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The Use of Mediation as Alternative Capital Market Dispute Resolution

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ABSTRACT

The activities of capital market players in the case of securities transactions usually lead to a dispute involving vendors or service providers, agreements, and contracts related to investment, one of the dispute resolution institutions or differences of opinion in the capital market through the procedures agreed by the parties is BAPMI. The role and responsibility of the arbitrator, mediator, and adjudicator in the settlement of disputes in the capital market, the form of dispute resolution conducted by the arbitrator, mediator, and adjudicator in Alternative Dispute Resolution (ADR) outside the court, as well as the enforcement of the decision given by the arbitrator, mediator, and adjudicator to the disputing party in Alternative Dispute Resolution (ADR) outside the court. The results of discussion and analysis of Alternative Dispute Resolution with mediation approach is the right initial choice in solving capital market disputes.

Keywords: Alternative Dispute Resolution, Capital Markets, Economy

INTRODUCTION

The existence of the capital market in Indonesia is one of the important factors in the development of the national economy, proven to have many industries and companies that use this institution as a medium to absorb investment and media to strengthen its financial position. In fact, the capital market has become the financial nerve center in the modern economic world today, even the modern economy could not exist without a capital market that is resilient and globally competitive and well-organized. Capital markets play an important role in promoting economic growth through the mobilization of financial resources and capital inflows companies and governments alike can benefit from the existence of capital markets. Both can utilize various financial instruments in the capital market to fund various long-term projects. For example, the government can issue bonds to build infrastructure that will certainly encourage the creation of national wealth and certainly have an impact on domestic economic growth.

The form of enforcement and supervision of the capital market is by the existence of Law No. 8 of 1995 on the capital market as legal certainty and legal basis in conducting capital market activities. This makes companies that are a legal entity will provide confidence in the capital market which is not only an alternative investment but has been used as part of the funding of the company or legal entity. In addition, the existence of supporting institutions and provisions both civil and criminal in the act adds to the confidence of business entities to carry out activities in the capital market today.

One of the factors for the creation of a resilient and globally competitive Indonesian capital market is the availability of a securities trading system that is able to compete with foreign capital markets. Therefore, the government continues to encourage the development of the trading

system to the highest level of efficiency without ignoring the factors of regularity and fairness and always follow the procedures of capital market openness in accordance with international standards in order to provide protection to both actors and investors.

The development of the capital market in Indonesia which makes many new rules or policies related will not only have a positive impact on the capital market as a support for the National Economic Development of the Republic of Indonesia but also cause differences of opinion and conflicts or disputes that cannot be avoided by the parties in the capital market activities. In this case, of course, any dispute that arises is required to resolve quickly and appropriately so that the dispute does not drag on so that it can harm the parties and disrupt the continuity of National Economic Development. The more trading activities carried out, the greater the risk of disputes that must be resolved, because in a business relationship and agreement, there is always the possibility of disputes.

Disputes that occur between capital market participants generally due to policies in economic sector, which is due to the need for increased role in the field of capital markets so as to allow the emergence of disputes between several parties. As a means to resolve capital market disputes, an alternative dispute resolution institution in the field of capital market was established, namely the Indonesian capital market Arbitration Board (BAPMI) which is under the support of rules issued by The Capital Market and financial institutions Supervisory Board (Bapepam-LK) which is now under the auspices of the Financial Services Authority (OJK), namely Law Number 8 of 1995 on Capital Markets and various rules of the Capital Market Supervisory Board and financial institutions which have been changed to the Financial Services Authority of the Republic of Indonesia.

BAPMI provides dispute resolution services when requested by the parties to the dispute through an out-of court dispute settlement mechanism. BAPMI offers 4 (four) types of dispute resolution outside the court that can be chosen by the parties to the dispute, namely binding opinion, mediation, adjudication, and arbitration. Through the four ways the settlement is expected to produce a decision that provides a win-win solution for the parties.

However, despite the regulation on ways to resolve disputes on capital market activities, it is possible that there are still some problems in practice. This usually occurs in capital market activities that use agreements, where the parties do not use the dispute resolution forum selection clause or even make a dispute resolution forum selection clause that results in an ambiguous matter or a new problem arises in the selection of a dispute resolution forum in the capital market. This is because the contract includes two settlement forum options that ultimately lead to meaning in resolving the dispute must first choose which forum will resolve it, because it cannot be denied that the capital market dispute will also affect Indonesia's National Economic Development.

This habit becomes an interesting thing to study legally. The question that arises is, in the selection of capital market Dispute Resolution, what kind of clause is effective in the selection of capital market Dispute Resolution forum in the framework of National Economic Development and what are the legal consequences if there is no clause at all containing the choice of forum or appointment of Dispute Resolution forum in an agreement related to capital market activities to National Economic Development.

This paper will discuss more aspects of legislation and matters related to the substance of the law. So the legal issues that will be discussed in this paper are: how effective alternative capital market dispute resolution in order to support National Economic Development?, what are the legal consequences of dispute resolution in

capital market dispute resolution linked to National Economic Development?

LITERATURE REVIEW

Capital Markets

The capital market is an event that can be used as a place or means of meeting between demand and supply of long-term financial instruments, generally more than 1 (one year). The law defines the capital market as "activities related to the public offering and trading of securities, public companies related to the securities they issue, as well as institutions and professions related to securities" (Samsul, 2006: 43).

The capital market consists of primary market and secondary market. The primary market is the market for newly issued securities and as a means for companies that for the first time offer stocks or bonds to the general public. In this market, funds come from the flow of new securities from buyers of securities (called investors) to companies that issue securities (called issuers). While the secondary market is the market for trading existing securities (old securities) on the stock exchange and as a means of buying and selling securities between investors and the price is formed by investors through securities intermediaries. The money that flows from this transaction no longer flows to the company that issued the securities but only flows to the holders of one security to the holders of other securities (Samsul, 2006:46-47). According to law No. 8 of 1995 on the capital market, the capital market is an activity concerned with the public offering and trading of securities, public companies related to the securities they issue, as well as institutions and professions related to securities.

The capital market has an important role for the economy of a country because the capital market promises two functions, first as a means of funding businesses or as a means for companies to obtain funds from the public investors (investors). The funds obtained from the capital market can be used for business development, expansion, additional working capital and others, both capital markets become a means for people to invest in financial instruments such as stocks, bonds, mutual funds, and others. Thus, the public can place their funds in accordance with the characteristics of profit and risk of each instrument (Mawardi, 2009).

The capital market is also an alternative for companies to raise funds from investors. And basically the capital market is a place where buyers and sellers meet with the risk of profit or loss. To attract buyers and sellers to participate, the capital market must be liquid and efficient. A capital market is said to be liquid if sellers can sell and buyers can buy quickly. While the bond capital market will be efficient if the price and securities reflect the value of the company accurately.

Capital Market Dispute

Capital market disputes are disputes related to long-term financial instruments (securities)that can be traded, both in the form of debt and capital, both issued by the government, public authorities and the private sector. Long - term funds which are debt are usually in the form of bonds, while long-term funds which are capital funds are in the form of shares.

Capital market disputes when linked to law No. 8 of 1995 is a dispute in the activities concerned with the public offering and trading of securities, public companies related to the securities issued by them, as well as institutions and professions related to these securities. The capital market acts as a liaison between investors and companies or government industries through the trading of long-term financial instruments. (Umam, 2013)

Mediation

Mediation comes from the English language, "mediation", or mediation, IE dispute resolution involving a third party as a mediator or dispute resolution mediated. Christopher W. Moore argued that mediation is intervention in a dispute by a third party that is acceptable to the disputing

party, is not part of both parties and is neutral. These third parties do not have the authority to make decisions. He is in charge of helping the conflicting parties to voluntarily come to an agreement accepted by each party in a dispute.

According to the formulation of Article 6 paragraph (3) of Law No. 30 of 1999 also states that "by written agreement of the parties" disputes or differences of opinion are resolved through the assistance of "one or more expert advisors" or through mediators".

Thus, in principle, mediation is a way of resolving disputes outside the court through negotiations involving third parties who are neutral (non-intervention) and impartial (impartial) and accepted by the parties to the dispute. The third party is called a mediator or mediator whose job is to assist the disputing parties in solving their problems, but does not have the authority to make decisions. With mediation, a common ground is expected to be reached in resolving the problems faced by the parties, which will then be poured as a collective agreement. The decision - making is not in the hands of the mediator, but in the hands of the disputing parties. With regard to the place of mediation, the parties may determine for themselves and choose where they wish to hold this mediation. Mediation can be held anywhere in the world.

MATERIAL AND METHODS

The method of approach to be used in this research is normative juridical approach. This approach was chosen considering that in order to achieve the research objectives/ research targets researchers refer to the legal norms contained in the legislation, Court decisions and legal norms in the community and mining legal instruments. The research approach to legislation is carried out by reviewing all laws and regulations related to legal issues to be studied, namely the normative study of the regulation of mining business activities in relation to the resolution of mining disputes.

RESULTS AND DISCUSSION

Alternative Capital Market Dispute Resolution Options

Capital markets have an important role in macroeconomic activities as a tool to allocate economic resources optimally. This can be seen in companies that require more funds view the capital market as a tool to obtain funds that are more profitable than capital obtained from the banking sector. Capital obtained from the capital market, in addition to easier to obtain, also the cost of obtaining capital is Cheaper. In addition, the capital market also functions in improving economic performance through increasing national income, creating employment opportunities, and more evenly development results for the community.

The capital market can be defined as a market that is managed in an organized manner by trading securities (securities), such as bonds, preferred shares, Common Shares, Warrants, and rights by using the services of intermediaries, commissioners, underwriters, and other institutions that exist in the market.

Although many entrepreneurs use the capital market as an effort to improve their business capabilities, but in carrying out trading activities in the capital market, market participants or entrepreneurs are also often faced with various obstacles, causing disputes between the parties in carrying out their trading activities.

Basically, the capital market dispute is divided into two based on its legal class, namely based on public law and private law. Violations or capital market problems in public law are in the field of criminal and administrative law, while violations or private law problems include violations or problems in the field of civil law, among other examples such as investment managers who fail to pay to customers or more often problems in agreements between financial services institutions and consumers or customers.

Capital Market dispute resolution in the field of Public Law is carried out by the authority Financial Services (OJK) as a

supervisory institution for the running of capital market activities.

OJK has the authority to directly conduct examination and investigation of complaints of violations in the field of criminal and administrative law. Meanwhile, in the event of a civil law Capital Market dispute, especially with regard to the agreement of the parties of market participants, in its resolution it is necessary to see in advance the clause on the selection of the dispute resolution forum.

Dispute resolution in principle is the freedom of the parties to choose and agree on which forum will be used in the event of a dispute, this is the principle of freedom of contract adopted by the Indonesian civil law system. If the parties to the agreement have agreed that any dispute will be resolved in court, the mak must go to court, and other institutions become unauthorized. Similarly, if the parties to the agreement have agreed that any dispute will be resolved in arbitration institution X, then it must go to arbitration institution X, and the court or other arbitration institution becomes unauthorized.

The problem today, in dispute resolution, especially in using the non-litigation forum which is part of the Alternative Dispute Resolution in the capital market is that often the parties can not resolve the dispute in the Indonesian capital market Arbitration Board (BAPMI) because of an error in the use of the clause election of the dispute resolution forum.

This happens because in the writing of the clause the Parties Set 2 options forum settlement in the contract, for example, the forum option clause mentions "the dispute will be resolved through court or arbitration", or if it cannot be resolved through arbitration will be submitted to the court" of course the clause will cause confusion in its implementation in the future, because the clause seems to give options to the parties whether to bring to court or to arbitration.

The emergence of such problems is usually due to ignorance of the parties or the parties consider that the clause" the dispute will be resolved through court or arbitration", or" if it can not be resolved through arbitration will be submitted to the court " is considered the most neutral to accommodate the wishes of the parties during contract negotiations. In addition to the factor of incomprehension, it is also common for the parties to the agreement to also include clauses without first studying the characteristics of the industry. Thus, even if they agree to resolve any disputes through the Indonesian capital market Arbitration Board (BAPMI), but because it includes a dispute resolution clause also to the court, in practice the clause is a fatal mistake with the consequences of the clause is called "nosense arbitration clause", and consequently complaints that go to BAPMI can not be processed.

For that, so that the parties to the dispute can use the BAPMI forum or court that must be selected one of them, in the settlement of disputes suggested for industry players before making cooperation and agreements with other parties must first ensure that the forum to be chosen in resolving disputes more clearly, because the vagueness of the choice of the forum causes the dispute resolution is difficult to do BAPMI. This can be seen from the research results of BAPMI team, some of the complaints that entered this institution could not be followed up because the parties in the clause of the agreement included the clause "nonsense arbitraseclause".

For it also needs a clause sentence that is effectively used as a choice forum dispute resolution in the capital market, for example, can be by expressly choosing one of the forums, for example by including the following clause sentence "dispute will be resolved through BAPMI mediation in accordance with BAPMI regulations and events."or if the parties have expressly stated For example that the dispute is resolved through BAPMI but possible occurrence of a disagreement through mediation on the initial stage of dispute resolution, then the parties can combine

between mediation by arbitration with the following clause sentence ”the dispute will be resolved through the mediation of BAPMI according to BAPMI procedures and events. If until the mediation period does not succeed in achieving peace, or the parties withdraw or do not continue mediation, it will be resolved through BAPMI arbitration according to BAPMI procedures and events. Lack of understanding of the parties to the effective clause, due also to there is still a lack of socialization from BAPMI which was just established so that it has not fully aware of how the procedures in BAPMI. Whereas in the settlement of capital market disputes, especially in the field of civil law, the Indonesian capital market Arbitration Board (BAPMI) itself is an option that is always used by the disputing parties in capital market activities compared to the court. BAPMI is an institution that was born because of the characteristics of the Capital Market Industry and is an institution formed to resolve disputes that arise between fellow capital market participants, both disputes that arise due to securities transaction activities and disputes between investors or service providers involved in this industry, including for matters of agreements and contracts related to investment and transactions in the capital market.

In line with this, it should be remembered that as provided for in Article 3 Law No. 30 of 1999 on arbitration that “the District Court is not authorized to adjudicate disputes of the parties that have been bound in advance by the agreement arbitration” as well as in Article 1 Number 1 of Law Number 30 of 1999 on Arbitration which explains that “arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. This indicates that the dispute resolution forum clause must indeed made effectively and decisively because both forums do not have the authority again if one of them has been selected and listed as a forum that will resolve disputes by the parties to the agreement. As for the existence of Article 1 number 1 and Article 3 of Law No. 30 of 1999 on arbitration is actually a limitation of the parties in order to avoid the existence of nonsense clause arbitration clause and will prevent the parties from technical discussion in the future when the dispute actually occurred discussion in the future will be much more difficult than when prepared in the early stages of the agreement.

However, if in this case the parties have previously entered the Election Clause ambiguous dispute resolution forum, dispute resolution through BAPMI certainly will not be closed at all because the parties to the dispute can settlement of disputes through arbitration by way of between the parties disputes must make a dispute settlement agreement through arbitration by taking into account Article 9 UU30 / 1999 which has provided that “the arbitration agreement made after the emergence of engketa must be made in writing, if necessary in the form of a notarial deed, and must make at least the following matters: regarding the disputed issue, the full names and residences of the parties and the arbitrator, the place of Arbitration, the full name of the secretary of some kind of substitute clerk in court, the term of the arbitration, the statement of willingness of the arbitrator and the statement of willingness of the parties to bear all the costs of the arbitration. If there is no mention of any of the foregoing, then the arbitra agreement becomes null and void.

According to BAPMI, there are at least two options for settlement forums that can taken in resolving disputes iniforum is the forum court and forum outside the court (such as mediation danarbitrase). This needs to be a concern for capital market industry players for pouring the forum selection clause well in the agreement will avoid additional disputes that actually arise due to the sound of clauses that are wrong (nonsense), ambiguous and/or responsibility.

For greater convenience, the parties may adopt the standard forum Options Clause

issued by the arbitration or mediation institution chosen by the parties in agreement, which should be observed is the forum to be chosen in resolving each disputes that arise, as for some important things that need to be known by the parties in determining the choice of the settlement forum and how to pour it into the agreement.

The use of forum selection clauses in dispute resolution is usually not used in capital market disputes tort, because usually in tort involving a third party in the matter.

So in this case if there is a dispute in the capital market that is against the law, the dispute is likely to be directly brought to court but still with restrictions as in Article 3 of the arbitration law on the Prohibition of district courts that are prohibited from resolving disputes that are already bound by the arbitration agreement.

Basically, the arbitration path itself does not rule out the possibility for disputes tort resolved through arbitration, if it is in previous agreements have included clauses election dispute forum through arbitration, then the dispute should be resolved through arbitration. This is considering as stipulated in Article 2 of Law No. 30 of 1999 about arbitration and Alternative Dispute Resolution does not provide for the limitation that disputes resolved through arbitration are limited to default.

Based on the provisions of Article 2 of the arbitration law, with the nomenclature that may arise from the legal relationship, is used as a basis for the party who feels harmed by PMH to resolve existing problems through arbitration. As for one of the reasons that is generally used by parties who filed a lawsuit PMH to the District Court and not to arbitration is because of the relationship of third parties to the existing problems.

Arbitration law itself does not provide further explanation regarding participation third party in the arbitration process. However, if it refers only to the provisions of Article 30 of the arbitration law, then the entry of third parties is possible in a process of Arbitration examination. Provided, the entry of such third party obtains the consent of either the arbitrator or the arbitral tribunal and the parties (applicant and respondent).

Mediation As An Alternative Dispute Resolution In The Settlement Of Property Disputes

Law No. 21 of 2011 on the Financial Services Authority (OJK law), the regulatory authority and supervision of activities in the capital market originally owned by Capital Market Supervisory Agency (Bapepam) since December 31, 2012 has moved to OJK.19 the capital market itself is regulated in the law of the Republic of Indonesia number 8 of 1995 concerning the Capital Market.

Dispute resolution through Alternative Dispute Resolution is the settlement of disputes outside the court. Out-of-court dispute resolution is closed to the public (closed door session) and the confidentiality of the parties is guaranteed, the process is faster and more efficient. This out-of-court dispute resolution process avoids the delays caused by procedural and administrative proceedings as in general courts and has a win-win solution. This out-of-court dispute resolution is called Alternative Dispute Resolution (hereinafter referred to as APS).

To ensure the successful implementation of the APS mechanism, the prerequisites in the form of key success factors must be known. Key success factors are as follows:

a) The dispute is still within " reasonable limits "the APS will be effective if the dispute that occurs between the parties is still in a "reasonable" state. The level of disputes that are above the reasonable threshold will be difficult to resolve by the APS method. Such disputes generally have made the relationship of the parties very bad, so that between the parties there is no desire to solve the problem in a win-win solution (using APS). In a situation like this, it will be difficult to come up with a decision that is acceptable to both parties.

b) Commitment of the parties the success of dispute resolution through APS is determined by the determination and good faith (tegoede trouw) of the parties to the dispute to accept responsibility for their own decisions as well as receiving legitimacy from the APS is determined by how much commitment and acceptance of the APS process from the parties to the dispute. Thus if the parties do not initiate the APS with good faith determination, then the APS process will be futile, unproductive, and will only consume money and time. Despite the low cost in the APS compared to litigation.
c) The sustainability of the settlement relationship through APS is based on the spirit of win-win solution. Therefore, taking into account future interests, then from the disputing parties there should be a desire to maintain their good relations. This is what will encourage them to not only think about the final result in their favor, but also think about the process of how to achieve it.

The definition of APS as stipulated in Article 1 Paragraph (10) of Law No. 30 of 1999, APS as an institution to resolve disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by way of consultation, negotiation, mediation, conciliation, or expert judgment and arbitration.

From the type of dispute resolution contained in law No. 30 year 199 then the focus of problem solving by using mediation mechanisms. Mediation according to Supreme Court Regulation No. 1 of 2016 on mediation procedures in court (Perma No. 1 of 2016) defines mediation as follows: "Mediation is a way of resolving disputes through a negotiation process to obtain an agreement of the parties with the assistance of a Mediator."

Mediation is a way of resolving disputes by agreement of the parties to the dispute involving a neutral third party as a mediator in order to accelerate the achievement of peace. It is believed that the mediator will be able to direct the parties towards peace more quickly. If a mediation effort is chosen, it shows the seriousness of the parties to continue to resolve the dispute peacefully and indicates to remain on good terms in subsequent businesses.

Article 3 Paragraph (6) Perma No. 1 of 2016 gives a maximum limit of 30 (thirty) to the parties to mediate. The main characteristics of a mediation process are:

a) There is an agreement of the parties to involve a neutral party;
b) The Mediator plays the role of mediator who facilitates the desire of the parties to reconcile;
c) The parties jointly determine for themselves the decision to be agreed;
d) The Mediator may propose offers of dispute resolution to the parties without any authority to force and decide;
e) The Mediator assists in the implementation of the content of the agreement reached in mediation.

Some of the principles of mediation are:

a) Is voluntary or subject to the agreement of the parties;
b) In the civil sector;
c) Simple;
d) Closed and confidential;e) and
e) Mediates or acts as facilitator

The mediation process is always mediated by one or more mediators chosen by the disputing parties. The selection of mediators should be carried out carefully and thoughtfully. The involvement of the mediator in the dispute that occurs as a trigger for the parties to go to a peaceful settlement, so that the mediator generally does not interfere in determining the contents of the peace agreement, unless it is really needed. This is based on the principle of the mediation process, that the material of the peace agreement is the absolute right of the parties to determine it without any intervention from the mediator.

In the mediation process, a mediator has the role of: a) bringing equal interests closer and minimizing differences in interests; b) creating a conducive, intimate and directed

meeting (focusing on the substance of the problem); c) not positioning itself as a person who decides and does not judge right or wrong (not acting as a judge); d) identifying problems and possible solutions that are acceptable to the parties; e) documenting the agreement that has been produced; f) helping the implementation of the compromise deed produced.

The things that have been mentioned above pursed that in the initial Alternative Capital Market dispute as a preventive measure is to apply mediation as an alternative dispute resolution because in the capital market segment problems in general must be related to economic activities so that mediation is appropriate to reduce the buildup of cases in court and as restorative justice outside the humanist court.

CONCLUSIONS

The capital market is an organized financial system that brings together stock owners and investors who have a certain period of time either directly or through intermediaries. Usually the case that occurs in general is the case of stock price manipulation, the Alternative Dispute Resolution in the capital market with mediation mechanisms is very appropriate as an effort to resolve disputes outside the court which is expected to be able to produce an agreement peacefully and equally do not feel at a disadvantage or an agreement that can be accepted by each party. If we see some violations of the law committed by the parties in the capital market that harm the other party but there is no attempt to reclaim their rights, then it is hoped that if there is an attempt to claim the rights then mediation is one way to resolve this dispute that is humanistic

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