

Legal Construction of Banking Mediation Institute in Indonesia

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ABSTRACT: The existence of legal provisions In Indonesia which regulates the implementation of such mediation known as alternative dispute resolution. The results shows that the role of Banking Mediation in non-litigation resolution is very important to protect the rights of customer and especially after the issuance of the provisions of Bank Indonesia Regulation No. 10/1/PBI/2008 and No. 7/7/PBI/2005. The enacting of such provisions shall be realized so that the implementation of the banking mediation process and the resolution of customer complaints can be effective and the community or the customer can be protected their rights. Bank dispute resolution through bank mediation has a positive impact, especially in increasing public confidence in the bank. Due to protracted disputes between the customer and the bank can reduce the image of the bank and can bring negative impact to the continuity of the existence of the bank that is reputation risk and decreased level of public confidence in the bank. For customers, especially small customer and micro- and small businesses, besides as a form of legal protection against the rights of customers, the presence of banking mediation also provides fresh air to the dispute resolution between customers and banks that often requires more time and expenses. Through this banking mediation the resolution of disputes between customers and banks can be solved simply, cheaply and quickly.

Keywords: *Alternative Dispute Resolution, Banking, Business Law, Mediation*

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I. INTRODUCTION

The presence of bank in the modern economy has become a difficult necessity to be avoided, because it has touched the needs of everyone and all levels of society. If previously the people can save money under the pillow or in a money box, today the people will prefer to save money in the bank, because it can produce interest and more secure. Meanwhile, the people who need funds will more easily come to the bank to find people who can and want to loaned funds to the needy.¹

In conducting its function as a mediator for parties that has excess funds with poor one raises the legal relationship between the banks with the customer. This legal relationship can cause a dispute between the customer and the bank. Weak protection to the customer seen from the increasing number of cases that emerged in its development. This is also increasingly seen from the many complaints of customer by the mass media that essentially are not satisfied with the services provided by banks that are not in accordance with the advertisements offered.²

Based on data from Indonesia Bank in 2013 of 884.454 complaints submitted by Commercial Banks, the number of complaints is not all can be mediated because it is not in accordance with the rules, processes and stages to be mediated by Indonesia Bank. From the number of complaints, which can be mediated or eligible for mediation there are 194 complaints and mediations have been made with 16 complaints, but also some that can be resolved between customers and banks without the involvement of Indonesia Bank.

In relation to the implementation of mediation, the existence of legal provisions In Indonesia which regulates the implementation of such mediation known as *alternative dispute resolution*.³ Alternative dispute

¹ Abdullah Piter, Suseno, 2003, *Sistim Dan Kebijakan Perbankan Di Indonesia*. Pusat Pendidikan Dan Studi Kebanksentralan (PPSK) Bank Indonesia, Jakarta, page.1

² Ronny Sautma Hotma Bako, *Hubungan Bank dan Nasabah Terhadap Produk Tabungan dan Deposito (Suatu Tinjauan Hukum Terhadap Perlindungan Depositor Di Indonesia Dewasa Ini)*, (Bandung: Citra Aditya Bakti, 1995), page.3.

³ Jacquelin M. Nolan-Haley in his book "Alternative Dispute Resolution In a Nutshell" quoted by Bismar Nasution in his paper "Penyelesaian Sengketa Alternatif Melalui Mediasi", presented at PERMA Interactive Dialogue No.2 of 2003 on Mediation at the Court, Medan 2003 stated that the term *Alternative Dispute Resolution* was first emerged in the United States along with an alternative search in 1976, when "Chief Justice" Warren Burger held the *Roscoe E. Pound Conference on the Cause of Popular Dissatisfaction with the Administration of Justice* ("Pound Conference") in Saint Paul, Looking for new ways to resolve conflicts.

settlement is an option for parties who want to resolve their dispute without the court.⁴ The choice depends entirely on the wishes of each of the disputed parties. Dispute resolution with mediation is currently restricted to civil disputes only. This is motivated by the opinion that the dispute is not detrimental to society in general.⁵ In this mediation institution, enabling the independent mediator who can provide advice in accordance with their respective profession, for example there is a conflict between the customer and the bank concerning the legal matter, there must be a mediator who is expert in banking law, which can come from independent parties. However, in the implementation of banking business activities often the rights of customers can not be met well, causing a dispute⁶ between the customer and the bank, which if cannot be resolved properly by the bank, then potentially harm the customer and or the bank.

Disputes may occur because no agreement reached between the disputed parties. This dispute can occur because dissatisfaction and where there are parties who feel disadvantaged and then this dissatisfaction become an unfinished conflict of interest resulting in a conflict.⁷

The resolution of legal conflicts can be done through 2 (two) ways, namely litigation and non-litigation process.⁸ The legal conflict between the bank and the customer that resolved through the court forum can ultimately win one of the parties because the resolution through the courts basically uses the *win-lose principle*. Basically, the business world wants an efficient and effective dispute resolution where the process is easy, but in practice the disputed parties prefer to resolve through the litigation process at the court. This also occurs in disputes between banks and their customers, so that mediation institutions are expected to play a role in the disputes resolution through non-litigation, even many banks still have not established a complaint unit or banking mediation within the internal scope of the bank, it raises the issue that banking mediation in non-litigation dispute resolution tends to have not serious attention from the management of Indonesian banking.

II. ANALYSIS AND DISCUSSION

1. Implementation of Economic Law as Legal Basis of Banking

Economic law as the legal basis that governing economic activity includes all aspects, in terms of essence and existence, its relationship with other areas of law, as well as the studied scope. The meaning of essence and effectiveness are economic growth, welfare, and equal opportunity.⁹ Economic law is also all the rules governing economic laws, issued by the government, all policies and the existence of government involvement.

Banking law is a set of rules of law in the form of legislation, jurisprudence, doctrine, and other legal sources that regulate the banking issues as an institution, and aspects of its daily activities, the rules should fulfilled by a bank, the behavior of officers, rights, obligations, duties and responsibilities of parties involved with the banking business, what may or may not be done by the bank, the existence of the bank, and others pertaining to the banking world.¹⁰

Banking has a primary function as intermediary institute, by collecting funds from the community and distributes them effectively and efficiently in the real sectors to encourage the development and stability of a country' economy. In this case, banks collect funds from the community on the basis of community trust. If the community believes in the bank, then they will feel safe to save money or funds in the bank. Banks must always maintain the trust level of customers or the communities in order to save their funds in the bank, and the bank can distributethe funds to encourage the nation' economy.

Bank's services are very important in the development of country economic. It is generally divided into 2 (two) purposes. *First*, as provider of mechanism and efficient payment for the customers, for this, banks provide cash, savings, and credit cards. This is the most important bank role in economic life. *Second*, by receive savings from customers and lending them to those in need of funds, the bank is increasing the flow of funds for more productive investment and utilization.¹¹

The banking sector has a very vital role, among others, as a regulator of the national economic. The flow of money is needed to support economic activity. Thus, the health and strong condition of the banking

⁴GunawanWidjaja, *Seri HukumBisnisAlternatifPenyelesaianSengketa*, PT Raja GrafindoPersada, Jakarta. 2005. Page. 90

⁵ Jimmy Jose Sembiring. *Cara MenyelesaikanSengketa di LuarPengadilan (Negosiasi, Mediasi, Konsultasi&Arbitrase)* Jakarta; Visimedia, 2011. Pages 25-26

⁶*The rule of law is not only to satisfy one party by harm the other, but to produce a compromise between conflicting interests to minimize the possibility of frictions, which have a relatively long life expectancy.* See Hans Kelsen, *TeoriUmumHukumdan Negara*, translated by Somardi (Jakarta: Bee Media Indonesia, 2007), page.15.

⁷SuyudMargono, *ADR danArbitrase Proses PelembagaanAspekHukum*, (Jakarta: Ghalia Indonesia, 2000), page.34.

⁸Litigation is a legal dispute resolution through a court, while non-litigation is a legal dispute resolution outside the court.

⁹Sumantoro, *HukumEkonomi*, Jakarta:Universitas Indonesia (UI) Pers 1986, page 5

¹⁰Munir Fuady, *HukumPerbankan Modern BerdasarkanUndang-UndangTahun 1998*, Cet-1, Bandung : PT. Citra Aditya Bakti, 1999. Page 14

¹¹LukmanSantoso, *Hak Dan KewajibanHukumNasabah Bank*, Cet-1, Yogyakarta: PustakaYustisia, 2011. Page 32

sector becomes an important target of the policy in the banking sector. The role of the banking sector in development can also be seen in its function as a means of transmitting monetary policy. In addition, banking is a very vital tool in organizing payment transactions, both nationally and internationally. Given the importance of the function, then efforts to maintain public confidence in the banking sector becomes a very important thing to do.¹²

Along with the growth of the business world and the people's need for banking products and services; the banking business is now increasingly complex. The complexity of the banks' business can be seen both in terms of products and services as well as from business networks with institutions built by banks to strengthen the attractiveness of the products and services of the banks concerned. We can feel that every bank is doing addition of outlets, features and benefits of its bank products. In cooperation with several non-bank institutions, with several business partners such as Telkom, Telkomsel, PLN, Indovision/Cable Vision and so on. Efforts to develop product features, services and business networks by each bank will increase the number of customer interactions with the bank.

2. Overview of Dispute Resolution in Banking Sector

Disputes can occur to anyone, between individuals and individuals, individuals and groups, groups and groups, companies and companies and so on. In other words, disputes can be public or civic and can occur in both national and international settings. It is a situation where there are parties who feel disadvantaged by other parties. The disadvantaged party conveys this dissatisfaction to the second party and if the second party does not respond and satisfy the first party, and shows dissent, then it is called a dispute. Thus, it can be concluded that the dispute is a dispute that occurs between the parties that indicate a difference of opinion. Dispute resolution depends on how the handling of dispute.¹³

Banking sector in the life of a country is an agent of development, because the bank is a financial institution that has a function as a financial intermediary institution as an institution that collecting funds from the community in the form of savings and re-distribute to the community in the form of credit or financing.¹⁴ In addition, the bank is also *an agent of trust* given the principles of bank as fiduciary principle.

There are 2 (two) dominant problems that consumers often complaint of banking services. *Firstly*, complaints about banking products, such as ATM (*Automatic Teller Machine*), credit card, and various types of savings, including banking product complaints related to the prizes and advertising of banking products. *Secondly*, complaints about the ways of working of officers who are unsympathetic and less professional especially *service point* officers, such as teller, customer service, and security. This argument underlies the need for an independent body that can be an alternative for the parties to resolve the dispute.

Alternative Dispute Resolution (ADR) is a form of non-court dispute resolution based on consensus committed by the disputed parties whether or not with the assistance of a neutral third party.¹⁵ It is a term that needs to be looked for equivalent in Indonesian language. It is often interpreted as an *alternative to litigation* but is often interpreted as an *alternative to adjudication*. The selection of either of these two meanings has different implications. If the first as a reference (*alternative to litigation*), the entire dispute resolution mechanism outside the court including arbitration is part of the ADR. *Alternative to adjudication* may include consensual or cooperative dispute resolution mechanisms such as consultation, negotiation, mediation, expert judgment and conciliation.¹⁶

Disputes resolution between banks and customers has been implemented by Indonesia Bank, through the Directorate of Investigation and Banking Mediation. Regulations pertaining to banking mediation have also been regulated in a Regulation of Indonesia Bank. This is in line with the regulation of the authority of Indonesia Bank in the overseeing of the Bank. As regulated in Article 8 of Act No. 23 of 1999 concerning Indonesia Bank, Indonesia Bank regulates and oversees the bank. The last task is to arrange and oversee the bank, and it will be held ultimately by Financial Service Authority.

As Act No. 21/2011, Financial Service Authority (OJK) is an independent institution that has the functions, duties and authority to regulate and provide oversight of financial services. In this case, OJK takes over the function of Indonesia Bank in conducting oversee on banking activities, in order to create a health banking

¹²Sutedi Adrian, 2007, *Hukum Perbankan Suatu Tinjauan Pencucian Uang, Merger, Likuidasi Dan Kepailitan*, Sinar Grafika Jakarta, page 130

¹³Nurnaningsih Amriani, 2011, *Mediasi Alternatif Penyelesaian Sengketa Perdata di Pengadilan*, Penerbit PT Raja Grafindo Persada, pages 12-13

¹⁴Anonim, 2007, "*Pelaksanaan Fungsi Mediasi Perbankan*", Directorate of Investigation and Mediation of Indonesia Banking, www.bi.go.id, accessed on 28 October 2013.

¹⁵Rachmadi Usman, *Op, Cit*, page 2

¹⁶Suyud Margono, *Penyelesaian Sengketa Bisnis Alternative Dispute Resolution* (ADR) (Jakarta: Ghalia Indonesia, 2010) page 30

system that fulfills 3 (three) aspects: the ability to preserve the public' interest, encourage economic growth and monetary control and to be able to develop its business fairly.

A health banking industry also needs to be supported by independent and effective supervision as set forth in the Third Pillar of API. Independent and effective supervision is needed both now and in the long run, in response to increased business activity and the complexity of banking risk. Banks no longer only sell banking products and services but also other financial products such as insurance, asset-backed securities, and mutual funds that require more complex supervision.¹⁷

The context of Bank supervision through banking mediation which by the Indonesia Bank Act is authorized of bank supervision to Indonesia Bank is very important to be applied. Indonesia Bank under the law is authorized to supervise the bank. The authority covers 4 (four) aspects: *power to license, power to regulate, power to control and power to impose sanction*.¹⁸

Supervision by Indonesia Bank on the banks can be in the form of direct supervision, through inspection followed by corrective actions, also can be in the form of indirect supervision which is a form of early supervision through analysis research, and evaluation of bank report.¹⁹

Implementation of bank supervision was related to public confidence in the bank. Because the loss of public confidence in a bank has a domino effect that can affect the confidence of others, so the banking as a whole has difficulty. Therefore, the need to implement banking supervision and development is absolutely necessary to maintain public trust.²⁰

The objective of bank supervision was to increase public confidence, that banks are financially healthy, well managed and professional and not contained threats to the interests of the community who store funds in the bank. Pressure and attention are given to aspects within the individual bank that are expected to protect the community refund. The general objective of bank supervision and development is to create a health banking system that meets 3 (three) aspects: banking that can safeguard the interests of the community well and banking that develops fairly and benefits for the national economy.²¹

Safeguard of public interest can be created by seeking banks individually to operate in a healthy and efficient. Thus, create a secure banking and able to fulfill its obligations to the depositors. Banking should develop fairly so that banking services can touch all levels of communities. Banking as a center of technology and innovation is able to actively seek and develop unexplored economic potential in society. Banks should be able to grow but such growth should properly. Healthy and efficient banks are beneficial to economic development and can support monetary control.²²

Relation to the banking mediation is appropriate to the authority of Indonesia Bank in *power to regulate*. With this, enables the supervisory authority (Indonesia Bank) to regulate the banks' operational activities in the form of regulations to create a health banking system, as well as to meet peoples' expectation of the adequacy and quality of banking services.²³ Dispute is a social phenomenon that occurs since peoples interact with each other. Human have interest in something or sometimes different opinions in understanding something. The complexity in modern life is increasingly likely to cause disputes.

According to Ahmadi Miru,²⁴ further elaborating on the disputes resolution should be the hope of every person facing a dispute with another party, including the proper dispute resolution of the dispute arising between the consumer and the producer.²⁵ Daniel S. Lev in his review concerns the legal culture in Indonesia, ways conflict resolution has its own characteristics due to the support of certain values. Despite the differences in intensity here and there, but in general compromise and peace are values that have strong community support.

3. Banking Mediation as an Alternative of Dispute Resolution

Efforts to resolve dispute through litigation in courts and arbitration are not easy to do, especially for small customers and micro businesses. Resolution through litigation in courts and arbitration generally requires more cost, aprocedure that is not simple and takes a relatively longer time. Paying attention to the characteristics of small customers and micro businesses that are specific and different from middle and large customers, dispute resolution between the bank and the small customer and micro business should be done simply, cheaply and

¹⁷AgusSugiarto, *Membangun Fundamental Perbankan Yang Kuat*, <http://www.ppatk.go.id>, accessed on 8 November 2013.

¹⁸BismarNasution, *AspekHukumPenyelesaianSengketa Antara Bank Dan Nasabah*, presented at the Limited Discussion of Banking Mediation, held by Bank Indonesia in cooperation with the Department of Law, Postgraduate School of the University of North Sumatra, Tiara Convention Center Medan, Thursday, 14 February 2007, page 9.

¹⁹Muhammad Djumhana, *HukumPerbankanDi Indonesia*, PT Citra Aditya Bakti, Bandung 2000, page.104.

²⁰ZulkarnainSitompul,2005. *ProblematikaPerbankan*, (Bandung: Books Terrace &Library.,page 218.

²¹BismarNasution, *Op.Cit.*, page 9.

²²*Ibid*

²³Muhammad Djumhana, *HukumPerbankanDi Indonesia*, *Op.Cit.*, page.204

²⁴Ahmadi Miru, *Prinsip-PrinsipPerlindunganHukumBagiKonsumenDi Indonesia*, 2011, page 209

²⁵Ahmadi Miru&SutarmanYodo,*HukumPerlindunganKonsumen*. PT Raja GrafindoPersada: Jakarta, 2004 pages 235-236

quickly. One alternative is through banking mediation. In order to protect the customer's rights properly, protected and fulfilled, Banking Mediation Institution must be established soon. Before the institution can be established, in accordance with its authority, for temporary time, Indonesia bank performs the banking mediation function.²⁶ The legal basis of mediation in Indonesia is Act No. 30 of 1999 on Arbitration and Alternative for Dispute Resolution in which effective from 12 August 1999.

Indonesia Bank²⁷ through the regulation of legislation was established Banking Mediation Institution, this institution has socialized through Indonesia Bank Regulation No. 8/5/PBI/2006 dated 30 January 2006 and Circular Letter of Indonesia Bank No. 8/14/DPNP dated 1 June 2006 so that Indonesia Bank has performed Banking mediation function as a simple, cheap, and quick, the bank has not been able to satisfy customers and cause disputes between the customer and the bank. Submission of such dispute resolution may be submitted to Indonesia Bank by customer or customer representative with the following conditions:

1. Disputes that may be submitted are civil disputes arising from financial transactions.
2. Disputes that may be submitted are disputes arising from the resolution of customer complaints made by the Bank.
3. The customer may not submit any financial claim resulting from any immaterial loss. Immaterial loss in question is loss due to defamation and unpleasant deeds.
4. The value of financial claims submitted in rupiah currency with the maximum amount is Rp. 500.000.000,00 (five hundred million rupiah). The amount may be a cumulative loss of financial loss to the customer, potential loss due to delay or non-performance of the customer financial transactions with other parties, and or costs incurred by the customer to obtain a dispute resolution.
5. The deadline for submission shall be no later than 60 (sixty) workdays, from the date of the letter of customers' complaint resolution from the bank.
6. The customer submits a dispute resolution to the Banking Mediation Institution in writing using the attached form or made by the customer.

According to Badriyah Harun, there are several things that constitute mediation rules, as follows:

- a. Customers and banks are obliged to submit and reveal all important information related to the subject matter of the dispute in the series of mediation.
- b. All information of parties relating to the mediation process is confidential information and cannot be disseminated for other interest outside the parties involved in the mediation process, i.e parties other than customers, banks and mediators.
- c. Mediator is neutral, impartial and seeks to assist the parties to come to an agreement.
- d. Resulted agreements from the mediation process are voluntary agreements between the customer and the bank and are not a recommendation or decision of mediator.
- e. The customer and the bank cannot seek legal advice or legal counsel to the mediator.
- f. The customer and the bank for any reason will not submit a lawsuit against the mediator, officer or Indonesia Bank as the implementer of the banking mediation function, either for any loss that may arise due to the execution of the deed of agreement, as well as by other causes related to the implementation of mediation.
- g. The customers and the bank in mediation process wish to resolve disputes. Thus, customers and banks are willing to mediate in good intention, cooperate with mediators during the mediation process and attend mediation meetings in accordance with agreed dates and places.²⁸

If agreement is reached in the mediation process of the customer, the bank or representative then the agreement must be set forth in the deed of agreement signed by the customer, or the customer representative with the bank. The deed of agreement is final and binding for the bank and the customer. Banks are required to implement the results of resolution of bank disputes between the customers and the banks that have been agreed and set forth in the deed of agreement.

If the agreement is not reached through mediation of the customer, the representative with the bank, then the party who feels disadvantaged will make further efforts to resolve the dispute through arbitration or judicial process. If customers or representatives of customers and banks make further efforts, they agree to:

- a. Not involve the mediator or Indonesia Bank as the executor of the banking mediation function to provide testimony in the implementation of the court in question.
- b. Not request mediators or Indonesia Bank to submit any part or all of the mediation documents administered by Bank Indonesia, whether in the form of notes, reports, minutes, mediation process reports and/or other files related to the mediation process.

²⁶PP BI No. 8/5/PBI/2006 on Banking Mediation

²⁷Article 2 PP BI No. 8/5/PBI/2006 on Banking Mediation

²⁸Badriyah Harun, 2010, *Penyelesaian Sengketa Kredit Bermasalah*, Yogyakarta: Pustaka Yustia, page 129

Submission of dispute resolution is submitted to the Directorate of Investigation and Banking Mediation. However, Bank Indonesia regulation does not regulate where mediation can be performed. Complaints are submitted by the customer to the above address, but mediation may be exercised in the jurisdiction of the Bank Indonesia representative offices throughout Indonesia, depending on where the customer and the bank are in dispute. This is to facilitate the parties to mediate.²⁹To resolve the dispute through mediation, parties are usually able to reach agreement among them, so the mediation can be felt.

III. CONCLUSION

The role of Banking Mediation in non-litigation resolution is very important to protect the rights of customer and especially after the issuance of the provisions of Bank Indonesia Regulation No. 10/1/PBI/2008 and No. 7/7/PBI/2005. This indicates that the protection of customer' rights have begun to be noticed. The enacting of such provisions shall be realized so that the implementation of the banking mediation process and the resolution of customer complaints can be effective and the community or the customer can be protected their rights.

The role of Banking Mediation Institution in non-litigation resolution of dispute as an alternative to resolve the dispute in banking dispute resolution, one of them was to achieve equality between parties in conflict so that can reach win-win solution. Bank dispute resolution through bank mediation has a positive impact, especially in increasing public confidence in the bank. Due to protracted disputes between the customer and the bank can reduce the image of the bank and can bring negative impact to the continuity of the existence of the bank that is reputation risk and decreased level of public confidence in the bank. For customers, especially small customer and micro- and small businesses, besides as a form of legal protection against the rights of customers, the presence of banking mediation also provides fresh air to the dispute resolution between customers and banks that often requires more time and expenses. Through this banking mediation the resolution of disputes between customers and banks can be solved simply, cheaply and quickly. Through banking mediation, the rights of customers can be maintained and met in well.

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²⁹Susilawetty, 2013 *Arbitrase dan Alternatif Penyelesaian Sengketa Ditinjau Dalam Perspektif Peraturan Perundang-Undangan*, Publisher Gramata Publishing.