



## **Institutionalization of Alternative Dispute Resolution (ADR) in Indonesia to facing ASEAN Economic Community (AEC)**

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### **ABSTRACT**

Alternative dispute resolution can be one option the parties to resolve business disputes when the settlement of disputes through the courts used are considered less advantageous for businesses and consumers alike. Although there is still a shortage of the power of law and legal compliance agreements and the development of professional arbitration institution. This paper analyzes the institutionalization of ADR in Indonesia as ASEAN countries member and how readiness Indonesian National Board of Arbitration to facing AEC. A basic distinction is drawn regulation in Indonesia. The method used in this paper is a descriptive analyzis normative legal method. In this case the author uses literature study from a legal perspective and regulatory in Indonesia. This paper discusses the development of institutional ADR, which includes institutional ADR in indigenouse people in Indonesia, the institutionalization of ADR outside the court and the institutionalization of ADR in courts as well as the readiness of BANI as an independent agency that provides alternative dispute resolution services.

*Key Words : Institutionalization, Alternative Dispute Resolution (ADR), Indonesian National Board of Arbitration (BANI), ASEAN Economic Community (AEC).*

### **1. Introduction**

Enforcement of the world market, especially in the region give birth to a single economic system.<sup>1</sup> It will be a lot of foreign investment and international trade that occurs and the implications for increased business disputes across borders. Dispute with a partner or a business partner is deemed detrimental to the reputation of businesses and potentially reduce the confidence of clients, customers, and consumers. So that business disputes are generally highly classified by business parties.

Business dispute resolution mechanisms , in general, can be reached through litigation and non-litigation<sup>2</sup>. settlement of disputes through the courts is used for this is considered less advantageous for businesses and individual consumers. Besides being costly, too time-consuming and cumbersome. So the business community prefers to conduct negotiations to resolve business disputes between businesses, because it guaranteed the confidential nature of the dispute although there is still a shortage of the power of law and compliance with legal agreements and the development of arbitration institutions are professional and negotiations are considered inadequate.<sup>3</sup>

<sup>1</sup>R. I. Tektona, "Arbitrase Sebagai Alternatif Solusi Penyelesaian Sengketa Bisnis di Luar Pengadilan," *Pandecta Res. Law Journal.*, vol. 6, no. 1, 2011.

<sup>2</sup>Rika Lestari, "Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi di Pengadilan dan Di Luar Pengadilan di Indonesia," *Ilmu Hukum Journal*, vo. 3, no. 2, 2013

<sup>3</sup>Richard J and L. Boyd, "An Alternative to Alternative Dispute Resolution," *Employee Relation Law Journal.*, vol. 29, no. 3, Winter 2003.

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In Indonesia, there are many parties who offer services negotiations or arbitration for the business sector. Arbitration existing, limited to the formal institutions of institutionalized<sup>4</sup> set up by the government as BANI, BAMUI and P3BI, while negotiations are informal services available in professional associations.

The negotiation and arbitration have good opportunities as an alternative dispute resolution business compared to a settlement through legal institutions are often considered not a favorable option. Therefore, negotiations and arbitration need to be developed. Development of professional associations need attention because Indonesia is currently faced with the AEC, it will possibly sign a mediator /arbitrator professionals from abroad.<sup>5</sup> This becomes a challenge when Indonesia did not prepare by developing an institutional<sup>6</sup> ADR and professional associations in the field, then the power of Indonesia will miss its competitiveness to compete in their own country facing professionals from abroad.

Based on the above background, the authors are interested in conducting a study on institutional and readiness of Indonesia arbitration institutions in the face of the AEC. As for the problem in this paper is to review about ADR institutions in Indonesia as ASEAN member countries have different legal systems in other countries as well as the readiness of BANI to face the AEC.

## **2. Materials and Methods**

The paper is moved from the existing regulations in Indonesia. So the research methods used in this paper is a normative legal research method (normative legal research) that is descriptive analysis. Normative research called a doctrinal study, namely: the research object of study documents legislation and library materials. Type of research, then the approach used in this study is a normative approach or dogmatic law (legal dogmatic approach) as the main approach. In this case, the author uses literature from the perspective of the law and regulations. Information and data obtained are derived from sources literature review in this paper were analyzed using content analysis method (content analysis), legislation, to then be deduced.

## **3. Result and Discussion**

In the resolution of business disputes, the parties have the freedom to choose what dispute resolution forum will be selected. The principle of freedom of the parties (*Partijvrijheid*) is recognized in hu-kum system prevailing in Indonesia. This is in accordance with the provisions of Article 1338 paragraph (1) of the Penal Code say that "all agreements made legally valid as law for those who made it". Theoretically, there are two forums to choose the parties to the dispute menyelesaikan, namely through the courts (litigation) or out of court (non-litigation). The legal basis for the parties to choose a forum to resolve business disputes also set out clearly in Law No. 48 of 1999 on Judicial Power. Article 58 states: "Efforts can do settlement of civil disputes outside the courts through arbitrase country or alternative dispute resolution". Under Article 58 of Law 48 of 2009, it can be seen that the parties are given the freedom to choose the settlement of disputes, whether through forum court or alternative dispute resolution. One alternative dispute resolution that can be chosen by the parties is through the mechanism of arbitration.

### **3.1 Institutional Development ADR**

ADR as an alternative dispute resolution outside the court is expected to play a role in preventing and resolving business disputes in society so that the problem of institutional ADR also be important to note. ADR also institutional development can not be separated from the socio-economic-political Indonesia as a whole, and particularly the development of legal culture, housekeeping judiciary and

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<sup>4</sup>Sufiarina, E. F. Fakhriah, "Kewajiban Upaya Non Ajudikasi Sebagai Syarat Mendaftarkan Gugatan Guna Mewujudkan Peradilan Sederhana, Cepat, dan Biaya Ringan (Tinjauan atas PERMA No. 1 Tahun 2008), *Padjajaran Ilmu Hukum Journal.*, vol. 1, no. 1, 2014. p.

<sup>5</sup>R. I. Tektona, *Op. cit*

<sup>6</sup>Clemente, Tina S. "Challenges of the ASEAN Economic Community 2015: Focus on the Philippines." *Asian Politics & Policy*, vol. 5, no. 4, 2013, p. 677+. InfoTrac Business and Economics Collection 2017,

equality of bargaining power and access to information for people.<sup>7</sup> The views and behavior of society is a prerequisite that determines the success of ADR.

Besides, it is also the government's role in the development of the ADR system in Indonesia is very need for terms of implementation of the program educational and human resource development professional negotiators, especially local / local arbitrator or professional associations, as well as the popularization of ADR in the community. In view of the legal aspects of ADR has been some product of legislation that gives the opportunity to run or manage the implementation of general and sectoral negotiations in Indonesia. In particular, ADR components are most in need of legal legitimacy is arbitration. In arbitration, the referee's decision requires the force of law clear and precise application.<sup>8</sup> Without the legal certainty of the legal force arbitral award, the arbitration would not be desirable or public trust as an option to resolve the dispute.

### **3.2 Institutionalization of ADR in Indonesian Indigenous People**

During this time the public is already familiar with the settlement of the case with the show of peace, well known as an event deliberation, and also different types of events settlement through customs agency.<sup>9</sup> In many cases in rural areas (remotes area) are far from urban areas and that they have a life that is traditional and customary laws and adopting simple as patterns of interaction, traditional settlement patterns are very effective as a solution to the case that they are dealing with. In addition to its legal certainty, but also contains the basic elements of reconciliation as a result, no one felt defeated (win-win solution). And with the fact that, it seems to be very unfortunate if the reconciliatory solution in the event through the Institute of Indigenous customary law be time lost. Moreover, if explored more deeply (Duc in Altum) to the root of the philosophy contained in the basic principles of customary law, typically found there are unique things that are indigenous (local genius) that even the world of modern civilization urban areas was necessary and feasible to draw inspiration from it.<sup>10</sup>

The settlement with deliberation between the parties to the dispute has been commonly known and adopted by the people of Indonesia during this time.<sup>11</sup> Even the term 'deliberation' was seen to contain personal philosophy typical of Indonesia, which is formulated into Pancasila as the foundation of the basics of life of society, nation, and state of Indonesia. Customary law is the law which is based on norms of everyday life that are directly incurred as a statement of the culture of the native Indonesia in this case as the statement of a sense of justice in connection strings attached, so clearly seen that customary law is the law of indigenous peoples in Indonesia are made by the Indonesian people themselves hereditary based value consciousness manifested in the habits of daily life by using measurements of reasoning and a sense of justice.<sup>12</sup> But with the change of the pattern of community life of traditional society to a modern society, a paradigm shift in the community dispute resolution. This is partly because, since birth policies, among others, the government attempted to do justice uniformity through Law No. 1/1951, customary justice referred to in Staatblad. 1932 No. 80 were eliminated gradually, while the village justice referred to in Staatblad. 1935 No. 102 is still maintained continuously included linkages with General Jurisdiction.<sup>13</sup>

The development of the livelihoods for communities to influence the development of dispute settlement patterns encountered. Unification of the Indonesian judicial system, on the one hand, be the consequences for the legal system of Indonesia to adopt the Civil Law System as a legacy of the colonial legal system.<sup>14</sup> But on the other side of society hope to resolve disputes through the courts is precisely returned to find new problems in the form of resistance to an injunction against any particular case because it is considered by the parties in part no sense of fairness. Because the process of dispute

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<sup>7</sup> S. Margono, *Penyelesaian Sengketa Bisnis*, (Jakarta: Ghalia Indonesia, 2010)

<sup>8</sup> *Ibid*

<sup>9</sup> N. Simanjuntak, "Penguatan Lembaga Adat Sebagai Alternatif Penyelesaian Sengketa," *Negara Hukum Journal.*, vol. 4, no. 1, June 2013.

<sup>10</sup> *Ibid*

<sup>11</sup> Rika Lestari, *Op cit*

<sup>12</sup> N. Simanjuntak, *Op cit*

<sup>13</sup> N. V. Ariani, "Alternatif Penyelesaian Sengketa Bisnis di Luar Pengadilan," *Rechtsvinding Journal.*, vol. 1, no. 2, August 2012

<sup>14</sup> *Ibid*

resolution through the courts resulted in the decision that is adversarial that have not been able to embrace the common interest, since the decision is a win-lose solution<sup>15</sup>, where there are those who feel a win and on the other side there are those who feel defeated. Therefore strengthening Indigenous Institute APS can to be good for the object of the dispute is private and civil, as well as in the category of public disputes need to be developed, because in the context of the Indonesian legal system it is possible when referring to the basic rules in the Act No. 30 of 1999 and is associated with the rule in PERMA No. 1 of 2008 as well as the variety of rules relating to others. Strengthening institutions that as APS containing justice, could be applied to the start of a change in mindset around post-colonial to the nomenclature of "indigenous peoples" is no longer just positioned as "authority take care of itself" but a union of people as human collective responsibility assignment countries apply the truths that restorative justice.<sup>16</sup>

### **3.3 Institutionalization of ADR Outside Court**

In the context of Indonesian law, Arbitration regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. In Act, it says that every dispute arise can be resolved through national or international arbitration in accordance with the agreement of the parties to the dispute and also stipulates that the dispute should be based on the rules and regulations (rules and regulations) on the arbitration institution agreed upon by the parties to the dispute. If an arbitration forum has decided to "award" to the parties to the dispute, then according to Indonesian law the award must be registered with the court for its implementation. For arbitration award issued by the national, award must be registered at the court where the defendant is domiciled or where the object of the dispute is located. If the investment dispute settlement the parties choose international arbitration forum, the implementation of the award of arbitration can only be done after obtaining the approval of the Central Jakarta District Court. In the case of the Indonesian government become parties to the dispute in the settlement through arbitration, then the approval of the Supreme Court shall be requested prior to the award Furthermore, international arbitration decision can only be implemented in Indonesia if the arbitration institution which decides a dispute is in one of the countries parties to the New York Convention.<sup>17</sup>

Dispute resolution through arbitration resulted in an arbitration award is final and binding, which is a final decision and have is legally enforceable and binding on the parties. So against an arbitral award may not be filed an appeal, an appeal or reconsideration is one of the advantages of arbitration to avoid the disputes are increasingly prolonged. However, in practice, there is a possibility that the implementation of an international arbitration award may acquire resistance through the courts in Indonesia. The possibility that one side can be understood as legal efforts continued, but the one the other hand can be rated as the neglect of arbitration as a means of dispute resolution that is recognized by the Act.<sup>18</sup>

In addition, it is undeniable that in fact, not all decisions generated through this arbitration will give satisfaction to the parties. There are times when the arbitration decision is not implemented voluntarily by the parties. It can be caused because there are things in the decision on the dispute discredited or there are other reasons. In this case, the court has a major role in developing the arbitration. Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution allows the intervention of the court in the settlement of disputes through arbitration if one party feels dissatisfied with an arbitration award, that is by applying for the cancellation of the arbitral award filed with the District Cour.<sup>19</sup>

Basically, to file a request for cancellation of the arbitration decision should be based on the reasons stated in Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. However, the reasons used as the basis for the cancellation of an arbitral award can only be lodged

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<sup>15</sup>Rika Lestari, *Loc Cit*

<sup>16</sup> N. Simanjuntak, *Op cit*

<sup>17</sup> M. Hikmah, "Implementasi Konvensi New York 1958 dalam Perkara-Perkara Arbitrase Internasional di Indonesia," *Opinio Juris Journal.*, vol. 13, May-August 2013

<sup>18</sup>*Ibid*

<sup>19</sup>M. Andriansyah, "Pembatalan Putusan Arbitrase Nasional oleh Pengadilan Negeri," *Jurnal Cita Hukum.*, vol. 2, no. 2, 2014.

against the arbitration decision, which was registered in court and must first be found by a court decision.

Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution has set out clear regarding the cancellation of an arbitral award.<sup>20</sup> In the aforementioned article states that the arbitration ruling parties may apply for cancellation if the rulings are suspected to contain elements are as follows: a). Letters or documents are filed in the examination after adjudication recognized otherwise false or counterfeit; b). Once the decision is taken those documents which are decisive, which is hidden by the other party; or c). The decision taken by the ruse carried out by one of the parties in the dispute.

### **3.4 Institutionalization of ADR in the Courts**

Similar with the strengthening of the traditional institution of an alternative dispute resolution institutions, there is also the prevailing Dading event, in any event, a civil case<sup>21</sup>, which has continued until today. Events peace settlement in court civil cases always can be taken up by a decision of the case is legally binding (inkracht). In the current development of ADR no longer solely used to settle the dispute out of court but also be used to resolve the dispute in court. Which is known for mediation in court (court-annexed)?<sup>22</sup> This phenomenon is not only growing in Indonesia but first developed in other developed countries such as Germany, Japan, and other developed countries. In Indonesia, the court mediation procedure is governed by the Supreme Court Regulation No. 2 of 2003 as amended by the Supreme Court Regulation No. 1 of 2008 on Mediation in court. In the Supreme Court, Regulation No. 1 of 2008 can be seen that mediation must be done by civil litigants in court on the day of the first trial. Mediation is done so that the parties can resolve the dispute between them with peace. Civil court judge is obliged to submit to the parties to the dispute to mediation or the path of peace and that the content of a peace agreement that is made into Court Judge's decision. In the Indonesian civil procedural law in the justice of the peace process is known as Dading. The judges generally feel more appreciated and respected, besides of course the lighter duties, because the judge's decision will be read: punishing the parties Plaintiff and Defendant to obey all the peace of the decision in this case. With that, a decision on a solution Dading inkracht and can be directly executed by the parties themselves.

In addition, the court also has a role in the execution of the arbitral award as implementers of the execution.<sup>23</sup> But the new courts play a role in executions arbitration decision if there is a request from interested parties because in this case, the court is passive.<sup>24</sup> In the implementation of the arbitration decision, the court guided by the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, 1958 New York Convention on the Recognition and Implementation of International Arbitration or foreign, as well as PERMA No. 1 Year 1990 on the Implementation of Foreign Arbitral Awards. In other words, the court in the execution of the arbitral award has the most important role is as an executor or executors arbitral award. To be carried out executions, the arbitral award must be registered, because if they are not registered with the arbitration decision can not be executed. In the case of delay in registration, the arbitration decision can still be made, but it depends on the consideration of the Chairman of the Court.<sup>25</sup>

### **3.5 The Readiness of the Indonesian National Arbitration Board (BANI)**

Indonesian National Arbitration Board (BANI) is an institution that was born in 1977. BANI was established as an independent agency that provides services related to mediation, arbitration and dispute resolution outside the court for the support of business associations that are members of the Indonesian Chamber of Commerce and Industry (KADIN). Settlement of business disputes through arbitration, especially less well-known and understood by the public. And a perception that BANI as arbitration agency business is considered expensive and the possibility of its decision can not be executed and

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<sup>20</sup>G. H. Tampongangoy, "Arbitrase Merupakan Upaya Hukum Dalam Penyelesaian Sengketa Dagang Internasional," *Lex Et Societatie Journal UNSRAT.*, vol. 3, no. 1, 2015.

<sup>21</sup> N. Simanjuntak, *Op cit*

<sup>22</sup> S. Margono, *Op. Cit*

<sup>23</sup> Joejoen Tjahjani, "Peranan Pengadilan dalam Pelaksanaan Putusan Arbitrase," *Jurnal Independen.*, vol. 2, no. 1, 2014

<sup>24</sup>*Ibid*

<sup>25</sup>*Ibid*

submitted to the court<sup>26</sup> a challenge for BANI as an institutional body set up by the government to resolve business disputes, especially in the era of the ASEAN economic community. In the practice of law that has occurred in Indonesia, the Court accepted the case had been decided by BANI and the contract has been evident stated that arbitration as a dispute resolution choice to be a factor BANI as alternative dispute resolution institutions institutionally does not have the power and the authority of execution. Compliance with the agreement that was made into a major point or in other words the legal awareness of the consequences of the choice of alternative dispute resolution has been decided not matched by good faith.

In addition, the law disharmony can inhibit the development of institutional ADR in Indonesia. Thus the need for harmonization and legal understanding between the judiciary and alternative dispute resolution in this regard BANI for the practice of law can be run effectively and quickly. In addition to professional development and the referee negotiators in Indonesia must be consistent with the rules and codes of professional conduct that apply internationally, international ADR entities, as well as capable of competing with the negotiator/international referees.<sup>27</sup>

To deal with AEC, BANI as Institutions alternative dispute resolution, currently has 73 arbitrators in the country and 57 arbitrators abroad domicile at Jakarta and has a representative office is only available in 6 major cities in Indonesia, namely in Surabaya, Bandung, Pontianak, Denpasar, Palembang, Medan, and Batam, has been a challenge for BANI to face the labor market as a consequence of the AEC. If BANI not immediately responding to these challenges, it will no doubt be unable to compete with association or foreign dispute resolution body operating in Indonesia later. The development of the association and the profession needs to be improved through the recruitment, education, and specialized training as a negotiator or arbitrator locally, given the pluralistic Indonesian society, hence the need for negotiators local or arbiter local professionals be a positive thing for the existence of the Indonesian nation in the face of AEC.

Strengthening internal BANI organization also needs attention, as the leading sector in alternative dispute resolution for the community, BANI must have strong institutional organizations. Dualism organizationThe current must be addressed in order to resolve disputes BANI performance can be optimized for people, especially businessmen.<sup>28</sup>

#### **4. Conclusion**

The development of institutional ADR, in the which includes institutional ADR indigenous people in Indonesia, is possible because in accordance with the philosophy of the Indonesian nation is "deliberation-consensus" known in adatrecht. UU no. 30 of 1999 and is associated with the rule in PERMA No. 1 of 2008 became the basis for the enactment of the institution can be custom ADR. The Institutionalization of ADR outside the court has set in its own legal order, namely in Law No. 30, 2009. However, in practice, there is a possibility that the execution of the decision of the arbitration can acquire resistance through the courts in Indonesia even cancellation may be filed with the trial judge referred to in Article 70 quo. The Institutionalization of ADR in courts is possible with the event Dading in any event civil cases. Reorganization of BANI as an independent agency that Provides alternative dispute resolution services and the development of professional associations, education and training for negotiators local / local and socialization BANI arbitrators and ADR education to the community could be an attempt to prepare for the AEC.

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<sup>26</sup>S.Margono, *Op cit*

<sup>27</sup>*Ibid*

<sup>28</sup> H. Agustin, "BANI Riwayatmu Kini", *Newspaper Hukum Online.Com*, Oktober 2016.

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