MEDIATION-ARBITRATION: A PROPOSAL FOR PRIVATE RESOLUTION OF FLATS DISPUTES IN PERSPECTIVE OF INDONESIAN LAW

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ABSTRACT

The rise of cases which is private between developers and consumers of flats always ends in the realm of litigation. A dispute resolution system in a court that does not guarantee confidentiality, a hostile disagreement between the litigants, a lengthy trial process that incurs enormous costs is the reason many parties choose to resolve through alternative dispute resolution. Among the various alternative dispute settlement mechanisms, mediation and arbitration have increasingly gained recognition and acceptance. Its hybrid, namely mediation-arbitration (med-arb), has also emerged and has received much attention and appreciation. Through normative legal research and using descriptive analytical research methods, it is found that the flats dispute can be done outside the court through alternative dispute resolution in this case through med-arb. A peace agreement made by the parties with the help of a mediator in the med-arb process will bind the parties to the arbitration process, which will result in a final and binding arbitral award. Weaknesses of mediation are perfected by final and binding arbitration in a single settlement process. Thus med-arb can be a means of dispute resolution that meets the principles of justice and legal certainty.

Keywords: Mediation-Arbitration, Alternative Dispute Resolution (ADR), Pre Project Selling, Consumer, Developer.

INTRODUCTION

In this modern era, having a flat is a choice for most people, especially those living in cities. Almost every country, particularly Indonesia, has already known the presence of flats. The regulation of flats in Indonesia is mentioned in Act No. 20 2011 about Flats (later called Act of Flats). This country has developed a custom in housing business to sell flats that are developing or about to develop through Pre-Project Selling (PPS) System. This concept is very effective, efficient, and profitable, especially for developers since it relatively helps the cycle of developers' finance, as well as the expense of their investment for the building construction projects (Purbandari, 2012). This concept has been popular in France since 1967, known as "*vente d'immeuble a` construire*" or a sale of a building to be constructed (Merwe, 2015).

Ironically, this PPS System in Indonesia poses many problems, especially in the part of consumers. In Pre-Project Sales Contract/PPJB (Perjanjian Pengikatan Jual-Beli), for instance. This PPJB is a standard agreement by a developer. Given that it is made by the developer, it tends to be subjective on the developer's profit, and may disadvantage the consumers. Much information is not publicly shared during the process of PPJB, such as the status of property, the specification of building, what if the consumers get their collective

rights violated or late due to the developers (Yudhantaka, 2017). Those problems may pose a dispute between the developer and consumers in the next future.

To solve the civil case of Flat Selling, it may be through litigation or non-litigation process, as mentioned in Article 105 subsection (2) of Act of Flats. In the litigation process, the injured party in the first level of public court may still take some legal efforts by filing an appeal to the Higher Court, then to the Supreme Court, and even asking for a judicial review to the Supreme Court. On the other hand, as the more time it takes for the resolution, the more expense the pertinent parties may spend. Even often, the court decisions cannot be carried out voluntarily by the parties. Thus, for some parties who feel dissatisfied with the court's decision, they may take one of the mechanisms of Alternative Dispute Resolution (ADR), such as arbitration.

Actually, although the arbitration is confidential and the nature of arbitration verdict is final and binding, it remains creating a paradigm of unjustness toward the injured parties. That is because the characters of arbitrators in arbitration are similar to the characters of judges in court (i.e., they take judgment on cases).

Therefore, it needs a concept of dispute resolution that may provide a complete solution of disputes, measurable period of time, justice and legal certainty without putting some parties into an advantageous position and other parties into disadvantageous one. The legal issues to discuss in this study are as follow. Mediation and Arbitration as the kinds of ADR in Indonesia; and Med-Arb as the resolution of flat disputes.

METHODOLOGY

The study of normative law was used, considering the exclusive character of the study itself which method is normative. This method was used to analyze the correlation of legal regulations, jurisprudence, and contracts. Doctrinal study, however, was used to analyze the principle of law, the literature of law, along with scholars' views of law that have high qualification (doctrine) and comparison of law.

As this study is a normative research, statute and conceptual approaches were used. Statute approach was applied by examining the legislation and other related legal regulations on intended legal issue. It is an approach using legislation and regulation (Mahmud, 2009).

RESULTS AND DISCUSSION

Mediation in Indonesia

Mediation is a process of reconcilement between the disputing parties through the assistance of a mediator for the sake of justice without spending a lot of expenses, yet remains effective and sincerely accepted by the disputing parties (Abdurrasyid, 2011). The basic regulation of mediation is mentioned in Act No. 3 1999 about Arbitration and Alternative Dispute Resolution (known as Act of ADR) as well as the Regulation of the Supreme Court (PERMA) No. 1 2016 about the Procedures of Mediation during the Litigation (known as PERMA 1/2016). Mediation, as a kind of ADR, is implemented during or out of the litigation.

In the litigation, mediation is the mandatory process that should be conducted. It is seen in Article 4 subsection (1) PERMA 1/2016 that:

> *"Every civil dispute filed to the Court, including a lawsuit (verzet) over the verdict of verstect and resistance from the litigants (partij verzet) or the third party (derden verzet) against the*

implementation of a verdict with fixed legal power, should be solved through mediation at first, except due to particular provisions based on the Regulation of the Supreme Court."

According to the description, it identifies that when the case filed into the court is a civil case, therefore, before going into the investigation stage, it should take mediation in the first place.

Mediation, both in and out of the litigation, has four similar characteristics, as follow:

1. Accessible.
2. Voluntary.
3. Confidential.
4. Facilitative (Wibowo, 2018).

The difference between mediation in and out of the litigation is the mediator. During the litigation, the mediator may be from the judges or an independent mediator that holds a certificate as a mediator. This independent mediator should be officially registered in the pertinent court. For mediation out of the litigation, the mediator may be from a certified independent mediator only.

In the case of mediation conducted in litigation, it starts with filing a lawsuit. Then, the judge of case investigation requires the parties to take mediation and appoint a mediator through an appointment letter. The appointed mediator is based on a shared election or a direct appointment from the judge. During the mediation, the final result may succeed and reach conciliation, or otherwise, fail. When the mediation reaches the conciliation, the disputing parties, with the assistance from a mediator, should make a written agreement (i.e., known as the agreement of concilement) signed by the disputing parties and the mediator as well. Then, the mediator reports the conciliation to the judge by enclosing a letter of agreement for concilement. Through the mediator, the pertinent parties may ask the judge to corroborate the Agreement of Reconcilement into the Deed of Concilement. Corroborating the Agreement of Concilement into the Deed of Concilement with an expectation that if one day, one of the disputing parties commit to do the content of the deed, the injured party may ask for execution to the court. That is because the Deed of Concilement is executorial and as powerful as the verdict with fixed legal power (*inkracht*). However, when the mediation does not work, the mediator should file it to the Judge of Case Investigation, which in turn, the judge will establish a decree to continue the process of case investigation based on the applied law.

In the case of mediation conducted outside the litigation, the pertinent parties may ask for assistance to an independent mediator as their mediator for the case they encounter. The mediation will be conducted without filing the case to the court. Hence, it is purely initiated by the disputing parties to commit concilement. Similar to the mediation in litigation, the final result to possibly happen is reaching a concilement or, otherwise, it will fail. When the mediation reaches the concilement, the pertinent parties along with the mediator's assistance should formulate a written agreement called the Agreement of Concilement signed by the pertinent parties and the mediator. Then, they should file the agreement to the authorized court in order to get the Deed of Concilement by filing the lawsuit. However, when the mediation does not work, the mediator will have no obligation to file the report to the court since there is no obligation with the court. Thus, the process of mediation outside the court is considerably completed, and the pertinent parties may solve the case using the expected model of resolution (whether litigation or another ADR model).

The Advantages and Disadvantages of Mediation in Indonesia

Toward the resolution of flat dispute, there are advantages and disadvantages for the pertinent parties in terms of selecting mediation as their way to seek for solution. The first advantage is that the disputing parties may flexibly discuss things they are disputing without getting stuck with any formalism. Second, the mediation is private and confidential. This confidentiality may attract some parties, particularly for businessmen, to solve their problems without any publication of the problem. As the process of dispute resolution may reveal some facts and information for the sake of the resolution, it should remain confidential. Concerns may reveal if the confidential information is spread out to public. When it happens, the confidential information can be used by the law-breakers for criminal purposes (Irina, 2018), which may potentially disadvantage their business in the next future. Therefore, it needs a process of dispute resolution that may assure the confidentiality of the pertinent parties. Third, mediation has a quick process. As mentioned in Article 24 subsection (2) and (3) PERMA 1/2016, the time spent for having mediation is 30 (thirty) days at most, and will be extended up to 30 (thirty) days more as the parties' request. It is different from the resolution through litigation which has no certainty on its period of time. Fourth, the successful mediation may result in win-win solution, thus, the disputing parties still have a good relationship in the next future. Fifth, in relation to relatively and measurably low budget, it may suppress the expense due to the short process of mediation, unlike the litigation which may spend more expense due to its longer process.

On the other hand, mediation has several limitations as well. First, toward the final result, it merely results in the Agreement of Concilement. This agreement is like other common agreements that contain rights and obligations for the pertinent parties for the sake of conciliation. However, when one of those parties breaks the content of the agreement, it may pose a conflict which leads to a new dispute for both parties. Thus, the Agreement of Concilement is not that powerful to provide a legal assurement for both parties. Therefore, it needs corroboration by turning the agreement into the Deed of Concilement. Second, mediation is not coercive. As the function of a mediator in a mediation is as a facilitator, not a judge, the mediation may not be conducted when one of/both of disputing parties have no willing to commit mediation. Third, if none of the disputing parties have a good faith to do mediation and prefer prioritizing their ego, the mediation may not work. In addition, if one of the disputing parties is sure that they may win the dispute, it implies that they prefer deciding to accept any judgment rather than having win-win solution through mediation.

Arbitration in Indonesia

In Indonesia, the arbitration process also acts as a sort of Indonesian Civil Law to settle disputes related to both civil and commercial transactions (Israhadi, 2018). The legal basis for arbitration in Indonesia is Act No. 30 1999 about Arbitration and Alternative Disputing Resolution (later known as Act of ADR). Article 1 subsection (1) of Act of ADR defines arbitration as a solution of civil cases outside the public court, and it is based on the agreement of arbitration made by the disputing parties. Hence, arbitration is defined as a solution of dispute by one or more arbitrators (an intermediary party or judge in case of arbitrator) based on an agreement of the disputing parties, and they will obey the resolution from their arbitrator (Umar, 2013). The disputed object to be solved through arbitration merely refers to sales objects and particular rights that fully belongs the disputing parties as mentioned in Article 5 subsection (1) Act of ADR. Article 66 subsections (b) Act of ADR, along with its explanation, has set the object of dispute to be solved through arbitration. It

sets that the objects to be solved through arbitration refer to the context of commerce, including sales, banking, financing, investment, industry, and intellectual assets. Based on Article 5 subsection (1) Act of ADR, associated with the explanation of Article 66 subsection (b) Act of ADR, the object of dispute to be resolved through arbitration has broad meaning, which is as long as the object is in the context of commerce law (Nia, 2016).

To put disputes with agreement into arbitration as a solution, the agreement should contain a clause of arbitration or an agreement of arbitration. One example of the clause of arbitration in Indonesia is that (Abdurrasyid, 2011):

> *"Every dispute with agreement will be resolved and decided by Badan Arbitrase Nasional Indonesia (BANI) based on the procedural regulation of arbitration through BANI, and the resolution may imbed the disputing parties, as the initial and final resolution."*

With the clause of arbitration, and based on Article 3 Act of ADR, the public court has no authority to judge any dispute to be solved through arbitration. In the process of arbitration, it actually has a process of mediation. Article 45 subsection (1) Act of ADR mentions that the arbitrator or the board of arbitrators should take efforts for concilement at first before the disputing parties attend the court at the predetermined date. Based on the article, it finds that the process of mediation reveals in the form of concilement the arbitrator/the board of arbitrators seeks for.

The Advantage and Disadvantage of Arbitration in Indonesia

Similar to mediation, arbitration has some advantages and disadvantages in its process, particularly for flats dispute resolution. The most prominent advantage of arbitration is apparent in its confidentiality. Article 27 of Act of ADR sets that every investigation of cases by arbitrator/the board of arbitrators is privately conducted. It actually deviates from the provision of Procedural Law of Civil Case in Indonesia, which should be open to public. However, it solely aims to give more emphasis on the nature of confidentiality in the process of arbitration to make sure the confidentiality of the disputing parties and prevent any unexpected publication. In case of time, arbitration has more effective time rather than the process of litigation. Article 48 of Act of ADR mentions that the time spent to seek for dispute resolution through arbitration is 180 (one hundred and eighty) days at most or about 6 (six) months since the arbitrator/ the board of arbiters is organized. On the other hand, BANI gives 3 (three) months period of time with 3 more months' extension (Abdurrasyid, 2011). Then, the resolution through arbitration is final and binding. It is different from the resolution through litigation which provides chances to do investigation that takes longer time. With final and binding result, the procedures of arbitration seem quicker with more measurable budget. However, it is undeniable that the budget is still high for some parties, yet it corresponds to the process of seeking for dispute resolution. In fact, it is lower than having litigation which may spend more expense with unmeasurable amount of money as it takes a very long time to seek for the resolution.

In addition to the advantages, arbitration has several disadvantages as well. First, the body of arbitration has no power or authority to do execution on their resolution. Thus, when one of the disputing parties is not willing to do the resolution, another party should file an appeal to the Chairman of local Public Court to do execution for the resolution (*vide* Article 61 Act of ADR). Second, it is related to the nature of arbitration as the part of adjudication. It is a dispute resolution by the third party, on behalf of the disputing party, to provide resolution for the case (Firmansyah, 2015). Unlike the resolution through mediation which

results in win-win solution, the resolution through arbitration is a win-lose solution. As the consequence, the sentenced party may see the result as an unfair solution and makes them feel grudge, making the business relationship between both parties suffer.

Med-Arb as a Resolution of Flats Dispute

In previous section, two kinds of ADR (i.e., mediation and arbitration) are discussed. However, those two methods have several limitations in its implementation. As the time goes by, therefore, an alternative resolution for dispute cases through a *hybrid* process by modifying those two resolutions into one has revealed. It merges arbitration with mediation, and it is known as Mediation-Arbitration (Med-Arb). Actually, this method has been popular in San Francisco, California, USA. Firstly, published by Sam Kagel; a pioneer that modified two methods into one unity to provide a resolution for a very controversial nurse-strike case in San Francisco in 1970s (Fullerton, 2010).

In case of flats dispute, one question reveals, "*Can this case be solved through med-arb?*" Before answering the question, it needs to discuss the natures of the case at first. The flat dispute discussed in this present study is one that derives from a Developer-Consumer Pre-Project Sales Contract/PPJB (*Perjanjian Pengikatan Jual-Beli*) that brings disadvantages to one of the parties. Those mostly disadvantaged in PPJB are consumers. Indonesia has a regulation for consumer protection that is Act No. 8 1999 about Consumer Protection (later known as Act of CP). This regulation sets an authorized body that solves a dispute between producers and consumers. It is *Badan Penyelesaian Sengketa Konsumen (BPSK)*, which may seek for solution on producer-consumer disputes.

However, seeking for solution on such cases is not always through BPSK since it may still be solved through litigation and non-litigation according to the pertinent parties' choice. It is mentioned in Article 45 subsection (2) Act of CP. The article has provided an authorization for all parties to select the forum of dispute resolution they prefer the most, particularly when their agreement has mentioned the clause of resolution forum such as BANI. Based on that clause, and for the sake of law, BPSK has no longer authority to provide resolution for cases between producer and consumers. It is related to the principle of freedom in having contract, as mentioned in Article 1338 BW emphasizing that a legitimate contract acts as a law that binds the contracting parties.

Another thing to be considered is whether BANI (as a body of arbitration in Indonesia) classifies a flat dispute into the object of dispute or not. It should be noted that some countries, such as Europe, may not consider this case as one to be solve through arbitration. In Indonesia, however, the case of consumer dispute is classified into one to be possibly solved through arbitration. As previously discussed, the object of dispute in BANI is related to the context of commerce, as mentioned in Article 5 subsection (1) Act of ADR. In addition, the flats dispute discussed in this present study is classified into commerce, and it can be solved through arbitration. As it can be solved through arbitration, it can be solved through med-arb as well.

As mediation has a variety of presentation and utilization, the disputing parties may discuss their cases and seek for a good solution they can afford, and everyone may utilize mediation. However, when the business stops or not reaching the expected goals which leads to the end of contract, the pertinent parties still have chances to solve the dispute through alternative methods, rather than filing the case into litigation (which may take more time and expense). They may go to the process of arbitration that results in a final and binding resolution. It notes that a mediator can be appointed as an arbitrator (or one of the arbitrators in a board of arbitrators). Appointing an independent party as an arbitrator is another option.

One powerful reason that makes a mediator may act as an arbitrator is that he/she has found which part of the case to be solved, and the pertinent parties have already mentioned the clause of arbitration in their agreement. When a mediator appoints an arbitrator to handle the case, the pertinent parties must want assurance for that. However, it may increase the expense they should pay (Abdurrasyid, 2011).

The Advantage of Med-Arb in Flat Dispute Resolution

1. Providing a Final and Binding Resolution: It should be noted that med-arb begins with a case filed to the Department of Arbitration. The process of arbitration promises a final and binding result for any cases that cannot be solved through mediation. The prominent characteristic of med-arb is its assurance on the final result, which is the nature of arbitration. As the resolution through arbitration is final, it may not be appealed for further legal actions (such as a request for appeal, cassasion, or judicial review). An arbitrator who is also a mediator in Med-Arb has full authority to make an Agreement of Concilement which is further corroborated with a final and binding resolution. It is different from a mediator; that merely makes an Agreement of Concilement.
2. Measurable and More Effective Expense: The time and expense during the process of Med-Arb is more effective and efficient as both mediation and arbitration are modified into a chronological and separable process. Hence, both the mediator and the arbitrator are the same person, when the mediation does not work well, the disputing parties will have arbitration as the next stage. They do not need to seek for the third party as the impartial one.
3. The Disputing Parties Are More Potential to comply with the Resolution: During the process of Med-Arb, it begins with mediation as the initial stage before having the process of arbitration. During mediation, the disputing parties discuss things they may deal with in order to reach concilement, which further be mentioned in the Agreement of Concilement. When those parties make the Agreement of Concilement, the deal is corroborated with a final and binding resolution from arbitration. They will be more potential to comply with the resolution since its content is based on their own agreement of concilement. It is totally different from the court by judges' consideration, which must sentence one of the disputing parties, and thus, break their legal relationship for the next future.

Although Med-Arb is not always appropriate for every model of flat disputes, the concept of Med-Arb may at least contribute to flat dispute resolution which contains the principle of justice and legal assurance, as well as the capability to solve problems without breaking any legal relationship between the pertinent parties.

CONCLUSION AND RECOMMENDATION

Flats dispute is classified into a civil case, including those that deal with consumers, which resolution can be found through litigation and non-litigation. Non-litigation method has a variety of alternative resolution. One of those is a *hybrid* process called mediation-arbitration (Med-Arb). In case of flat dispute, it may be solved through med-arb. The best solution to solve a more specific case that deals with consumers on a flat dispute through non-litigation method refers to Med-Arb. This method has several advantages, such as providing a final and binding resolution, more effective and measurable in expense and time, and a bigger potential for the pertinent parties to comply with the resolution.

In addition, it should be noted that when the dispute is expected to be solved using med-arb method, it should have the element of arbitration within. Ideally, the expense for arbitration should not be too high, considering the consumers' financial condition. Therefore, it should be more affordable for all parties. It will be another case if the dispute deals with a business contract which pertinent parties are from those with higher income. Given the absence of regulation on Med-Arb in Indonesia, it needs to set the period of time for mediation (if any) in arbitration. It aims to define the period of time spent in the procedures of med-arb in order to prevent any possible problems in the future.

REFERENCES

Abdurrasyid, H.P. (2011). *Arbitration and alternative dispute settlement (APS)*. Jakarta: Fikahati Aneska.

Firmansyah, A. (2015). Establish alternative patterns of financial service sector consumer dispute resolution in Indonesia. *Proceedings of the Seminar Nasional Penelitian dan PKM Sosial, Ekonomi dan Humaniora.*

Fullerton, R. (2010). Med-arbitration and its variants: Ethical issues for parties and neutrals. *Dispute Resolution Journal*, *65*(2), 52-154.

Irina, V.V. (2018). Verbal agression in virtual social environments. *Astra Salvensis, 6*(SI), 58-98.

Israhadi, E.R. (2018). A study of commercial arbitration and the autonomy of the indonesian arbitration law. *Journal of Legal, Ethical and Regulatory Issues, 21*(1),1-8.

Mahmud, M.P. (2009). *Legal research*. Jakarta: Kencana Prenada Media Group.

Merwe, C.V.D. (2015). *European condominium law*. Cambridge: Cambridge University Press.

Nia, K. (2016). Mediation-arbitration for land dispute settlement. *Sosiohumaniora,18(3)*, 207-217.

Purbandari. (2012). Legal certainty and protection on property marketing with pre project selling system. *Widya, 29*(1),12-18.

Umar, M.H. (2013). *BANI and dispute resolution*. Jakarta: Fikahati Aneska.

Wibowo, B.R. (2018). Introduction and stages of mediation in court. *Presented to the Pelatihan Sertifikasi Mediator Terakreditasi Batch 2 held by Jimly School Law and Government, Surabaya, Indonesia*.

Yudhantaka, L. (2017). The validity of the apartment sale and purchase contract with the pre-project selling system. *Yuridika, 32*(1), 84-104.