

Conceptual Article

Exception of Mediation Procedure in Bankruptcy Cases According to Supreme Court Regulation Number 1 Year 2016

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ABSTRACT

Mediation in Court is regulated in Supreme Court Regulation Number 1 Year 2016 including the exception. This article aims to examine cases with exception of mediation procedure based on PERMA Number 1 Year 2016 and to identify why Bankruptcy Application in Commercial Court is one of cases with exception. This study finds that PERMA (Supreme Court Regulation) Number 1 Year 2016 exempts cases in Commercial Court, Industrial Relation Court, Objection to the Decision of the Indonesia Competition Commission, Decision of Information Commission and Decision of Consumer Dispute Settlement Agency, Application for Annulment of Arbitration Award, Political Party Dispute, Small Claim Court and Cases with time frame. Bankruptcy Application according to Laws of Bankruptcy in Commercial Court is carried on using speedy procedure, a direct legal remedy to the Supreme Court. Its Application and resolution are within limited time period.

Keywords: Mediation; Commercial Court; Bankruptcy Application.

A. INTRODUCTION

Dispute Settlement can be resolved either in court or out court. Out court dispute settlement begins when there is no satisfaction over the process of dispute settlement in court which usually takes relatively longer time and costs some money.

In the settlement of civil cases, court is not the only media that can be used to settle the cases. In 1976, Chief Justice Warren Burger asked participants of a conference consisting of scholars, judges, and lawyers to find a way to settle a dispute. Since then, Alternative Dispute Resolution (ADR) has developed as an alternative to out court dispute resolution (Mamudji, 2004), "settlement via alternative dispute resolution (ADR) methods can be promising options available to all stakeholders involved in urbanization

era, i.e. developers, government agencies and citizens at large" (Abdullah, 2015).

Forms of ADR according to Suyud Margono are: (1) Consultation; (2) negotiation; (3) Mediation; (4) Conciliation; (5) arbitration; (6) good offices; (7) mini trial; (8) summary jury trial; (9) rent a judge; and (10) med arb (Kapindha, Dwi M, & Sabrina, 2014).

"As a flexible, economic and speedy dispute resolution mechanism, arbitration is becoming increasingly crucial for the fast-developing" (Han, & Li, 2011), however, dispute settlement through arbitration is win lose judgment, thus, along with its development, mediation using win-win solution (Puspitaningrum, 2018) becomes favorable.

Mediation can be defined as : "Mediation was one of the alternative for solving methods, a voluntary procedure, where the conflicting parties have the

chance to express their interests, supported by a third neutral and unbiased person, without power of decision, the mediator is qualified to assist the parties during negotiation, enabling communication between them in order to take the most satisfactory decisions, this way helping them to reach an agreement unanimously accepted, an efficient and long-lasting and confidential one" (Radulescu, 2012).

In mediation, mediator appointed by the disputing parties has to be a neutral person or a neutral institution which is capable to accommodate all the parties (Kartoningrat, & Andayani, 2018). "Mediation is most effective when supported by organizational commitment to ADR strategies, policies and processes, and conducted by independent, experienced and qualified mediators" (McKenzie, 2015).

Dispute settlement is not always conducted through a trial in court. Ways to settle dispute can also be done effectively and efficiently in a settlement institution. Settlement in law of civil procedure is commonly known as *dading* (Nugroho, 2017), regulated in Article 130 HIR/Article 195 RBg. This Article is an article aiming to gain more benefits of a court reformation policy.

According to Soerjono Soekanto, "Dispute is discord among persons or groups related because one of the party rights is violated" (Sufiarina, 2014).

The Supreme Court of The Republic of Indonesia has established some trials as pilot projects such as Batu Sangkar District Court. Some District Courts, such as South Jakarta District Court, Muara Enim District Court, has settled some cases through mediation (Sugiatminingsih, 2009).

In the settlement of civil cases in court, when the parties involved has been properly summoned and attended the first trial, the judge has an obligation to offer settlement to those parties. According to provision of Article 130 HIR/154 RBg, The judge who handles civil cases must always first seek effort to a settlement to the parties involved in the case (Daud, 2000).

Before mediation is conducted, it is necessary to take into account the presence of both parties involved, The Explanation of Mediation Procedure by Panel of Judges, The Appointment of Mediators, and The Delay of the examination of the case by the Judge handling the case (Mardhiah, 2011).

The result of this settlement effort is in the form of a settlement agreement. A settlement agreement is an agreement resulted from the mediation in the form of a document containing provisions of dispute resolution signed by the parties involved and the Mediator (Arwana, & Arifin, 2019).

In addition to reducing the accumulation of cases in the court, mediation also aims to optimize the role of judges as the agent of reconciliation for the disputant as regulated in Article 130HIR and 154 RBg (Sari, 2017).

The latest regulation concerning settlement is stipulated in Supreme Court Regulation of The Republic of Indonesia Number 1 Year 2016 on Mediation Procedure in Court (hereinafter referred to as PERMA No. 1 Year 2016). PERMA is an elaboration of settlement institution stipulated in Article 130 HIR/154 RBg. The concept of mediation is integrated into settlement process in court because

both HIR and RBg do not regulate the settlement procedure in detail (Witanto, 2011).

Article 4 section (1) PERMA No. 1 Year 2016 stipulates that all forms of civil disputes brought to court must first undergo an amicable settlement process through mediation process, unless PERMA stipulates different way (Ardy, Sihabudin, & Novianto, 2018).

Article 4 section (2) PERMA No. 1 Year 2016 stipulates that there is exception to dispute resolution through mediation in Commercial Court having the authority to examine and to decide the application of bankruptcy.

There are some previous studies on the same issue. The first study is a study by Septi Wulan Sari entitled Mediation in Regulation of The Supreme Court of The Republic of Indonesia Number 1 Year 2016. In this study, Sari only focused on analyzing the characteristics of mediation process based on PERMA No. 1 Year 2016, and the conclusion of this study is that Mediation is an action taken by any parties involved in order to solve a dispute between two or more parties through negotiation and discussion in a search for an amicable settlement (Sari, 2017).

The second study is a study by Laurensius Arliman S entitled Mediation Through Amicable Settlement as An Alternative Dispute Resolution Institution to Support National Economy Development. Laurensius Focuses on the role of mediation as an alternative institution for dispute settlement in supporting national economy development and the role of amicable settlement approach (Arliman S, 2018).

The third study is a study by Sindy Firginia Angelica Koloay entitled Legal Review of Mediation Procedure in Solving Civil Cases in District Court According to Regulation of The Supreme Court of The Republic of Indonesia No. 1 year 2016 on Mediation. This study focused on what the procedure of mediation in court is according to PERMA No. 1 Year 2016 and how the implementation of the integrated mediation in court is (Koloay, 2018).

The fourth is a study by Abdul Halim Talli entitled Mediation in PERMA Number 1 Year 2008. Talli conducted a research on the role of mediators as a neutral party who help resolve the dispute. This neutral party's main job is to give assistance to the parties involved in a dispute to understand each other perspective on the matter disputed, and then helps them to make objective assessment out of the whole situation (Talli, 2015). This study was conducted in 2015 when PERMA No. 1 Year 2016 was not issued yet, thus it is no longer relevant to discuss Mediation by referring to PERMA No. 1 Year 2008.

The fifth study is the study by Sufiarina entitled A Catch 22 of Mediation Procedure Regulation in Court on The Settlement of Sharia Economy Bankruptcy Settlement in Indonesia. In this study, Sufiarina reported that the amendment of PERMA No. 1 Year 2008 into PERMA No. 1 Year 2016 makes it possible to resolve sharia economy bankruptcy in Religious Court. This may potential cause authority overlapping between Religious Court and Commercial Court in issuing a decision for a bankruptcy case (Sufiarina, 2019).

The sixth study is a study by a German researcher, Ludek Kolecek entitled Bankruptcy Laws

and Debt Renegotiation. This study reported the effect of the practice of Bankruptcy Laws on the number of liquidation in simple loan business using asymmetric information which does not allow creditors to credibly commit to liquidate their company if the companies suffer loss. Ludek said "that if the liquidation costs are high, softer bankruptcy law is preferred" (Kolecek, 2008).

The seventh study is a study by Emanuele Tarantino (an Italian researcher) entitled "Bankruptcy law and corporate investment decisions". In this study, Emanuele reported that big European Countries have recently adopted bankruptcy law which strengthens business entity stand to renegotiate the unpaid debt obligation. Emmanuele stated that "Renegotiation in bankruptcy allows lenders to increase recovery rates, however it also weakens the contract's ability to solve the moral hazard problem embedded in the production project". This means that the bankruptcy law in some big European Countries has stood on the business entity side (Tarantino, 2013).

The eighth study is a study by Ariane Lambert-Mogiliansky, Konstantin Sonin & Ekaterina Zhuravskaya entitled "Are Russian Commercial Courts Biased? Evidence From A Bankruptcy Law Transplant". In this study, Lambert and Mogiliansky examined judicial bias tendency in bankruptcy process after the enactment of Bankruptcy Law Year 1998 in Russia: "These findings are consistent with the view that politically strong governors subverted enforcement of the 1998 bankruptcy law" (Lambert-Mogiliansky, Sonin, & Zhuravskaya, 2007).

Based on those studies, the researcher did not find any similarities with the focus of this study. This study, in fact, does not discuss the implementation of mediation process as in a study by Septi Wulan Sari, Laurensius Arliman S., and Sindy Firginia Angelica Koloay; this study does not focus on the role of mediator as discussed in a study by Abdul Halim Talli nor discussing the chance of authority overlapping between Religious Court and Commercial Court as in a study by Sufiarina; this study does not examine judicial bias tendency in bankruptcy process in Russia as in a study by Ariane Lambert-Mogiliansky et.al; this study does not focus on bankruptcy regulations adopted by most of European Countries as in a study by Emanuele; and also, this study does not explains and elaborate the effect of the implementation of bankruptcy law on the number of liquidation as in a study by Kolecek Ludek.

In this study, the researcher focused on the exception of mediation procedure concerning bankruptcy application in Commercial Court according to PERMA No. 1 Year 2016.

Based on the aforementioned elaboration, the main question is "What cases are exempt from mediation procedure according to PERMA No. 1 Year 2016? and Why Bankruptcy Application in commercial Court are exempt from mediation procedure?".

B. DISCUSSION

1. Cases which Are Exempt from Dispute Settlement through Mediation According to PERMA No. 1 Year 2016.

Gary Goodpaster has a wide definition of mediation: mediation is a mediation negotiation process of dispute resolution in that there is an outside party, which does not take any stand and is neutral, working together with the parties involved in the dispute to assist them reach an amicable settlement agreement (Saifullah, 2009).

After the enactment of PERMA No. 1 Year 2016, it is mandatory for all civil cases registered to court to first go through a mediation. The courts mentioned here are Court of First Instance and Court of Appeal in the area of Religious and District Court. The term "mandatory" to first find settlement through mediation means that settlement through mediation according to PERMA No. 1 Year 2016 is imperative.

Article 4 PERMA No. 1 Year 2016 stipulated that disputes which are exempt from settlement through Mediation as mentioned in section (1) consist of (Hadiati, & Tampi, 2017): disputes which are examined within certain time frame in court such as: 1. disputes which are settled through Commercial Court; 2. Industrial disputes which are settled through Industrial Relation Court; 3. objection to Decision of Indonesian Competition Commission ; 4. objection to decision of the Consumer Dispute Settlement Agency; 5. Application for Annulment of Arbitration Award, , and Cases with grace period; 6. objection to decision of Information Commission; 7. political party dispute settlement; 8. disputes which are settled through small claim court; and 9. other disputes which are examined within certain time frame determined by legislations.

Provision of the exception of the implementation of mediation procedure is not

limitative as stipulated in Article 4 PERMA No. 1 Year 2016. However, there is potential to omit mediation procedure for other disputes which are not mentioned in Article 4 because Article 4 only mentions certain types of disputes. Thus, it is still possible for other types of disputes to omit mediation procedure in their settlement process (Sufiarina, 2019).

The exception of dispute settlement concerning bankruptcy and suspension of debt payment obligation (PKPU), dispute of industrial relation (PHI), consumer dispute and business competition dispute is made by PERMA No. 1 Year 2016 because the settlement of those types of cases is limited within certain time frame. The settlement of bankruptcy application must be settled within 60 days in Commercial Court of First Instance, within 60 days in cassation level, and 30 days for Judicial Review, thus, in total, the settlement process of bankruptcy application needs to be completed within 150.

Industrial dispute settlement must be settled in industrial relation court within 30 days. In addition, the settlement process of industrial relation begins with mediation in its initial step and if the mediation is failed, claim can be registered to Industrial Relation Court where it takes 50 (fifty) working days for Industrial Relation Court to issue a decision. (Santoso PN, 2018).

Consumer Dispute Settlement Agency (BPSK) must issue decision not more than 21 working days after the claim accepted. Within not more than 7 working days, the parties involved will receive the decision, and, not more than 14 working days since the announcement of decision, the parties may file an objection to District Court. If within those 14 working

days period since the announcement of the decision, the parties do not file any objection, the court considers all parties involved accepted the decision of Consumer Dispute Settlement Agency (BPSK) and if within the time frame the decision of Consumer Dispute Settlement Agency is not executed by the parties involved, BPSK may submit the decision to investigator as proper initial proof to conduct an investigation. If there is an objection from any of the parties, District Court must issue decision within not more than 21 days since the day the objection received by the court; and upon District Court decision, the parties may file cassation to the Supreme Court of the Republic of Indonesia within not more than 14 days, then the Supreme Court is required to issue a decision within not more than 30 days after cassation application received.

2. Exception of Settlement through Mediation in Bankruptcy Application in Commercial Court.

Settlement of bankruptcy application in commercial court is one of cases with exception. This means that it is not mandatory for bankruptcy application in commercial court to be settled through mediation process when both parties (the plaintiff and the defendant) attend the first trial. Prohibition or non mandatory mediation for settlement in PERMA No. 1 Year 2016 is made for some reason as follows: (1) settlement of bankruptcy application in commercial court is conducted in a short period of time, (2) there is certain time frame for the settlement of bankruptcy application in commercial court, (3) legal remedy can be taken in the form of direct action to Supreme Court of the Republic of Indonesia within certain time frame of case examination, and (4) verification of

bankruptcy application in Commercial Court is simple.

a. Settlement of bankruptcy application in Commercial Court is conducted within short period of time

Law Number 37 Year 2004 on Bankruptcy and Suspension of Debt Obligation as the improvement of Law No. 4 Year 1998 on The stipulation of Government Bankruptcy Regulation in Lieu of Law (Perpu) into Legislation which has existed and has been enacted is law makers' effort to ensure the continuity of economic activities in various sectors particularly the ones related to fund turnover in the society (Burlian, 2016).

According to Article 8 section (5) Bankruptcy Law and Suspension of Debt Payment Obligation (PKPU), bankruptcy decision issued by Commercial Court and cassation decision issued by the Supreme Court of the Republic of Indonesia must be made within not more than 60 days, while in Article 302, it is mentioned that decision of judicial review must be made within not more than 30 days. This regulation of time frame aims to ensure bankruptcy process in court is progressing within short period of time.

In contrary, criminal cases (which at that time including bankruptcy cases) apply different procedure. The party which is unsatisfied with bankruptcy decision from District Court may file an Appeal, Cassation or even Judicial Review.

There is no regulation concerning filing an Appeal in Law of Republic of Indonesia Number 37 Year 2004 in order to ensure that the settlement of bankruptcy cases can be done within short period of time.

b. The Settlement Process of Bankruptcy Application in Commercial Court has limited time frame

Bankruptcy procedure, starting from the registration of the application until the court decision is made, must be completed within time frame of not more than 60 days, as stipulated in Article 8 section (4) Law of Bankruptcy and PKPU. Debt settlement must be resolved in a short period of time and effectively in court so that the business can gain foreign investors' trust back, and the country's economy may recover soon during that moment (Muladi, 1998).

Fast settlement is also done through simple verification in debt verification for bankruptcy cases in Commercial Court. Cases with difficult and complex debt verification which in turn causes more time to be settled are not the authorization of Commercial Court. The authorization of such cases belongs to District Court.

Regulation stipulating 60-days time frame for bankruptcy cases settlement in Commercial Court may result in faster case settlement process, meeting the period required within the time frame, and no more bankruptcy cases held. Different from the previous regulation, according to Circular of Supreme Court (SEMA) of The Republic of Indonesia Number 6 Year 1992, the settlement of civil cases (in this case including bankruptcy cases during that period) in District Court is resolved in 6 months (180 days), and this time frame may be extended under permission of Chief of District Court.

c. Legal remedy in Bankruptcy in the form of direct legal action to Supreme Court of the

Republic of Indonesia and time frame of cases examination

The party which is unsatisfied and suffers loss as a result of the decision of Commercial Court may file direct legal remedy to Supreme Court through Cassation (this is different from the regulation existed before the establishment of Commercial Court in that the unsatisfied party must first file an Appeal before Cassation). If, still, there is no satisfaction with the Cassation decision, Judicial Review can be filed. The time frame to complete the Cassation is 60 days, while to complete Judicial Review is 30 days.

With the possibility of making legal remedy of bankruptcy decision directly to Supreme Court without having to filing an Appeal to District Court, the settlement of bankruptcy cases as stipulated in Law Number 37 Year 2004 may be processed in shorter period of time. Case settlement starting from the registration of bankruptcy application to Commercial Court to the issuance of Supreme Court decision only takes 150 days.

Here are the procedures for direct legal remedy:

(1) The application of Cassation attached with cassation memory must first be registered to the Registrars of Commercial Court in 8 days after bankruptcy decision issued.

(2) The registrar then takes the application to the defendant (the opponent of the party which files cassation) in maximum 2 days since the application is registered.

(3) The defendant may file cassation contra memory to answer cassation memory filed by the plaintiff and deliver it to the Registrar within not more than 7 days.

(4) The Registrar then will deliver cassation contra memory to Cassation plaintiff in maximum 2 days after cassation contra memory is received.

(5) The Registrar then must pass cassation application, cassation memory, cassation contra memory along with case archives to Supreme Court of The Republic of Indonesia in maximum of 14 days after Cassation application is registered.

(6) The Supreme Court of the Republic of Indonesia will determine the date for the examination of Cassation application in not more than 2 x 24 hours.

(7) The examination of Cassation application starts in maximum 20 days after the application is received by the Supreme Court.

(8) Cassation decision is issued maximum 60 days after cassation application is received by the Supreme Court.

(9) Registrar of the Supreme Court must pass the copy of Cassation decision to the Registrar of District Court in maximum 3 days after the date of cassation decision determined.

(10) The bailiff of Commercial Court must deliver the copy of cassation decision to the Plaintiff, Defendant, Curator, and Supervisory Judge in maximum 2 days after Cassation decision is received.

(11) The party which is unsatisfied with the cassation decision may file Judicial Review to The Supreme Court. Judicial Review may be filed if there is new evidence. The application of Judicial Review must be passed to Registrar of Commercial Court and then be passed to Registrar of the Supreme Court. The decision of Judicial Review is issued in 30 days.

(12) The copy of Judicial Review must be passed to all the parties involved in maximum 2 days after the

decision is announced by the Supreme Court of the Republic of Indonesia.

d. Verification of bankruptcy application in Commercial Court is simple

The principle of simple verification means that bankruptcy decision must be made by the Judge if there is fact or situation that is simply proven that the requirements to be bankrupt according to Article 2 section (1) Law RI Number 37 Year 2004 has been fulfilled. This principle is associated with the principle of fast settlement of cases.

Ricardo Simanjuntak (the Former General Chief of Indonesia Curators and Administrators Association/AKPI) stated that Indonesia Bankruptcy Law cannot hold Insolvency Test system because, in order to be categorized to insolvency situation (Simalango, 2017), which is an inability to fulfill financial obligation on the due date as normally occur in business context, or a situation where financial obligation is way bigger than the asset in certain period of time (Fuady, 1999), the company which is about to be declared bankrupt must continuously suffer loss and lose its asset up to more than 50% (percent). Considering this, Indonesia only holds the assumption of unable to pay. This assumption is made according to legal assumption conveyed in Article 2 section (1) Bankruptcy Law (Rahayu, 2009).

Based on aforementioned explanation, if Mediation for bankruptcy application in Commercial Court is permitted or is not prohibited, the time frame of bankruptcy application settlement is reduced, consequently the settlement of bankruptcy application in Commercial Court will take longer time.

The time frame of bankruptcy application settlement is 60 days in Commercial Court in first Instance, 60 days in cassation level, and 30 days for Judicial Review. If this time frame is combined with the time frame for mediation, which according to Regulation Of Supreme Court of The Republic of Indonesia Number 1 Year 2016 on Mediation procedure is 30 days, the process of bankruptcy application settlement will take longer time.

The total time needed to resolve bankruptcy application from court of first instance to cassation and judicial review if mediation is mandatory, as stipulated in PERMA No. 1 year 2016, is 230 days. This definitely is not in accordance with the principle conveyed in Law Number 37 year 2004 on Bankruptcy and Suspension of The Obligation of Debt Payment which is to solve bankruptcy application in short period of time. Therefore, PERMA No. 1 Year 2016 gives exception for the settlement of bankruptcy application in Commercial Court to be proceeded without mediation.

C. CONCLUSION

Based on the result of this study, it can be concluded that: PERMA No. 1 Year 2016 regulates the exception to certain cases to be resolved through mediation. Those certain cases are cases settled through procedures of Commercial Court, Industrial Relation Court, Objection of Decision of Consumer Dispute Settlement Agency, and Objection of the Decision of Indonesia Competition Commission.

In addition, mediation is prohibited and is not mandatory for bankruptcy application in Commercial Court because: a.Settlement of bankruptcy

application in Commercial Court proceeds fast; b.In resolving bankruptcy application in Commercial Court, There is time frame for resolving bankruptcy application in Commercial Court; c.Legal remedies proceed directly to Supreme Court of The Republic of Indonesia, and there is regulation on time frame for case examination; d.Verification for bankruptcy application in Commercial Court is simple.

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