

# Recent Practices of Mediation in Court and of Amicable Settlement Effort in Arbitration and Policy Recommendation for Indonesia

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# In-Court Mediation

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- ❑ Supreme Court Regulation No. 2 Year 2003
  - ❑ Mandatory procedure.
  - ❑ Party-appointed mediator.
  - ❑ Only applies in the first level of court.
  - ❑ Limitation of 30 days.
  - ❑ Claim withdrawal upon settlement.

# In-Court Mediation

- ❑ Several unclear issues within Supreme Court Regulation No. 2 Year 2003
  - ❑ Very short time limit in appointing mediator.
  - ❑ No guidance on how the court decide to approve the mediator.
  - ❑ No clear qualification of mediators.
  - ❑ No mechanism for evaluation or replacement of mediators.
  - ❑ Short time allotment to conduct mediation.
  - ❑ Unclear whether extension of time is possible.
  - ❑ Unclear whether settlement agreement would be enforceable as court judgment.
  - ❑ No definitive sanctions for non-compliance.

# Case Study 1

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- ✦ PT Pelayaran Umum Indonesia v. PT. Asuransi Dayin Mitra Tbk and PT Marsh
  - ✦ Brought before the District Court of Central Jakarta.
  - ✦ Claimant insured its vessel to 1<sup>st</sup> Defendant (the insurer) while 2<sup>nd</sup> Defendant acted as the broker.
  - ✦ Claimant changed the class of the vessel, which was then sunk.
  - ✦ Claimant sought compensation for damages.
  - ✦ Author was acted on behalf the broker.

# Case Study 1

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- ✦ Appointed an insurance expert as a mediator.
- ✦ The parties held four meetings.
- ✦ Concluded a preliminary settlement agreement.
- ✦ Claim against PT Marsh was revoked.

# Amicable Settlement in Arbitration

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## ✦ Article 45(1) of Law No. 30 Year 1999

### ✦ Mandatory procedure

- The arbitrator(s) has to encourage the parties to settle the dispute amicably.
- Discretion of the parties to accept the suggestion.

### ✦ Applies in every hearing

- At the beginning of each proceeding.

### ✦ No detailed procedural rules

- Under direction of the Tribunal and subject to the consent of the parties.

# Case Study 2

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## ✦ Investor v. Operator

- ✦ The arbitration has been commenced since January 2006.
- ✦ Claimant seeks termination of contract.
- ✦ The Tribunal has held five hearings.

# Case Study 2

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- ◆ The Tribunal constantly promoting amicable settlement.
  - The Tribunal postponed the examination of the case and instructed the parties to negotiate the terms of the disputed contract.
  - The Tribunal ordered the Executive Director to attend the hearing without the participation of lawyers.
  - The negotiation has been conducted for more than a month and has been adhered by the parties.

# Remuneration System of Advocate

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## ✦ Article 21(1) of Advocate Law

- ✦ The amount of advocate's fee should be reasonable and subject to agreement between the advocate and the client

## ✦ Code of Ethic of Indonesian Bar Association (Article 4(d)&(e))

- ✦ The amount of attorney's fee should be appropriate with the client's financial capacity.
- ✦ The client shall not be liable of unnecessary expenses.

# Current Practice of Advocate's Fee

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## ✦ Set by contract in advance of representation

### ✦ Billable hours

- Based on hours spent.

### ✦ Lump sum

- A one-time payment.

### ✦ Success fee

- Percentage of the collected amount.

### ✦ Pro bono

- Free service for the underprivileged.

### ✦ No cure no pay

- Charge upon result.

# Elements of Japanese System Applicable in Indonesia

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## ✦ *Wakai* (Reconciliation)

- ✦ In-Court Mediation has adopted *Wakai* restrictedly.
- ✦ *Wakai* is already adopted in the Arbitration Law.
- ✦ Case study 1 is an application of *Wakai*.

## ✦ *Chotei* (Conciliation)

- ✦ *Chotei* has not been applied in Indonesia.
- ✦ Law No. 30 Year 1999 already recognizes *Chotei* as one of alternative dispute settlements.

# Policy Recommendation


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- ✦ In-court mediation should also be applied at the higher level of trial court and may be conducted during the court proceedings upon request of the parties as applied in *Wakai* system.
- ✦ Qualification of mediator should be clear.
- ✦ Expert mediator should be compulsory.
- ✦ The procedure for approving appointment of mediator and for its evaluation or replacement should be clarified.
- ✦ A certain sanction for non-compliance should exist.
- ✦ Lengthen the time limitation of 30 days and should be extendable.

# Action Plan

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- ✦ Advising the amendment to the law regulating in-court mediation with reference to the Reconciliation system (*Wakai*).
- ✦ Advocating the adoption of Conciliation system (*Chotei*) in the procedural law.



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*Thank you*  
*Terima Kasih*  
Arigato Gozaimasu

