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Regulation of Commercial Dispute Settlement Mediation in the Perspective of Legal Assurance and Justice

Umar Hasan[1*], Suhermi[1], Sasmiar[1]
[1]Universitas Jambi, Indonesia

[*]Corresponding Author: umarhasan@unja.ac.id

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Abstract: *The Indonesian government is currently trying to formulate an appropriate and up-to-date formula for making regulations on mediation and settlement of commercial disputes. This is done by the Indonesian government to support various policies that have been made to ensure legal certainty so that investment can develop. Therefore, the authors are interested in bringing up the theme of this scientific article by analyzing comparative studies between Indonesia and Malaysia. The analysis in this article is about the mediation arrangement for the settlement of commercial disputes in Indonesia by comparing it with Malaysia to achieve legal certainty and justice. The research method used is normative juridical. The results of the study show that the regulation of mediation for the settlement of commercial disputes in Indonesia as regulated in Law Number 30 of 1999 in substance and structure does not meet legal certainty and justice. Meanwhile, in Malaysia, the arrangements for dispute resolution mediation regulated in the Kuala Lumpur Regional Arbitration Center Mediation Regulations and the 2012 Mediation Law (UU 749) have met legal certainty and justice. In the future, the concept of regulating commercial dispute settlement mediation in Indonesia and its substance and structure must meet legal certainty and justice. This scientific article concludes that the concept of regulating commercial dispute resolution mediation in Indonesia must be regulated separately because, in substance and structure, mediation and arbitration have different principles. It is preferable that the regulations that will be made in the future involve various parties related to the business world to produce representative regulations both nationally, regionally, and internationally; if necessary, Indonesia will become an alternative legal model for dispute resolution through mediation.*
Keywords: *Regulation, Dispute Resolution Mediation, Legal Certainty and Justice.*

Introduction

In a study of literature and everyday life, the terms "conflict" and "dispute" are often found. Conflict is an English term derived from conflict and dispute, terms from the word dispute (Rahmadi, 2011). In terms of dispute resolution so far, it can be done through two events: first, dispute resolution through litigation or court, which is the oldest form of dispute resolution; and second, dispute resolution based on out-

of-court cooperation, known as Alternative Dispute Resolution (ADR), also called mediation (Usman, 2003).

Mediation is an alternative form that can resolve disputes requiring regulation in the implementation process to obtain legal certainty and procedural justice (Rusli, 2012). It is hoped that the disputing parties can make peace. Because if it is understood etymologically, mediation means being in the middle and being assisted by a third party as a mediator to resolve the problem, where the third party here is neutral and impartial (Hanifah, 2016). Through a value perspective (good, bad, right, and wrong), I studied that dispute resolution through mediation is a peace process that both parties desire, which will create legal certainty and justice in a mediation process (Talib, 2010). 2013). The choice of mediation here is to achieve a feeling of peace because, in equilibrium, there is a value contained in the mediation process that is free from symbols of formality. This is where there is a value of freedom that will eliminate the dominance of the superior over the inferior (Arwana & Arifin, 2019).

In the application of dispute resolution utilizing mediation, of course, it will not be separated from the legal principles used as the basis for the formation of law in society to achieve the ideals of a good life together, which is primarily related to alternative dispute resolution by mediation (Rahmah, 2019). Here, the legal principle is the basic principle (fundamental) of the law, which are the limitations that will be the benchmark for thinking about the law (Erwin, 2015). Some regulations apply to alternative dispute resolution, including dispute resolution by mediation, namely the principle of good faith, contractual principles, binding principles, freedom of contract, and the direction of confidentiality (Wiguna, 2018). Mediation results from a written agreement made by the parties to the dispute and has a binding nature that must be carried out in good faith by the parties (Mulyana, 2019). In mediation, both parties benefit equally. Dispute resolution by mediation also has a principle that reflects the philosophy of final and binding dispute resolution, meaning that the results of a written agreement made by the disputing parties are critical and carried out in good faith (Mulyana, 2019).

A big problem currently being faced by the Indonesian people is law enforcement (Zainuddin, 2018). In terms of the quantity and quality of disputes that occur in society, there has been an increase from time to time. On the other hand, the state courts, which have the authority to adjudicate based on the law, have limited capabilities. Moreover, the state courts have recently been hit by a crisis of confidence (Usman, 2003). This condition should not be allowed to drag on because situations like this have the potential to lead to vigilante actions or the emergence of mass justice, which can cause chaos in people's lives (Nugroho, 2020). The solution that must be present is to develop an alternative dispute resolution in Indonesia that cannot be

offered in this alternative dispute resolution (Putra et al., 2021).

Dispute resolution through mediation in a dispute resolution process if the parties can not only be done out of court, as is done by non-governmental organizations and private institutions (Diah, 2016), but there is also an integrated dispute resolution mediation in a court system that is carried out by judges by reconciling cases; this is what is also known as judicial mediation (Syukur, 2012). The integration of mediation into a court system is a legal breakthrough that occurred in the 20th century.

This judicial mediation generally only resolves civil cases. However, some countries have implemented a judicial mediation system in minor criminal cases or criminal acts committed by minors, known as juvenile offender mediation (Bradshaw et al., 2006). In Malaysia, in addition to commercial dispute resolution mediation under the auspices of the Kuala Lumpur Regional Center for Arbitration (KLRCA), there is also community mediation, which can help resolve disputes within the environment without having to go to court (Khan, 2017). Apart from being a mediation that has been integrated with the court established in 2008, this has almost complete security with the judicial mediation procedures in Indonesia as regulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2008 concerning Mediation Procedures in Courts.

The Alternative Mediation Regulations in Dispute Resolution that will be discussed in this article are regarding commercial dispute resolution mediation as regulated by the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The theory used in writing this scientific paper is the theory of justice because justice is a commercial dispute resolution through mediation that leads to a peace process for the common good, which is wrapped in the value of justice, which in this case is procedural justice. If we examine justice, it is an abstract thing, but it cannot be denied that everyone desires justice (Nasution, 2015). Therefore, the law must be brought closer to justice through equity to straighten the law's human nature. This method is applied to the standard law system (Raharjo, 1991) because justice is a form of honesty that is based on the principle of equality, equal opportunity and freedom, and the direction of difference (two principles of justice) (Faiz, 2009).

The next very relevant theory used in this scientific article is the theory of legal certainty. According to Utrecht, legal certainty has two meanings: firstly, there are generalist rules so that individuals know what actions can be done and what cannot be done; and second, there is security for individuals from government arbitrariness (Syahrani, 2008), because of the existence of this generalist rule of law. Each individual should know what rights and obligations must be done and accepted by each individual.

The presence of legal certainty here is das sollen, which is a hope for justice

seekers from arbitrary action; with legal certainty, people will know what their rights and obligations are according to applicable law, because legal certainty is not only in the form of articles in the law but a goal that must be achieved in a country.

Method

The research method used in writing this scientific article is normative juridical and involves examining library materials or secondary data. According to Baader Johan Nasution, normative legal research studies legal principles, legal systematics, levels of legal synchronization, legal comparisons, and legal history (Nasution, 2008). The approaches used in writing this scientific article are: a historical approach, a path to the law (statute approach), a conceptual approach, and a comparative approach (Marzuki, 2010). In addition to the above method, this scientific article also uses a philosophical approach that is concerned with the object of the study of legal philosophy, which includes legal ontology, legal axiology, legal epistemology, legal theology, legal ideology, legal logic, and legal scholarship, all of which are related to the issues raised and examined in this scientific article.

Result And Discussion

Regulation of commercial mediation in Indonesia is regulated by Law Number 30 of 1999, which is regulated in only a few articles, such as Article 1 point (10) and Article 6. However, this law regulates more than just arbitration. Based on researchers' analysis, we can directly conclude alternative mediation, which is only contained in 2 (two) articles on arbitration arrangements. This substance regulates it, but it is not complete as in the case of arrangements regarding arbitration.

According to the author, the mediation arrangement in the law does not meet the demands of legal objectives, legal certainty, and legal benefits, especially to meet the needs of justice. After the researchers analyzed Law Number 30 of 1999 and the KRLCA Mediation Regulation, the 2012 Mediation Act (Act 749) and the KRLCA Mediation Regulation Scheme, it can be concluded that there are similarities and differences. There are similarities, namely:

1. The start of the mediation process is after the appointment of a mediator by the parties to the dispute or by an alternative dispute resolution/arbitration institution, with a period of 7 (seven) days as referred to in Article 6 paragraph (4) and paragraph (5). The mediation process is carried out in Malaysia after the disputing parties submit a written request to the KLRCA. The disputing parties have received a written response from the KLRCA, as referred to in Rules 3 and 6 of the KLRCA.
2. The appointment of a mediator can be made by the parties to the dispute or appointed by arbitration or other alternative dispute resolution institution if the parties fail to appoint a mediator. This is regulated in Article 6 paragraphs (3) and (4). In Malaysia,

the appointment of a mediator can be made by the parties to the dispute, which is based on a proposal from the KRLCA, or appointed by the Director of the KRLCA if the parties agree and it is based on a mediation agreement. This is contained in Rules 7 and 8 of the KRLCA Mediation Rules and Articles 7 and 8.

3. The mediation agreement is carried out using a written agreement between the disputing parties, as regulated in Article 6 paragraph (3). Meanwhile, in Malaysia, a mediation agreement is also made in writing by the disputing parties. It must be signed by the parties and contain the submission of all disputes to the mediator, following the intent of Article 6 paragraphs (1), (2) and (3).
4. The mediation process must be carried out within 30 (thirty) days and produce a written agreement signed by both parties to the dispute and related parties such as the mediator. The mediator upholds the confidentiality of this matter following article 6 paragraph (6). As for Malaysia, the mediation process is not defined, but the mediator is required to be able to settle commercial disputes following the agreement, as referred to in Rules 21 to 24 of the KRLCA Mediation Regulations, Articles 9 to 11, and the mediation process must end within 3 (three) months. According to Article 29 (d) of the KRLCA Mediation Regulations, unless the parties determine otherwise, this means that there is time uncertainty in the mediation process.
5. The principle of good faith is the basis for resolving commercial disputes through mediation, as regulated in Article 6 paragraph (1); good faith in Malaysia is also the principle in resolving a commercial conflict through mediation. This is in line with the intent of article 16 of the KRLCA Mediation Rules.
6. The end of mediation is when the parties have reached a peace agreement in good faith, made in writing and signed by the parties to the dispute. If an agreement is not reached, the parties based on the agreement can resolve the dispute through arbitration and ad-hoc arbitration.

The differences between Indonesia and Malaysia in mediation arrangements are as follows:

1. The place of trial for mediation cases is not regulated in Law Number 30 of 1999, which is based on the agreement of the disputing parties. Meanwhile, in Malaysia, where the mediation will be held, if not agreed upon, then the mediation must comply with the KRLCA Model Clause and Rule 22 of the KRLCA Mediation Regulations, which state that mediation is carried out at the KRLCA location.
2. The requirements to become a mediator are not regulated in Law Number 30 of 1999. Meanwhile,

Malaysia regulates the conditions to become a mediator as stated in Article 7 paragraph (2) letters (a) and (b), which state that the mediator must have qualifications that follow the knowledge and experience gained through a training program or a formal higher education or meet the requirements set by the institution related to the mediator process.

3. In the mediation process, the disputing parties can be represented by other parties such as lawyers or those who have full authority to settle commercial disputes; in Indonesia, this is not regulated in law, while in Malaysia, the granting of power is called representation and authority. It is regulated in Rules 16, 17 and 18 of the KRLCA Mediation Rules.
4. Mediation costs are high in the commercial dispute resolution process in Indonesian law. However, in Malaysia, the cost of mediation is carried out in detail; this is contained in Rules 29, 30 and 31 of the KRLCA Mediation Regulations and is also regulated in the KRLCA Fee Scheme.
5. The mediation process does not prevent the occurrence of a lawsuit to the court, arbitration, and so on, which is contained in Article 4 of the Mediation Law 2012 (Act 749), meaning that even though the dispute resolution is in progress employing mediation, the parties are still allowed to file a lawsuit. Court and arbitration, except for disputes resolved by judges, as well as lower court officials or court officials, and mediation conducted by the Legal Aid Department, as contained in Article 2 letters (a), (b), and (c) of the Mediation Law 2012 (Act 749). Meanwhile, in Indonesia, alternative dispute resolution, such as mediation, wants to set aside a dispute resolution with a litigation process, as referred to in Article 6 paragraph (1).
6. The role of the mediator in other trials is not regulated in Indonesia. However, the form of this role is that the mediator is not justified in acting as an arbitrator/ lawyer/ witness in another trial such as a court, arbitration related to the settlement of mediation disputes. Except for the parties' consent to the conflict, it is contained in Rules 35 and 36 of the KRLCA Mediation Rules.
7. Registration of the mediation agreement results at the local District Court in Indonesia is regulated in Article 6 paragraph (7). In Malaysia, the outcome of a mediation agreement reached by the parties is not required to be registered with the local court. In this case, the parties have good faith. They are consistent in carrying out the agreement from the mediation result because this is an order from the law and as regulated in Article 14 of the 2012 Mediation Law (Act 749).

Based on the explanation above, we can see similarities and differences in the regulation of commercial mediation between Indonesia and Malaysia. This equation is due to the general principles of mediation that apply to many countries in the world, even though each country has a different legal system. The general

principles for resolving commercial disputes through mediation are justice, expediency, and legal certainty (Hidayah, 2017).As the author explained above, there is also a philosophy that values and principles of dispute resolution mediation. The difference is caused by the legal system that applies in each country. It is also influenced by the legal and political system that is used in a country, which also influences the regulations that will be made by a government and whether the regulation is included in the priority scale or not. The habit factor also influences the resolution of a commercial dispute utilizing mediation, which is a source of law-making regulations, one of the differences in regulations in a country.

The advantages and disadvantages of a regulation mediating dispute resolution in Malaysia, when examined in terms of substance, procedure, and structure, have advantages compared to mediation arrangements in Indonesia. The system regulates the understanding of the mediation process in Malaysia:

1. Part I of the KRLCA Mediation Rules holds:
2. Application of mediation regulations;
3. Commencement of the mediation process;
4. There is an appointment of a mediator;
5. The role of the appointed mediator;
6. The role of the parties;
7. Have the authority and make the statement
8. Ensured the mediation process's confidentiality;
9. The occurrence of a mediation process;
10. The conclusion of a mediation
11. There is a mediation fee;
12. The existence of administrative assistance;
13. There are exceptions and responsibilities;
14. The role of the mediator in other trials; and
15. There is a fee scheme.
16. Part II relates to the fee scheme, which consists of fee scheme A regarding mediation confidentiality statements and scheme B explaining a mediation clause model.
17. Section III concerning the Mediation Law 2012 (Act 749) regulates:
18. Preliminary;
19. Regarding the interpretation of the terms mediation, independent party, mediation communication, mediation agreement, mediator, mediation costs, the responsibility of the mediator, and the Minister;
20. Mediation cannot prevent a claim from proceeding to arbitration or court.
21. The procedure for initiating a mediation;
22. Appointment of mediators;
23. Termination of the appointment of a mediator;
24. The role of the mediator;
25. Implementation of mediation activities;
26. There is a settlement agreement;
27. The existence of confidentiality and privileges

28. There are mediation costs and responsibilities.
29. Part IV regulates the Guidelines for the KRLCA Mediation Regulations, as the author has explained above.

Based on the above, the regulation regarding commercial mediation in Malaysia has been able to fulfill the demands of the purpose of the law, namely the existence of legal benefits, the presence of legal certainty, and most importantly, it has fulfilled the needs of justice.

The weakness of commercial mediation regulation in Malaysia is in writing regulations and laws that are not written in full, such as philosophical considerations (considering) the birth of a law/regulation, the absence of juridical relations (remembering) the lack of legal concerns. There are sociological considerations (stipulates), but there is no law/regulation number relating to the state gazette and additional state sheets. Meanwhile, in the State of Indonesia, a regulation/law is contained in the complete text of the law, starting from the name of the law, number, year, and regulations, including philosophical, juridical, and sociological considerations. This is due to the influence of the Continental European legal system, whose primary source of law is written laws or regulations. This affects the mention of the law, unlike the continental European legal system, as in recognition of the Mediation Act 2012 (Act 749).

If examined from the comparative aspect of commercial mediation regulations between Indonesia and Malaysia from the perspective of justice, it can be seen in Article 1 Paragraph 3 of the 1945 Constitution, which states that the State of Indonesia is a State of Law, but this article does not mention or explain what rules apply in this country. However, if studied based on existing facts, the Indonesian legal system combines Islamic legal techniques, customary law, and European law, especially Dutch law (Nurhardianto, 2015).

This legal system is binding and becomes a guideline for the Indonesian nation and state in acting in the life of the government and state following applicable rules. The Indonesian state applies a civil law legal system that has several characteristics, such as:

1. A legal system that has binding power because it is compiled in a systematic way in a law, which we know as the term "codification";
2. There is a separation of powers, consisting of the capabilities of legislators, judicial authorities, and non-interference with each other;
3. Having an inquisitorial system in a judiciary, in which the judge must play a role in being able to observe and trace the facts of the evidence before making a decision; and
4. The civil law legal system is the oldest legal system in the world, born in A.D.533.

Malaysia is a federal monarchy that is constitutionally led by the Yang Dipertuan Agung, also known as the King. Malaysia's system of government is the Westminister Parliamentary system of government, which is a legacy of British rule (Mubarok,

2021). Malaysia did not abolish the original law that existed before the British entered the existing legal system in Malaysia; Malaysia maintains the fundamental law following the culture in its society.

However, in a relatively long period, the principles of the standard law system began to show their influence on the government system in Malaysia, so that in legal cases in courts in Malaysia, the principles of the original law and Islamic law began to be excluded, or also called banned in Malay. Malaysia also consists of states, and there are also federal states.
Malaysia also knows the name of the constitution. This term in Malaysia is called an institution, better known as the Institutional Association of Malay Lands (PTM), the highest law in Malaysia. Institutions are written legal documents formed based on the two previous documents, namely the 1948 Malay Land Alliance Agreement and the Independence Institutionalization of 1957 (Hamda, 2012).

In addition to the constitution as written law in Malaysia, there are five other legal sources, namely *adat*, Islamic law, equity principles, judicial decisions (jurisprudence), and common law. In the legal system in Malaysia, there are also 7 (seven) sources of law that are then used as principles and/or arguments by the court in resolving a dispute.

Furthermore, the concept of justice between Indonesia and Malaysia has similarities, although the legal system adopted from a historical perspective differs. This can be seen in the idea or theory of justice used in Malaysia, a universal concept of justice and influenced by western thinkers who were fostered based on British common law and widely applied to countries in the world. In connection with this theory of justice, essentially every society must obtain equal justice, and the institutions of society must play a role in receiving this justice.

The concept of justice in Indonesia was also influenced by western thinkers, such as Plato, Aristotle, John Rawl, Hans Kelsen, and others; this can be seen in the author described in the previous chapter. This is indeed inseparable from the legal system adopted by Indonesia, which is based on continental Europe or civil law. According to Islamic thought in Indonesia, the concept of justice is also influential in law enforcement; this is because the majority of Indonesian citizens are Muslims. As in Malaysia, Indonesia also has the Civil Code, a derivative of the Dutch Civil Code, customary law and Islamic law regulations.

The legal objectives of the Malaysian legal system have similarities with the goals of Indonesian law, which are universal and aim at security, order, and peace, prosperity, and giving birth to happiness for all existing people. The enactment of the legal system that applies to a country will undoubtedly affect its law enforcement system.

In Malaysia, with a Federal System that is influenced by the standard law system, the mention of laws or regulations,

as the author mentions in the comparison of the regulation on commercial dispute resolution mediation between Indonesia and Malaysia, is not stated that the Malaysian legal system does not say the complete preamble, such as the preamble to the laws and regulations that are in Indonesia.

The legal system in Malaysia also only mentions articles at the statutory level, as in the 2012 Mediation Law (Act 749). However, at the regulatory level, under laws such as the KRLCA Mediation Regulations, they do not mention articles but call them rules. In the Indonesian legal system, philosophical, juridical, and sociological considerations are always mentioned, starting from the highest legal rules to the lowest level of the regulatory structure. Likewise, the writing of other elements is done in full.

Conclusion

Indonesia's commercial dispute settlement mediation regulations as regulated in Law Number 30 of 1999 have not been able to fulfill a sense of justice because, in substance and procedurally, they are not regulated perfectly systematically; moreover, the mediation regulation is only superimposed on arbitration regulations, which in substance and structure have differences. The principle one. Meanwhile, the Malaysian state in the regulation system of commercial dispute settlement mediation is more perfect and systematic, so that it has fulfilled the community's sense of justice. Concerning the concept of regulation of commercial dispute resolution mediation in Indonesia, it is appropriate to set it up in a separate regulation because, in substance and structure, mediation and arbitration have different principles. The concept of regulation must follow the development of global business law to ensure legal certainty and justice.

If necessary, Indonesia could establish a model law for alternative dispute resolution via mediation. Concerning Mediation Institutions in Indonesia: Mediation institutions in Indonesia should be united in an institutional forum, namely the "National Mediation Center (PMN)," in which there is a list of mediators according to their respective expertise, and which has branches in each province. This is to prevent complicated bureaucracy related to place, timeliness, and cost.

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