

The Failure of Court-Ordered Mediation in Solving Disputes in Indonesia

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Obstacles of ADR Implementation

- ✦ Negative attitude of the disputant to honor ADR
- ✦ **No Good faith from disputant**
- ✦ Misused court power to nullify contract
- ✦ Lack of incentives for lawyer to settle the dispute in a short time
- ✦ Lack of skill and incentives for judge to settle the dispute through ADR

Case study 1:

(Indah Kiat vs. US Bank National Assoc. at Bengkalis District Court;
Lontar Papyrus vs. US Bank National Assoc at Kuala Tungkal District
Court)

- ✦ A trustee and Note holders are American Companies. They are sued by issuer of International Bond which is Indonesian company. In order to secured the repayment of Bond, the Note holders (creditors) are protected by Holding some securities such as mortgage and fiduciary. The Bond issuer which is a debtor request the District court to nullified the principal agreement and all securities agreement to avoid the repayment of the debt and the enforcement the securities by the Note holders. In this situation the Debtor has no intention to have settlement agreement through court mediation. Therefore although the requirement of Perma No 2/2003 has been fulfilled, the mediation failed.

Case Study 2:

(PT Leighton Contractor Indonesia vs. PT. Cakrawala Bahari Sebuku at South Jakarta District Court)

- ✦ Contractor of a mining site was sued by a Mining Right Owner in District Court. Contractor was claimed to have breached the contract because it did not follow the agreed procedures of solving dispute.
- ✦ Judge ordered mediation to be attempted first.
- ✦ Mediation conducted in three meetings.
- ✦ Mediator was not serious in conducting mediation, passive (no initiative), inexperienced in handling a mining contract case.
- ✦ The other party (owner) was not cooperative.
- ✦ Mediation failed. Parties back to court.

Case Study 3:

(Former Patient vs. Hospital Mgt at Tangerang District Court)

- ✦ A hospital management was sued by its former patient on the base of tort in District Court. The management was claimed to have made an administrative mistake which resulted to the illness of the patient.
- ✦ In the first hearing, the parties appeared before the judge. Defendant was not represented by the attorney.
- ✦ In the first hearing, the judge did not order mediation to be attempted first.
- ✦ When appearing before the judge in the second meeting, attorney of the defendant was asking for mediation to be attempted first. The judge refused such request.

Experience to Date

- ✦ Serves more as a procedural step before court hearing.
- ✦ Most of the mediators appointed are judges.
- ✦ Perception among lawyers that courts are not serious in encouraging mediation.

The Application of PERMA 02/03

- ❑ No implementing regulations have yet been issued.
- ❑ Many questions regarding the implementation.
- ❑ Not very widely known in the legal profession; particularly in remote areas.
- ❑ Education and publication needed to make parties aware of court-ordered mediation.

Problems with PERMA 02/03

✦ Appointment of Mediator

- ✦ Very short time limit in appointing mediator.
 - One day period is not sufficient, especially when involving foreign parties.
- ✦ No guidance on how court shall approve mediators.
- ✦ No clarification on the qualification of mediators.
- ✦ No mechanism for evaluation or replacement of mediators.
 - When mediator is believed to be not independent and impartial, it is unclear whether parties may request recusal of a mediator.

Problems of PERMA 02/03 (cd.)

✦ Procedure

- ✦ Short time limit to conduct mediation.
 - 30 days period is not sufficient, especially when involving foreign parties.
- ✦ Unclear whether extension of time is possible.
- ✦ No detailed procedural rules.
 - It is unclear whether the court will design the procedure or leave that to the parties or the mediator.

Problems of PERMA 02/03 (cd.)

✦ Settlement

- ✦ Unclear whether settlement agreement would be enforceable as judgment or arbitral award.
 - Will a settlement agreement executed before or endorsed by the court be enforceable the same as a final and binding judgment or arbitral award, without the necessity of further court hearings to prove the case?

Problems of PERMA 02/03 (cd.)

✦ Effectivity

- ✦ No sanctions provided if PERMA 02/03 is not followed.
 - The regulation does not invalidate a court decision if mediation has not been ordered first.

Concluding Remarks

- ✦ Despite the shortcomings, PERMA 02/03 is needed to reduce courts' case load.
- ✦ Most lawyers are reluctant to attempt mediation because of the relatively smaller fee earned, compared to litigation.
- ✦ Most parties have perception that a proposal to mediate would be seen as weakness by the opposing party.