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Keberadaan **Teraju:** Jurnal Syariah dan Hukum, sebagai jurnal ilmiah dan media komunikasi ilmiah dengan fokus kajian pada ilmu syariah dan ilmu hukum. Jurnal ini diterbitkan dua kali dalam setahun, yakni pada Maret dan September oleh **P3M dan Jurusan Syariah dan Ekonomi Bisnis Islam STAIN Sultan Abdurrahman Kepulauan Riau** dengan **ISSN Online 2715-386X** dan **ISSN Print 2715-3878**. **Teraju** mengundang para peminat, pengkaji, peneliti dan akademisi untuk mempublikasikan hasil penelitian dan karyanya yang berhubungan dengan ilmu syariah dan hukum di jurnal ini. Tulisan yang dimuat tidak mencerminkan pendapat redaksi.

Focus and Scope

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- **Syariah:** Usul Fikih, Fikih, Hukum Ekonomi Syariah, Hukum Keluarga Islam, Perbandingan Mazhab, dan Ilmu Falaq.
- **Hukum:** Filsafat Hukum, Hukum Bisnis, Hukum Pidana, Hukum Perdata, Hukum Tata Negara, Hukum Adat, Hukum Internasional dan Studi Perbandingan Hukum.

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Effectiveness of Shari'ah Economic and Business Dispute Resolution through Arbitration and Alternative Dispute Resolution (ADR)

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Abstract

In this paper, we will discuss a little about the effectiveness of sharia economic and business dispute resolution through Arbitration and alternative dispute resolution (ADR). So that it can be described how the dispute resolution mechanism in a civil relationship between one party and another, of course, sometimes does not work as expected. This problem will be examined using a research method with a qualitative approach, namely a research process and an understanding based on on a methodology that investigates a social phenomenon and human problems. Regarding the dispute resolution process in the economy and business of sharia Arbitration is a method of dispute resolution that can be chosen by parties who have problems or disputes. In the settlement of disputes in the court there is a tiered procedure, in the district court, high level, the Constitutional Court, PK etc., while in arbitration there are stages. Apart from that, if the decisions are different, an appeal is still possible in court if no agreement is reached, however in arbitration it is final and binding (final and binding). Advantages The arbitration procedure is carried out closed, not open to the public (confidential), not too formalistic as is the case in court. The parties may choose a person who is trusted to be the arbitrator. The aim of arbitration and alternative dispute resolution outside the court is the same as through court channels, namely to uphold justice. The only difference is that the court is a State Court, which is general in nature. Arbitration is a commercial business court or commercial court.

Keywords: *Dispute, ADR.*

Abstrak

Dalam tulisan ini, kami akan sedikit membahas tentang efektifitas penyelesaian sengketa ekonomi dan bisnis syariah melalui Arbitrase dan Alternatif Penyelesaian Sengketa (ADR). Sehingga dapat digambarkan bagaimana mekanisme penyelesaian sengketa dalam hubungan perdata antara satu pihak dengan pihak lainnya, tentunya terkadang tidak berjalan sesuai dengan yang diharapkan. Masalah tersebut akan dikaji dengan menggunakan metode penelitian dengan pendekatan kualitatif yaitu proses penelitian dan pemahaman yang didasarkan pada metodologi yang menyelidiki fenomena sosial dan permasalahan manusia. Mengenai proses penyelesaian sengketa di bidang ekonomi dan bisnis syariah Arbitrase merupakan salah satu metode penyelesaian sengketa yang dapat dipilih oleh pihak-pihak yang mempunyai masalah atau sengketa. Dalam penyelesaian sengketa di pengadilan ada prosedurnya berjenjang, di pengadilan negeri, tingkat tinggi, Mahkamah Konstitusi, PK dll, sedangkan di arbitrase ada tahapan. Selain itu, jika putusan berbeda, banding masih dimungkinkan di pengadilan jika tidak tercapai kesepakatan, namun dalam arbitrase bersifat final dan mengikat (final and binding). Keunggulan Prosedur arbitrase dilakukan secara tertutup, tidak terbuka untuk umum (rahasia), tidak terlalu formalistik seperti yang terjadi di pengadilan. Para pihak dapat memilih orang yang dipercaya untuk menjadi arbiter. Tujuan arbitrase dan alternatif penyelesaian sengketa di luar pengadilan sama dengan melalui jalur pengadilan, yaitu untuk menegakkan keadilan. Satu-satunya perbedaan adalah bahwa pengadilan tersebut adalah Pengadilan Negeri yang bersifat umum. Arbitrase adalah pengadilan bisnis komersial atau pengadilan niaga.

Kata kunci: *Sengketa, ADR.*

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Introduction

The existence of forms and cooperation in doing business that are increasingly rapid and complex does not rule out a difference in understanding. In a civil relationship that occurs between one party and another, of course, sometimes it does not go as expected. A good agreement in carrying out a cooperative or other civil relationship is very likely to cause disputes.

When the dispute that occurs is unavoidable, it is necessary to have a resolution so that the conflict does not

drag on and causes even greater losses. Difference of understanding and cross dispute demands a resolution. In this business world, there is a need for many things to be learned, starting from knowing the types of businesses and existing regulations, including the disputes that exist when doing business.

There are two methods of dispute resolution in Indonesia. Namely, dispute resolution in the civil sector can be carried out by means of two dispute resolution efforts. The first can be through litigation (court) and the second through non-

litigation (Alternative Dispute Resolution). The litigation route is taken through the court route and the non-litigation route is taken outside the court.

Arbitration and Alternative Dispute Resolution in Business

1. Forms of Business Disputes

The word arbitration comes from *arbitrare* (Latin) which means the power to solve something according to policy.

According to Suraputra's fingerprint, in the title several issues of obstacles to the implementation of international refereeing citing how arbitration works Washington DC defines' Arbitration is a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case they agreed in advance to accept as final and binding".¹

As for all problems that may arise between the parties while carrying out a business relationship, agreement or contract, both in the field of trade etc., it is called a business dispute.

Business disputes include:

- a. Labor Dispute
- b. Contract Dispute
- c. Electronic Contract (E-Contract)
- d. Business competition
- e. Consumer Disputes.²

Discussions

A. Out of Court Business Dispute Resolution Mechanisms

According to Law Number 30 of 1999 concerning Arbitration and alternative dispute resolution in article

1 paragraph (1), it defines that arbitration is a way of resolving civil disputes outside of a public court based on an Arbitration agreement made in writing by the disputing parties.³

Based on the form arbitration is divided into two:⁴ namely

1. institutional arbitration (permanent) because the existence of this arbitration body is permanent for a time without being limited. It does not depend on whether the dispute is handled or not. And this form of arbitration is generally the most preferred by the parties who set out an arbitration clause in their agreement if a dispute may arise which is called the *Pactum De Compromittendo*.

What is meant by *Pactum De Compromittendo* is agreeing and agreeing with the arbitrator's decision. The form of this clause is regulated in article 2 of Law No. 30 of 1999. The main and important things in the provisions of this article, among others, are the ability or authority to make an agreement between the parties making the agreement, to submit the settlement of disputes that may arise in the future to arbitration. or through an alternative dispute resolution.

2. adhoc arbitration (volunteer)

is an arbitration conducted not through a specific arbitration or it can be said that adhoc arbitration is an alternative dispute resolution carried out through arbitration that

¹Huala Adolf, *Arbitrase Komersial Internasional*, (Jakarta: Raja Grafindo Persada, 1993), hlm 13

²Joni Emirzon, *Alternatif Penyelesaian Sengketa diluar pengadilan (Negosiasi, mediasi, konsiliasi dan arbitrase)*, jakarta: Gramedia Pustaka Utama, 2000, hlm.44

³Candra Irawan, *Aspek Hukum dan Mekanisme Penyelesaian Sengketa di Luar Pengadilan (Alternative Dispute Resolution) di Indonesia* (Bandung : Mondar Jaya, 2010) hlm 1.

⁴Anshori, Abdul Ghofur *Penyelesaian Sengketa Perbankan Syari'ah: Analisis Konsep dan UU No.21 Tahun 2008*, (Yogyakarta: Gajah Mada University Press, 2010),hlm 53

is not through institutional arbitration.⁵

This body is said to be temporary because the arbitration team was only formed incidentally. Namely when there is a dispute resolution request. Meanwhile, after the dispute is finished, the arbitration team that is formed will be dissolved. In addition, in this ad hoc arbitration, the parties mostly used it, which at the beginning of the contract did not mention the arbitration clause in the agreement. So that this agreement was made during or after a dispute arose. And this agreement is known as a compromise deed. A compromise deed as an arbitration agreement is made after a dispute arises between the parties or in other words, an arbitration agreement is not held in the agreement. Thus, a compromise deed is a deed containing the rules for resolving disputes that have arisen between the people who promised.

The legal provisions governing arbitration can be seen in:

1. Law No.48 of 2009 on judicial power article 58
2. Law No.30 of 1999 concerning arbitration and alternative dispute resolution.⁶
3. Law number 5 of 1968 concerning the settlement of disputes between the State and foreign citizens regarding capital investment
4. Presidential Decree number 35 of 1981 concerning the ratification of the convention of the recognition and enforcement of foreign arbitral awards

⁵Rohmad Adisaputro, *Upaya Penyelesaian Sengketa Bisnis di Lembaga Keuangan Syariah Melalui Badan Arbitrase Syariah Nasional (BASYARNAS)*, Yogyakarta: Universitas Gajah Mada, 2005.hlm 12

⁶ Harahap, M. Y. (2002). *Beberapa Catatan yang Perlu Mendapat Perhatian Atas UU Nomor 30 Tahun 1999*. Jakarta: Jurnal Bisnis.hlm 2

5. Supreme Court Regulation Number 1 of 1990 concerning the procedures for the implementation of foreign arbitration awards.

It is said that as an alternative to resolving civil disputes outside the arbitration court, it has many advantages compared to dispute resolution in court. Even for business actors and the business world, there is a tendency to choose to resolve disputes through arbitration.⁷

The advantages of arbitration are:

1. Arbitration is personal

The arbitration process and mechanism are private or not open to the public, so that the parties and arbitrators are bound by strict and strict rules. This allows important business secrets and information to be protected from the public, the media and even business competitors.

2. Free to choose arbitrators

The parties to a dispute are free to choose who the arbitrator will be. With a note as long as the chosen one is impartial, has no interest or is neutral. Even the appointed arbitrator who is selected can be from a professional in the field of dispute and is given the freedom to choose an arbitrator from any country.

3. Arbitration can save time

The period for examining dispute cases has been determined by the law. Examination of dispute cases in arbitration within a maximum period of 180 days or 6 months. So the dispute will run effectively and efficiently.

⁷Hasanuddin, *Bentuk-bentuk Perikatan (Akad) Dalam Ekonomi Syariah dalam Kumpulan Makalah Ekonomi Syariah*, Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI hlm 2

4. The decision is final and binding

An award in an arbitration is a decision in the first and last instance for the settlement of disputes that have been decided through arbitration, the court is not entitled to examine the reasons or is currently considering the arbitration decision that has been issued. Thus there is no process for appeal or review as is the case in court.

5. No additional fees

Although the formal fee is higher than the cost in court, there are no other costs in the arbitration process. One of the things that can be saved in the arbitration process is the cost saving in legal advisory services.

6. Can be used across countries

The execution or enforcement of arbitral awards can cross national borders. Or international coverage. The parties can choose a legal decision in choosing the process and venue for the arbitration.

Although in practice arbitration is viewed as having many advantages, arbitration also has drawbacks.

The weaknesses of arbitration are:

1. Relatively expensive administrative costs

At this point it can be said that both strengths and weaknesses. Although it can save costs for lawyers or legal advisors, the disputing parties must prepare sufficient funds to resolve disputes through arbitration. Especially institutional arbitration

2. No executorial power without court execution order

Arbitration awards can only be executed after being registered and receiving execution orders from courts, but courts in Indonesia are

often reluctant to give orders to enforce arbitration awards, this is related to international arbitration decisions contrary to public order.

3. absence of legal precedent.

In arbitration there is no known legal precedent or attachment to previous arbitral awards. this allows the emergence of different decisions and on similar cases.

In Indonesia, arbitration has been known since the Dutch East Indies era, after independence based on the provisions contained in the transitional rules of the 1945 Constitution. The RV is still valid as long as it does not conflict with the constitution. In general, at that time arbitration was used by exporters and importers as well as other entrepreneurs, so it can be concluded that arbitration is well known and used in the business world in Indonesia.⁸

In the provisions of Article 5 of Law Number 30 Year 1999 it is stated that:

"Disputes that can be resolved through arbitration are only disputes in the field of trade and rights which according to the laws and regulations are fully controlled by the disputing parties."

In many sharia civil agreements in Indonesia, arbitration clauses are widely used as an option for dispute resolution. The legal opinion given by the shari'ah arbitration institution is binding because the opinion given will become an inseparable part of the main agreement (whose opinion is requested at the arbitration institution). Any opinion that is contrary to the legal opinion given means a breach of contract (breach of contract).⁹

⁸Mariam Badrul zaman, *Kompilasi Hukum Perikatan*, Citra Aditya Bhakti, Bandung, 2001.

⁹Syamsul Anwar, *Hukum Perjanjian Syari'ah Studi tentang Teori Akad dalam Fikih*

Therefore, resistance in any form of legal remedy cannot be applied. Arbitration decisions are independent, final and binding, such as decisions that have permanent legal force so that the head of the court is not allowed to examine the reasons or legal considerations of the decision of the National Syari'ah Arbitration Board.

B. General Description of Shari'ah Economic and Business Dispute Resolution

The Indonesian national arbitration body or commonly known as (BANI) is an independent institution that provides assistance services related to arbitration, mediation and other forms of alternative dispute resolution outside the court. the provisions of Article 5 of Law Number 30 Year 1999 state that:

"Disputes that can be resolved through arbitration are only disputes in the field of trade and rights which according to the laws and regulations are fully controlled by the disputing parties."

In the form of a shari'ah civil agreement in Indonesia, arbitration clauses are widely used in various ways and options in dispute resolution. The legal argument or belief given by the shari'ah arbitration institution is binding, therefore the opinion given will also be an integral part of the main agreement (i.e. the opinion requested by the arbitration institution).

Any opinion that is contrary to the legal opinion given means a breach of contract (breach of contract). Therefore, a resistance process in the form of any legal remedy cannot be carried out. Decisions of arbitration that are independent, final and binding are like decisions that have permanent legal force so that the head of the court, even in this case, is not allowed

to re-examine the reasons or legal considerations of the decision of the National Syari'ah Arbitration Board.

Since the growth and development of syari'ah banking activities in 1998,¹⁰ the settlement of Islamic banking disputes on average was carried out through the Arbitration process by the Indonesian Muamalat Arbitration Agency (BAMUI) which later changed to the National Syari'ah Arbitration Board (BASYARNAS) because on average the contract (agreement) between Bank Syari'ah and its customers always includes an arbitration clause and usually any decision from BASYARNAS is final and binding or in part through the litigation process in court.¹¹

Basyarnas is an institution that functions in settling sharia disputes with the aim of resolving disputes or civilization that prioritizes peace or reconciliation,¹² providing fair and fast settlement of muamalah or civil disputes arising from trade, finance, industry, sharia economic business services . Settle civil disputes between banks and Islamic financial institutions with customers or their partners by agreement

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution Article 1 paragraph (10) of the Arbitration Law and Alternative Dispute Resolution is said; "Alternative Alternative Dispute Resolution is a dispute resolution institution or difference of opinion

¹⁰Rohmad Adisaputro, *Upaya Penyelesaian Sengketa Bisnis di Lembaga Keuangan Syari'ah Melalui Badan Arbitrase Syari'ah Nasional (BASYARNAS)*, Yogyakarta: Universitas Gajah Mada, 2005.hlm 23

¹¹Muhammad Arif, *Respon BASYARNAS Perwakilan Daerah Istimewa Yogyakarta Terhadap kewenangan Pengadilan Agama*, Yogyakarta: Universitas Islam Indonesia, 2008.hlm 75

¹²Farhurrahman Djamil, *Hukum Perjanjian Syari'ah*, kencana perdana press, hlm 54

Muamalat, (Yogyakarta: PT RajaGrafindo Persada Jakarta).hlm 27

through a procedure agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment."

And in Article 6 paragraph of the Arbitration Law and Alternative Dispute Resolution; "1) Disputes or civil differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by overriding litigation in the District Court. 2) Settlement of disputes or differences of opinion through alternative dispute resolution as referred to in paragraph (1) shall be resolved in a direct meeting by the parties within a maximum period of 14 (fourteen) days and the results are stated in a written agreement. 3) In the event that the dispute or difference of opinion as referred to in paragraph (2) cannot be resolved, then with the written agreement of the parties, the dispute or difference of opinion is resolved through the assistance of one or more expert advisors or through a mediator. 4) If the parties within a period of 14 (fourteen) days with the help of one or more expert advisors or through a mediator fail to reach an agreement, or the mediator fails to bring together the two parties, the parties can contact an arbitration institution. or an alternative dispute resolution institution to appoint a mediator.

5) After the appointment of a mediator by an arbitration institution or an alternative dispute settlement institution, within 7 (seven) days the mediation effort must be initiated. 6) Efforts to resolve disputes or differences of opinion through a mediator as referred to in paragraph (5) by upholding confidentiality, within a period of 30 (thirty) days an agreement must be reached in writing signed by all

parties concerned. 7) A written dispute settlement agreement or dissent is final and binds the parties to be implemented in good faith and must be registered at the District Court within 30 (thirty) days from the signing. 8) The dispute resolution agreement or dissent as referred to in paragraph (7) must be completed within 30 (thirty) days from registration. 9) If the settlement effort as referred to in paragraph (1) to paragraph (6) cannot be achieved, the parties based on a written agreement can submit a settlement effort through an arbitration institution or ad-hoc arbitration. " With the presence of this law, it further strengthens the existence of APS as an institution / paranata for dispute resolution outside the court (extra judicial).

C. Alternative Out-of-Court Business Dispute Resolution Based on Indonesian Law

ADR or Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely settlement outside of court by means of consultation, negotiation, mediation, conciliation, or expert judgment. Referring to the provisions of Article 1 paragraph (10) of the Arbitration and Alternative Law.¹³

Settlement of disputes using the alternative dispute resolution mechanism is carried out based on an agreement of the disputing parties. The form of a decision based on the agreement is written into an agreement or contract. Which is signed by the parties and binds the parties.

¹³Ahmad Mujahidin, Kewenangan dan Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia. hlm 17

Conclusion

Arbitration is an alternative method of dispute resolution that can be chosen by parties who have a problem or dispute. In dispute resolution. As for the courts or through the litigation process, there are multilevel procedures, such as for example in the district court, high court, MK, PK etc. whereas in arbitration there are levels of action. In addition, if the decisions are different, an appeal is still possible in court if no agreement is reached, but in arbitration it is final and binding.

Besides that, the advantages of arbitration procedure are closed, not open to the public (confidential), not too formalistic as in court. The parties may choose or appoint a person or from professionals who are trusted and deemed qualified to become arbitrators.

The results and objectives of arbitration and alternative dispute resolution outside the court are the same as through court channels, namely to uphold justice, provide legal certainty, etc. It's just that the difference is the court is a State court or State Court, which is general in nature. Arbitration is a commercial business court or commercial court.

The concept of arbitration in Indonesia. The peaceful settlement of disputes has been known to the Indonesian people for a long time. This can be seen from the existence of customary law that is spread across various parts of Indonesia. The principle is deliberation.

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