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Addressing the Challenges of Arbitration Implementation in Indonesia

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Abstract
The implementation of arbitration in Indonesia faces various challenges that may affect its effectiveness as a dispute resolution method. One of the main challenges is the lack of understanding of arbitration procedures among the public and businesses, which results in uncertainty in going through the process. In addition, legal uncertainty and lack of consistent regulation may create doubts about the arbitrator's decision. Potential conflicts of interest are also an issue that needs to be addressed, especially in relation to the selection of independent and qualified arbitrators. The quality of arbitrators and arbitral institutions greatly affects the outcome of this process. Despite the existence of supportive regulations, implementation on the ground is often not optimal, thereby reducing public confidence in arbitration. To improve the effectiveness of arbitration in Indonesia, it is important to increase socialization of arbitration procedures, strengthen regulations, and ensure the independence and professionalism of arbitrators. These steps are expected to make arbitration a more reliable alternative to dispute resolution.

I. INTRODUCTION

In resolving a dispute in court, options can be divided through litigation. As the times have rapidly developed, many members of society feel satisfied, while others do not, with resolving a case through the judicial route. Consequently, due to the pros and cons regarding this matter, a process for resolving disputes through arbitration was created, which involves several stages, such as conducting consultations, followed by negotiations, mediation, and finally, conciliation.

However, the dispute resolution process can only be conducted within the scope of trade or business disputes, meaning that matters outside of this cannot be resolved through arbitration. Thus, issues not mentioned earlier cannot be settled peacefully through arbitration. Currently, the dispute resolution process is increasingly favored among the public. It is evident that there are more businesses emerging, both through social media and in person, as the resolution of disputes through arbitration is considered to provide advantages for business people compared to resolving disputes through formal courts, which have numerous stages that must be fulfilled. The advantages of arbitration, which are more straightforward than formal court proceedings, have made arbitration increasingly used today to resolve trade and business disputes.

Arbitration has become key for traders and businesspeople in resolving their disputes. The final and binding nature of arbitration awards ensures that the resolution will not be biased (Tarantang et al., 2022). Jurisdictional choice is an agreement or clause drafted by the parties involved in an agreement to determine which court will have jurisdiction over any disputes that may arise in the future. In other words, this clause states the parties' agreement to submit their jurisdiction over disputes to the court they have chosen. This legal choice can be included in a clause within the contract or agreement made by the parties. However, in practice, the implementation of jurisdictional choice often does not go smoothly. There are several obstacles that can hinder its execution, such as ambiguity regarding the jurisdiction chosen by the parties.

This ambiguity indicates situations where the parties in a contract do not reach an agreement or lack clarity regarding which court has the right to handle the dispute. For example, a contract may merely state that the process will take place in a certain country or that the choice only refers to the legal system of a country without providing further details (Ali, 2022). Besides the shortcomings in the formal court resolution process, there are also shortcomings within the arbitration dispute resolution process. While arbitration is known for being quick, inexpensive,

and concise—where disputes can be resolved in a maximum of six months—this presents a challenge for arbitration bodies, which must complete matters quickly and reach a resolution acceptable to both parties involved in the dispute.

An example of such a challenge arises during dispute resolution, particularly regarding mediation and cassation. In arbitration, mediation is part of the dispute resolution process. The problem lies in the absence of cassation in resolutions through arbitration, as arbitration awards are final. Thus, if a disputing party later discovers strong evidence to support their case, it becomes challenging to apply for cassation in court, illustrating a weakness in the arbitration field during the dispute resolution process. Therefore, in this writing, the author intends to discuss the challenges of dispute resolution through arbitration in Indonesia.

II. RESEARCH METHODS

This research applies a descriptive analysis method used to collect relevant data. The type of data utilized is secondary data, which is obtained from searching for information in the form of articles, books, research reports, and other sources relevant to the focus of this research. The source collection technique applied is literature study or library research. Literature study is an activity related to collecting data from libraries, reading, recording, and processing research materials. Analysis of the data sources used is deductive, namely by analyzing existing data sources and departing from the results of this research or existing general knowledge. Furthermore, factual data or opinions of experts on certain issues will be identified, and then aspects that show similarities and differences related to the object under study will also be described (Ibrahim et al., 2023).

III. RESULTS AND DISCUSSION

A. Effectiveness Of Arbitration In Extrajudicial Settlement Implementation

Arbitration is a method of dispute resolution conducted outside the conventional court system, where the parties involved agree to submit the resolution of their dispute to one or more arbitrators (Baharuddin, 2024). The arbitration process is voluntary and based on the agreement between the parties, which can be documented in a contract or a separate agreement. In arbitration, there are private parties or individuals known as arbitrators, who act as judges and will listen to the arguments from the disputing parties before issuing a decision. Arbitration is binding for all parties involved and is final.

This process is conducted based on an agreement that can be documented in the form of an arbitration agreement. This agreement can be an arbitration clause included in the main contract or a separate agreement made by the parties to resolve a specific dispute. Many business contracts include arbitration clauses that stipulate that any disputes arising in the context of the contract will be resolved through arbitration. This clause becomes an integral part of the contract and binds all parties involved (Agustina, 2024).

In addition to arbitration clauses in contracts, parties also have the option to draft a separate arbitration agreement that contains their consent to resolve a specific dispute through arbitration. This agreement can be made either before the dispute arises or after the dispute occurs. The arbitration agreement is binding on the parties who sign it. Therefore, when the parties agree to use arbitration as a method of dispute resolution, they are deemed to have accepted the process and are willing to comply with the resulting decision.

Arbitration awards have the same legal force as court judgments, meaning that these awards can be executed and enforced by the courts or other legal authorities (Mayangsari et al., 2020). Once the arbitration process is completed and a decision is made, that decision is final and binding on all parties involved. This is different from non-binding arbitration, where the process can be halted and taken to court if the parties do not reach an agreement. The principle of recognition and enforcement of arbitration awards is recognized internationally through the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (1958). More than 160 countries are parties to this convention, allowing arbitration awards to be recognized and enforced across various international jurisdictions. When parties agree to resolve a dispute through arbitration and sign an arbitration agreement, they are considered to have made a legal commitment to follow the arbitration process and accept the resulting decision.

The selection of arbitration as an effective method for extrajudicial dispute resolution can be influenced by several factors. Some of the main factors that encourage the choice of arbitration as a dispute resolution method are:

1. Speed of Resolution: The arbitration process is generally faster than

conventional court proceedings. The parties involved can determine their own hearing schedule and procedures, expediting the resolution of disputes. Arbitration provides flexibility for the parties to tailor the rules and procedures according to their needs, making the dispute resolution process more efficient and aligned with the nature and complexity of the dispute.

2. Confidentiality: The arbitration process can be conducted privately, meaning that information regarding the dispute does not become public. This is advantageous for parties who wish to maintain the confidentiality of business information or protect their privacy. The parties involved have the option to choose arbitrators who possess specific expertise and knowledge relevant to the issues at hand. The reliability and expertise of the arbitrators can enhance the quality of the decisions rendered.
3. Internationalization: Arbitration is capable of resolving disputes involving parties from different countries or jurisdictions. This process supports an international context and facilitates dispute resolution on a larger scale. Arbitration awards have the same legal force as court judgments and can be enforced in various jurisdictions, particularly through the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.
4. Manageable Costs: Although the costs associated with arbitration can be significant, in many situations, this process is more cost-effective compared to conventional court trials, which may involve attorney fees, court costs, and longer timeframes. The parties involved have an active role in the arbitration process, such as selecting arbitrators, formulating procedural rules, and directing the dispute resolution process.
5. Applicable Law Choices: The parties have the opportunity to choose the law that will be applied in arbitration, providing them with the freedom to select the legal framework that is most relevant to the dispute at hand. They can also choose a specific arbitration institution to conduct the arbitration process, providing structure and guidance in dispute resolution (Winarta, 2022).

Among various extrajudicial dispute resolution efforts, arbitration has strong recognition and a legal foundation in Indonesia. Many legal experts in the country have reviewed and supported the use of arbitration as a dispute resolution method. One prominent figure advocating for this is Prof. Jimly Asshiddiqie (Primayanti & Bruaharja, 2023), a constitutional expert and former Chief Justice of the Constitutional Court of Indonesia. He stated that arbitration can function as an effective tool for resolving disputes, especially in the context of international business. The primary objective of resolving disputes through arbitration is to provide an efficient, effective, and fair alternative method for settling disagreements between conflicting parties. Arbitration is designed to offer a more flexible and efficient process compared to conventional court pathways. The involved parties can customize the rules and procedures according to their needs, allowing the dispute resolution process to progress more swiftly. This positive perspective indicates that arbitration can provide faster and more efficient solutions in resolving disputes, particularly in the business context in Indonesia. Support from legal experts also aligns with efforts to enhance legal certainty and the business environment in the country (Kristiyanti, 2022).

The efficiency of arbitration can be explained through several factors:

a) Distrust in the District Court: Many parties feel dissatisfied with the dispute resolution process through courts, which often takes a long time. This lengthy process frequently leads to dissatisfaction, especially if appeals or cassations are needed, which require considerable time.
b) Fast and Cost-Effective Resolution: The dispute resolution process through arbitration bodies tends to be quicker and more cost-effective. This is stated in Law No. 30 of 1999, Article 48, Paragraph 1, which states that disputes must be resolved within 180 days or six months after the arbitrator or arbitration panel is established. These factors make arbitration an attractive option for parties wishing to resolve disputes efficiently, fairly, and in accordance with their specific needs. The selection of the appropriate arbitration forum in Indonesia should refer to Law No. 30 of 1999 concerning alternative dispute resolution through arbitration (Rudy & Mayasari, 2022).

Several considerations should be made in selecting arbitration, particularly the importance of including an arbitration clause in the contract.

This clause stipulates that disputes arising from contractual relationships will be resolved through arbitration. The Arbitration Law also recognizes arbitration institutions as organizers of the arbitration process. Choosing a recognized and reputable arbitration institution can provide certainty and quality in the arbitration process. Some well-known arbitration institutions in Indonesia include the Indonesian National Arbitration Board (BANI) and the Indonesian Arbitration and Alternative Dispute Resolution Institution (LAAPSI). Parties can also choose arbitrators who are suitable for the disputes at hand (Hakim, 2022).

Arbitrators must be neutral, independent, and possess relevant expertise regarding the contested issues. The selection of arbitrators should consider their experience, reputation, and competence. The choice of the arbitration location is also crucial, as it can affect the process and costs. The parties must determine the arbitration location while considering process smoothness, transportation costs, and accessibility. Additionally, the parties may determine the language used in the arbitration process. The selection of language should consider the comfort and needs of all parties to ensure that each party can understand and participate effectively (Sinaga, 2021).

c) Confidentiality: The resolution through arbitration bodies is conducted confidentially, which is highly beneficial for the business world as it avoids publicity, thus safeguarding the confidentiality of the disputing parties.
d) Choice of Arbitrator: The disputing parties have the right to choose the arbitrator who will handle their dispute. According to Law No. 30 of 1999, Article 13, Paragraph 1, if there is no agreement on the selection of an arbitrator, the Head of the District Court can appoint an arbitrator or arbitration panel.
e) No Expert Witnesses Required: In resolving disputes through arbitration, expert witnesses are not required as in district court proceedings. This is because the disputing parties have already appointed experts who understand the issues at stake.
f) Final Decision: Arbitration awards are considered final decisions and there are no avenues for appeal.
g) Lower Costs: The costs of resolving disputes in arbitration bodies are usually lower compared to those in district courts.
h) Choice of Legal Theory: The disputing parties have the freedom to choose the legal theory that will be applied in the dispute resolution.

There are several advantages to resolving disputes through arbitration bodies:

1. Choice for Foreign Entrepreneurs: For foreign entrepreneurs, using arbitration bodies is a suitable choice as they may find local court systems and judges differ from their home countries.
2. Challenges in Developing Countries: Many entrepreneurs from developed countries believe that judges in developing countries do not fully grasp the complexities of commercial and international financial disputes.
3. Time Required: The dispute resolution process through courts often takes a considerable amount of time for entrepreneurs from developed countries.
4. Subjectivity: There is a perception that dispute resolution in Indonesia can be subjective because the judges come from that country.
5. Work Relationships: Court processes focus on determining who is right and wrong, which can damage working relationships between the parties.
6. Compromising Decisions: Dispute resolution through arbitration bodies can yield compromises, making the decisions more acceptable to both parties.

B. Challenges Of Dispute Resolution Through Arbitration Institutions In Indonesia

In the case a quo, the parties involved in the agreement have the right to determine the choice of law and legal jurisdiction in accordance with the agreement reached. Furthermore, they can also determine the choice of forum, where they agree to select the institution or forum that will resolve the disputes that may arise between them. In this agreement, the parties have agreed to use arbitration as the dispute resolution institution. This reflects the principle of freedom to contract (pacta sunt servanda), which is universal, in accordance with the provisions of Article 1338 of the Indonesian Civil Code.

If there is a clause regarding the choice of law in an agreement, then the law applicable to the agreement is the law that has been agreed upon by the parties, as what they have agreed upon serves as the law for them who made the agreement (Pantow, 2020).

Several common weaknesses related to arbitration efforts are as follows:

a) Limited Control: Although the parties involved have a certain degree of control in the arbitration process, in practice, the arbitrator plays a crucial role in establishing the procedures and implementation of arbitration. The selection of an arbitrator who is inexperienced or lacks adequate expertise in the issues of the dispute can lead to unsatisfactory or even questionable decisions.
b) Legal Uncertainty: Arbitration decisions are often more difficult to predict compared to court judgments. This is because arbitrators are not always bound by legal precedents, which may result in less structured legal outcomes. The appeal process in arbitration is also limited and more challenging to apply compared to the appeals process in court, making it difficult to thoroughly review arbitration decisions.
c) Inability to Resolve Public Disputes: Arbitration usually takes place privately and confidentially, which can complicate the resolution of disputes that are public in nature or involve broader societal interests. Arbitration may be less appropriate for resolving highly complex disputes or those relating to technical legal issues.
d) Potential Conflicts of Interest: Arbitrators may have business or professional relationships with one of the parties, which can create conflicts of interest. Although ethical measures and disclosures are usually implemented, the possibility of conflicts of interest remains.
e) Limited Evidence Sources: The evidence exchange process (discovery) in arbitration may be more limited compared to conventional courts. This can hinder the parties in preparing and presenting evidence. The fact-finding process or witness examination in arbitration may not be as formal and structured as in court, which can affect the thorough and accurate collection of information. (Mahmudah, 2022)

IV. CONCLUSION AND SUGGESTIONS

A. Conclusion

The conclusion from the discussion above shows that arbitration as an out-of-court dispute resolution method has several advantages and disadvantages. On one hand, arbitration offers flexibility, speed, confidentiality, and the potential to reduce costs compared to conventional court processes. This makes it an attractive option, especially in the context of international business and complex disputes. However, there are weaknesses that need to be considered, such as limited control over the process, legal uncertainty in decisions, potential conflicts of interest, and limitations in the exchange of evidence. Additionally, arbitration may not be suitable for resolving public disputes involving broader societal interests. Ultimately, the decision to use arbitration should be based on the specific characteristics of the dispute and the needs of the parties involved. It is essential for the parties to carefully select the arbitrator and the arbitration institution, as well as to consider the applicable rules, so that the arbitration process can run efficiently and yield satisfactory decisions.

B. Suggestion

The suggestion in this research is that it is good to provide case examples for future research

REFERENCE LISTAN

Agustina, R. E. (2024). Efektifitas Arbitrase sebagai Penyelesaian Perselisihan. *Ethics and Law Journal: Business and Notary*, *2*(1), 263–272.

Ali, H. Z. (2022). *Hukum Islam: Pengantar Ilmu Hukum Islam di Indonesia*. Sinar Grafika.

Baharuddin, M. Y. A. (2024). Peran Hukum Arbitrase Dalam Penyelesaian Sengketa Bisnis Nasional: Hukum Arbitrase. *Jurnal Risalah Kenotariatan*, *5*(2), 310–320.

Hakim, M. A. (2022). Efektivitas Pasal 9 Undang-undang Nomor 30 Tahun 1999 Terhadap Penyelesaian Sengketa Bisnis di Badan Arbitrase Nasional Indonesia. *Sakina: Journal of Family Studies*, *6*(1).

Ibrahim, M. B., Sari, F. P., Kharisma, L. P. I., Kertati, I., Artawan, P., Sudipa, I. G. I., Simanihuruk, P., Rusmayadi, G., Nursanty, E., & Lolang, E. (2023). *Metode Penelitian Berbagai Bidang Keilmuan (Panduan & Referensi)*. PT. Sonpedia Publishing Indonesia.

Kristiyanti, C. T. S. (2022). *Hukum perlindungan konsumen*. Sinar Grafika.

Mayangsari, A., Prasetyo, A. A., & Bonauli, R. R. (2020). PEMBANGUNAN HUKUM ARBITRASE DI BIDANG KONSTRUKSI (Politik Hukum) SEBAGAI UPAYA PENYELESAIAN SENGKETA (Tinjauan atas Undang-Undang No. 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian

Sengketa Dan Tinjauan Atas Undang-Undang Nomor 2 Tahun 2017 Tentang Jasa Konstruksi). *Fairness and Justice: Jurnal Ilmiah Ilmu Hukum*, *18*(1), 86–100.

Pantow, C. S. (2020). Hubungan Hukum Para Pihak Dalam Perjanjian Kerjasama Dagang Antar Perusahaan Menurut Hukum Perdata. *Lex Privatum*, *8*(2).

Primayanti, A. D., & Bruaharja, I. (2023). Amanat Undang-Undang Partai Politik terhadap Partisipasi Kader Perempuan Dalam Pemilihan Umum. *Amsir Law Journal*, *4*(2), 220–227. https://doi.org/10.36746/alj.v4i2.208

Rudy, D. G., & Mayasari, I. D. A. D. (2022). Kekuatan Mengikat Klausula Arbitrase dalam Kontrak Bisnis dari Perspektif Hukum Perjanjian. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, *11*(2), 427–437.

Sinaga, N. A. (2021). Peranan Asas itikad baik dalam mewujudkan keadilan para pihak dalam perjanjian. *Jurnal Ilmiah M-Progress*, *8*(1).

Tarantang, J., Kurniawan, R., & Nariyah, Y. (2022). *Arbitase syariah: Regulasi dan Implementasi Penyelesaian Sengketa Bisnis di Indonesia*. K-Media.

Winarta, F. H. (2022). *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional: Edisi Kedua*. Sinar Grafika.