaders should use in settling disputes¹⁴.

There is no single approach to the use of ADR in the Timorese community. Community members use the various modalities in different orders and ways, as they seek out dispute resolution mechanisms which they consider legitimate, and which will be effective in meeting their needs. The path chosen may involve customary dispute resolution or non-adat ADR and may also involve the formal justice system - or a combination of the three. The choice of community members is influenced by a variety of factors which are further influenced by their gender identity, among other factors mentioned earlier.

¹³ Ibid.

¹⁴ Ibid.



Seeing the use of the ADR system which was previously used by the Indonesian state, Timor Leste can take the values and systematics of ADR in Indonesia to be applied in Timor Leste. To date, there is no legal basis that has been specifically established as a juridical basis for the practice of ADR in Timor Leste. Therefore, it can be started with Timor Leste making laws or legal regulations that specifically regulate alternative dispute resolution. So that the ADR system can have permanent legal force.

Furthermore, it is stated in the Timor Leste law that whenever there is a public crime, the public prosecutor must conduct a direct investigation. This means that for general crimes, the public prosecutor must continue to investigate and adjudicate a case even though the victim and perpetrator have reached a settlement using the ADR process. It is very ineffective. Where should when the parties have reached an agreement the judicial process is stopped. If still running, then what is the function of the ADR system.

The law does not specify the types of disputes it covers or what ADR (mediation or arbitration) modalities should be used by tribal leaders to resolve disputes. Because the ADR systematics in Timor Leste is still unclear, and does not yet have an independent legal basis, so that this system is not optimally used by tribal leaders in resolving disputes.

CONCLUSION

Compared to Indonesia, which has a tidier and more structured legal system specifically to base the practice of ADR, Timor Leste still lags behind in settling disputes outside the court. Timor Leste still uses customary norms and provisions that exist in the culture of the community to be able to carry out law enforcement based on the principle of finding the right solution to be able to address the interests of all parties in a dispute. This makes Timor Leste properly concentrated in being able to form laws and regulations that are more established and capable of overseeing every legal activity of its people.



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