

DYNAMICS OF BUSINESS SEA TRADE DISPUTE SETTLEMENT BY MEDIATION IN THE PORT OF BELAWAN, NORTH SUMATERA, INDONESIA

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Abstract: Conflicts in business sea trade have positive relationship with the increasing activities of the sea international trade. However, this kind of conflict was still unable to be solved accurately, precisely, safely and smoothly either by the Indonesia's court system or other states' court systems. For this reason, this research taking the cases in the Port of Belawan, North Sumatera, Indonesia has three objectives. The first is to examine forms and mechanisms to settle business sea trade dispute. The second is to determine factors that encourage business community settled the sea trade dispute outside the formal court. The third is to address judgment and barriers faced by business community in settling their business trade outside the formal court. The approach used to analyse the research questions was based on the normative legal approach using both primary and secondary data. The instruments for collecting primary data are through field observation, in-depth interview and questionnaires. The secondary data were from literature and other legal documents related with business sea trade. The study found as follows. First, mediation or negotiation has been the dominant way that was used by the business community in the port of Belawan to solve the business sea trade disputes. Second, the practical, economic and the legal cultural reasons have been the reasons why the business sea trade disputes were settled outside the formal court. Third, judgment to use mediation or negotiations by business community is because this method is open and based on kinship principle. However, there is obstacles encountered using this method including the lack of understanding of the parties, the knowledge and negotiation techniques itself, and the absence of a law. Thus, much remain to done by the government to formulate rules to support this mediation or negotiation method in formal legal way.

Index Terms- Business sea trade dispute, mediation or negotiation, dispute mechanism, the formal court system, the legal culture

I. INTRODUCTION

The development of sea transport infrastructures has been considered as one of the important policy measures in Indonesia's infrastructural development. The reason for this is not only because Indonesia is as an archipelago country, but more importantly it is because sea transport development will be able to speed the economic growth of the country. Sea transport development is not only able to provide services for the movement of people, but it is also able to distribute goods nationally as well as internationally.

The purpose of transport infrastructure development stated in the national development plan on one hand is to improve the transportation services in an efficient, reliable, high quality, safe and affordable prices and to realize the intermodal transportation system in integrating the regional development and made a part of a distribution system that is capable providing services and benefits to the wider community including increasing the network of villages and cities on the other hand.

As the sea transport becomes important, disputes among the parties involved in sea transport increased rapidly. However, resolution and settlement to the disputes in sea transportation have been lacking. This consequently has made inefficient economic development. It also affects the productivity of business activities and increases production cost. This condition will further increase the price of goods and services and hence it affects the welfare of the consumers (Harahap, 1997). As mentioned by Adam Smith:

“The current justice system that can be accepted by the business community is the justice system which is able to solve dispute quickly and accurately at a low cost. Whilst the justice system that cannot settle the dispute simple, fast, and at a low cost would not be appropriate and would not be acceptable in the business world. This kind of justice system may result the following things. First, economic activity will not be efficient because the cost of production increases, high risk, and no legal certainty regarding the company status. Second, workers' lives will be in danger, because the possibility of the company was destroyed due to continuous ongoing dispute. Third, companies will face uncertainty and ultimately destroyed” (Hughes, 2001).

Due to the problems above, this paper has three objectives. The first is to examine the form and mechanism used by the business community in settling sea trade disputes in the port of Belawan, North Sumatera. The second is to determine what the

driving factors that businessmen are more interested in finding solution out of court toward dispute settlements. The third is to highlight judgment and constraints faced by businessmen in settling the dispute of goods transportation outside the court.

II. RESEARCH METHOD

The research method used in this study is a descriptive qualitative method. However, the approach used to analyse the above research questions was based on the normative legal approach. An empirical-sociological legal research was also used in order to look at the settlement solution toward dispute of compensation of transportation goods in the Belawan port, North Sumatera, Indonesia. Note also that a normative judicial method is used to search for a dispute settlement by way of consensus through a negotiation that can bring benefits for the both parties, namely, the carrier and the goods owner. Normative judicial method was used to analyze alternative forms of dispute resolution of goods transport compensation relating to Article 6 of Law 30 of 1999 about Arbitration and its Alternative for Dispute Resolution.

The source of the data in this study was both primary and secondary data. The secondary data was collected from the literature. Information collected from literatures includes information on statutory provisions, scholar opinion published in journals, and other legal texts related to the issues. These data and information were collected to explore the existing documents, especially documents relating to the compensation dispute claims for goods transport which have occurred on the shipping company as well as archives and other documents contained in the Container Terminal Unit (UTPK) Gabion in the Belawan port.

The primary data were collected from the field survey. Instruments used to collect the primary data are both qualitative and quantitative. The instruments for collecting qualitative data are through field observation and in-depth interview, while the quantitative data were collected using questionnaires.

The population in this study was the Shipping Agents who are members of INSA (Indonesian National Shipowners Association) and export import service users who are members of GAFEKSI. The number of respondents interviewed using questionnaires were ten respondents from Shipping Agents and ten respondents from export import service users.

The in-depth interviews were undertaken with Directors, managers and technical agencies officers of shipping companies. The companies selected include PT. (Persero) IPC I Belawan Branch, UTPK Gabion of Belawan port, Indonesian National Ship-owners Association (INSA) North Sumatra, The Association of Forwarder (GAFEKSI INSA) North Sumatra, the Office of Customs and Excise Belawan, and Port Administrator (ADPEL) of Belawan to mention just a few. This in-depth interview aims to obtain data and information regarding the problems of import and export as well as the departure and the arrival of international or intersulair ships. Note that, the reason to select the Port of Belawan, North Sumatra as a survey location is simply because this port is as one of the big sea-port in Indonesia and this sea port has a large business activity as well as one of the largest international sea-ports in Indonesia.

After the above primary and secondary data were collected, the data were then edited. This is done to minimize errors of data collected. Once editing is completed, the next process is grouping and coding the data set according to groups or unit analysis of the study. For data obtained from in-depth interviews, a simplifying process was conducted. This is done by classifying the interview data into specific groups according to the unit analysis of the study and variables used in the study. Finally, these data and information collected were analyzed using the inductive and deductive methods based on the data and information collected from the survey.

III. RESULTS AND DISCUSSION

Form and Mechanism of Business Sea Trade Dispute Settlement

The study found that the mechanism of dispute settlements in international business trade in the sea port of Belawan, North Sumatra was mostly done outside the formal court. The parties include in this settlement usually include the owner / consignor (shipper), consignee and the carrier agent of shipping. The mechanism to settle dispute in international business trade was through mediation or negotiation.

The important of negotiation is because this way can be used as an initial means to settle any disputes. By negotiation any disputes between parties can be settled more effective and efficient. This is simply because the form of settlement is very practical and economical so that it is able to meet the interests of both parties. However, if the disputes cannot be settled in the negotiation stage, the solution to the dispute will be brought to Arbitration body. However, in practice the solution of the disputes by Arbitration body is not so often. It is because this way is considered costly and there is no warranty of the confidentiality of the parties in the litigation.

Furthermore, in the case in which the disputes cannot be settled at negotiation and arbitration stages, both parties in disputes are able to bring the case to the formal justice. However, the dispute settlement using the formal justice was unusual. This is because the formal justice at this point has not been able to give a sense of fairness and legal certainty for business. Also,

this mechanism solution was considered ineffective and inefficient by the business community. In addition, this settlement mechanism has been considered timely and costly so it does not give benefits to both parties in the business. Therefore, the mechanism that was preferred by the business community in the Port of Belawan to settle the disputes is through negotiation.

However, there are some principles that have to be agreed in settling business dispute by parties under this negotiation as follows. The first principle is the consensus principle. This principle is defined as an agreement between an individual (party) and another individual to formulate a common opinion toward the problems faced. To obtain unanimity of a common opinion usually is done firstly by way of exchanging ideas, opinions, feelings or judgment between all parties. Having these exchanges and discussion among parties, there will be then established a common agreement between parties. Note that this kind of consensus was usually found in the case of dispute related with the goods transportation via sea port.

The second principle is agreed principle. This principle is done if there are differences in the interests of the parties in conflict. All the differences among parties are discussed until they reached common agreement toward the solution of the dispute. However, in the process of the establishment of the common agreement, each party in business dispute should commit to the final agreement that were made among the parties. However, unlike the consensus principle, the agreed principle was usually found in the case of business dispute related with benefit and loss cases rather than goods transportation cases.

The third principle is the family principle. In this principle, the solution toward the business disputes is done by the parties based on order, politeness, mutual respect in a family atmosphere. Each party do not give any kind of pressures to another party. Thus, any decision made toward the dispute settlement comes from the conscience of each party to the dispute.

The above three types of principles in business dispute settlement have been outlined in the fourth principle of Pancasila. This indicates that this kind of dispute in business sea trade can be settled not necessary through the formal justice court, but it can also be settled outside the court, particulaly through mediation or negotiation means. This suggests that there is a new breakthrough in the field of law in that any business dispute can be solved through negotiation. Note that, detail examples of the cases in which the disputes of business international trade that were settled outside the formal court through negotiation mechanism can be seen in Djafar Albram (2010). So, what factors encourage businesses seeking for dispute resolution outside the court?

Factors Encouraging Business Seeking for Dispute Resolution Outside the Court

It was found that there are at least two factors that encourage the settlement of business disputes in sea transportation outside the court. The first factor relates with the culture of the people in Indonesia. The second relates with the practicality and economic reasons.

The culture of Indonesian people plays important role in business dispute settlement is mainly because through this legal culture, it is assumed that business relationship between the parties involved will be sustained. Also, it is because there is assumption that the culture solution is more friendly and collegially. This way is also considered able to maintain the confidentiality of their trading business on one hand and more importantly it is able to maintain the good name and reputation of the parties in dispute. Dispute resolution through negotiation outside the court was considered to produce a "win-win solution" for both parties in dispute.

However, the dispute settlement via outside court has two principles. The first is the merit principle. Under the merit principle, each party in dispute should be able to maintain a trust and honesty. Also, the decision made from the negotiation is entirely the result of agreement between the parties which is the best solution to avoid the collapse of one of the parties in dispute.

The second principle is harmony principle. This principle means that both parties in dispute need to cooperate one and another in the decision making process. A mutual agreement reached in the negotiations is a solution that can provide optimum benefit in the development of the business to both parties and should be voluntarily accepted by them.

Apart from the above two principles, there are other principles that are worth noting. These principles include the principle of patience, the principle of authority, and the principle of justice and equality. The later principle suggests the important of wise and fair treatment toward business sea trade dispute. These two treatments are needed to be satisfied by both parties in dispute. If the treatment given by one of the party to another party is not equal and fair, this will not make the business dispute settled down.

The important of the role of culture in solving business dispute outside the formal court in the port of Belawan, North Sumatra was argued to be related with the ethnic background of the businessmen. In the Port of Belawan, most of the businessmen are the chinesse which have Confucius traditional culture. This culture may be the reason why the dispute settlement of businessmen is done through negotiation outside the court. In the chinesse culture, the harmony of the people is usually maintained, so as to foster an ongoing relationship better. Thus, the legal culture and cultural reasons play a strong foundation for the existence of businesses in developing alternative dispute resolution outside the court. It does not only able to establish a good relationship of the parties, but it can also recover the disputes that have occurred since this kind of settlement has

a sense of fairness for the parties to the dispute. For the Chinese businessmen, "Doing business is not for one day, but it is for the long term".

Therefore, this study once again confirmed that the business dispute settlement in the sea trade outside the formal court tends to be preferred than the dispute settlement in the formal justice court. The reason for deciding this measure is not only cultural reasons, but it is also because this measure is quiet simple and practical.

Judgment and Constraints in Dispute Resolution Outside the Court

There are several judgments in deciding business dispute settlement outside the formal court. The first is judgment from the perspective of businessmen themselves. The second is judgment from the legal culture. The third is judgment on the basis of the support of the government. Finally, it is judgment from regulatory and global developments perspectives.

In terms of business judgment, from the interview with the Chairman of the Indonesian National Shipowners Association (INSA) North Sumatra, for instance, it was argued that settlement of disputes through the courts is a very avoidable. However, if the settlement should use the formal court, businessmen tend to use arbitration. This way is argued rarely taken by the businessmen since it usually takes a very large cost and time. For this reason, businessmen tend to use negotiation or mediation as an alternative to dispute resolution as this way tends to use the principle of win-win solution. This dispute resolution is in accordance with the principles of the business world. However, detailed information to use negotiation or mediation method should be well-informed to the businessmen.

In terms of legal culture, the use of mediation as a dispute resolution media has been known for a long time. In fact, this mediation method has long been known in our customary law. This method is almost similar to the patterns of settlement of disputes through the justice of the peace. Note also that this method is similar with the legal culture of Muslims in resolving disputes. Thus, the negotiation method in settling the business dispute is in accordance with the legal culture of Indonesia. The problem now is how to maintain the legal culture in order to truly become a real legal culture in society, particularly in the business community. Thus, much remains to be done.

From the perspective of government, the dispute settlement outside the court has long been supported by the government. This is evident, for instance, from the statement of the former President Suharto in APEC Conference in Bogor toward the dispute in the implementation of APEC agreement. As a consequence, there is an APEC Economic Trade Disputes mediation service desk in this agreement.

Furthermore, in terms of legislation, although there is no legislation that specifically regulates the mediation, the rules that already exist can be used as a legal basis for the application of mediation. Provisions that can be used as the legal basis for mediation as an alternative dispute resolution business is Article 1338 of the Civil Code regarding freedom of contract. In this article, it was mentioned that the parties are free to contract, including the freedom to choose a dispute resolution forum. Mediation is a dispute resolution forum. Therefore, the mediation should be by agreement. With the agreement of mediation, the parties are bound to resolve disputes through mediation.

Another important provision as the legal basis for mediation is Articles 1851 and 1858 of the Civil Code, which regulate the peace treaty or agreement or so called *dading*. This *dading* can happen, both inside and outside the court. Apart from the Article 1851 and Article 1858 of the Civil Code, other regulations that provide opportunities for the application of mediation is Article 130 or Article 154 HIR RBG, but this article can only be applied to mediation within the judicial system or connected annexed.

Finally, in terms of global development, it is certainly obvious that the use of mediation as a media opportunity settlement of business disputes outside the court is preferred. This method has been implemented by both developed and developing countries. Thus, it seems a must to be considered by Indonesia, if this country does not want to be left behind in the global business developments. If not, there is a great possibility at a later time there will be foreign mediator services play a major role in this matter.

However, in doing the mediation as an alternative dispute resolution business, there are constraints. These constraints include the business community itself, the litigation culture, the quality of human resources, and the quality of justice. In terms of business community, for instance, there are many business people who know about mediation as an alternative dispute resolution. Ignorance of these businesses can be caused by several things. First, because of mediation as an alternative dispute resolution business is still a new thing, so that business community does not yet know completely about the intricacies of mediation. Secondly, the lack of information from the mediation service providers about the services they offer and the effectiveness of dispute resolution through mediation. The lack of information about mediation may cause the business community will lose their confidence to use this mediation method as an alternative dispute resolution. The third constraint relates with the nature of confidentiality of this measure so information on cases that have been successfully resolved through mediation are not easily obtained by the business community.

The litigation culture has an influential role in the application of mediation in Indonesia. This is because the culture of business litigants generally tend to look for shortcuts in the business. As a result, the application of mediation would be hampered if business community proposed an appeal because of the tendency of dissatisfaction on the verdict, habit of offering "bribes" and using its own power or relatives to win the cases. This trend is feared affecting the application of mediation. Therefore, the success of mediation depends on the parties' sincerity and commitment to carry out the mediation with the best, and respect the agreements that have been reached. This is certainly very closely related to the prevailing business ethics, which is the most important element in the conduct of international business transactions.

The quality of human resources relates to the quality of mediator. The quality of mediator is the elements of a cutting edge in the development of mediation as an alternative business dispute resolution. Thus, it is a must to have mediators which have a high qualification which a certain educational background, expertise in specific areas and a technical skills to mediation. This mediator can be from academicians and practitioners who have been in the disciplines of alternative dispute resolution (ADR) or the member of the Association of Export-Import Indonesia, the Association of Shipping, Officer / employees of Port Administrator (ADPEL), Customs and Excise Customs officials who handle the traffic of goods import-export and Port Corporations (IPCs) as the harbor authority that handles warehousing and ship docked.

The final constraint relates to the lack of confidence in the quality of the court. This may arise due to the quality of the national judicial forum, where business people tend to feel less confidence in the use of national law. As a result, the business community feel less confident about the legal protection that would be obtained. Thus, this problem should be hindered to reach the success of the implementation of the dispute settlement through negotiation or mediation.

IV. CONCLUDING REMARKS

This study found as follows. First, business sea trade disputes are usually settled outside of court using mediation and negotiation method. This settlement is used as a result of the weaknesses of the formal court system. This settlement is considered efficient and effective. This is because the procedure is very simple, practical and economical, and not costly.

Second, the study found that there are many factors and reasons why the businessmen seeking to resolve disputes out of court. Apart from the practical and economic reasons, the legal culture is also important reason as this culture is able to preserve the existing business relationships and avoid as far as possible the existence of conflicts, disputes, so as to give a real advantage in a business relationship for both parties.

Third, judgment used by business community in settling business sea trade dispute via mediation is simply because this method emphasized the principle of win-win solution through an approach kinship to reach agreement on the understanding of a better business relationship. While the obstacles encountered in the mediation include the lack of understanding of the parties regarding the benefits and usefulness of mediation, and the quality of mediator or negotiator.

Fourth, the mediation was able to produce an agreement or resolve a problem more quickly than with other methods. Also, the results of the mediation process more private than litigation. Another advantage is that mediation can create an atmosphere conducive to the creation of a compromise between the two disputing parties to obtain mutually beneficial results for the continuation of their business.

On the basis of the above findings, it is suggested that there is a need for preparation and full support from the Government, Institution / Legislative, State Institutions, a competent State Officials and other relevant stakeholders to maximize efforts to establish a solid legal basis in the framework of providing support and commitment to the development and institutionalization for means of mediation or negotiation as an alternative dispute resolution in business sea trade. This is not only relate to the preparation of laws, but more importantly relates with the anticipation to overcome the lack of effective judicial system.

Second, the need for support from the Government to develop a business dispute resolution using legal culture as this culture emphasis mutual respect, tolerance, solidarity for foster a sense of brotherhood. Third, the mediation measure must be socialized to businessmen or entrepreneurs in Indonesia as this has also been successfully applied in developed countries, such as United States, Europe, Australia, Canada, England, Japan, Korea, Hong Kong and Singapore in recent decades. Finally, the advantages of using mediation as an alternative dispute resolution of a business in Indonesia is very open to be developed further. This can be done through the Government and other trade associations, such as: Chamber of Commerce (KADIN), GAPEKSI, INFA, INSA and other government institutions such as PT. PELINDO, ADPEL, and Customs and Excise institutions. Thus, much remain to be done by the government and other stakeholders to realize the important of mediation or negotiation as business dispute settlement in the sea trade.

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