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The Ineffectiveness of Dispute Resolution Through Arbitration According to Indonesian Law No. 30 of 1999 on ADR (Alternative Dispute Resolution)

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Abstract: This article or writing aims to find out about the ineffectiveness of settlement through arbitration according to Republic of Indonesia Law Number 30 of 1999 concerning Adr (Alternative Dispute Resolation). The problem focuses on the ineffectiveness of settlement through arbitration according to Republic of Indonesia Law Number 30 of 1999 concerning ADR (Alternative Dispute Resolution). In order to approach this problem, theoretical references from legal certainty and dispute resolution are used. The data was collected through normative legal research. The data source used is secondary data. Secondary data in this research is divided into 3 parts, including: Primary, Secondary and Tertiary Legal Materials and analyzed qualitatively. This study concludes that arbitration is a method of resolving a civil dispute outside the general court which is based on an arbitration agreement made in writing by the parties to the dispute. However, arbitration forums also have weaknesses that both parties should consider before deciding to submit their case. Arbitration is considered to have several legal subject weaknesses in the form of states still being reluctant to give their commitment to hand over their rescue to international court bodies. The process of completing a settlement through arbitration does not guarantee that the decision will be binding.

Keyword: Ineffectiveness, Arbitration, Law No. 30 of 1999.

INTRODUCTION

Conventionally, dispute resolution is conducted through the courts (litigation), but subsequent developments have led to the emergence of extrajudicial dispute resolution due to dissatisfaction with the efforts of dispute resolution through the courts. Extrajudicial dispute resolution can be carried out through Arbitration and Alternative Dispute Resolution (ADR), including consultation, negotiation, mediation, conciliation, or expert appraisal as regulated in Law Number 30 of 1999. However, only trade or business disputes that can be resolved in this manner, so disputes other than that cannot be reconciled and are not the subject of settlement under this law (Sudjana, 2018).

The establishment of Law No. 30 of 1999 is based on the exercise of judicial power entrusted to the judicial body in accordance with Law No. 14 of 1970 concerning the Basic Provisions of Judicial Power. This is the parent and general framework that lays the foundation

and principles of the judiciary and guidelines for the general courts, religious courts, military courts, and state administrative courts, each of which is regulated by its own law. In the Explanation of Article 3 Paragraph (1) of Law No. 14 of 1970, it is stated, among other things, that the settlement of cases outside the court based on peace or through arbitration is still permitted, but the arbitration only has executive power after obtaining permission or an order for execution (executoir) from the court. Until this day, the legal basis used for the examination of arbitration in Indonesia are Articles 615 to 651 of the Code of Civil Procedure (Reglement op de Rechtsvordering, Staatsblad 1847. 52), Article 377 of the Revised Indonesian Regulation (Het Herzeiene Indonesisch Reglement, Staatsblad 1941:44), and Article 705 of the Code of Procedure for Areas Outside Java and Madura (Rechtsreglement Buitengewesten, Staatsblad 1917 No. 127) (General Explanation of Law No. 30 of 1999).

Arbitration can generally be carried out in the settlement of both public and private disputes, but in its development, arbitration is more often chosen to resolve contractual disputes (civil), which are classified into:

a. Quality Arbitration: Resolves factual disputes requiring highly technical expertise;
b. Technical Arbitration: Focuses on document interpretation and contract applications;
c. Mixed Arbitration: Addresses both factual and legal disputes.

Effectiveness (adjective) means successful or fit for purpose, derived from the base word "effective." Effectiveness indicates success in terms of achieving the set targets. According to the official Indonesian Dictionary, the word effective means effect, influence, consequence or ability to produce results. Therefore, effectiveness is the activeness, utility, the existence of conformity in an activity carried out by a person with the intended target. Effectiveness basically indicates the level of achievement of results, which are often or are almost always associated with the concept of efficiency, although there is actually a difference between the two. Effectiveness emphasizes the results achieved, while efficiency emphasizes the method to achieve the results considering the input and output used. Therefore, in essence, efficiency refers to “doing things right” while effectiveness refers to “doing the right thing” (http://elib.unikom.ac.id/files/disk1/456/jbptunikompp-gdl-iiphimawan-22764-7-babii.pd).

However, the problem with arbitration is that it is considered to have several weaknesses in the form of legal subjects, such as states being reluctant to commit to submitting their disputes to international courts. The dispute resolution process through arbitration does not guarantee that its decision will be binding.

Based on the aforementioned problems, the author is interested in writing about "The Ineffectiveness of Dispute Resolution through Arbitration According to Indonesian Law Number 30 of 1999 concerning ADR (Alternative Dispute Resolution).".

METHOD

This research adopts a literature review approach with a normative legal methodological framework.

In normative legal research, literature is the primary data which, in research, is classified as secondary data. Data collection in this research only uses secondary data. Secondary data is data used by researchers to answer research questions through a literature review. Secondary data has a very broad scope, including personal letters, diaries, books, to official documents issued by the government. The secondary data used by researchers are data sourced from applicable laws and regulations and relevant literature.

In normative legal research, the data used is secondary data. Secondary data in this research is divided into three parts: Primary Legal Material, Secondary Legal Material, and Tertiary Legal Material.

Data collection is done through a literature review involving the analysis of legal literature and regulations. This study uses a qualitative descriptive analysis method.

RESULTS AND DISCUSSION

The arbitration law provides an authentic limitation. Article 1 paragraph 1 defines arbitration as: "a method of settling a civil dispute outside of the general court based on an arbitration agreement made in writing by the parties to the dispute."

According to the Procedural Rules of the Indonesian National Arbitration Board (BANI), arbitration is the settlement of disputes arising in trade, industry, finance, and services, as well as providing a binding opinion without any dispute regarding a matter concerning an agreement (Article 1 Constitution of BANI).

The above definition of arbitration exhibits the same elements, which includes:

a. There is an agreement to submit any existing or future disputes to a third party or parties outside of the general court for a decision.
b. Disputes that can be resolved are those that involve personal rights that can be fully controlled, especially in this case, industrial products, and finance.
c. The decision shall be final and binding.

Arbitration is the voluntary submission of a dispute to a neutral third party. This third party can be an individual, an institutional arbitrator, or an ad hoc arbitrator. Ad hoc arbitration is formed specifically to resolve or decide a particular dispute. However, it is important to note that the parties must fully understand the nature of arbitration and formulate their own procedural rules. Institutional arbitration is an arbitration body that is permanent in nature, so it will remain in existence even after the dispute has been resolved (Utama, 2012).

Dispute resolution through arbitration requires the consent of both disputing parties to submit their dispute to arbitration. This must be fulfilled before arbitration can exercise its jurisdiction. In arbitration, the parties are free to choose a judge (arbitrator) whom they consider to be neutral and expert or specialist in the subject matter of the dispute they are facing. Arbitral awards are also relatively more enforceable in other countries compared to disputes resolved through, for example, courts (Sefriani, 2011).

Essentially, Arbitration can take two forms: an arbitration clause included in a written agreement made by the parties before a dispute arises (factum de compromitendo); or a separate arbitration agreement made by the parties after a dispute arises (submission agreement). Thus, dispute resolution through arbitration can be explicitly stated before a dispute occurs or proposed at the time of the dispute by mutual agreement (Budiman, 2016).

Arbitration as an alternative dispute resolution is regarded as an effective and fair method. The contribution of this institution to the development of international law in general is also significant. However, the arbitration forum also has weaknesses that should be considered by both parties before deciding to submit their case. The most prominent advantages of arbitration include:

a. Dispute resolution through arbitration is relatively faster than litigation in court, since there is no appeal, cassation, or judicial review process in arbitration.
b. Due to the faster dispute resolution time, arbitration costs are not as expensive as regular court proceedings. Both of these factors are very important in the business world which aims to achieve efficiency and is profit-oriented.
c. Confidentiality. Arbitration proceedings can be conducted confidentially if the parties so desire. The confidentiality referred to includes the trial process and the results of the arbitral award. Appendix 3 of the WTO Dispute Settlement Understanding states that the parties themselves can decide whether or not to keep their case confidential from the public. In the author's view, this is very important in dispute resolution for multinational companies. Because they still need to maintain the good image of each company in the eyes of the public in general and consumers in particular.
d. Arbitral awards are, in principle, binding and final. This is reinforced in Article 30 of the UNCITRAL Model Law on International Commercial Arbitration, which states that the arbitral award is binding on the parties as from the date of its communication to them.

The majority of arbitral awards are complied with by the parties, even without any enforcement mechanism.

Therefore, arbitration sacrifices a considerable amount of time and resources in pursuit of justice in various places. In addition to the advantages previously explained, in practice, arbitration actually has weaknesses. An arbitral award will completely lose its force if one party or party involved in the dispute does not meet the bona fide requirement (good faith). Therefore, to minimize this, it must be supplemented by improvements in the weaknesses of arbitration, for example, by ensuring the bona fide of the parties, the national law of a country regarding the execution of an arbitral award, and carefully, concisely, and clearly stipulating an arbitration clause regarding the arbitral forum to be chosen to resolve the dispute.

Meanwhile, the ineffectiveness of arbitration includes:

a. Dispute resolution through mediation is considered able to produce a compromise decision, which is acceptable to both parties involved in the dispute.
b. Arbitration is considered to have several legal subject weaknesses, such as states being reluctant to commit to submitting their disputes to international judicial bodies.
c. The dispute resolution process through arbitration does not guarantee that the decision will be binding. International law does not guarantee that the losing party or dissatisfied party will comply with the decision.

CONCLUSION

Arbitration is a method of resolving a civil dispute outside of the general court based on an arbitration agreement made in writing by the disputing parties. Arbitration, as an alternative dispute resolution, is considered an effective and fair method. The contribution of this body to the development of international law in general is quite significant. However, the arbitration forum also has weaknesses that should be considered by both parties before deciding to submit their case. Arbitration is considered to have several legal subject weaknesses, such as states being reluctant to commit to submitting their disputes to international judicial bodies. The dispute resolution process through arbitration does not guarantee that the decision will be binding.

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