



NAVIGATING THE LABYRINTH OF STATE-OWNED ENTERPRISES DISPUTES IN INDONESIA: A QUEST FOR EFFECTIVE RESOLUTION MECHANISMS

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ABSTRACT

This paper critically assesses the adequacy of mediation as an alternative dispute resolution (ADR) method for resolving disputes between State-Owned Enterprises (SOEs) in Indonesia. It also explores the potential of other ADR methods for more effectively resolving such disputes specifically tailored for SOEs disputes. The paper commences by providing an overview of the mediation concept as an ADR mechanism, exploring its advantages and disadvantages. It then delves into the characteristics of typical SOEs disputes and the audit concerns associated with them. Subsequently, the paper examines international and Indonesian mediation practices, scrutinising their effectiveness and applicability in the context of SOE disputes. It also identifies the potential obstacles to using mediation to resolve SOE disputes, considering the inherent concerns of SOEs in making decisions. Based on these findings, the paper recommends the adoption of adjudication as an alternative ADR mechanism for SOEs disputes, advocating for the establishment of an Adjudication Tribunal tasked with rendering fair, impartial, and efficient decisions. Finally, the paper proposes a regulatory adjustment by identifying the potential risks associated with adjudication and providing mitigation strategies.

Keywords: state-owned enterprises; alternative dispute resolution; mediation.

I. INTRODUCTION

State-owned enterprises (“**SOEs**”)¹ are instrumental entities that play a pivotal role in Indonesia's economic and societal landscape. As mandated by Law Number 19 of 2003 concerning State-Owned Enterprise (“**Law 19/2003**”), SOEs are entrusted with a multifaceted mission that encompasses driving national economic growth, generating revenue for the government, pursuing profitability, providing essential public services by delivering high-quality and affordable goods and services to meet the needs of the general populace, pioneering business ventures yet to be undertaken by the private sector and cooperatives, and extending guidance and support to entrepreneurs from lower economic strata, cooperatives, and the community.²

In 2019, the Minister of State-Owned Enterprise of the Republic of Indonesia (“**Minister**”), through his representative, explained that the Minister is currently evaluating the problems at SOEs. During the evaluation, he found that thirteen (13) SOEs companies are suing each other. The Minister mentioned that discussions could have resolved these lawsuits more amicably.³ In early 2020, the Minister informed the House of Representatives that seventeen (17) SOEs were in dispute, and many ended up in court litigation.⁴ This fact has raised concern since resolving disputes in court means

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¹ In this paper, SOEs and SOE in either plural or singular form may be used interchangeably. SOE shall also mean the SOE, and its affiliates.

² Article 2(1) of Law 19/2003.

³ Fariha Sulmaiati, “Erick Thohir Temukan 13 Kasus BUMN Saling Gugat”, <https://katadata.co.id/agustiyanti/berita/5e9a4c5564135/erick-thohir-temukan-13-kasus-bumn-saling-gugat>, downloaded on 20th of November 2023.

⁴ Kumparan Bisnis, “Erick Thohir Ungkap Ada 17 BUMN Ribut dan Berujung di Pengadilan”, <https://kumparan.com/kumparanbisnis/erick-thohir-ungkap-ada-17-bumn-ribut-dan-berujung-di-pengadilan-1ssPpLY9chj/full>, downloaded on 22nd November 2023.

exposing internal SOE matters to the public.⁵ In an attempt to manage those issues, later in the same year, the Minister mentioned that if there is a dispute between SOE, they shall try to resolve it in one (1) day.⁶

In 2023, the Ministry of State-Owned Enterprises of the Republic of Indonesia enacted Regulation Number PER-2/MBU/03/2023 concerning Guidelines for Governance and Activities of Significant Corporations of State-Owned Enterprises (“**Regulation 2/2023**”). The background of this enactment is that the regulations concerning the principles of corporate governance for SOEs, the application of risk management for SOEs, and many others, are spread out across various ministerial regulations, so there is no synchronisation or harmonisation among these regulations. Therefore it is necessary to make a legal breakthrough by consolidating several related regulations of the Minister into a single, comprehensive minister regulation.⁷

SOEs currently use Regulation 2/2023 to guide their corporate activities. Other than various provisions relevant to governance and corporate matters, this regulation introduces mediation as a dispute resolution mechanism for SOEs or their affiliates. Encompassing a myriad of provisions pertaining to governance and corporate affairs, this regulatory framework assumes a central position in delineating the norms and standards that govern the conduct of SOEs. Among its notable features, Regulation 2/2023 introduces mediation as a primary mechanism for dispute resolution concerning SOEs or their affiliated entities.

Based on this regulation, the Minister may mediate dispute between SOEs, including their affiliates.⁸ This paper will critically assess the adequacy of mediation as an alternative dispute resolution (“**ADR**”) method for resolving disputes between SOEs. It will also explore the potential of other ADR methods for more effectively resolving such disputes specifically tailored for SOEs disputes.

Considering the aforementioned background and problem, this paper will first explain the mediation concept as ADR mechanism recognised internationally, including the advantages and disadvantages (A). The paper will then describe typical SOEs disputes and audit concerns (B). Further, the paper will describe international and Indonesian mediation practice (C). The paper will also identify whether mediation can resolve SOE disputes considering the SOEs’ concern (D). The paper will offer a recommended ADR mechanism for disputes between SOEs (E). Ultimately, the paper will propose a regulatory adjustment by also identifying the risks and providing the mitigation (F).

II. DISCUSSION AND RESULTS

SOEs Disputes and Audit Concerns

Disputes between SOEs in Indonesia present a unique phenomenon in the global corporate landscape. Despite sharing the same ultimate shareholder, the Government of the Republic of Indonesia (“**GOI**”), hence consolidated financial statements, SOEs in Indonesia have engaged in various conflicts, including conflicts between them, raising questions about the effectiveness of corporate governance mechanisms within these entities.

The standard company ownership structure of Indonesian SOEs is that the Government of the Republic of Indonesia (“**GOI**”), where the Minister represents the GOI in this matter, owns one (1) A-

⁵ *Ibid.*

⁶ M Baqir Idrus Alatas, “Erick Tohir Ingin Sengketa Antar BUMN Diselesaikan Sehari” <https://www.antaraneews.com/berita/3661608/erick-tohir-ingin-sengketa-antar-bumn-diselesaikan-sehari>, downloaded on 27th November 2023.

⁷ Preamble of Regulation 2/2023.

⁸ Article 7(1) of Regulation 2/2023.

Series⁹ share and a majority of B-Series¹⁰ shares, and other entity(s) or public own the rest of B-Series shares. Generally, there are two types of SOEs: limited liability company and public service company. SOEs have to prioritise synergistic cooperation between SOEs including in the area of procurement of goods and services.¹¹ The Minister acts as the majority shareholder of almost all Indonesia's SOEs, except a few whose shares are owned by the Minister of Finance of the Republic of Indonesia.

SOEs are subject to audits by the Supreme Auditor of the Republic of Indonesia (“BPK”). These audits have frequently uncovered irregularities in SOE management practices, leading to legal consequences for SOE directors. In numerous cases, SOE directors have been detained by law enforcement agencies (“LAE”), convicted by courts, and sentenced to imprisonment. The primary cause of these legal actions is the criminal charge of causing financial loss to the state. This legal vulnerability has prompted SOEs to adopt a risk-averse approach in resolving contractual disputes with other SOEs, often opting to avoid settlements altogether. BPK, however, initially aspired to address prolonged conflicts between SOEs, anticipating that such disputes would be amicably resolved through investigative examinations.¹²

It is not easy for SOEs’ board of directors to make business decisions, where there is the potential for punishment for business decisions deemed detrimental to state finances. Law No. 40 year 2007 concerning Limited Liability Company (“Law 40/2007”) provides that Members of the Board of Directors are personally liable for any losses incurred by the company if they are at fault or negligent in their duties.¹³ As for the board of directors of SOE, these losses may be interpreted as losses to the state's finances, as long as they meet the requirements of the applicable laws and regulations.¹⁴ The Constitutional Court has ruled that SOEs are essentially entities that are responsible for carrying out some of the functions of the state. Although the state's wealth has been transformed into SOEs capital, the SOEs are still subject to the state's financial laws. Therefore, SOEs are not considered to be private entities, and their financial losses can be considered to be losses to the state's finances.¹⁵

The decision-making process for SOEs’ board of directors is notably challenging, primarily due to the inherent difficulty in navigating the intricate balance between effective business strategies and potential repercussions for decisions perceived as prejudicial to state finances.¹⁶ The complex nature of this dilemma stems from the dual responsibility borne by SOEs’ board of directors, who must concurrently pursue commercial viability and adhere to fiscal prudence in alignment with the overarching objective of safeguarding state financial interests. The potential for punitive measures further compounds this challenge, as the fear of legal consequences or censure creates an environment where innovative business decisions may be impeded, and resulting in the ineffectiveness of SOE in the development of the Indonesian economy.¹⁷ This intricate interplay between the imperative to foster

⁹ A-Series share is a special share with a specific power to suggest and/or decide in various areas depending on what is regulated on the SOEs articles of association.

¹⁰ B-Series share is a common share with standard voting right.

¹¹ Articles 137, 146, 147, and 148 of Regulation 2/2023.

¹² Warta Pemeriksa, “BPK Berupaya Menyelesaikan Sengketa Antar BUMN”, <https://wartapemeriksa.bpk.go.id/?p=24250>, downloaded on 25th November 2023.

¹³ Article 97(3) of Law 40/2007.

¹⁴ Henny Juliani, “Pertanggungjawaban Direksi BUMN Terhadap Perbuatan yang Mengakibatkan Kerugian Keuangan Negara”, *Masalah-Masalah Hukum*, Vol. 45 No. 4, October 2016, pp. 299-306.

¹⁵ *Ibid.*

¹⁶ Kusmono, Kusmono, et al., “The Legal Protection Weakness of the Directors Board from the Risk of Losses Due to Business Decisions”, *International Journal of Research in Business and Social Science* (2147- 4478), Vol. 10, No. 2, 2021, p. 306-310, <https://doi.org/10.20525/ijrbs.v10i2.1038>.

¹⁷ Kusmono, Kusmono, et al., “Legal Risks for the Business of Persero’s State Owned Enterprise (SOE) and Their Implications for State Finance”, *Journal of International Legal Communication*, Vol. 8, No. 1, 2023, p. 56-67, <https://doi.org/10.32612/uw.27201643.2023.8>. pp. 56-67.

business growth and the imperative to safeguard state financial integrity underscores the multifaceted nature of the decision-making landscape for SOEs' board of directors, necessitating a nuanced and well-informed approach to strike an optimal balance between entrepreneurial acumen and fiduciary responsibility.

Mediation as a Dispute Resolution Mechanism

Mediation is a widely recognised method for resolving conflicts between parties, offering a non-adversarial approach to dispute resolution. It involves the intervention of a neutral third party, the mediator, who facilitates discussions between the conflicting parties without imposing a judgment. Unlike a judge in a court, the mediator does not have the authority to issue binding decisions, but rather focuses on guiding the disputants towards a mutually acceptable agreement.¹⁸ In other words, a third party helps disputants resolve conflicts by enabling parties to find their own solutions.¹⁹ Mediation has been identified as an effective tool for managing various types of conflicts, including civil, labour, and household disputes.²⁰ It is considered an informal yet powerful mechanism for conflict prevention, management, resolution, and peace-building.²¹ Furthermore, mediation has been found to be particularly beneficial in educational settings, where it contributes to reducing interpersonal conflicts and promoting a culture of conflict resolution.²²

The effectiveness of mediation in conflict resolution is evident in various contexts. For instance, mediation is recognised as a valuable approach for resolving household conflicts involving children.²³ Additionally, mediation has been deeply rooted in the customary laws and usages of many societies, serving as a primary mode of conflict resolution even before the formal court system was established.²⁴ Moreover, the use of mediation in religious courts has been acknowledged as an urgent and essential mechanism for resolving disputes, particularly in family law matters.²⁵

The efficacy of mediation stems from its inherent strengths. Firstly, mediation promotes confidentiality, safeguarding sensitive information and preserving both parties' reputations.²⁶ This privacy encourages open communication and honest dialogue, which is essential for reaching a mutually acceptable outcome.²⁷ Secondly, mediation empowers parties to retain control over the resolution process, allowing for flexibility and adaptability, tailoring the process to the specific needs and interests

¹⁸ Andrew Kydd, "Which Side Are You On? Bias, Credibility, and Mediation", *American Journal of Political Science*, Vol. 47, No. 4, September 2003, p. 597-611, <https://doi.org/10.1111/1540-5907.00042>.

¹⁹ Cheryl A. Picard, et al., "Insight Mediation: A Learning-Centered Mediation Model", *Negotiation Journal*, Vol. 23, No. 1, January 2007, p. 35-53, <https://doi.org/10.1111/j.1571-9979.2007.00126.x>.

²⁰ Eneng Nuraeni, et al., "Mediation in Household Dispute Reconciliation: Prospects and Challenge", *Khazanah Hukum*, Vol. 4, No. 2, 2022, p. 120-128. <https://doi.org/10.15575/kh.v4i2.19113>.

²¹ *Ibid.*

²² Elizabeth T. Sugh, et al., "Women in Mediation and Conflict Resolutions: Lessons, Challenges, and Prospects for Africa.", *IOSR Journal of Humanities and Social Science*, Vol. 22, No. 01, January 2017, p. 01-06, <https://doi.org/10.9790/0837-2201020106>.

²³ Nancy A., Burrell, et al., "Evaluating Peer Mediation Outcomes in Educational Settings: A Meta-Analytic Review", *Conflict Resolution Quarterly*, Vol. 21, No. 1, September 2003, p. 7-26, <https://doi.org/10.1002/crq.46>.

²⁴ Magdalena Tabernacka, "The Legal Situation of a Child in Mediation in Light of the Regulations of International Law", *International Comparative Jurisprudence*, Juni 2021, <https://doi.org/10.13165/j.icj.2021.06.007>.

²⁵ Peter Apuko-Awuni, "Mediation as an Option Under Alternative Dispute resolution: the case of ghana". *UCC Law Journal*, Vol. 2, No. 1, 2022, p. 157-175, <https://doi.org/10.47963/ucclj.v2i1.903>.

²⁶ Fan Xiaoyu, "The Confidentiality and Transparency Debate Under Investor-State Mediation", *Groningen Journal of International Law*, Vol. 9, No. 2, 2022, p. 325-351, <https://doi.org/10.21827/grojil.9.2.325-351>.

²⁷ Rebecca Storrow, et al, "Exploring Research Regarding Mediation Party Preferences and Mediation within Commercial Arbitration", *Conflict Resolution Quarterly*, Vol. 37, No. 4, 2020, p. 289-303, <https://doi.org/10.1002/crq.21278>.

of the disputants.²⁸ This flexibility has been shown to empower parties, enabling them to have a greater sense of control over the decisions made during the resolution process.²⁹

Despite its numerous advantages, mediation has its limitations. One inherent weakness of mediation lies in its voluntary nature. Parties are not legally obligated to participate in the mediation process, and either party can withdraw at any time.³⁰ This lack of compulsion can hinder the effectiveness of mediation, particularly in cases where one or more parties are unwilling to engage in constructive dialogue. Lack of trust and collaboration between the parties can also impede the willingness of the parties to engage in open and constructive dialogue, which is essential for successful mediation.³¹

Additionally, the absence of a binding decision (of an adjudicating person) can pose challenges in ensuring the enforceability of any agreements reached during mediation.³² In contrast to mediation, litigation seeks to establish a definitive and judicially sanctioned resolution that imposes a binding obligation on the parties, whereas mediation strives to foster a mutually agreeable solution through collaborative negotiation and compromise. Consequently, litigation's inherent enforcement power ensures the court's decision is carried out, even if one party resists compliance. Conversely, mediation agreements, lacking such coercive authority, depending on the parties' willingness to honour the terms they have collectively agreed upon.

A further limitation of mediation lies in the non-executory nature of the settlement agreement, which lacks the mandatory enforcement power of a court judgment. While the successful culmination of mediation often produces a settlement agreement, a legally binding contract between the disputing parties, its efficacy hinges on the parties' voluntary compliance with its terms.

Should both parties remain committed to fulfilling their stipulated obligations within the settlement agreement, the probability of future disputes arising from the same matter is substantially diminished. However, in the event of a breach by a party to the settlement agreement, the unresolved issue ultimately requires recourse to a formal dispute resolution mechanism.

Mediation can be broadly categorised into two distinct types: out-of-court mediation and court-annexed mediation. Out-of-court mediation, also known as extrajudicial mediation, occurs outside the formal court system and can be initiated either before or after a dispute arises. In contrast, court-annexed mediation is a mandatory process integrated into the court system and often employed as a prerequisite for proceeding to trial.

International and Indonesian Practice of Mediation

1. International Practice

The use of mediation as a dispute resolution mechanism in the United States is influenced by a complex interplay of federal and state laws and regulations. Federal laws provide overarching regulations, while each of the 50 states has its own set of rules and regulations authorising and governing mediation, leading to variations in the legal frameworks across different states.³³ These laws typically

²⁸Bailey, Jo, Daugherty, et al., "Assessing empowerment in divorce mediation", *Negotiation Journal*, Vol. 25, No. 3, July 2009, p. 327-336, <https://doi.org/10.1111/j.1571-9979.2009.00229.x>.

²⁹*Ibid.*

³⁰O. Mozhakina, "Nature of the Voluntary Principle in Mediation", *Uzhhorod National University Herald. Series: Law*, Vol. 1, No. 61, 2020, p. 77-79, <https://doi.org/10.32782/2307-3322.61-1.17>.

³¹Zhen Lin, et al., "Resolving Forest Property Rights Disputes in China: The Bailian Case", *Systems Research and Behavioral Science*, Vol. 29, No. 2, 2012, p. 227-231, <https://doi.org/10.1002/sres.2109>.

³²*Ibid.*

³³Robert H. Mnookin, "Alternative Dispute Resolution", *The New Palgrave Dictionary of Economics and the Law*, January 2017, p. 56-60, https://doi.org/10.1007/978-1-349-74173-1_14.

address critical aspects of mediation, including the confidentiality of proceedings, the enforceability of agreements, and the qualifications required for mediators.³⁴

Mandatory mediation programs have been implemented in certain states in the United States of America to address specific types of disputes. These programs have been the subject of extensive research and evaluation in various fields, including sociology, psychology, law, and medicine.³⁵ McIsaac discusses the success of a mandatory mediation program in California, which led to the statewide enactment of mandatory mediation based on the program's achievements.³⁶

The Federal Mediation and Conciliation Service ("FMCS") in the United States plays a crucial role in promoting and supporting mediation by providing mediation services to both government agencies and private parties.³⁷ Additionally, the FMCS is responsible for developing mediation standards and training programs, contributing to the professionalisation and standardisation of mediation practices.³⁸

According to the American Arbitration Association ("AAA"), over 300,000 mediations are conducted each year in the United States.³⁹ In 2021, the AAA conducted over 120,000 mediations.⁴⁰ The success rate of mediation in the United States is estimated to be between 70% and 80%.⁴¹

In the United Kingdom, particularly in England and Wales, mediation is regulated by the Mediation Act 2017, which advocates for its use as an effective ADR.⁴² Additionally, the legal framework for mediation in the UK is established in the Civil Procedure Rules, which necessitate the consideration of mediation in suitable cases and provide a structure for court-ordered mediation, where a judge can direct parties to engage in mediation before proceeding to litigation.⁴³

The Mediation Act 2017 plays a crucial role in promoting mediation as an effective ADR method, aligning with the historical inclusion of ADR in the justice system, which has shaped the concept of access to justice, emphasising not only cost-effective justice but also tailoring the characteristics of each case to the appropriate dispute resolution process.⁴⁴ Furthermore, the Act reflects the evolving culture shift towards the use of mediation as a means to resolve conflicts, as it is reinforced by the judiciary's position against compulsion, with courts assuming the power to compel parties to engage with ADR, utilising the threat of costs consequences for parties refusing to engage in ADR.⁴⁵

Mediation in Singapore is regulated by the Mediation Act 2017, which provides a comprehensive framework for the practice of mediation and outlines the roles and responsibilities of mediators and

³⁴ Jeanne M. Brett, et al., "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers", *Negotiation Journal*, Vol. 12, No. 3, July 1996, p. 259-269, <https://doi.org/10.1111/j.1571-9979.1996.tb00099.x>.

³⁵ Richard Fellows, "Mediation in the Construction Industry: An International Review", *Construction Management and Economics*, Vol. 29, No. 11, 2011, p. 1175-1177, <https://doi.org/10.1080/01446193.2011.639378>.tallodi

³⁶ Hugh McIsaac, "A Response to Peter Salem's Article "The Emergence of Triage in Family Court Services: Beginning of the End for Mandatory Mediation", *Family Court Review*, Vol. 48, No. 1, January 2010, p. 190-194, <https://doi.org/10.1111/j.1744-1617.2009.01298.x>

³⁷ Timea Tallodi, et al. "Mediation's Potential to Reduce Occupational Stress: A New Perspective", *Conflict Resolution Quarterly*, Vol. 32, No. 4, May 2015, p. 361-388, <https://doi.org/10.1002/crq.21121>.

³⁸ *Ibid.*

³⁹ Joseph Krislov, "The Mediation Process: Practical Strategies for Resolving Conflict", *ILR Review*, Vol. 40, No. 2, January 1987, p. 291, <https://doi.org/10.2307/2523299>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² David Spencer, "*Mediation Law and Practice*", Cambridge University Press, 2007, <https://doi.org/10.1017/cbo9780511811005>.

⁴³ Barbara Billingsley, et al., "Evolution, Revolution and Culture Shift", *Common Law World Review*, Vol. 45, No. 2-3, 2016, p. 186-213, <https://doi.org/10.1177/1473779516657745>.

⁴⁴ Dorcas Q. Anderson, "Counting the Cost of Enlarging the Role of ADR in Civil Justice", *Erasmus Law Review*, Vol. 14, No. 4, 2021, p. 256-269, <https://doi.org/10.5553/elr.000208>.

⁴⁵ Barbara Billingsley, et al., *Op.Cit.*

mediation bodies.⁴⁶ In addition to the Mediation Act, Singapore has other laws that support mediation, such as the Civil Procedure Rules, which govern court-annexed mediation, and the Family Justice Act, which promotes the use of mediation in family law disputes.⁴⁷ These laws collectively contribute to the widespread use of mediation as a dispute resolution method in Singapore, with over 10,000 mediations conducted in 2022 alone.⁴⁸ The success rate of mediation in Singapore is estimated to be between 80% and 90%.⁴⁹

The presented statistical data above in the authors' opinion convincingly demonstrates that mediation has emerged as a highly effective dispute resolution method. However, further in-depth research is warranted to definitively ascertain whether mediation is universally suited for all contractual disputes in developed nations. While the current evidence overwhelmingly supports the efficacy of mediation, a more nuanced understanding of its applicability across the spectrum of contractual disputes is essential to ensure its optimal utilisation and maximise its benefits.

A comprehensive research agenda should be pursued to elucidate the suitability of mediation for diverse contractual disputes fully. This endeavour should thoroughly examine the factors contributing to the success or failure of mediation in various contractual contexts. Particular attention should be paid to identifying potential barriers to mediation's effectiveness, such as the complexity of the contractual terms, the power dynamics between the disputing parties, and the nature of the underlying dispute.

By delving into these intricate considerations, researchers can shed light on the types of contractual disputes most amenable to mediation and those that may require alternative dispute resolution mechanisms. This refined understanding will empower parties to make informed decisions about the most suitable course of action when faced with contractual disagreements, leading to more efficient and harmonious dispute resolution processes.

2. Indonesian Practice

Etymologically, mediation comes from the Latin word "mediare", which means "in the middle" or "to be in the middle".⁵⁰ This concept may be because the mediator must be in the middle of the conflicting parties. In the Indonesian dictionary, the word "mediation" is defined as the process of involving a third party in the resolution of a dispute.⁵¹ Referring to Syahrizal Abbas, the explanation of mediation from a linguistic perspective emphasises the existence of a third party who bridges the conflicting parties to resolve their disputes. This explanation is important to distinguish mediation from other forms of ADR.⁵²

The emergence of mediation institutions in Indonesia is not specifically a response to dissatisfaction with the judiciary, as in capitalist countries. The emergence of mediation in the West is a response to the law and the judiciary with its positivist logic. This is a vigilante phenomenon.⁵³ This usually happens because they judge that the law can no longer accommodate their aspirations.

⁴⁶Dorcas Anderson, *The Evolving Concept of Access to Justice in Singapore's Mediation Movement*, Cambridge University Press, p. 128-145, <https://doi.org/10.1017/s1744552320000105>.

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan*, Bandung: Citra Aditya Bakti, 2003, p. 79.

⁵¹Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, *Kamus Besar Bahasa Indonesia*, Jakarta: Departemen Pendidikan dan Kebudayaan, 1998, p. 569.

⁵²Syahrizal Abbas, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat dan Hukum Nasional*, Jakarta: Kencana, 2009, p. 3.

⁵³Vigilante phenomenon is a phenomenon where society creates its own mechanism for resolving cases outside the existing corridor.

Mediation in Indonesia is not present as a form of protest against the law or the judiciary. If it were a response to the law or the corruption of the judiciary, mediation should have emerged in Indonesia long ago. Mediation in Indonesia emerged more as a response to the vigilante phenomenon, which led to destructive experiences such as inter-ethnic, religious, and other social conflicts. The fact that the judiciary is now willing to recognise and make mediation mandatory is a coincidence, especially considering the experience in the West.⁵⁴

The concept of “mediation” was first recognised as a legitimate form of dispute resolution in Indonesia in Article 130 of the *Het Herziene Indonesisch Reglement (“HIR”)*⁵⁵, which states that the district court must attempt to reconcile the parties to a dispute if they appear in court on the appointed day. If this attempt is successful, a settlement agreement is recorded in court. Both parties are legally bound to fulfil the terms of this agreement. This agreement carries the same weight as a regular court judgment and is enforced in the same manner. However, appeals or cassations cannot be sought against this type of judgment. The next provision states that if mediation fails to reconcile the parties, the complaint must be read aloud first.⁵⁶

In 1999, the Government enacted Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (“**Law 30/1999**”). This law regulates provisions concerning arbitration and ADR. ADR is a process for resolving disputes or disagreements outside of court, through procedures agreed upon by the parties involved. ADR methods include consultation, negotiation, mediation, conciliation, and expert appraisal.⁵⁷ Under this law, mediation is an alternative resolution of disputes or differences of opinion through a procedure agreed upon by the parties, which is conducted outside of court. The mediation concept defined here is slightly different from what is mentioned in the above paragraph where as such identifies mediation as a settlement within the court, as specified in Article 130 HIR.

There are several stages of the mediation process in Law 30/1999. Article 6 of this regulation states that in the initial phases of conflict resolution, the parties are encouraged to engage in face-to-face discussions to address their differences. If the dispute persists for 14 days without resolution, one or more expert advisors or a mediator should be engaged to facilitate a settlement. If this attempt is unsuccessful within another 14 days, or if the mediator is unable to bridge the gap between the parties, the parties may seek assistance from an arbitral institution or an alternative dispute resolution body to appoint a mediator. After the appointment of a mediator by an arbitration institution or an alternative dispute resolution institution, mediation efforts must be able to begin within 7 (seven) days. The mediation process to resolve disputes or disagreements must result in a written agreement signed by all parties involved within a period of not more than 30 (thirty) days. A settlement agreement or difference of opinion in writing is legally binding and must be implemented in good faith. Furthermore, the agreement must be registered with the District Court within 30 days of signing. However, if the mediation fails to resolve the dispute, the parties may agree to submit the dispute to an arbitration institution or ad hoc arbitration.⁵⁸

On September 11, 2003, the Chief Justice of the Supreme Court issued Supreme Court Number 2 on the Procedure for Mediation in Court which has been amended several times, most recently through

⁵⁴ Achmad Gunaryo, *Mediasi Peradilan di Indonesia, dalam Musahadi HAM (ed.), Mediasi dan Resolusi Konflik di Indonesia Dari Konflik Agama Hingga Mediasi Peradilan*, Semarang: Walisongo Mediation Center, 2007, p. 107.

⁵⁵ Article 130 of HIR.

⁵⁶ Article 130 of HIR.

⁵⁷ Article 1(10) of Law 30/1999.

⁵⁸ Article 6 of Law 30/1999.

Supreme Court Regulation No. 1 of 2016 (“**Supreme Court Regulation 1/2016**”). This regulation regulates dispute resolution procedures through mediation, in both the general court system and the religious court system, as well as in courts outside these two systems, where permitted by law. According to the law, the chairperson of the panel of judges of the case is required to mention in the judgment’s consideration that the case has been attempted to be reconciled through mediation, including the name of the mediator. A chairperson of the panel of judges who does not order the Parties to undergo mediation so that the Parties do not undergo mediation has violated the law.⁵⁹ It means that mediation is a compulsory step in the judicial process.

A mediator, referring to the Supreme Court Regulation 1/2016, is a neutral third party who helps people in conflict to find a mutually agreeable solution. The mediator does not take sides or make decisions but facilitates communication and helps the parties understand each other's perspectives. Mediation can be an effective way to resolve disputes quickly and efficiently, and it can also help to preserve relationships. Every mediator must have a mediator certificate, which is obtained after attending and passing a mediator certification training organized by the Supreme Court or an institution that has been accredited by the Supreme Court.⁶⁰

Supreme Court Regulation 1/2016 also sets forth the standards for mediation, including the procedures for carrying out mediation, the guidelines for mediator behaviour, and the stages of mediation. Mediation must be completed within 30 days of the order to mediate. If the parties agree, the mediation period may be extended for an additional 30 days.⁶¹ In the event of a successful mediation, the parties, with the help of the mediator, must document the agreement in writing in a settlement agreement⁶² signed by both parties and the mediator. If mediation fails to reach an agreement or cannot be carried out, the mediator must notify the examining judge in writing. The examining judge will then issue an order to continue the case proceedings in accordance with the applicable procedural laws.⁶³

In support of such Supreme Court Regulation, the Indonesian Mediation Center (*Pusat Mediasi Nasional*) (“**PMN**”) has been designated as one of the providers of mediation training for judges at that period.⁶⁴ PMN is a professional institution that provides mediation services and training. PMN has an ethics code and an ethics council to ensure that mediators are held to high standards. PMN also has control over all holders of a mediation certificate, which ensures that only qualified mediators are able to practice mediation. The instructors for mediation courses are experienced mediators who have also taught mediation.⁶⁵

There are three stages of the mediation process regulated by PMN, namely the pre-mediation process, the mediation-negotiation process, and the final mediation process. During the pre-mediation process, the parties to the dispute shall register their case with PMN, together appoint a mediator who is suitable for the nature of the case and the appointed mediator holds a meeting with all parties to discuss the role of the mediator, the procedure, and the costs. In the mediation-negotiation process, first, the mediator holds separate meetings with the parties to gather initial information. After that, the mediator holds a meeting with all parties to jointly define the disputing parties' problems, interests, and

⁵⁹ Article 3(1), (2), (3) of Supreme Court Regulation 1/2016.

⁶⁰ Article 13(1) of Supreme Court Regulation 1/2016.

⁶¹ Article 24(2) and (3) of Supreme Court Regulation 1/2016.

⁶² “Settlement agreement” is a document that summarizes the terms of a dispute resolution agreement reached through mediation. It is signed by the parties to the dispute and the mediator. Article 1 (9) of Supreme Court Regulation 1/2016.

⁶³ Article 32 of Supreme Court Regulation 1/2016.

⁶⁴ Indonesian Mediation Center, “Tentang PMN, latar belakang, sejarah”, <https://www.pmn.or.id/tentang-pmn/latar-belakang-sejarah/>, downloaded on November 23th, 2023.

⁶⁵ Indonesian Mediation Center, “Mengapa memilih pelatihan mediasi di PMN”, <https://www.pmn.or.id/tentang-pmn/latar-belakang-sejarah/>, downloaded on November 23th, 2023.

needs. In this part, the mediator helps the parties to develop alternative solutions to the problems, interests, and needs that have been defined. The parties negotiate to reach an agreement on the alternative solutions guided by the mediator. In the final mediation process, if an agreement is reached, the parties will sign a settlement document which will then be processed into a binding agreement. If no agreement is reached, the parties may terminate the mediation by withdrawing from the mediation process.⁶⁶

The concept of mediation as an alternative dispute resolution outside of the court is also contained in Law Number 48 of 2009 concerning Judiciary Power (“**Law 48/2009**”). The law states that civil disputes can be resolved outside of court through arbitration or other ADR methods and mediation is one of the ADR methods outside of the court.⁶⁷ The settlement of a dispute through ADR shall be recorded in a written agreement. This agreement is final and binding on the parties, and they must implement it in good faith.⁶⁸

The Supreme Court's recent announcement that the number of successfully mediated cases in 2022 witnessed a remarkable surge of 92.24% from the previous year, reaching a staggering total of 20,861 cases,⁶⁹ marks a significant milestone in the realm of dispute resolution. This exponential growth signals a burgeoning willingness among disputing parties to embrace amicable settlement mechanisms, a departure from the traditional adversarial approach of litigation.

However, it is crucial to acknowledge that all these mediated cases stem from the mandatory mediation requirement stipulated under Supreme Court Regulation 1/2016, which mandates mediation as a prerequisite to trial proceedings. This raises an intriguing question: does the observed increase in mediation cases truly reflect a genuine preference for out-of-court dispute resolution or is it merely an obligatory step in the legal process?

Further research is warranted to fully grasp the extent to which out-of-court mediation has gained favour among disputing parties. This endeavour should encompass a comprehensive analysis of voluntary mediation cases, independent of any court-imposed mandates. By delving into the motivations and experiences of parties who have proactively chosen mediation, researchers can shed light on the true effectiveness and appeal of out-of-court dispute resolution mechanisms.

Unveiling the underlying factors that drive disputing parties towards voluntary mediation is paramount to understanding the true potential of this alternative dispute resolution method. If the observed increase in mediation cases indeed reflects a genuine preference for out-of-court settlements, it would underscore the growing recognition of mediation's efficacy and cost-effectiveness. This shift in mindset could herald a new era of harmonious and efficient dispute resolution, minimising the strain on the judicial system and promoting amicable resolutions that preserve relationships and protect reputations.

Therefore, while the Supreme Court's announcement is undoubtedly encouraging, it catalyses further exploration into the true dynamics driving the surge in mediation cases. By delving into the motivations and experiences of parties who have voluntarily embraced mediation, we can gain a deeper understanding of the factors that contribute to its success and pave the way for its even wider adoption as a preferred method of dispute resolution.

⁶⁶ Indonesian Mediation Center, “Tentang mediasi”, <https://www.pmn.or.id/tentang-mediasi/>, downloaded on November 23th, 2023.

⁶⁷ Article 58 Law 48/2009.

⁶⁸ Article 60(1) of Law 48/2009.

⁶⁹ Jakarta Humas Mahkamah Agung, “Selama Tahun 2022, 20.861 Perkara Berhasil Didamaikan Melalui Proses Mediasi”, <https://www.mahkamahagung.go.id/id/berita/5669/selama-tahun-2022-20861-perkara-berhasil-didamaikan-melalui-proses-mediasi>, downloaded on November 25th, 2023.

Mediation as an ADR mechanism for SOEs

In contrast to other prevailing laws and regulations that establish a comprehensive framework for mediation, Regulation 2/2023 adopts a more streamlined approach, solely empowering the Minister to mediate disputes arising between SOEs upon the request of the board of directors of an SOE involved in the disagreement. This unique provision deviates from the customary mediation procedures outlined in other legal instruments, which often delve into intricate details regarding the mediation process. Moreover, Regulation 2/2023 underscores the definitive nature of the settlement agreement reached through mediation, mandating its adherence by the SOEs in dispute. This emphasis on the conclusiveness of the settlement agreement reinforces the Minister's authority as a mediator and underscores the finality of the mediated resolution.

As per Law 30/1999, mediation stands as ADR mechanism, facilitating the resolution of disputes or disagreements through a mutually agreed-upon procedure conducted outside the confines of the court system. The phrase "agreed upon by the parties" underscores the consensual nature of mediation, implying that both parties must voluntarily opt for this resolution approach. Regulation 2/2023, however, deviates from this principle by initiating the mediation process solely at the behest of an SOE's board of directors. This regulation does not mandate the parties' agreement to mediation. In the author's opinion, such a departure from the consensual foundation of mediation compromises its very essence. Without the parties' mutual consent, the process veers into the realm of litigation, resembling the initiation of a court lawsuit.

In Indonesia, the mediation process is governed by a defined set of procedures, particularly with regard to the completion timeline and the various stages involved. Supreme Court Regulation 1/2016 mandates that the mediation process must be concluded within 30 days from the issuance of the mediation order, with an option for a 30-day extension. Conversely, Law 30/1999 stipulates a 14-day timeframe for the mediation process to be completed. In instances where the mediator is unable to reconcile the parties' differences, they may seek assistance from an arbitral institution or an alternative dispute resolution body to appoint a mediator. This mediation process, aimed at resolving disputes or disagreements, must culminate in a written agreement signed by all parties involved within a period not exceeding 30 (thirty) days. PMN further divides the mediation process into three distinct phases: the pre-mediation stage, the mediation-negotiation stage, and the final mediation stage. While they do not explicitly define a time limit for completion, they establish a standardized procedure for conducting mediation. Regulation 2/2023, however, deviates from this established practice by omitting any time limitations for the mediation process. This absence of a timeframe could undermine the perception that Regulation 2/2023 is designed to facilitate expeditious dispute resolution.

As previously discussed, a mediator serves as an impartial third party facilitating the resolution of conflicts by assisting parties in reaching a mutually acceptable solution. However, various regulations establish specific requirements and qualifications for individuals seeking to become mediators. Supreme Court Regulation 1/2016 delineates the standards for mediators. Article 13 paragraph (2) mandates that all mediators possess a mediator certificate, obtainable upon successfully completing and passing a mediator certification training program organized by the Supreme Court or an institution accredited by the Supreme Court. The PMN also establishes specific criteria for appointing mediators. Prospective mediators must successfully complete a mediation course conducted by the PMN. Additionally, the PMN maintains oversight over all certified mediators, ensuring their qualifications and proficiency in practicing mediation. In light of the foregoing, the standards and qualifications of mediators play a critical role in the efficacy of the mediation process. Failure to adhere to these standards may jeopardize the professionalism and integrity of the mediation proceedings.

Regulation 2/2023 solely addresses the appointment of the Minister as a mediator, with the possibility of delegation to personnel within the ministry's legal department. Notably, this regulation lacks specific provisions governing the procedures or specialized training required to fulfil the role of a mediator, as outlined in other regulations.

Following the promulgation of Regulation 2/2023, the authors found that the number of mediation processes that successfully resulted in a settlement is questionable.⁷⁰ This fact is perhaps due to the time between the enactment of the regulation and this paper being relatively short, therefore it is premature to conclude whether the provision of mediation would be sufficient to trigger a good quality mediation. However, the authors are confident that the number will stay the same since the concerns of the SOEs remain. There is no incentive that management of the disputing SOEs will not be exposed to legal issues if they compromise their contractual positions in the mediation process.

Recommended ADR Mechanism Disputes between SOEs

This paper recommends the use of compulsory adjudication to resolve disputes between SOEs. In contrast to mediation, adjudication does not necessitate productive dialogue between the parties involved in a dispute. The adjudicator holds the power to render a verdict on the issue at hand. Indeed, arbitration and litigation both share an adjudicatory character, implying that the decision reached may be detrimental to one of the parties. Nevertheless, this approach is advantageous in addressing the parties' reluctance to reach amicable solutions, as the adjudicator will make a determination, potentially reaching an outcome that is mutually beneficial for both disputing parties. The binding decision of an adjudicatory dispute resolution process plays a crucial role in ensuring the enforceability and effectiveness of the resolution. When examining the literature, it becomes evident that the presence of a binding decision significantly impacts the outcomes and perceptions of fairness in dispute resolution. Gent & Shannon emphasise the importance of encouraging the use of binding arbitration or adjudication to manage conflicts effectively. They suggest that incorporating such mechanisms into formal agreements can enhance the resolution process, highlighting the significance of binding decisions in formalising dispute resolution.⁷¹

Further, this paper recommends an introduction of a specific adjudication tribunal to adjudicate disputes between SOEs ("**Adjudication Tribunal**"). The characteristics of the Adjudication Tribunal shall be (i) formed based on an agreement to adjudicate by the parties; (ii) the unique composition of the tribunal which shall include a representative of the Minister, auditor of BPK, and officer of LEA; and (iii) the power of the Adjudication Tribunal.

Few internationally recognised bodies have introduced a concept of a dispute board, or adjudication board. World Trade Organization has a system called the Dispute Settlement Body ("**DSB**") to resolve trade disputes between states. The DSB is widely recognised as having an adjudicative nature, serving as the adjudicator of disputes between member countries.⁷² The DSB operates under the Dispute Settlement Understanding (DSU), which outlines the rules and procedures for the settlement of disputes within the WTO.⁷³

⁷⁰ Interviews with persons relevant to ongoing mediation at the Ministry of State-Owned Enterprise in November 2023.

⁷¹ Stephen E. Gent, et al., "Decision control and the pursuit of binding conflict management", *Journal of Conflict Resolution*, Vol. 55, No. 5, May 2011, p. 710-734, <https://doi.org/10.1177/0022002711408012>.

⁷² Eddy, "The Role of the Dispute Settlement Body (DSB) in the Settlement of Trade Disputes Between Member Countries of the World Trade Organization (WTO)", *Jurnal Hukum Prasada*, Vol. 10, No. 1, 2023, p. 36-42, <https://doi.org/10.22225/jhp.10.1.2022.36-42>.

⁷³ *Ibid.*

The International Federation of Consulting Engineers (known as “**FIDIC**”) has issued many types of conditions of contract, as contract drafts, which can be used by contracting parties in international construction projects. FIDIC conditions of contract provide a chain of dispute resolution process which at the early stage shall involve a so-called Dispute Avoidance/Adjudication Board (“**FIDIC DAAB**”). FIDIC DAAB has the power to adjudicate disputes, although its decision may be later disputed by the dissatisfied party through arbitration.

Formed by an Agreement to Adjudicate

The initiation of the adjudication process, akin to mediation and arbitration, hinges upon the mutual agreement of the disputing parties to engage in adjudication. This agreement to adjudicate can be either explicitly incorporated into the underlying contract as an adjudication clause or stipulated in a separate agreement specifically entered into upon the emergence of the dispute.

The presence of a compulsory adjudication clause within the underlying contract between SOEs streamlines the process, as the parties need only reach a consensus on the formation and composition of the Adjudication Tribunal, including the appointment of its members. However, in the absence of such a clause, the parties must forge an adjudication agreement at the time of the dispute's inception. This latter approach carries the inherent risk of failure, as the parties' relationship may have deteriorated to a point where reaching an agreement on adjudication becomes a formidable challenge.

The complexities surrounding the adjudication agreement highlight the importance of proactive planning and the inclusion of clear dispute resolution mechanisms within the underlying contract. This foresight expedites the adjudication process and minimises the potential for further discord and protracted disputes.

The Composition of the Adjudication Tribunal

The Adjudication Tribunal, composed of a representative of the Minister, an auditor of the BPK, and an officer of the LAE, embodies the convergence of expertise from the government, financial oversight, and legal enforcement. The Minister's representative, designated as the Chairperson, serves as the central figure, reflecting the Minister's position as the ultimate majority shareholder of the SOEs. This Chairperson's perspective, grounded in the management of SOEs, ensures that the Tribunal's decisions align with the SOEs' strategic direction and long-term interests.

The BPK auditor's role extends beyond traditional auditing responsibilities, bringing valuable insights into the potential financial implications of the dispute resolution process. Their participation safeguards against any decisions that could inadvertently cause losses to the state treasury. Similarly, the LEA officer's expertise in criminal law proves invaluable in assessing whether potential resolutions contravene the penal code. Their presence ensures that the Tribunal's decisions uphold the rule of law and safeguard the integrity of the SOEs' operations.

The Power of the Adjudication Tribunal

At its core, adjudication empowers the adjudicator to render a definitive judgment or decision on the dispute. This distinction from mediation, where the mediator serves as a facilitator, underscores the adjudicator's authority to issue binding determinations.

This paper postulates that the power vested in the Adjudication Tribunal mirrors that of an arbitration tribunal, encompassing the authority to establish their jurisdiction, interpret legal principles, and grant interim measures. This parallels the robust powers conferred upon arbitration tribunals, emphasising adjudication proceedings' authoritative nature.

Proposed Regulatory Adjustment, the Associated Risk and the Mitigation

Regulation 2/2023's mediation provisions necessitate a paradigm shift, entailing the substitution of mediation with adjudication. This can be realised by the issuance of a new regulation regarding compulsory adjudication as a dispute resolution mechanism between SOEs ("**New Regulation**"). This realignment aligns with the evolving conflict resolution landscape within SOEs requiring adjudicated decisions rather than facilitated resolutions. The New Regulation will bind only SOEs and their affiliates. It will not apply to dispute between an SOE and a private third party.

1. The Proposed Concept of Provisions of the New Regulation.

The following section will point out and elaborate on several items that shall be included in the New Regulation.

Agreement to Adjudicate

All transactions between SOEs shall be governed by a contract that explicitly mandates compulsory adjudication as the primary and exclusive dispute resolution forum. This contractual clause will establish a two-stage resolution process, ensuring a diligent and structured approach to conflict resolution. The initial stage will involve comprehensive negotiations between the parties to achieve an amicable settlement through mutual understanding and compromise. If negotiations fail to yield a mutually agreeable resolution, the dispute shall automatically escalate to the second stage – adjudication.

Contracts concluded prior to the promulgation of the New Regulation, where no disputes have emerged, shall be subjected to modification to ensure alignment with the provisions of the New Regulation. This requirement for amendment seeks to establish a uniform and consistent dispute resolution framework across all SOE transactions. However, this requirement shall not apply in instances where either of the following conditions is met: (i) A dispute arose before the enactment of the New Regulation, rendering the application of the New Regulation's adjudication clause inapplicable to the existing dispute, and (ii) No dispute has arisen, but contract modification may trigger a cross-default with other existing contracts. In such cases, a delicate balance must be struck between enforcing the New Regulation's provisions and maintaining the integrity of existing contractual agreements.

The Establishment of Dispute Administrator

The Minister shall establish an organisational structure to administer the dispute resolution process between disputing SOEs ("**Dispute Administrator**"). The operation of this administrator shall mimic an arbitration institution. The Dispute Administrator will act as the secretary of each adjudication process.

The Dispute Administrator manages a list of names who can be appointed as members of the Adjudication Tribunal. It also manages the administrative aspects of each adjudication case, including the receipt of claims and responses, the preparation of case files, and the coordination of communications between parties, the Adjudication Tribunal, and the Minister.

The Dispute Administrator provides logistical and administrative support to the Adjudication Tribunal, including arranging for hearing venues, managing the production of documents and evidence, and organising depositions and site inspections.

The Dispute Administrator serves as the primary channel of communication between the parties, the Adjudication Tribunal, and the Minister. It facilitates the exchange of documents, ensures compliance with procedural deadlines, and maintains transparency throughout the adjudication process.

The Composition of Adjudication Tribunal

As identified above, the composition of the Adjudication Tribunal shall be a representative of the Minister, an auditor of BPK, and an officer of LEA. The Dispute Administrator shall administer the list of names eligible to become tribunal members.

This model of cross-governmental institution engagement will require a specific joint agreement on which this paper will elaborate below.

Adjudication Procedure

The New Regulation will introduce a comprehensive adjudication procedure specifically designed to address disputes arising between SOEs. This procedure, mirroring the structure and principles of institutional arbitration rules and procedures, will establish a robust framework for the selection of Adjudication Tribunal members, define the authority vested in the Adjudication Tribunal, uphold the impartiality and independence of tribunal members, establish time limits for the adjudication process, outline hearing procedures, and ensure the finality and binding nature of tribunal decisions.

A critical aspect of the procedure revolves around the concept of the appointing authority. If two (2) members of the Adjudication Tribunal cannot reach a consensus on the appointment of the Chairperson, the appointing authority will assume the responsibility of making the appointment. This paper proposes that the Minister shall serve as the appointing authority, aligning with the concept of having the Secretary of the Permanent Court of Arbitration serve as the “appointing authority” as adopted by the UNCITRAL Arbitration Rules.⁷⁴ This designation of the Minister as the “appointing authority” reinforces the government's oversight role in this compulsory adjudication, ensuring its impartiality and effectiveness in resolving SOE disputes.

Prohibition to Select Governing Laws of the Contract Other than Indonesian Law

Given that all members of the Adjudication Tribunal will hold the esteemed status of public servants of the Republic of Indonesia, it is imperative that contracts between SOEs adhere to the governing principles of the laws of the Republic of Indonesia. This mandate stems from the fact that the members of the Tribunal have been meticulously educated under the encompassing framework of Indonesian public and private laws. By adhering to the laws of Indonesia, we can effectively circumvent any potential inefficiencies that may arise from the involvement of foreign experts tasked with interpreting contracts that fall outside the purview of Indonesian law.

Furthermore, for contracts entered into prior to the promulgation of the New Regulation that deviated from the governing principles of Indonesian law, it is essential that these contracts

⁷⁴ Article 6(1) of UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021).

undergo a thorough amendment process to ensure their alignment with the New Regulation. This proactive measure will ensure that the Adjudication Tribunal can effectively fulfil its mandate without encountering any legal impediments arising from non-compliant contracts.

By adhering to the principles outlined above, we can foster a robust legal framework that not only safeguards the interests of the Republic of Indonesia but also promotes efficiency and transparency in resolving disputes between SOEs.

Decision of the Adjudication Tribunal

In addition to the meticulously defined adjudication procedure, the New Regulation emphatically underscores the definitive and irrevocable nature of the Adjudication Tribunal's decisions for the disputing SOEs. The deliberate exclusion of any appellate mechanism further reinforces this unwavering stance. This decisive approach is deeply rooted in the unwavering belief that the Adjudication Tribunal possesses the requisite expertise and impartiality to render definitive judgments on disputes involving SOEs. By establishing the Tribunal's decisions as the ultimate resolution, the New Regulation fosters an environment of swift and conclusive dispute resolution, minimising the potential for protracted legal battles that could hinder the operational efficiency of SOEs.

Joint Agreement between Governmental Institutions

As alluded to earlier, the unique composition of the Adjudication Tribunal, comprising GOI officers from diverse institutions, necessitates a formal joint agreement between the concerned entities. This paper proposes the potential involvement of the Ministry of State-Owned Enterprises, the BPK, and the LAE encompassing the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*), the Supreme Prosecutor's Office (*Kejaksaan Agung*), and the Indonesian National Police (*Kepolisian Republik Indonesia*).

The negotiation of the terms and conditions of this agreement must be guided by the shared commitment of all parties to uphold their obligations and support the newly introduced adjudication process, which aims to achieve swift and effective resolution of disputes between SOEs. This collaborative spirit is essential to ensure the Adjudication Tribunal's smooth functioning and realise its objectives.

In light of the potential for criminal investigations involving SOEs in cases of alleged fraud or corruption, the authors anticipate that the LAE may request a provision in the agreement stipulating that the Adjudication Tribunal's decisions shall not hinder ongoing criminal investigations. This proposal aligns with the principles of due process and ensures that the pursuit of justice is not impeded.

2. The Associated Risk and the Mitigation.

The New Regulation, which mandates compulsory adjudication for contractual disputes between SOEs, could introduce a potential investment risk for foreign investors owning shares in publicly traded SOEs. The concern stems from the potential unfamiliarity of foreign investors with the concept of compulsory adjudication and its potential impact on their investments.

Foreign investors are accustomed to international standards in contractual arrangements, which typically involve negotiation, mediation, and arbitration as the primary dispute resolution mechanisms. Compulsory adjudication, on the other hand, is a relatively new concept in Indonesia and may not be well understood by foreign investors.

In the absence of familiarity with compulsory adjudication, foreign investors are likely to rely on statistical data about the success rate of mediation. However, mediation success rates can vary significantly depending on the specific context and parties involved. Therefore, relying solely on mediation success rates may not provide foreign investors with a comprehensive understanding of the benefits of compulsory adjudication.

To mitigate the potential investment risk, the Indonesian Financial Service Authority (“OJK”) can play a crucial role in educating foreign investors about compulsory adjudication and its implications for their investments. OJK can provide clear and concise information about compulsory adjudication to foreign investors, explaining the process, the types of disputes covered, and the potential outcomes. OJK can also emphasise that compulsory adjudication is part of a legal process deriving from a common affiliate transaction, and it does not intend to impact foreign shareholders' investments negatively. Lastly, OJK can highlight the benefits of compulsory adjudication, such as its potential to expedite dispute resolution and reduce costs.

OJK may also consider issuing a specific regulation to support the implementation of the New Regulation. This regulation could establish clear and transparent guidelines for compulsory adjudication proceedings to ensure fairness and predictability for foreign investors, and facilitate communication and cooperation between foreign investors and the relevant authorities to address concerns and ensure a smooth transition to the new system.

By taking these measures, OJK can help to mitigate the potential investment risk introduced by the New Regulation and foster a more conducive environment for foreign investment in Indonesia.

III. CONCLUSION

The current provisions governing mediation between SOEs, as outlined in Regulation 2/2023, fall short in providing a comprehensive framework for mediation, especially in light of the general principles enshrined in Law 30/1999. Even if Regulation 2/2023 were to provide a complete set of mediation procedures, the mediation process could still prove ineffective in resolving disputes due to the inherent concerns of SOEs in making decisions.

In view of these shortcomings, the Minister should introduce the concept of adjudication as an alternative method for resolving disputes between SOEs through the establishment of an Adjudication Tribunal. This tribunal would be tasked with rendering decisions that comprehensively consider all relevant aspects of the dispute, potentially reducing or eliminating the number of questions that arise during subsequent audits or legal inquiries.

By adopting adjudication as a dispute resolution mechanism, SOEs can rest assured that their disputes will be resolved fairly, impartially, and efficiently, ultimately safeguarding the interests of both the SOEs involved and the state as a whole.

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Laws and Regulations

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- Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
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- Law of the Republic of Indonesia Number 48 of 2009 concerning Judiciary Power.
- Regulation of the Minister of the Republic of Indonesia Number PER-2/MBU/03/2023 concerning Guideline on Governance and Significant Corporate Activities of State-Owned Enterprises.
- Supreme Court Regulation (Perma) No. 1 of 2016 concerning Mediation Procedures in Court.
- UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021).

Interview

- Interviews with persons relevant to ongoing mediation at the Ministry of State-Owned Enterprise in November 2023.