Part I Overview of the Dispute Resolution Mechanism in Indonesia. Chapter II Alternative Dispute Resolution

著者	Juwana Hikmahanto
権利	Copyrights 日本貿易振興機構（ジェトロ）アジア経済研究所 / Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) http://www.ide.go.jp
journal or publication title	Dispute Resolution Process in Indonesia
volume	21
page range	40-55
year	2003
URL	http://hdl.handle.net/2344/00015015

Chapter II
Alternative Dispute Resolution

II.1 Scope of the Term

ADR can mean three things depending on the answers to the question of alternative to what dispute resolution being considered. If court system is the answer, the alternative to court mechanism will be negotiation, mediation, conciliation and arbitration. Here the meaning of ADR is private dispute settlement mechanisms outside the court that is pursued on voluntary basis among parties to a dispute. This will form the first meaning of ADR.

However, if the answer to the question is settlement other than by adjudication process, then ADR has a much narrower scope than the first meaning. ADR will not include arbitration, as it involves adjudication process similar to the court system. ADR within this meaning only covers negotiation, mediation and conciliation. This forms the second meaning of ADR.

The third meaning of ADR has much wider scope than the first and second meaning. The meaning of ADR will consist of voluntary and mandatory means of settling dispute outside the court. Mandatory since according to some laws the dispute has to be settled by certain government agencies that is outside the court. However, challenge on the decision will subsequently go to court.

In this study, the third meaning of ADR will be used. For such purpose, this chapter will be divided into three parts. The first part will discuss matters concerning negotiation, mediation and conciliation. The second part will discuss matters concerning arbitration. The last part will discuss some of mandatory ADRs.

Two notes need to be made aware beforehand. First, the study will discuss ADR mechanism both as provided under the law and the so-called informal ADR, which lacks legal basis. The informal ADR is the most practiced dispute resolution in Indonesia.

The other note is with respect to what will not be dealt in this study. The study will not concern itself with criminal offence settled outside the court. Although Indonesian law does not recognize plea-bargaining, however, there have been instances where criminal offence is settled outside the court. An example often cited, is a driver

unintentionally hits someone who dies as a result. That driver often will not be charged with a criminal offence by the police on the ground the victim's family has agreed on outside court settlement.

II.2 Negotiation, Conciliation and Mediation

II.2.1 Background

In Indonesia, most private dispute has been resolved by negotiation by the parties in a dispute to achieve common agreement to a solution. This process is referred to as *musyawarah mufakat*, which literally means dialog to reach consensus.

There are many reasons for the parties in a dispute to opt *musyawarah mufakat*. First, *musyawarah mufakat* is a settlement that likely maintains good relation among the disputed parties. Maintaining good relation for many Indonesians is very important. They see dispute have caused damage to a good relation, and it will become much worse, if such dispute is not settled amicably based on *musyawarah mufakat*.

Second, settling dispute by *musyawarah mufakat* is seen by many to have prospect of resolving dispute without any confrontation. Formal mechanism, especially court, is seen more of face-to-face confrontation. In addition, the contending parties will argue each other based on his or her own perspective without any consideration of the opponent party.

Other reason for opting *musyawarah mufakat* is the mechanism consistent with traditional practice of settling dispute. Indonesians believe *musyawarah mufakat* has rooted in their culture.

In addition, *musyawarah mufakat* is cost efficient since the process does not involve money. Parties, however, may compromise compensation in form of money.

Furthermore, in *musyawarah mufakat* the parties are in control in deciding the form of settlement, from a simple apology to money compensation settlement. In this sense, justice is decided by parties to a dispute themselves, and not by other third party. Many Indonesians have considered this as the most appropriate dispute resolution mechanism.

If for some reasons dispute cannot be reached through negotiation, the parties will refer the dispute to a third party. The third party will hear and try to find acceptable settlement for parties to a dispute. This is what is referred to as mediation or conciliation.[64] In the mediation or conciliation process, the principle of *musyawarah mufakat* is also used. The mediation or conciliation is commonly used in the village justice.[65] The third parties acting as mediator or conciliator include, among others, leaders of the community, religious leader or a senior respected person within community not holding position as leader.

II.2.2 Provisions Governing Negotiation, Mediation and Conciliation

In 1999, the mechanisms for negotiation, mediation and conciliation process provided under the Arbitration and Alternative Dispute Resolution Act (hereinafter referred to as "Arbitration Act").[66] Nevertheless, such ADR mechanisms is only limited to a dispute of commercial nature. ADR in a much wider meaning has not been provided in an act.

Once there was an effort from the Ministry of Justice and Human Rights to initiate an Act exclusively governing negotiation, mediation and conciliation dubbed as '*Rancangan Undang-undang tentang Alternatif Penyelesaian Sengketa*' or Draft Law on Alternative Dispute Resolution. There are two important objectives pursued on the initiative. First is to recognize the existence of negotiation, mediation and conciliation as practiced by many Indonesian, in addition to give sound legal basis for such mechanisms.

The other aspect is to recognize the amicable agreement resulted from negotiation, conciliation and mediation to have enforceable effect. This is because under the prevailing law only amicable agreement mediated and drawn before the court that has enforceable effect. Amicable agreement concluded outside the court does not have enforceable effect.

---

64 The term mediation or conciliation in this study will be used interchangeably as long as the process involves third party who has no power to render decision.

65 Hooker describes village justice as a 'system of voluntary mediation under which villagers submit dispute to some indigenous form of settlement process.' **See**: M.B. Hooker, Adat Law in Modern Indonesia, (Kuala Lumpur: Oxford University Press, 1978), 140

66 Act Number 30 Year 1999. State Gazette Number 138 Year 1999

Unfortunately, the draft law has never been processed to a much higher authorities. One reason is that at the time the Draft Law was being discussed, the House of Representative passed the Arbitration Act. There was a feeling among the drafters that the proposal to introduce separate Act on ADR would be conceived as redundant by many, as the Arbitration Act also mentions "ADR".

II.2.3 ADR under the Arbitration Act

The definition of ADR under the Act is "(A) resolution mechanism for disputes or differences of opinion through procedures agreed upon by the parties outside the court, namely, consultation, negotiation, mediation, conciliation, or expert assessment."[67]

Under the Arbitration Act, article 6 is the only article dealing with ADR. Article 6 consists of nine paragraphs. In paragraph 1 it states that, "(D)isputes or differences of opinion that are not of a criminal nature may be resolved by the parties through ADR based on their good faith by setting aside resolution based on litigation at the District Court."[68]

The Act also provides that ADR shall be carried out not later than 14 days to which the outcome has to be agreed in writing.[69] If for some reasons the process failed, the parties may request in writing the assistance from one or more advisors or a mediator to solve the dispute.[70] The Act further provides that in the event after the lapse of 14 days, the dispute is not resolved, parties may request for an arbitration center or an ADR institution to appoint a person acting as mediator to mediate or conciliate the dispute.[71] The difference with the former is the mediator has to be appointed by certain institution.

The mediator has to begin the mediation process at least 7 days (presumably, after his/her appointment, which the Act does not clearly mention).[72] Within 30 days, a written

---

67 Arbitration Act art. 1 (1). Under the elucidation of the Arbitration Act it is stated that, "ADR is a dispute settlement institution based on procedure agreed by the parties, namely, outside court settlement by consultation, negotiation, mediation, conciliation or expert opinion." This meaning of ADR if referred to earlier discussion on the meaning of ADR will conform with the second meaning of ADR.

68 *Id.* art 6 (1).

69 *Id.* art. 6 (2).

70 *Id.* art. 6 (3).

71 *Id.* art. 6 (4).

72 *Id.* art. 6 (5).

resolution has to be signed by all parties concerned.[73] The amicable agreement has to be registered at the District Court within 30 days after its signing.[74] The Act further provides that within 30 days after registration the resolution has to be executed.[75]

If amicable settlement through ADR failed, the Act provides that parties may submit the dispute to be heard at institutional or ad hoc arbitration based on written agreement.[76] However, it is not clear under the Act whether the ADR process in this provision is compulsory or voluntary in nature before submission to arbitration.

II.3 Arbitration

II.3.1 Background

Arbitration is understood as a process by which parties to a dispute agree to submit their differences to one or more impartial persons for a final and binding decision. Arbitration as one of dispute settlement mechanisms has its long history in Indonesia. The Dutch colonial law had recognized arbitration by providing in the law of procedure.[77]

Since Indonesia's independence, works on amending the Dutch colonial arbitration law had been initiated as early as 1979.[78] It is not until 1999, did the effort come to a success. On that year the Arbitration Act, has been promulgated and replaced the Dutch colonial Arbitration laws.[79]

The Arbitration Act consists of 9 chapters and 82 articles. The Arbitration Act is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

---

73 *Id.* art. 6 (6).

74 *Id.* art. 6 (7).

75 *Id.* art. 6 (8).

76 *Id.* art. 6 (9).

77 Act on Rules of Civil Procedures, Staatsblad 1847:52. Under such Act the provisions on arbitration starts from Article 615 until 651.

78 Sudargo Gautama, *Undang-undang Arbitrase Baru 1999* (The New Arbitration Law 1999), (Bandung: Citra Aditya Bakti, 1999), v.

79 Under Arbitration Act art. 81, it is stated clearly that the Act of Rules of Civil Procedure that concerned with arbitration is revoked completely.

II.3.2 Features of the Arbitration Act

The Arbitration Act provides the legal basis for arbitration procedure in Indonesia replacing the Dutch colonial provisions.[80] It becomes the Indonesian *Lex Arbitri*. The Act defines arbitration as "(A) mechanism of settling private disputes outside the General Tribunal based on arbitration agreement entered in writing by parties to a dispute".[81]

Under article 5 of the Arbitration Act, the dispute that can be arbitrated is limited to, "dispute of commercial nature, or those concerning rights which under the law fall within the control of the disputed parties."[82] The article further elaborates that, "(D)ispute which may not be resolved by arbitration is dispute which according to prevailing regulations cannot be settled by amicable means."[83]

Dispute can only be arbitrated, if and only if, the parties to a dispute have agreed in writing for settlement through arbitration.[84] The agreement, however, can be executed before or after dispute arises.[85]

The Arbitration Act provides exclusive jurisdiction once parties have submitted their dispute to arbitration. A court should consider itself as having lack of jurisdiction to settle a dispute that has been agreed by the parties to be settled in arbitration.[86] Further the Act states that, "(T)he existence of arbitration agreement in writing shall negate the right of parties to submit resolution of dispute and difference of opinion provided under the agreement to the District Court."[87] If the District Court were to receive such dispute, it would have to refuse and restraint from intervening from the dispute, except otherwise

---

[80] The Arbitration Act apart from providing rules for ADR and arbitration, also provides binding opinion from arbitration institution. Nonetheless, the provisions are very brief and general. One important point is binding opinion, once issued, may not be appealed.

[81] *Id.* art. 1 (1).

[82] *Id.* art. 5 (1).

[83] *Id.* art. 5 (2).

[84] *Id.* art. 2. The article provides as follows, "This Act shall govern the resolution of disputes or differences of opinion between parties having a particular legal relationship who have entered in an arbitration agreement which explicitly states that all disputes or differences of opinion or which may arise from such legal relationship shall be resolved by arbitration or through alternative dispute resolution."

[85] *Id.* art. 9 (1) provides that, "In the event the parties select resolution of dispute by arbitration after a dispute has arisen, their agreement to arbitrate has to be drawn in a written agreement signed by the parties."

[86] *Id.* art. 3.

[87] *Id.* art. 11 (1).

provided under the Act.[88] This provision is intended to eliminate the problem that has been occurring time and again whereby court will examine cases brought to it, even though parties to a dispute have concluded arbitration agreement.

The Act also provides the qualification of arbitrators. An arbitrator has to satisfy five qualifications.[89] First, the nominated arbitrator has the ability to act under the law. Second, arbitrator has to be at the age of not less than 35 years. Third, arbitrator may not have any family relationships with the parties to a dispute. Fourth, the arbitrator must not have any financial or other interests in the arbitration award. Lastly, the arbitrator should have 15 years experience and knowledge in the area of matters being disputed. An active judge, prosecutor, court clerk or other judicial officials may not be appointed as arbitrator.[90]

The Act provides detail provisions on forming the arbitration and the appointment of arbitrator.[91] For example, the arbitration can be formed in a single or panel of arbitrators depending on the agreement concluded by the parties. If parties are unable to decide the selection or composition of arbitrators, the head of District Court will determine on this issue.[92] There is also provision on immunity of the arbitrator examining a case.[93]

In chapter III of the Arbitration Act, the parties to a dispute have the right to refuse arbitrator selected to sit in the arbitration. Article 22 paragraph (1) provides that, "(A) request of refusal may be submitted against an arbitrator if it is found sufficient cause and authentic evidence which gives doubt of an arbitrator in its performance of partiality and will take side in rendering the award."[94] Paragraph (2) of the same article further states, "(R)equest for refusal of an arbitrator may also be made if it is proven there is family, financial or working relationship with one of the party or his/her proxy."[95]

---

88 *Id.* art. 11 (2).

89 *Id.* art. 12 (1).

90 *Id.* art. 12 (2).

91 *Id.* art. 12 until 21.

92 *Id.* art. 13 (1).

93 *Id.* art. 21 provides that, "The arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceeding to carry out the function of arbitrator or arbitration tribunal unless it is proved that there was bad faith in the action."

94 *Id.* art. 22 (1).

95 *Id.* art. 22 (2).

Rule of procedures is another provisions that the Arbitration Act elaborates in great length. The rule of procedures governing arbitration, in principle, is free to be determined by parties to a dispute, as long as it does not contradict with the provisions of the Act.[96] The Act states that all hearing of arbitration are closed to the public.[97] The language used in the arbitration has to be in Indonesian language, unless otherwise agreed by the parties and approved by the arbitrator.[98]

Parties to a dispute are free to agree on the substantive law governing the examination of their dispute.[99] The arbitrators have the discretion to decide the place of arbitration, unless parties to a dispute decide otherwise.[100] An attorney can represent each of the disputed parties.[101]

A third party, a non-contracting party to an agreement, may become a party in the arbitration process if such party has related interest in the dispute. The intervention by a third party has to be agreed by parties to a dispute and further approved by the arbitrators.[102]

The Arbitration Act recognizes two kinds of award. First, is the final award and the second is the provisional award. Provisional award is issued if requested by one of the contending parties.[103] The Act goes as far as in stipulating provision on a final arbitration award. The final award, at least, has to consist the following:

(1) at the heading of the award there should be a sentence stating "For the Justice based on One Almighty God";

(2) there should be names and addresses of the parties to a dispute;

(3) the case position;

(4) the argument of each parties;

(5) the consideration and conclusion of the arbitrators;

(6) the opinion of each of the arbitrators in case of any dissenting opinion;

---

96 *Id.* art. 31 (1). The article provides as follow, "The parties are free to determine, in an explicit written agreement, the arbitration procedures to be applied in hearing the dispute, provided it does not conflict with the provisions of this Act."

97 *Id.* art. 27.

98 *Id.* art. 28.

99 *Id.* art. 56 (2).

100 *Id.* art. 37 (1).

101 *Id.* art. 29 (2).

102 *Id.* art. 30.

103 *Id.* art. 32 (1).

(7) the decision of the arbitrators;

(8) the place and date of the award issued; and

(9) there should be signature of the arbitrators.[104]

The Arbitration Act states that in taking decisions, the arbitrators have to abide by the law or justice and reasonableness.[105]

The final award can be amended for administrative mistakes or things can be added or taken out, if requested by the parties, provided it is done within 14 day after the parties received the award.[106]

The Act provides that examination of a case should not take longer than 180 days starting from the arbitration tribunal is formed.[107] Such duration, however, can be extended if agreed by parties to a dispute.[108]

Another important feature of the Arbitration Act is the provisions on enforcement and annulment of arbitration award.

The Arbitration Act provides mechanism for the enforcement of foreign arbitral awards.[109] This is as consequence of Indonesia becoming a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[110]

The Arbitration Act defines foreign arbitral award as an award rendered by a permanent or ad hoc arbitration outside the jurisdiction of Indonesia, or according to Indonesian law, the award is considered foreign.[111]

The Central Jakarta District Court is the only court that has jurisdiction for a request on recognition and enforcement of foreign arbitral awards.[112] There are five requirements for foreign awards to be recognized and enforced by the court.[113]

First, the arbitration is carried out in a country that is a party to a bilateral or multilateral treaty that reciprocate recognition and enforcement of Indonesian arbitration awards. Second, the award concerns with matter that is commercial in nature under

---

104 *Id.* art. 54 (1).
105 *Id.* art. 56 (1).
106 *Id.* art. 58.
107 *Id.* art. 48 (1).
108 *Id.* art. 48 (2).
109 *Id.* Chapter VI Part II.
110 Indonesia ratified the Convention in 1981 under Presidential Decree Number 34 Year 1981.
111 Arbitration Act art. 1 (1).
112 *Id.* art. 65.
113 Arbitration Act art. 66.

Indonesian law. The third requirement is the award has obtained exequatur from the Central Jakarta District Court. Fourth if one of the parties to a dispute is the government of the Republic of Indonesia, the order of exequatur must be obtained from the Supreme Court.

The Act provides that enforcement of foreign arbitral award has to be requested by the arbitrator or its proxy, instead of party to a dispute. This is uncommon to many arbitration laws around the world. In practice, however, the request is made by one of the parties to a dispute, in particular the party desiring the enforcement, and the court will allow it.

The arbitrator or its proxy has to register the award at the Central Jakarta District Court before submitting application for enforcement.[114] The application for enforcement is submitted in the form of petition. Yet, the contending party may object the application submitted by party requesting for enforcement. The contending party becomes respondent in the process and the application becomes adversarial between party applying for enforcement and party who request the court to refuse enforcement.

If the Central Jakarta District Court issued decision in favor of enforcement, an appeal to the High or Supreme Court by the party whose assets is being executed will not be entertained.[115] However, if the enforcement is refused by the District Court, such decision can be appealed. The appeal goes directly to the Supreme Court.[116]

The Supreme Court has to render its decision not more than 90 days after appeal is received.[117] Once the Supreme Court renders its decision parties may not seek other legal actions.[118]

If enforcement of foreign arbitral award is granted, the Central Jakarta District Court will issue instruction for the bailiff to take necessary measures. If the assets were to be outside the jurisdiction of the Central Jakarta District Court, the court will delegate the instruction to enforce the award to the appropriate District Court where enforcement is being sought.[119]

---

114 *Id.* art. 67 (1).
115 *Id.* art. 68 (1).
116 *Id.* art. 68 (2).
117 *Id.* art. 68 (3).
118 *Id.* art. 68 (4).
119 *Id.* art. 69 (1).

Annulment of arbitration award applies only to award rendered by arbitration carried out in Indonesia.[120] The Arbitration Act provides three reasons for annulment.[121] First, if there is suspicion that letters or documents submitted for examination, after award has been issued, are found forged or declared as forged. Second, if there is suspicion after the award has been issued that crucial documents were found and such documents were concealed by on of the parties. Third, the decision has been issued based on certain fraud committed by one of the parties to a dispute.

An application for annulment of an arbitration award has to be made in writing within 30 days after the award is registered at the District Court.[122] The District Court that has jurisdiction to annul is the District Court where the arbitration process is held. The application for annulment is addressed to the head of certain District Court.[123] The District Court has 30 days to issue its decision.[124] Decision by the District Court can be appealed to the Supreme Court.[125] The Supreme Court will have 30 days to issue its decision.[126]

II.3.3 Arbitration Centers

In Indonesia, there are several arbitration centers. These centers can be divided into two categories. First is the arbitration center dealing with general jurisdiction and the second is the arbitration center with limited jurisdiction. The later is commonly referred to as specialized arbitration. Here it will describe the centers in general.

---

120 Recently there was a case where an foreign arbitration award is requested to be annulled by the Central Jakarta District Court. Although the Central Jakarta District Court lack of jurisdiction it issued annulment judgement. The case is now being appealed to the Supreme Court.

121 *Id.* art. 70. The reasons provided under article 70 is somewhat limited if compared to the Civil Law Procedure or Rv. According to such law the reasons are 10 reasons to annul arbitration award, such as the award has cover more than what has been agreed by the parties, the award was based on expired arbitration agreement, the award was issued by unauthorized arbitrators. In this connection it is questionable whether the Court is limited to apply the three reasons stated in article 70 or it may interpret those reasons outside the Arbitration Act.

122 *Id.* art. 71.

123 *Id.* art. 72 (1).

124 *Id.* art. 72 (3).

125 *Id.* art. 72 (4).

126 *Id.* art. 72 (5).

i) Arbitration with General Jurisdiction

BANI

The oldest arbitration and has very wide jurisdiction is *Badan Arbitrase Nasional Indonesia* or the Indonesian National Board of Arbitration and abbreviated as "BANI." BANI was formed by the Indonesian Chamber of Commerce in 1977.

BANI has a head office in Jakarta and maintains a branch office in Surabaya, East Java. BANI handles both domestic and international disputes. A reference of a dispute to BANI must be in writing, either in an arbitration clause, or in a contract or by subsequent agreement by the parties to a dispute.[127]

BAMUI

In 21 October 1993 at the initiative from the Indonesian Council of Religious Ulemas (Majelis Ulemas Indonesia) a new arbitration center was formed. The arbitration is named Badan Arbitrase Muamalat Indonesia or the Indonesian Muamalah Board of Arbitration and abbreviated as BAMUI. BAMUI is set up with the intention to provide a forum for the settlement of disputes arising from business transactions primarily among Muslims, or Islamic transaction. BAMUI also provides binding opinion if requested.[128]

ii) Specialized Arbitration

To date, there exists only one specialized arbitration. The specialized arbitration is arbitration center dealing exclusively on capital market. The center was formed in August 2002. The arbitration is named *Badan Arbitrase Pasar Modal Indonesia* or the Indonesian Capital Market Arbitration and abbreviated as BAPMI. BAPMI was founded by capital market societies.

---

[127] BANI suggests parties wishing to make reference to BANI for dispute settlement use the standard clause in their contracts as follows, "All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules." **See**: Brochure of BANI.

[128] Articles of Associations of BAMUI art. 4.

There are three ADR mechanism offered at BAPMI. First is providing binding opinion when requested by parties to a dispute.[129] Second is settling dispute through mediation and conciliation.[130] Third is settling dispute through arbitration.[131]

II.3.4 Problems Surrounding Arbitration Mechanism

There are many problems surrounding arbitration as a means of dispute resolution. First of all arbitration may be popular within the business circle, but it does not enjoy the same popularity for non-business society. Even the businesses that understand arbitration are limited. Hence, it is not the best mechanism available to solve private dispute.

The second reason has to do with cost. If compared to court mechanism, the cost may arguably less. However, for most Indonesian if they see the cost of going to arbitration they would be astonished.[132] Most Indonesian cannot relate that arbitration is inexpensive mechanism for settling dispute. Some parties to the dispute have backed down from pursuing arbitration mechanism on the ground of cost.

The third reason has to do with human resources. Simply said, only small numbers of qualified individuals have the capacity and willingness to become arbiter.

The fourth reason is the presence of arbitration centers are not within easy reach of the people. Indonesia is a vast and large country, but BANI has only head office in Jakarta and branch office in Surabaya. BAMUI and BAPMI currently still maintain offices in Jakarta. It would be too costly for parties outside Jakarta to take up their case at the existing arbitration centers.

Lastly, although arbitration awards rendered in Indonesia have never been refused for enforcement by court, however, that is not the case with respect to foreign arbitral awards.[133] Expatriates are frustrated when it comes to enforcement of foreign arbitral

---

129 BAPMI Articles of Association art. 6 (a).

130 *Id.* art. 6(b).

131 *Id*. art. 6(c)

132 The cost for registration fee as of 2 January 2001 is IDR 2 million. The administration/hearings fee and arbitrator's fee will depend on how much amount of money is being claimed. If it is less than IDR 500 million the administration/hearings fee is 10% and if the amount is over IDR 500.000 million the administration/hearings fee is 0.35%.

133 Since 1990 until 2002 the registrar of Central Jakarta District Court recorded 29 applications for the enforcement of foreign arbitral awards. Out of those numbers only 9 have been granted enforcement. However, out of 9 applications, there are enforcement being postponed.

awards in Indonesia. Their complaint is directed toward judges who have lack of understanding, corrupt judicial system and is not a convenient forum. If they can avoid enforcing foreign awards in Indonesia, they will do so.

II.4 Mandatory ADR

II.4.1 Background

In Indonesia, there are disputes that have to go to special government agencies for remedy. The legal dispute is not exactly private dispute among individuals. It has two features. The first is the public defended dispute, whereby an individual complaining against government or its officials where compensation is seek. Tax issues fall under this category. The second is individuals or the public complaining to State against other individuals. The State becomes referee, although the parties to a dispute do not face each other like in a civil case.

These agencies have attributes as judicial power based on two grounds. First, these agencies are intended by their framers to act on judicial bodies. Second, their decision, if appealed has to be submitted to courts.

II.4.2 Tax Court (Pengadilan Pajak)

Pengadilan Pajak or the Tax Court is established as improvement of Badan Penyelesaian Sengketa Pajak or the Board of Tax Dispute Settlement. The Tax Court was established by virtue of Tax Court Act of 2002.[134]

Under Article 2 of the Tax Court Act, the court is a judicial body for taxpayer who seeks justice on tax dispute.[135] Tax dispute is defined as dispute that arises in the area of tax between taxpayer and public officials with respect to the issuance of certain decree.[136]

The Act provides that a decision of the Tax Court can be re-opened and reviewed by submitting PK. The authority entrusted to review the decision is the Supreme Court.[137]This provision is uncommon. The provision places the Tax Court to be the first

---

134 Act 14 Year 2002.
135 Tax Court Act art. 2.
136 *Id.* art. 1 (5).
137 *Id.* art. 77 (3).

and final instance. As a body of final instance, it contradicts with the Judicial Power Act, which provides the Supreme Court as the court of last instance for any judicial bodies. It is uncertain whether the Act meant of re-opening a case is actually appealed for cassation. If it is re-opening a case the question is whether it involves something that is extraordinary since PK is an extraordinary legal actions. A case can only be re-opened if such case has been decided with verdict having enforceable effect.

In addition, the Tax Court Act does not mention any introduction of new evidence. The Act may mean appeal to which the term is used is 're-open.'

II.4.3 Commission for Supervision of Business Competition (KPPU)

Competition dispute between businesses or against businesses is mandatory to be examined and settled outside the court. The institution dealing with the examination and issuing decision is the *Komisi Pengawas Persaingan Usaha* or the Commission for Supervision of Business Competition (hereinafter referred to as the "Commission").

Although the Commission has the duty to handle dispute between businesses, however, the nature of dispute is not exactly the same as dispute in civil case. The Commission when summoning, examining and deciding a case is not based on adversarial manner between plaintiff and defendant. The Commission when it takes up the case, it will make its own enquiry on the party who is complaint and if found guilty, will impose sanction.

The Act provides that the Commission may only investigate cases that do not have criminal elements. If monopoly practices or unfair competition possesses any level of criminality then it is the responsibility of both the police to investigate and the public prosecutor to prosecute at the District Court.

II.4.4 Labor Dispute Settlement Committees

The Labor Dispute Act of 1957 (hereinafter referred to as "Labor Dispute Act"),[138] imposed obligation to the Minister in charge of labor to establish the *Panitia Penyelesaian Perselisihan Perburuhan Daerah* (the Regional Labor Dispute Settlement Committees) or the Regional Labor Dispute Settlement Committee (hereinafter referred

[138] Act 22 Year 1957.

to as “Regional LDSC”).[139] The Regional LDSC is a tripartite institution that consists of person nominated by the government, labor and employer. Any labor dispute dealing with working conditions has to go to Regional LDSC. In 1964 LDSC has widen its jurisdiction so it can examine termination of employment cases.

The 1957 Act also establishes the *Panitia Penyelesaian Perselisihan Perburuhan Pusat* or the Central Labor Dispute Settlement Committee (hereinafter referred to as “Central LDSC”) which has its sitting in Jakarta.[140] Similar to the Regional LDSC, the Central LDSC is also a tripartite institution.

The two tribunals and their procedures will be dealt extensively in chapter IV of this study.

139 Labour Dispute Act art. 5 (1).

140 *Id.* art. 12.