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Legal Binding of Deed of Settlement Resulted from Court Annexed Mediation in Ternate District'S Court

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Abstract
Civil dispute settlement through mediation in term of deed of settlement in the way of the court is subject to the rules and procedure as stipulated in the Supreme Court Decree (hereinafter referred to PERMA) No. 1 of 2008 on Mediation Procedures. Deed of settlement has executorial power. If one party does not obey (default) the decision of the settlement, the other party has right to request to the court to execute the desicion. The legal binding of the deed of settlement is similar to article 1858 (1) of the Civil Code and article 130 (2) HIR.
Keywords: Deed of Settlement, Mediation, Ternate District's Court

1. Introduction

A probmatic of law takes place due to many civil disputes are carried out in the area of law matters in which Indonesia court's process is showing ineffectiveness and inefficiency in the area of procedure laws process. As it is known, the procedure laws will be taken place in years to solve the disputes, while for the justice seeker communities, they need informal procedure and put into motion quickly. Mediation, in one hand, is one of alternatives dispute settlement to reduce the number of cases in the court. The idea of mediation itself comes from Latin word "mediare' that means –in the middle-.[1]

In Indonesia practice, the first promulgation of regulation requiring mediation before a case may be heard in court was the Supreme Court Decree (hereinafter referred to PERMA) No. 2 of 2003 on Mediation Procedures. It revised then in 2008 with PERMA No. 1 of 2008 on Mediation Procedures and re-revised with PERMA No. 1 of 2016, which is now in force. Article 6 of PERMA No. 1 of 2016 states that "mediation process basically is based on the closeness principle except both parties decide others". The article 6 of it means that the process of mediation can be conducted in 2 (two) types of meeting. First, the mediation must be closed to public; and second, the mediation is opened to the public. Both types of it must be agreed by the parties.

In the process of court annexed mediation either closed or opened to the public, it must be agreed by both parties. The result of it will be put in "deed of settlement" to show that mediation is successful or if one party is absent, the mediation is failure.

The mediation should take place within 40 "working" days as stipulated in article13 (3) of PERMA No. 1 of 2016. If it is failure due to there is no deal between the parties as stipulated in article 15, the mediator will submit in writing to court that the mediation is failure. However, this time may be extended up to a further 14 working days upon request by both parties to allow further negotiations.

If it is successful, the mediator assists the parties to draw up a deed of settlement, which must be signed by the parties themselves, not only their counsel. The deed itself should state that the lawsuit is withdrawn. This is reviewed by the judge at a final hearing and it becomes equivalent to a final, binding, enforceable, and judgement.

The deed of settlement has executorial power. If one party does not obey (default) the decision of the settlement, the other party has right to request to the court to execute the desicion. The legal binding of the deed of settlement is enforceable as mentioned in article 1858 (1) of the Civil Code and article 130 (2) HIR. Both articles indicate that the deed of settlement is binding as if the court's desicion (res judicata).

Therefore, based on the description as mentioned above, the article will examine 2 legal issues; first, how the process of civil dispute settlement in court annexed mediation is conducted?; and second is how the legal binding of the deed of settlement in the District Court?

2. Literature Review

2.1 Meaning of Mediation

Mediation is one of alternatives dispute settlement. According to Denaldy Mauna,[2] it has some dispute settlement processes, as follows:

a. *Litigation*. The dispute in it will be settled by the court;
b. *Arbitration*. It is one types of dispute settlement process that draws the procedure and the arbiter will be chosen by the parties to create desicion and will bind the parties.

[1] See Gary Good Paster, 1999, *A Guide to Negotiationd Mediation,* transleted by Toger Simanjuntak, Project ELIPS, Jakarta.
[2] See Denaldy Mauna, 2002, *Mediator's Skill*, a Paper in Training of Mediator, the Indonesia Supreme Court, Jakarta.

c. *Consiliation*. It has same characteristic with arbitration but it is governed by the Laws;
d. *Conselling*. It means that there will a process of *therapeutic* to give advice for the parties in order to assist them handling their problems;
e. *Negotiation*. It has some elements in its process of dispute settlement such as discussion, education, persuasive approach, and bidding process with the third party to deal with the case;
f. *Facility* of the process to be used in the dispute involving the third party;
g. *Case appraisal/neutral evaluation*. The third party has position to give an overview of the cases based on the facts;
h. *Mini Tria*. The process of dispute settlement to solve the case through exchange information attended by executive senior of each organisation; and
i. *Provati judging*. It has almost chacateristic to arbitration, which ex-judge acts to give desicion over the case and its desicion will bind the parties.

It can be also found some references or literatures that explain the meaning of mediation, such as:[1]

1) Mediation is a way to settle dispute through negotiation process between the parties assisted by the mediator to deal with the dispute;
2) Mediation is a negoatiation process to solve the parties's problem, which the third party – called mediator - is impartial and neutral. The mediator has no power to decide the dispute between the parties. The parties' dispute ask the mediator to assist them to find out the way to solve their poblems. It is assumed that the mediator has ability and capacity to change social dynamics of the parties particular in terms of conflict relationship between the parties. The mediator is trying to influence the parties in order to give them information and knowledge through the negotiation process in effective ways to help them to deal with the disputes they are facing;
3) Mediation is a middle procedure process in which someone acts as "*a vehicle*" to communicate between the parties's dispute in order to have the same overview on the dispute they have. It is expected that the dispute can be peaced or possible to be peaced. However, the parties have their own responsibility to solve their dispute and decide to solve it in peaceful way.

2.2 The legal binding Concept of the Deed of Settlement

The legal binding concept of it is similar to article 130 HIR, which states that the deed of settlement has the same legal binding to the court desicion. However, the desison on the deed of settlement can not be appeal and cassation. It has also executorial power. It means that the desicion of it is executable. If one party default to do it, the other party can ask to the court to execute it.

3. Research's Methods

The type's research is a normative legal research to recite the rules in positive law.[2] The research's approach will be used is statute, case, and conceptual approaches. Sources of legal materials used in this research are the primary and secondary legal materials. The primary legal materials are authoritative in the form of legislation such as the Indonesian Constitution, and the PERMA No. 2 of 2003 on Mediation Procedures. It revised then in 2008 with PERMA No. 1 of 2008 on Mediation Procedures and re-revised with PERMA No. 1 of 2016,.

The secondary legal materials further are materials either published or unpublished such as some literature (books), legal journals, the law scientific papers and articles.[3] Research's analysis is qualitative analysis. It means that content of the used materials in the research will interpret the law based on the theories and principles of law and then presented in a descriptive form that provides an overview of the legal binding of the deed of settlement in court annexed mediation.

4. Finding and Discussion

4.1 The Process of Civil Dispute Settlement in Court Annexed Mediation

In the context of dispute settlement in the court, the first compulsory way to be reached is "settlement" either between the dispute's parties or through mediation. The settlement is governed in Indonesian Civil Code (hereinafter referred to KUHPerdata) , which states: "a settlement is an agreement in which parties, by handling over, agreeing, or retaining a matter, resolve a matter which is pending suit or prevent a suit. This agreement shall be valid only if it is concluded in writing".

It can be concluded from the article that the settlement must be an agreement agreed by both parties in order to end the processing matter or to prevent the matter arise. The basic regulation (formal laws) is governed in

[1] See Department of Education and Culture of Republic of Indonesia, 2008, *A Great of Indonesian Language Dictionary,* Balai Pustaka, Jakarta.
[2] See J. Ibrahim, 2008, *Theory and Method of Normative Legal Research*, Bayu Media Publishing, Malang.
[3] See Peter Mahmud Marzuki, 2007, *Legal Research*, Kencana Prenada Media Group, Jakarta.

article 130 HIR jo. article 154 RBG which states:

(1) If the day of the dispute's party coming in the court, the District Court (hereinafter referred to PN) through the Head of PN tries to settle the dispue's parties;
(2) If the settlement is successful, it will be created "the deed of settlement" and the parties must obey the deed. It has also legal binding and must be executed by the parties; and
(3) No appeal.

If in terms of settling the parties is needed the language expert, it will be a further regulation on it.

Based on the formula of article 130 HIR jo. article 154 RBG as mentioned above, it can be summarized that the judge in court will request the parties to solve their disputes through "the settlement". If it is successful, the court will create the deed of settlement that put its desicion to ask the parties obeying the deed. Therefore, referring to the formula, the Supreme Court (hereinafter referred to MA) produces "Guideline on Mediation Process in Court". At first, the mediation process was governed in Circular Letter of the Supreme Court (hereinafter referred to SEMA) No. 1 of 2002 concerning Empowerment of District Court to Enact the Settlement Institition (ex- article 130 HIR) published 30 January 2002. Due to in-effective consideration then, MA released PERMA No. 2 of 2003 concerning the Mediation Process in Court.

In the context of civil disputes trial before an inspection of lawsuit conducted, the judges shall mediate the dispute parties. The settlement is offered before hearing the case. It is accordance with article 7 (1) PERMA No. 1 of 2016. According to article 10 (2) the Law No. 48 of 2009 on Judicial Power, the dispute settlement in the court must not oblige to settle dispute through "the settlement". The Settlement Institition as stipulated in 130 HIR or 154 RBG do not govern detail the settlement procedures. Therefore, the inspection lawsuit judge only conducts the settlement as suggestion to give an opportunity of the parties to settle themselves.

In the day of the trial, the judge shall order "mediation". It means that basically the way of the judge to mediate the parties is imperative and can not be ignored by the parties. The parties are able to agreen upon the mediator, as follows:

a. The judge does not inspect the case either an advocate or a legal scholar;
b. It is not legal profession that deems as a legal expert or has an experience in the subjectof disputes;
c. The examiner judge case; and
d. Mixture between the mediator as mentioned in point (a) and (d), or mixture between the mediator as mentioned in point (b) and (d), and/ormixture between the mediator as mentioned in point (c) and (d).[1]

The parties will confirm their mediator to the Head of the Examiner Judge. If the parties are unable to agree upon the mediator in 2 days of working hours, the parties must convey the failure of appointing the mediator to the Judge.

The usage of judge as mediator is no charge, while mediator non-judge will be paid by the parties or based on the agreement of the parties as stipulated in article 10 of PERMA no, 1 of 2016. The mediator must prepare the schedule of the mediation meeting to be discussed and agreed by the parties. The phase of mediation will be headed by the mediator and the mediator will use caucus to hear each parties prespectives related the disputes the parties face.

Article 13 (6) states that if it is needed and is agreed by the parties, mediation is able to be conducted anywhere by optimizing the comunication fasilities such as internet. The mediator is also able to invite someone (expert) to give an explanation or consideration related to the dispute in order to solve the dispute between the parties. Article 14 further indicates that the mediator shall state that the mediation is not successful if the parties or its representative does not come to attend the schedule meeting accordance with the agreed schedule by the parties or it does not come 2 times continously with any reason reasonly.

The mediator also is possible to ask the parties or the examiner judge that the dispute does not eligible to be mediated with some reasons such as the dispute in terms of mediation do not relevant anymore , unless it is stated in lawsuit letter. It isver imprtant to be remembered then that the mediator in terms of mediation does not play role as a desicion maker. The mediator must be neutral, listen all parties interests actively, and minimize all difference of the parties including intention of the parties. The mediator can not be intervened by one party to reach the objection of other party.

The mediator should take place within 40 working days. The mediator also shall submit in written form if the mediation process is failure and inform the failure to the judge (court) as stated in article 13 (3) PERMA No. 1 of 2016. The mediator further shall check the substance of the deed of settlement agreed by the parties before the parties signing the deed. It takes place because of avoiding the deed is against the laws or it can not be applied or it made in good not faith.

Article 131(1) HIR states that "If the parties are coming but they can not be settled (the proceedings letter), the letter suggested to the parties must be read. If one party does not understand to the language in the letter, the letter then must be translated into the party own language in order to be understood. The translated person will be

[1] See article 8 (1) of PERMA No. 1 0f 2016.

appointed by the head of the court". Therefore, it can be summarized that if the judge can not settle the parties dispute, the failure of settlement must be stated in the proceedings letter. The result of it, the hearings process can be indicated null and void.

Dispute settlement through the deed of settlement has some advantages substantially and physicologyily. It means that it is informal to settle its own dispute, including the cost is cheaper, the time is short, it is confidential, and the parties relationship is good.

The step of the mediation according to practical mediation, as followings:

a. The Phase of Mediation, as follows:
1. Pra-mediation;
2. Mediation in Process; and
3. Implementation.

b. The Resul of Mediation
a) Identified the Question, as follows:
a. Started Mediation;
b. Showing hidden interests; and
c. Formuling Problems and Arranging the Agenda.
b) Solving the Problems, as follows:
a. Developing the Options;
b. Analysing the Options;
c. Bidding Process; and
d. Reaching the Agreement.

c. Efefctiveness of the Mediation, as follows:
a. Fairness. It means that the mediator has attention to equality, controling the interest of the parties, and protecting the parties rights;
b. Desicion of the Dispute Parties. It means that the mediator assists the parties to reach the agreement;
c. General Effectiveness such as the quality of interventionand executable;
d. Efficiency in time, cost, and activities; and
e. The Agreement is dealt withor not?.

d. The Principle of Mediation
David spancer and Michael Brogan refer to Ruth Carlthon point of view on the principles of mediation. There are 5 philosopy of mediation, as follows:
1) *Confidentiality;*
2) *Volunteer;*
3) *Empowerment;*
4) *Neutrality;* and
5) *A unique solution*.

e. Model-model mediasi
Lawrance Boulle segregates mediation into:
1) *Settlement mediation*
2) Facilitative mediation
3) *Transformative Mediation*
4) *Evoluative Mediation*

Since PERMA was established, every civil dispute coming into the District Court and the Islamic Court have to enter mediation procedure as stipulated in Perma No. 1 of 2016. It means thta PERMA is not against to article 130 HIR and article 154 RBG.

4.2 The Legal Binding of the Deed of Settlement in the District Court

PERMA No. 1 of 2016 has governed detail the procedure laws of mediation process. However in practice, it is not easy to apply the mediation laws. The cases are not in line with the thought of the maker of PERMA when they drafted the PERMA. Therefore, it is really to be discussed and analyzed the norms in order to find out the solution of the cases faced.[1]

Article 17 of PERMA No. 1 of 2016 states then that "If mediation results from the agreement, both the mediator and the parties shall formula in writing the agreement and it must be signed by the mediator and the parties". The requirement as stipulated in PERMA also can been seen in article 1851 KUHPerdata, which states that "...this agreement shall be valid only if it is concluded in writing either *anderhandse acte* or authentic deed".

The major different between HIR and PERMA is the deed of settlement is made when the agreement between the parties is reached, while in PERMA the deed of settlement can be requested into the court if the

[1] See Bagir Manan, 2008, *Recovery the Court to be Resfectful: The Thought of Bagir* Manan, Jakarta, Ikatan Hakim Indonesia.

dispute parties have intention on it. If it is seen from the perspective of the agreement, the agreement of settlement does not have executorial power – called *akte van daading deed of compromise*. The agreement is a contract in usual. Whereas the deed of settlement has an executorial power. It means that if one party is default, the other party can request to the district court to be executed. The legal binding of the deed of settlement is the same to the court ruling as stated in article 1858 KUHPerdata and article 130 (2) HIR. Both articles state that the deed of settlement is similar to the court ruling that has been res judicata.

Mediation almost creates the agreement made by the parties. It is therefore the advantage of mediation is expected by the parties to deal with the case they are facing. It is realized also that some cases show that the mediation is failure. The mediation as an alternative dispute settlement then is hoped to decrease in-balance position of the parties as they are feeling if the dispute must be solved to the court of arbitration. If the mediation is conducted success, the deed of settlement tht has been signed by the parties will bind the parties and is able to be executed asfound out in a contract or an agreement.

In Indonesia, the agreement resulted from the mediation must be in writing form. It is enacted both court annexed mediation and outside the court. The laws of it can be seen in article 17 (1) PERMA No. 1 of 2016 as indicated above. Another laws also can be seen in article 6 (6) the Law No. 30 of 1999, as follows "the dispute settlement or dissenting opinion of the mediator as stipulated in verse (5) must hold the confidentiality principle. In 30 working days, the parties must reach the agreement between them in writing form and sign it by the relevant parties".

5. Conclusion

It can be concluded that:

a. The civil dispute settlement through court annexed mediation is governed in PERMA No. 1 of 2016 on Procedure of Mediation. It is substantively responsive toformula the legal norms related to the mediation.
b. The deed of settlement has executorial power to be submitted to the District Court if one party is default. The laws on it can be seen in article 1858 KUHPerdata and article 130 (2) HIR.

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