PREFERENCE OF NON-LITIGATION PROCEDURES THROUGH ALTERNATIVE DISPUTE RESOLUTION IN THE SETTLEMENT OF SHARIA ECONOMIC DISPUTES

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Abstract

Besides the settlement of cases through litigation in courts, there is another institution of non-litigation settlements through Alternative Dispute Resolution (ADR). From the normative side, it is clear that alternative dispute resolution is given a wide space to solve disputes between citizens and citizens and the state, especially regarding sharia economic disputes. Law No. 30 of 1999 concerning Arbitration and Alternative Case Resolution regulates dispute resolution outside the Court through Consultation, Negotiation, Mediation, Conciliation, and Expert Assessment. Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution can be said to be the most real and more specific manifestation of the state's efforts to apply and socialize the institution of peace in sharia business disputes. This law also states that the state gives freedom to the public to resolve their sharia business disputes outside the court, either through consultation, mediation, negotiation, conciliation, or expert judgment. The law is intended to regulate dispute resolution in sharia business disputes outside the court forum by providing the possibility and right for the disputing parties to resolve disputes or differences of opinion between the parties in a forum that is more in line with the parties' intentions. This forum is expected to accommodate the interests of the disputing parties, especially in terms of sharia economic disputes.

Keywords: Religious Courts, Sharia Economic Disputes, Non-litigation, Alternative Dispute Resolution

Abstrak

Cara penyelesaian konflik (perselisihan) antar individu dalam masyarakat selama ini, cenderung lebih banyak dilakukan melalui jalur konvensional yaitu penyelesaian perkara melalui litigasi (pengadilan). Sehingga banyak orang ingin mencari cara lain atau lembaga lain dalam penyelesaian sengketa di luar pengadilan melalui alternatif penyelesaian sengketa. Saat ini penyelesaian sengketa atau konflik sudah mulai bergeser ke penyelesaian non litigasi yang dikenal dengan Alternative Dispute Resolution (ADR). Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Perkara mengatur penyelesaian sengketa di luar Pengadilan. yaitu melalui Konsultasi, Negosiasi, Mediasi, Konsiliasi, dan Expert Assessment. Undang-Undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa dapat dikatakan sebagai wujud paling nyata dan lebih spesifik dari upaya Negara menerapkan dan mensosialisasikan pranata perdamaian dalam sengketa bisnis. Undang-undang ini juga menyatakan bahwa Negara memberikan kebebasan kepada masyarakat untuk menyelesaikan sengketa bisnisnya di luar pengadilan, baik melalui konsultasi, mediasi, negosiasi, konsiliasi, maupun penilaian ahli. Undang-undang dimaksudkan untuk mengatur penyelesaian sengketa di luar forum pengadilan dengan memberikan kemungkinan dan hak bagi para pihak yang berselisih untuk menyelesaikan sengketa atau perbedaan pendapat antara para pihak dalam suatu forum yang lebih sesuai dengan keinginan para pihak. Sebuah forum diharapkan dapat mengakomodir kepentingan para pihak yang bersengketa.

Kata kunci: Peradilan Agama, Sengketa Ekonomi Syariah, Non-litigasi, Alternative Dispute Resolution

A. Introduction

The method of resolving disputes between individuals in the community so far tends to be done more through conventional channels, namely the settlement of cases through litigation (courts). Although along the way, it is felt that conflict resolution through this route often creates an unfavorable impression for the parties. It is said that in order to reach a final decision from a court institution, the parties to the dispute are indeed required to actually fight in the judges' board so that it will be determined who will be the winner of the 'match'.

Due to the various weaknesses inherent in the judiciary in resolving disputes, both weaknesses that can be corrected or not, many people want to find other ways or other institutions in resolving disputes outside the judiciary through alternative dispute resolution.[1]

In 1999 the Government of the Republic of Indonesia, under the administration of President BJ Habibie, enacted Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The law is intended to regulate dispute resolution outside the court forum by providing the possibility and right for the disputing parties to resolve disputes or differences of opinion between the parties in a forum that is more in line with the parties' intentions. A forum is expected to accommodate the interests of the disputing parties.[2]

Nowadays, dispute resolution or conflict has shifted to non-litigation resolution, known as Alternative Dispute Resolution (ADR). In America and Australia, almost 90 percent of disputes are resolved through non-litigation, especially among business people. Likewise, dispute resolution through this institution has begun to appear in Indonesia, especially among entrepreneurs, although the frequency is still very small.

B. Discussion

1. Definition of Non-litigation

The term non-litigation (out-of-court settlement) consists of two syllables: non and litigation. The word non comes from English, namely, the word none, which means not or rejecting.[3] In its development, the word non has become the official language of Indonesia with the meaning not or not.[4] The word litigation comes from the word litigation which means the court process or the course of the case.[5] In simple terms, these two words can be understood by resolving cases outside the court that are carried out peacefully. In law, the term non-litigation is popular with several terms, such as alternative dispute resolution (APS) or alternative dispute resolution (ADR). ADR is a foreign term that needs to be matched in Indonesian.[6]

In Indonesia, the term non-litigation is often equated with the term alternative dispute resolution (ADR). Several other terms in Indonesian have also been introduced in several forums by various parties, such as out-of-court dispute resolution options (PPS). Alternative dispute resolution mechanisms (MAPS) and cooperative dispute resolution mechanisms.[7] Apart from the issue of terminology, legally, the Indonesian government has generally confirmed it in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Thus, since the enactment of Law No. 30 of 1999, the

[1] Caludia Christy Ester Kanter. "Penyelesaian sengketa bisnis di luar pengadilan." *Lex et societatis* 4, no. 9 (2016): 151-158.

[2] Erni Dwita Silambi. "Penyelesaian Sengketa Ekonomi dan Bisnis Melalui Arbitrase Internasional (Studi Kasus Pertamina vs Karaha Bodas)." *Jurnal Ilmu Ekonomi & Sosial* 3, no. 2 (2012): 296-306.

[3] John M. Echols and Hasan Shadily. *Kamus Inggris Indonesia, An English-Indoneisan Dictionary, Third Edition*. Jakarta: Gramedia Pustaka Utama, 1997.

[4] Anton M. Moeliono. *Kamus Besar Bahasa Indonesia Edisi Kedua*. Jakarta: Balai Pustaka (1996).

[5] John M. Echols and Hasan Shadily, *Op. cit*.,

[6] Rachmadi Usman. *Pilihan Penyelesaian Sengketa di luar pengadilan*. Bandung: Citra Aditya Bakti, 2003.

[7] Suyud Margono. *(Adr) Alternative Dispute Resolution Dan Arbitrase: Proses Pelembagaan dan Aspek Hukum*. Jakarta: Ghalia Indonesia, 2000.

Alternative Dispute Resolution (ADR) model as an out-of-court dispute resolution has been institutionalized in the Indonesian legal system.

Law No. 30/1999 on Arbitration and Alternative Dispute Resolution, in addition to regulating arbitration at length, also shows justice seekers that the law also emphasizes alternative dispute resolution in the form of mediation (and the use of experts). It does not even rule out the possibility of resolving disputes through other alternatives.[8]

Non-litigation is the resolution of legal problems outside the judicial process, the purpose of which is to provide legal assistance and advice in the context of anticipating and reducing disputes and differences, as well as anticipating legal problems that arise. Dispute resolution out of court (non-litigation) is an attempt to bargain or compromise to obtain a mutually beneficial solution. The presence of a neutral third party is not to decide the dispute, but the parties themselves who make the final decision.

The settlement of cases out of court is recognized in the laws and regulations in Indonesia. First, starting with the explanation of Article 3 of Law No. 14 of 1970 concerning the Basic Provisions of Judicial Power to the 3rd amendment of the law and Article 58 of Law No. 48 of 2009 concerning Judicial Power, it is emphasized that the settlement of cases out of court, on the basis of peace or through a referee (arbitration) is still allowed. Second, in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution Article 1 No. (10) stated that alternative dispute resolution is an institution for resolving disputes or differences of opinion through a procedure agreed upon by the parties, namely settlement out of court by means of consultation, negotiation, mediation, or expert judgment.

The practice of dispute resolution in a society cannot be separated from the legal culture of the community concerned. From the normative side, it is clear that alternative dispute resolution is given a wide space to solve disputes between citizens and citizens and the state, especially sharia economic disputes that always develop from time to time. On a certain side, the importance of the legal position in people's lives is basically inseparable from the function of the law itself in society concerning the expectations and goals desired by the community. However, it should be realized that the legal needs of every society are not the same. Law in a simple society certainly has different needs from the law in a developing society as well as in modern society. One way to understand the role of law is to see that there are differences in the function of law in society. The rapid and complex economic growth gave birth to various forms of business cooperation that are increasing daily. The increasing business cooperation causes a higher level of dispute between the parties involved in it. Basically, the causes of a dispute between the parties are as follows:

1. Default;
2. Acts against the law (*perbuatan melawan hukum*/PMH);
3. loss of one of the parties; and
4. Some parties are dissatisfied with the responses that cause losses.

2. Juridical Basis for Settlement of Sharia Economic Disputes in Non-Litigation

The rapid development of Islamic financial institutions is directly proportional to the magnitude of disputes between Islamic financial institutions and customers and other related parties. The development of sharia financial institutions is no exception to the regulation of sharia economic dispute resolution; both litigation and non-litigation need to be regulated by laws and regulations to realize the legal objectives. The juridical basis for resolving sharia economic disputes has always developed from time to time. The juridical basis for resolving sharia economic disputes that have been implemented to date are as follows:

[8] Munir Fuady. *Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis*. Bandung: Citra Aditya Bakti, 2003.

1. Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

   Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution is a law that was born for the settlement of civil disputes; in addition to being able to be submitted to the general court, it is also open to the possibility of being submitted through arbitration and alternative dispute resolution as an alternative way that aims to save time and cost. The general judicial process is considered to take a long time and costs a lot of money. General courts are held on the basis of simple, inexpensive, and fast principles; arbitration efforts and dispute resolution are completeness of the judicial system and a way to reduce time and costs in civil cases. The issuance of this law is expected to be a reference for the disputing parties so that it is not oriented to general justice alone.

   Law No. 30 of 1999, although entitled Arbitration and Alternative Dispute Resolution (APS), almost all of its contents regulate arbitration, while other arrangements regarding APS are not described in detail. The APS arrangement is only contained in Article 1, point 10 (definition), and Article 6. The rest of this law regulates arbitration. Other APS mechanisms, such as consultation, negotiation, mediation, conciliation, or expert judgment, are minimally included in this law. Even the meaning of each of the APS mechanisms is not defined in this law. In general terms, only the term arbitration is clearly defined (Article 1 point 1). The terms consultation, negotiation, mediation, conciliation, or expert judgment are not defined explicitly but are only included as part of the APS (Article 1 point 10).
2. Law No. 21 of 2008 concerning Islamic Banking, especially in the Elucidation of Article 55 of this law.

   Article 55 (1) of Law No. 21 of 2008 concerning Sharia Banking states that courts settle sharia banking disputes within the religious courts. However, Article 55 (2) of this law provides an opportunity for the disputing parties to settle their cases outside the Religious Courts if mutually agreed upon in the contents of the contract. The dispute can be resolved through deliberation, banking mediation, the National Sharia Arbitration Board (Basyarnas), or other arbitration institutions and/or through a court within the general court environment.

   Settlement of sharia banking disputes through alternative dispute resolution mechanisms outside the court, such as deliberation, mediation, and sharia arbitration, is the right step and deserves appreciation. However, problems arise when district courts are also given the same authority in resolving sharia banking disputes. There is a dualism in dispute resolution and legal uncertainty, as well as overlapping authorities in resolving the same case by two different judicial institutions. In fact, this authority is clearly the authority of the Religious Courts as regulated in Article 49 (i) of Law No. 3 of 2006 concerning Religious Courts.
3. Law No. 48 of 2009 concerning Judicial Power, in Article 16 paragraph (2) of this law, it is emphasized that: “The provisions in paragraph (1) do not rule out efforts to settle civil cases amicably.”
4. Law No. 8 of 1999 concerning Consumer Protection.
5. Non-litigation dispute resolution in this context is regulated in Article 47 paragraph (2) and Article 49 paragraph (1) of Law No. 8 of 1999 concerning Consumer Protection. The procedure for the settlement can be carried out by conciliation, mediation, or arbitration mechanisms, the results of which are then set forth in an agreement.
6. Regulation of the Supreme Court No. 2 of 2015 concerning Simple Lawsuits.
7. Regulation of the Supreme Court No. 1 of 2016 concerning Mediation.
8. Regulation of the Supreme Court No. 14 of 2016 concerning Procedures for Settlement of Sharia Economic Disputes.
9. Bank Indonesia Regulation (PBI) No. 8/5/PBI/2006 concerning Banking

Mediation jo. Bank Indonesia Regulation (PBI) No. 10/1/PBI/2008 concerning Amendments to Bank Indonesia Regulation (PBI) No. 8/5/PBI/2006 concerning Banking Mediation. This regulation stipulates that every bank must resolve disputes that occur with customers through banking mediation institutions which Bank Indonesia is still carrying out.

10. Bank Indonesia Regulation (PBI) No. 7/46/PBI/2005 concerning Contracts for the Collection and Distribution of Funds for Banks Conducting Business Activities Based on Sharia Principles. This regulation emphasizes that if a dispute occurs between a sharia bank and a customer, it will be resolved by deliberation; if a consensus cannot be reached, it will be resolved through the National Sharia Arbitration Board (Basyarnas), which is under the Indonesian Ulema Council (MUI).[9]

3. Alternative for Settlement of Cases outside the Court

Law No. 30 of 1999 concerning Arbitration and Alternative Case Resolution regulates dispute resolution outside the court through Consultation, Negotiation, Mediation, Conciliation, and Expert Assessment. This law does not entirely provide detailed and clear definitions or limitations.

3.1. Consultation

Black's Law Dictionary, as quoted by A. Rahmad Rosyadi, defines consultation as "consulting or negotiating activities such as a client with his legal advisor."[10] In addition, consultation is also understood as the consideration of people (parties) on a problem. Consultation as an ADR institution in practice can take the form of hiring a consultant to be consulted in an effort to resolve a problem. In this case, consultation is not dominant but only provides legal opinions, which can later be used as a reference for the parties to resolve the dispute.[11]

From the formulation given in Black's Law Dictionary, it can be seen that, in principle, consultation is a personal action between certain parties, called clients, and other parties who are consultants. A consultant who gives his opinion to the client to meet the needs and needs of the client. There is no formulation that states the nature of the engagement or obligation to fulfill and follow the opinion submitted by the consultant. This means that the client is free to make his own decisions that he will take for his own benefit. However, the client may be able to use the opinion expressed by the consultant. This means that in consultation, as an alternative form of dispute resolution, the role of the consultant in resolving existing disputes is not dominant. The consultant only provides an opinion (legal), as requested by his client, for which the parties themselves will decide regarding the dispute resolution. Although sometimes, the consultant is also given the opportunity to formulate the forms of dispute resolution desired by the disputing parties.[12]

3.2. Negotiation

The Business Law, Principles, Cases and Policy compiled by Mark E. Roszkowski states, "Negotiation process carried out by two parties with different demands (interests) by making a compromise agreement and providing concessions." This form of ADR allows the parties not to directly participate in negotiations, namely to represent their interests to each of the negotiators appointed to carry out compromises and release each other or provide concessions to achieve a peaceful settlement.[13]

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[9] Ahmad Mujahidin. *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*. Bogor: Ghalia Indonesia, 2010.

[10] Rahmat Rosyadi and Ngatino. *Arbritase dalam Perspektif Islam dan Hukum Positif*. Bandung: Citra Aditya Bakti, 2002.

[11] Nurul Hak. *Ekonomi Islam Hukum Bisnis Syariah*: *Mengupas Ekonomi Islam, Bank Islam, Bunga Uang dan Bagi Hasil, Wakaf Uang dan Sengketa Ekonomi Syariah*. Yogyakarta: Penerbit Teras, 2011.

[12] Ahmadi Hasan and Ach. Ahmad Aseri. *Adat Badamai: interaksi hukum Islam dan hukum adat pada masyarakat Banjar*. Banjarmasin: Antasari Press, 2007.

[13] Nurul Hak. *Op. Cit*,.

According to Joni Emerson,[14] negotiation can be interpreted as an effort to resolve the dispute between the parties without going through a judicial process with the aim of reaching a mutual agreement on the basis of harmonious and creative cooperation. The parties face each other carefully in discussing the problems they face in a cooperative and open manner.

This form of negotiation is only carried out outside the court, unlike peace and conciliation, which can be carried out at any time, both before the trial process (litigation) and in the court process, and can be carried out inside or outside the court. In order to have binding force, this peace agreement through negotiation must be registered at the District Court within 30 days from its registration as regulated in Article 6, paragraphs 7 and 8 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.[15]

Negotiation stages, according to William Ury, are divided into four stages, namely:

1. Preparation Stage
    a. Preparation as the key to success
    b. Get to know your opponent, learn as much as you can about your opponent and do some research
    c. Try to think in your opponent's way of thinking and as if your opponent's interests are the same as yours
    d. It's best to prepare questions before the meeting and ask them in clear language and never corner or attack the other party
    e. Understanding our interests and the interests of the opponent
    f. Identify the problem, whether the problem is a common problem
    g. Prepare the agenda, logistics, space, and consumption
    h. Setting up the team and strategy
    i. Determining BTNA (Best Alternative to A Negotiated Agreement), other alternatives, or base price (Bottom line)
2. Stages of Orientation and Positioning
    a. Exchange information
    b. Explain each other's problems and needs
    c. Make an initial bid
3. Stages of Concession/Bargaining
    a. The parties pass on the offer to each other, explain the reasons and persuade the other party to accept it
    b. Can offer concessions, but make sure we get something in return
    c. Trying to understand the other party's thoughts
    d. Identify common needs
    e. Develop and discuss settlement options
4. Closing Stage
    a. Evaluating options based on objective criteria
    b. An agreement is only profitable if there is no other better option if it does not succeed in reaching an agreement, canceling the commitment, or stating no commitment.

3.3. Mediation

Mediation, like other alternative dispute resolutions, has developed due to the slow pace of dispute resolution in court. Mediation emerged as an answer to the growing dissatisfaction with the justice system, which boils down to time, cost, and ability to handle complex cases. "Mediation is not easy to define."[16] In Indonesian regulations, the definition of mediation can be found in Article 1 point seven of the Regulation of the Supreme Court No. 1 of 2008, which is the method of dispute resolution through a negotiation process to obtain an agreement between the parties with the assistance of a mediator. In addition to the regulations, there are several scholars who try to define mediation.

From the explanation above, we can see that there are fundamental elements of the definition of mediation, including:

1. There is a dispute that must be resolved

[14] Joni Emerson. *Alternatif Penyelesaian Sengketa di luar Pengadilan (negosiasi, mediasi, konsiliasi dan arbitrasi)*. Jakarta: Gramedia Pustaka, 2001.

[15] Manan Abdul. *Hukum Ekonomi Syariah Dalam Perspektif Kewenangan Peradilan Agama*. Jakarta: Kencana Prenada Media Group, 2012.

[16] Laurence Boule and A. Rycroft. *Mediation Principles, Process, Practice*. Sydney: Butterworths, 1996.

2. Settlement is carried out through negotiations
3. Negotiations are aimed at reaching an agreement
4. The role of the mediator in assisting the settlement.

There are several reasons why mediation as an alternative dispute resolution has begun to receive more attention in Indonesia, including:[17]

1. Economic factors, where mediation as an alternative dispute resolution has the potential as a means to resolve disputes more economically, both from the point of view of cost and time.
2. The scope factor discussed in mediation has the ability to discuss the problem agenda more broadly, comprehensively, and flexibly.

The factor of fostering good relations, where mediation relies on cooperative settlement methods, is very suitable for those who emphasize the importance of good relationships between people (relationships) which have been ongoing and in the future.

Erman Rajagukguk stated that mediation would be successful if it has the following things:[18]

1. The parties wish to continue their business relationship
2. The parties have a common interest in resolving their disputes quickly
3. Litigation is considered by the parties to be time-consuming and expensive and will create a bad view for both parties because of the publication. Plus, it doesn't necessarily win.
4. Even though the parties are in an emotional state, the mediation process is considered by them as a place to meet and convey their respective interests
5. Time is the essence of completion
6. A good mediator will be able to make both parties communicate. Mediation will not work if one party files a frivolous lawsuit or claim, and the other party feels he or she will win through litigation. Likewise, mediation will fail if one of the parties delays the resolution of the dispute as long as possible, one of the parties or both parties have bad intentions.

3.4. Conciliation

M. Marwan and Jimmy P interpret conciliation as an effort to bring together the wishes of the disputing parties to reach an agreement to resolve disputes with kinship.[19] Munir Fuady explained conciliation is similar to mediation, which is a dispute resolution process in the form of negotiations to solve problems through a neutral and impartial external party who will work with the disputing parties to help find a solution to resolving the dispute.[20]

As an alternative dispute resolution institution, conciliation is not clearly defined in Law no. 30 of 1999. Conciliation, as an alternative form of dispute resolution outside the court, is an action or process to reach consensus or reconciliation outside the court. Conciliation functions to prevent the litigation process from being carried out; it can also be used at every level of ongoing justice, both inside and outside the court, with the exception of matters or disputes where a judge's decision has permanent legal force.[21]

Basically, conciliation has almost the same characteristics as mediation, except that the conciliator is more active than the mediator, namely:[22]

[17] Parman Komarudin. "Penyelesaian Sengketa Ekonomi Syari'ah Melalui Jalur Non Ligitasi." *AL-Iqtishadiyah: Ekonomi Syariah Dan Hukum Ekonomi Syariah* 1, no. 1 (2014): 87-105.

[18] Erman Rajagukguk. *Penyelesaian Sengketa Alternatif: Negosiasi*. Mediasi, Konsiliasi, Arbitrase, Jakarta: Fakultas Hukum Universitas Indonesia, 2005.

[19] M. Marwan and Jimmy P. *Kamus Hukum.* Surabaya: Reality Publisher, 2009.

[20] Munir Fuady. *Pengantar hukum bisnis: Menata bisnis modern di era global.* Bandung: Citra Aditya Bakti, 2016.

[21] Tri Ariprabowo and R. Nazriyah. "Pembatalan Putusan Arbitrase oleh Pengadilan dalam Putusan Mahkamah Konstitusi Nomor 15/PUU-XII/2014." *Jurnal Konstitusi* 14, no. 4 (2018): 701-727.

[22] Bambang Sutiyoso. *Penyelesaian sengketa Bisni: solusi dan Antisipasi bagi Peminat Bisnis Dalam Menghadapi sengketa Kini dan Mendatang*. Yogyakarta: Citra Media, 2006.

1. Conciliation is the process of resolving disputes outside the court cooperatively
2. The conciliator is a neutral third party who is seen and accepted by the disputing parties in negotiations
3. The conciliator is tasked with assisting the disputing parties to find a solution
4. The conciliator is active and has the authority to propose opinions and design terms of agreement between the parties
5. The conciliator does not have the authority to make decisions during negotiations
6. The purpose of conciliation is to reach or produce an agreement that is acceptable to the disputing parties to end the dispute.

The conciliation process will work well and optimally if several conditions are met as applicable in mediation, as stated by Gary Goodpaster as follows:[23]

1. The parties have comparable bargaining power
2. The parties pay attention to the future relationship
3. There are issues that allow trade offs to occur.
4. There is urgency or time limit for completion
5. The parties do not have long-lasting and deep enmity
6. If the parties have supporters or followers, they don't have much hope, but they can be controlled
7. Setting a precedent or defending a right is no more important than solving an urgent problem
8. If the parties are in a litigation process, the interests of other actors, such as lawyers and guarantors will not be treated better than mediation.

3.5. Expert Opinion or Assessment

Another form introduced in Law No. 30 of 1990 is expert opinion (assessment). In the formulation of article 52 of this law, it is stated that the parties to an agreement have the right to request a binding opinion from the arbitration institution on certain legal relationships of an agreement. This provision is basically the implementation of the duties of the arbitration institution as referred to in Article 1 paragraph 8 of Law No. 30 of 1999 which reads that the arbitration institution is the body chosen by the disputing parties to give a decision on certain disputes, the institution can also provide opinions binding on a certain legal relationship in the event that a dispute has not arisen.[24]

4. The legal power of non-litigation dispute resolution

In principle, the legal force of non-litigation dispute resolution is independent, final, and binding as is the case with court decisions that have permanent legal force, so that the head of the court is not allowed to examine the reasons or considerations of the decision. Non-litigation dispute resolution has very strong legal force as long as the process is carried out according to the provisions of the legislation. These powers include binding power, evidentiary power, and executive power by requesting assistance from a litigation institution, for example regarding the correctness of the arbitration clause in the event that the dispute is resolved through arbitration. Some important issues regarding arbitration are the issue of arbitration clauses, objects of disputes that can be resolved through arbitration, and the execution of arbitral awards.

The lifeblood of arbitration is an arbitration clause. Therefore, an arbitration clause will determine whether a dispute can be resolved through arbitration, where it is resolved, which law is used, and so on. The arbitration clause can be independent or separate from the main agreement. Although there is no requirement in the arbitration law that stipulates an arbitration clause must be made in a notarial deed. However, the arbitration clause must be carefully, accurately, and binding. The aim is to avoid the arbitration clause being used by one of the parties as a

[23] Gary Goodfaster. *Tinjauan Terhadap Penyelesaian Sengketa, Seri Dasar-Dasar Hukum Ekonomi 2, Arbitrase di Indonesia.* Jakarta: Ghalia Indonesia, 1995.

[24] Nurul Hak. *Op. Cit.,*

weakness that can be used to transfer the dispute to court.

The Indonesian National Arbitration Board (BANI) provides standard arbitration clauses as follows: "All disputes arising from this agreement, will be resolved and decided by the Indonesian National Arbitration Board according to the rules of BANI arbitration procedure, the decisions of which are binding on both parties to the dispute. , as a decision in the first and last instance." The standard UNCITRAL arbitration clause (United Nations Commission of International Trade Law) is as follows: "Any dispute, conflict or claim arising out of or in connection with this agreement, or default, termination or validity of the agreement will be resolved by arbitration in accordance with UNCITRAL rules."

According to Priyatna Abdurrasyid, the first thing to examine is the arbitration clause. This means that whether or not there is an arbitration clause, whether or not an arbitration clause is valid, will determine whether a dispute will be resolved through arbitration.[25] Priyatna explained that it was possible for an arbitration clause or agreement to be made after a dispute arose. One example of this is the dispute between Bankers Trust (BT) vs. PT Jakarta International Hotel Development (JIHD). The dispute between BT vs. JIHD has actually come to a decision. The London International Court of Arbitration has issued an award declaring JIHD to be in default and in breach of contract. JIHD was also sentenced to pay damages to BT.

According to Hotman Paris Hutapea, the lawyer who handled the JIHD case, there is no arbitration clause in the dispute concerning the SWAP transaction. Hotman openly stated that if anyone could show the arbitration clause in the dispute which was signed by both parties, it would be shown to him.[26] The question arises as to whether the reputation of Arbitration International London should be questioned considering that, based on Hotman Paris' statement, Arbitration International London has decided on a dispute where it turns out that there is no arbitration clause, or the opposite occurs.

Another issue regarding the arbitration clause is whether an agreement that contains an arbitration clause can be filed separately through the district court. This is certainly contrary to the essence of arbitration, where the parties have agreed to resolve the dispute out of court. Article 3 of the Arbitration Law expressly stipulates that the court is not authorized to adjudicate the disputes of the parties who have been bound by the arbitration agreement. Apart from BT vs. JIHD filed a civil lawsuit at the South Jakarta District Court, there was also a dispute between Roche International and PT Tempo Indonesia which was filed in a civil suit in court, even though there was an arbitration clause in the agreement. In a case like this, it is up to the judge who examines whether to reject or continue the case, the judges have their own independence and cannot be bound by one another.

The next issue concerns the object of the dispute which can be resolved through arbitration whether the arbitration clause should be interpreted narrowly or broadly. According to Article 5 of the Arbitration Law, disputes that can be resolved through arbitration are only disputes in the trade sector and regarding rights which according to the law and statutory regulations, are fully controlled by the disputing parties. In several cases that occurred in the commercial court, a debate arose whether the agreement contained an arbitration clause, if a dispute arose which led to a bankruptcy lawsuit against one of the parties.

There are two opinions in this matter, the first opinion says that the arbitration clause is something absolute. Thus, the court must declare that it is not authorized to examine disputes that contain an arbitration clause in it. The assumption is that the procedural law that applies to courts that are part of the general court is HIR. This opinion was held by the commercial court judges as seen in the case of

[25] Muhibuthabary. "Arbitrase Sebagai Alternatif Penyelesaian Sengketa Ekonomi Syariah Menurut Undang-Undang Nomor 30 Tahun 1999." *Asy-Syari'ah* 16, no. 2 (2014): 99-112.

[26] Apr Leo. *Arbitrase, Pilihan Tanpa Kepastian*. https://www.hukumonline.com/berita/a/arbitrase-pilihan-tanpa-kepastian-hol1905, 2015 (diakses pada 9 November 2015).

PT Enindo vs. PT Putra Putri Fortuna Windu. However, the Supreme Court is of the opinion that the arbitration clause in an agreement does not by itself cause the commercial court in bankruptcy matters to be unable to adjudicate it.

Article 616 Rv. states, among other things that grants, divorce, disputes over a person's status, and disputes regulated by statutory provisions cannot be submitted for settlement to arbitration. This means that bankruptcy cases cannot be submitted for settlement to arbitration because bankruptcy has been specifically regulated in Law No. 4 of 1998 concerning Bankruptcy, as seen in the cassation decision 012/K/N/1999. Logically, the opinion of the commercial court is more acceptable because it does not conflict with Article 3 of the Arbitration Law. However, the panel of judges must first examine the contents of the clause.

Article 60 of the Arbitration Law states that the arbitration award is final and has the permanent legal force that binds the parties. In theory, after there is an arbitration award, there is no other legal remedy that the losing party can submit, and the winning party only has to carry out the execution. However, in reality, the execution of the arbitral award is not as easy as turning the palm of the hand. Article 61 of the Arbitration Law stipulates that the execution is carried out based on an order from the court's chairman if there are parties who do not voluntarily carry out the arbitration award.

Furthermore, based on Article 62 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the head of the court first examines the documents, scope, and competence of the selected arbitration. This means that the court is not allowed to examine the subject matter again. Its job is only to allow or deny execution. If you refuse, the reasons are only those that are limitedly determined in Article 62 paragraph (2), including if the arbitration award violates decency and public order. There is no legal remedy against the refusal of execution for reasons as regulated in Article 62 paragraph (2).

For international arbitral awards, executions can only be carried out by the Central Jakarta District Court after the decision has been deposited (registered) at the clerk. Suppose the court refuses to carry out an execution. In that case, the reasons are only limitedly determined by Article 66 points a, b, and c of the Arbitration Law, including if the international arbitration award does not include the scope of trade and is contrary to public order. The Arbitration Act does not define or limit public order in its explanatory section. As a result, the definition of public order is used as legitimacy for one of the parties to request an annulment of the execution from the court.

In the case of the Bankers Trust against PT Mayora Indah Tbk. and Bankers Trust vs. PT Jakarta International Development Tbk., Chairman of the Central Jakarta District Court refused to carry out the execution of the London arbitration award for disturbing public order. The interpretation of public order, in this case, is that for the same case, there is currently a decision from the South Jakarta District Court which annuls the arbitration clause. So, if the London arbitration decision is executed, while the South Jakarta District Court decides that the arbitration clause is annulled, public order is violated.

The decision of the Supreme Court in the case of E. D & F. MAN (SUGAR) Ltd. vs. Yani Haryanto in 1991 became the first case for Indonesia to refuse the implementation of foreign arbitration decisions based on public order. According to Erman Radjagukguk, political considerations are often used as a guide to declaring foreign rule contrary to local public order, so the judge states that the arbitration award does not need to be enforced.

In 1999 six foreign arbitration awards were sponsored for further exequatur to the chairman of the court. The six cases involved Bankers Trust Co. Ltd. and BT Prima Securities against PT Mayora Indah Tbk. and PT Jakarta International Hotel Development Tbk. However, none of the six cases was executed. The consideration, as explained above, is that the London arbitration award, if executed, will disrupt public order.

Then, for 2000 there were two registered cases, but only one was executed, namely in the case of Noble Cocoa which is a division of Noble Americas Corp., against PT Wahana Adireksa. In this regard, the Chief Justice

issued an executive order in August 2000 under No. 143/2000. As for one other case, it's unclear how it ended. The losing party may have agreed to do it voluntarily. Likewise, in the case of Olimo, the owner of an auto parts shop who is in a dispute over the deposit to the NV bus company. King Kong, which for 33 years has not been completed because it has been postponed three times. Therefore, the alternative dispute resolution decision, in this case, is arbitration without execution is meaningless.

C. Conclusion

Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution can be said to be the most real and more specific manifestation of the state's efforts to apply and socialize the institution of peace in sharia business disputes. This law also states that the state gives freedom to the public to resolve their sharia business disputes outside the court, either through consultation, mediation, negotiation, conciliation, or expert judgment. The law is intended to regulate dispute resolution outside the court forum, especially for sharia economic disputes, by providing the possibility and right for the disputing parties to resolve disputes or differences of opinion between the parties in a forum that is more in line with the parties' intentions. This forum is expected to accommodate the interests of the disputing parties.

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