

## CHAPTER TWO

### LITERATURE REVIEW

#### a. Arbitration

A history shows that dispute settlement through third party service has been practiced by a human since a long time ago, started from ancient Greek era. This practice keeps going on at the golden age of Roman and Jewish and keep developed especially in a trade nations in Europe like The United Kingdom, France, and The Netherlands.<sup>1</sup> The term of Arbitration derived from the words “*arbitrare*” (Latin), “*arbitrage*” (Dutch/France), and “*shiedspruch*” (Germany).<sup>2</sup> Arbitration is a legal proceeding in which a neutral party, the arbitrator, conducts a hearing and issues a decision resolving a dispute between parties.<sup>3</sup>

Aristoteles argued that Arbitration is an alternative from the court because he thinks a justice is not merely a written regulation but it is more than that. Aristoteles said that it is conscionable to choose the dispute settlement through Arbitration rather than litigation, because the perspective of the arbitrators always rely on justice, while the Judges only

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<sup>1</sup> Isaak I Doore, 1986, *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis*, Boston, Martinus Nijhoff Publisher, p.43. It is also quoted by Huala Adolf in the book under the title “*Hukum Arbitrase Komersial Internasional*”, 2016, Keni Media, Jakarta, p.2.

<sup>2</sup> Andi Julia Cakrawala, *Op. cit*, p.65.

<sup>3</sup> Herbert M Kritzer, *Op. cit*, p.61. It is stated that Arbitration is one of the three primary choices of forums used intercontinental to adjudicate disputes. The other two forums are judicial court trials and administrative hearings.

focus on the Law.<sup>4</sup> In general it is assumed that Arbitration has the following advantages:

1. Confidentiality and privacy;
2. Informality of the proceedings;
3. Efficiency;
4. Technical specialism; and
5. A final award which could be enforced at the courts.<sup>5</sup>

Arbitration is the substance of a dispute to a judge or judges, in principle chosen by the parties, who agree to accept and respect the judgment. The judges of Arbitration are called ‘arbitrators’ and their judgment called an ‘award’.<sup>6</sup> It is commonly better to have one arbitrator appointed by each party and one (or, even better, three) neutral arbitrator from appointed arbitrator in advance.<sup>7</sup> In addition, the parties can choose the arbitrators that they consider have the knowledge, experience, and enough background to deal with the case.<sup>8</sup> The existence of Arbitration not apart from the sense of society’s disappointment towards The Court as what have been explained by Thomas J. Harron because the applied system of court tends to harm the parties, in a form of wasting time,

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<sup>4</sup> Fadia Fitriyanti, 2013, *Arbitrase Nasional & Arbitrase Syariah: Suatu Kajian Perbandingan*, Yogyakarta, Laboratorium Fakultas Hukum UMY, p.81.

<sup>5</sup> Sweet & Maxwell, *Op. cit*, p.765.

<sup>6</sup> John Collier & Vaughan Lowe, 2000, *The Settlement of Disputes in International Law*, Oxford, Oxford University Press, p.189.

<sup>7</sup> Anthony Aust, *Op. cit*, p. 407.

<sup>8</sup> Fadia Fitriyanti, 2013, “The National and Sharia Arbitrations: A Comparative Study”, Vol. 20 No 1, *Jurnal Media Hukum*, ISSN: 0854-8919, Yogyakarta, Indonesia, p. 172.

expensive cost, questioning the past without solving the future, creating the enemy among parties, and paralyzing people.<sup>9</sup>

**Figures 1.1**

**The Comparison of Dispute Settlement through Alternative Dispute Settlement (ADS), Arbitration, And Litigation<sup>10</sup>**

PROCESS	ADS	ARBITRATION	LITIGATION
Controller	Parties	Arbitrator	The Judge
Procedure	Informal	A little bit formal according to the rule	Formalistic technical
Time Period	Immediately fast (3-6 weeks)	Faster (3-6 months)	Up to 2 years or even more
Cost	Low Cost	Sometimes expensive	Very expensive
The rules of	No need	A little bit	Very formal and

<sup>9</sup> Suparto Wijoyo, 2003, *Penyelesaian Sengketa Lingkungan (Environmental Disputes Resolution)*, Surabaya, Airlangga University Press, p. 92.

<sup>10</sup> Fadia Fitriyanti, *Op. cit, Arbitrase Nasional & Arbitrase Syariah: Suatu Kajian Perbandingan*, p.53.

proof		informal	technical
Publication	Confidential	Confidential	Open for public
Relation among parties	Cooperative	Antagonistic	Antagonistic
Focus of Completion	For the future	The Past	The Past
Negotiation Method	Compromise	As hard on the principle of law	As hard on the principle of law
Communication	Fixing the past	Blocked	Blocked
Result	Win-win	Win-Lose	Win-Lose
Fulfillment	Voluntarily	Always rejected and filling a opposition	Rejected and looking for excuses
Emotional Condition	Free of emotion	Emotional	Emotions fluctuate

Furthermore, Schwezenberger ever said:

*“The only difference between arbitration and judicial settlement lies in method of selecting the members of these judicial organs. While in arbitration proceeding, this is done by agreement between the parties, judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept.”*<sup>11</sup>

The International Arbitration rules all provide that the arbitrator should take into account the contract terms and any relevant trade usage, and may assume the powers of an *amiable compositeur* or decide *ex aequo et bono*.<sup>12</sup> *Ex aequo et bono* means the parties beg the fairest verdict to the arbitrator.<sup>13</sup> The parties may expressly the relevant sources of applicable law, trade practice and/or *ex aequo et bono* because there is presumption that what is in the law is fair and equitable.<sup>14</sup>

In an Arbitration, the parties in a contract can choose by themselves some choices including:<sup>15</sup>

1. **Choice of Law**, means the party can choose by themselves which Law that applicable towards their interpretation of contract;
2. **Choice of Jurisdiction/Forum**, means the party choose by themselves about the applied court if the dispute arises among the parties in the future; and

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<sup>11</sup> D.J.Harris, 1998, *Cases and Materiale on International Law Fifth Edition*, London, Sweet Maxwell , p. 986.

<sup>12</sup> See Article 21(3) of ICC Rules 2012 of Arbitration

<sup>13</sup> Sudarsono, 1992, *Kamus Hukum*, Jakarta, Rineka Cipta, p. 120.

<sup>14</sup> Klaus Peter Berger, 1993, *International Economic Arbitration*, Boston, Kluwer Law International, p. 570.

<sup>15</sup> Munir Fuady, 2002, *Penyelesaian Sengketa Bisnis Melalui Arbitrase*, Bandung, Citra Aditya Bhakti, p. 42.

3. **Choice of Domicile**, means each party appointing where the legal domicile of the parties is.

In an Arbitration agreement, there are known 2 kinds of Arbitration Clause, i.e: *pactum de compromitendo* and compromise.<sup>16</sup> It is clearly written in Article 2 Subsection 1 of New York Convention 1958:

*“Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration.”*

*Pactum de Compromitendo* clause made before the dispute arise, while compromise clause made after the dispute happens in order to control about how to filling it to the arbitrator.<sup>17</sup> At glance, quoted by Stephen Allen from Law Faculty University of London, Arbitration has three important features in the context of international law:<sup>18</sup>

1. It is concerned with the resolution of an international dispute by reference to the rights and duties of the parties as a matter of international law;
2. The decisions of arbitral bodies are legally binding on the parties to the dispute; and

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<sup>16</sup> Joni Emirzon, *Op. cit.*, p. 100.

<sup>17</sup> Sudiarto & Zaeni Asyhadie, 2004, *Mengenal Arbitrase Salah Satu Alternatif Penyelesaian Sengketa Bisnis*, 2nd Edition, Jakarta, PT Raja Grafindo Persada, p. 72.

<sup>18</sup> Stephen Allen, 2013, *LawExpress International Law*, Edinburgh, Ashford Colour Press Ltd, p. 175.

3. The parties are allowed to select the person or people that will be given the job of deciding the particular dispute in question.

#### **b. Online Arbitration**

Arbitration as the method of dispute settlement has develop from time to time, by answering party's needs, the issue of online Arbitration arises and comes to rectify the disadvantages of conventional Arbitration because in a practice, conventional Arbitration often takes a long time and the cost of Arbitration is not as cheap as previous presumption.<sup>19</sup> With the increase of e-commerce activity through Internet media, which often causes disputes among the parties concerned, the international community needs a way of dispute resolution which is faster, cheaper and more effective than through conventional arbitration.<sup>20</sup>

The procedures or the steps of online dispute settlement are quite similar with the procedures of conventional Arbitration, the things that distinguish are only the place and the media which being used.<sup>21</sup> Online Arbitration as an Online Dispute Resolution (abbreviated: ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of

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<sup>19</sup> Moch Basarah, 2010, *Prosedur Alternatif Penyelesaian Sengketa Arbitrase Tradisional dan Modern (Online)*, Bandung, Genta Publishing, p. 89-90.

<sup>20</sup> *Ibid.* p. 91.

<sup>21</sup> Andi Julia Cakrawala, *Op. cit.*, p. 125. It is stated that online Arbitration is conducted with cyberspace or Internet and generally the dispute settlement system does not through face-to-face method.

disputes between parties.<sup>22</sup> Online Arbitration which conducted through Internet does not requiring face-to-face method among parties but it does not mean the Online Arbitration service provider could not confront both sides directly in some cases in order to create the fluency of dispute settlement.

Essentially, Online Arbitration is the most proper settlement because of two reasons. *First*, because less effectiveness of consensus in the mechanism of non-adjudicate dispute settlement. Second, because adjudication in the conventional Arbitration often less effective because the territorial distance makes people have to face-to-face so it takes time and cost, that is why the Online Arbitration become the most proper alternative.<sup>23</sup> Therefore, this kind of Arbitration is the mechanism that has the most prospect in the future to settle the dispute. Arbitration Resolution Services, Inc has proven that Online Arbitration's service is save up to 80% than litigation.<sup>24</sup>

In this context, Online Arbitration is very suitable for modern people who could trust each other. The high level of trustfulness have to be in line with a good system. It means an Online Arbitration only known in a modern society which has several characteristics, namely:

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<sup>22</sup> ICAC, 2014, "On-Line Disputes", taken from <http://www.worldarbitration.center/on-line-disputes/> accessed on Wednesday, November 9th 2017, 5:03 p.m.

<sup>23</sup> Gabrielle Kaufmann & Kohler Thomas Schultz, 2004, *Online Dispute Resolution Challenges for Contemporary Justice*, Netherlands, Kluwer Law International, p. 27.

<sup>24</sup> ARS, 2016, "On-Line Arbitration", taken from <https://www.arbresolutions.com/> accessed on Sunday, November 12th 2017, 11:42 p.m.



1. Openness to change;
2. Have a well insight;
3. Present and future oriented;
4. Think rationally;
5. The actions are oriented toward choice, not habit;
6. Because a complex problem, then it needs specialization;
7. Economic system is efficiency oriented
8. Tend to be individualist;
9. More appreciate on achievement;
10. High social mobility; and
11. Tend to respect and obey the formal Law.<sup>25</sup>

Because the modern society rely on rationality, have an education, and obey the formal Law then Online Arbitration is very suitable as the modern dispute settlement nowadays. Moreover, the parties prefer to choose ODR through online Arbitration since its decision is final and binding. The method of online communication that can be used by using e-mail, Instant messaging, Threaded discussion, online chat, video/audio stream, teleconference, and videoconferencing.<sup>26</sup> As an examples, the Online Arbitration have been applied in American Arbitration Association (AAA).

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<sup>25</sup> Some articles on the characteristic of modern society are defined by some experts, i.e: Selo Soemardjan, *Perubahan Sosial di Yogyakarta* (1962), or Soerjono Soekanto's books. Soekanto writes *Sosiologi, Suatu Pengantar*, published by Rajawali, Jakarta (1982), try to define consistently on the characteristic of modern society.

<sup>26</sup> Moch Basarah, *Op. cit*, p. 100.

Alike with conventional or traditional Arbitration, Online has similarities on the parties involved, i.e in the procedural hearings, the parties may appear in person or they may also be represented by an attorney.<sup>27</sup> Besides that, regarding to the enforcement of Online Arbitration award in general, it is only enforceable after an order for enforcement or *exequatur* is obtained from the local court. For example, in Indonesia, the International Arbitration award can be run under the authority of Chief of the Court of First Instance. Prior to granting the order, the Chief of the court will examine the basic grounds of the award, the designation of the arbitrators, their competence and whether they have not exceeded their mission.

### c. Dispute

According to Black's Law Dictionary, dispute means a conflict or controversy, one that has given rise to a particular lawsuit.<sup>28</sup> A dispute is a term that explains disharmony, contradiction, and clash among the parties. A dispute become something inherent in human's life and it is quite rough to avoid.<sup>29</sup>

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<sup>27</sup> Sudargo Gautama, *Op. cit*, p. 460.

<sup>28</sup> Bryan A Garner, 2009, *Black's Law Dictionary Ninth Edition*, Texas, A Thomson Reuters Business, p. 540.

<sup>29</sup> Andi Julia Cakrawala, *Op. cit*, p. 49.

Stated by Winardi,<sup>30</sup> a dispute that happen between individuals or groups that have a relation or interest will arise legal consequences. It is not doubtful if disagreements among parties may occur at any time and these may create a legal dispute.<sup>31</sup> In the business scale, a dispute sometimes comes from the speculation of businesses that fail to address and plan for key aspects at the outset. As a result, they run into serious difficulties later on which arises the dispute.<sup>32</sup>

Sometimes the party, who is deemed as to make default, claims that she/he/it has done properly. In other words, on the other way round, it is also peculiar that one party alleges another party default despite the fact that the latter has performed her/his/its obligation without imperfectness. In such cases, really there is a different interpretation concerning performance of subject matter. Consequently, this difference leads to a dispute between the parties.<sup>33</sup> In the dispute, the first party who filed the case called as a claimant. Otherwise, the opposite party called as a respondent.

Legal dispute sometimes referring as a conflict that violate legal norms.<sup>34</sup> Ali Achmad Homzah also stated that dispute is a contraposition between two parties or more which began from different perception that

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<sup>30</sup> Winardi, 2001, *Asas-asas Administrasi Bisnis (Business Administration)*, Bandung, Mandar Maju, p. 95.

<sup>31</sup> Sally A Harpole, 2003, "Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region", Vol. 20 No 1, *Journal of International Arbitration*, ISSN: 0255-8106, Wolter Kluwers United States of America, p. 2.

<sup>32</sup> Central Chambers Law Corporation, 2008, *Model Commercial Contracts amd Letters (2nd Ed)*, Singapore, Sweet & Maxwell Asia, p. 531.

<sup>33</sup> Peter Mahmud Marzuki, *Op. cit*, p. 266.

<sup>34</sup> Joost Pauwelyn, 2003, *Conflict of Norms in Public International Law*, Cambridge, Cambridge University Press, p. 5-6.

indicates violation of norms.<sup>35</sup> From the definitions mentioned above, it can be said that every dispute creates consequence, here are some examples of dispute that often be found:

1. Dispute in Economic Sector;
2. Dispute in Tax Sector;
3. Dispute in International Law;
4. Dispute in Business Law; and
5. Dispute in Land Law.<sup>36</sup>

#### **d. Dispute Settlement**

Broadly speaking, there are two concepts to the dispute settlement. First, there are methods such as (in no particular order) negotiation, mediation, conciliation, good offices, and inquiry. These are mostly known as peaceful or diplomatic settlement of disputes, none of these methods need judicial process.<sup>37</sup> Besides, the other methods are consists of arbitration and judicial settlements.

In terms of how to reach the best decision, every single dispute have to handled by neutral party.<sup>38</sup> It is mainly because to create the best decision for justice seeker. That is why the mentioned methods above are

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<sup>35</sup> Ali Achmad Homzah, 2003, *Seri Hukum Pertanahan III Penyelesaian Sengketa Hak Atas Tanah dan Seri Hukum Pertanahan IV Pengadaan Tanah Instansi Pemerintah*, Jakarta, Prestasi Pustaka, p. 14.

<sup>36</sup> Andi Julia Cakrawala, *Op. cit*, p. 50.

<sup>37</sup> Ademola Abass, 2012, *International Law: Text, Cases, and Materials*, Cambridge, Cambridge University Press, p. 435.

<sup>38</sup> Bambang Sutyoso, 2008, "Penyelesaian Sengketa Bisnis Melalui Online Dispute Resolution dan Pemberlakuannya di Indonesia", Vol. 20 No 2, *Mimbar Hukum*, ISSN: 2443-0994, Yogyakarta, Indonesia, p. 231.

the proper process to deal with dispute. The various processes for settling disputes have been recognized in United Nations Charter (abbreviated: UN Charter). Chapter VI of the UN Charter recognizes both the diplomatic and judicial processes for settling the case. According to Article 33(1) of UN Charter:<sup>39</sup>

*“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”*

Basically, the dispute settlement can be divided into two which are through litigation nor outside of court as known as an Alternative Dispute Settlement (abbreviated: ADS). The background on the existence of ADS comes from the ideation of Warren Burger as the chief of American Supreme Court in 1976 at Saint Paul, Minnesota conference.<sup>40</sup> Some things are the reasons to invent ADS are:

1. Reducing the congestion case in the Courts;
2. Increasing the public order to the process of dispute settlement;
3. Expediting and expanding access to the Courts; and
4. Giving a chance to reach acceptable and satisfying decision.

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<sup>39</sup> This provisions is clear in the instructions to parties to a dispute. Article 33(1) imposes a moral obligation on all parties to seek a diplomatic resolution of their disputes, which, as would have been noticed, including Arbitration and judicial settlement.

<sup>40</sup> Fadia Fitriyanti, *Op. cit, Arbitrase Nasional & Arbitrase Syariah: Suatu Kajian Perbandingan*, p. 54.

There are several legal entities that focus on ADS, namely:<sup>41</sup>

1. Negotiation, it is a kind of peaceful settlement through discussion among the parties. The technic of negotiation does not involving third party, just focusing on the discussion that conducted by the related parties. This involves direct contact between the parties to a dispute in their settlement.
2. Mediation, it means a process to solve a problem, which impartial neutral party cooperates with dispute party to find consensus. Mediator does not have a responsibility to decide the case, but only helps the parties involved. This involves using a neutral third party as a negotiator.
3. Conciliation, it is a kind of process if dispute party could not formulate a consensus. This process refers to the consensus pattern, the conciliator is neutral party who might active or passive. The dispute party have to declare the consensus according to the proposal of third party and make it as a dispute settlement where an independent body is engaged to investigate the dispute and to provide a report containing recommendations targeted to settle the dispute. Yet, such reports are not legally binding on the parties involved in the conciliation.
4. Arbitration, it is a process that a dispute parties are agree to settle the case to the neutral party. In Arbitration, the parties may choose by

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<sup>41</sup> Khotibul Umam, 2010, *Penyelesaian Sengketa Diluar Pengadilan*, Yogyakarta, Penerbit Pustaka Yustisia, p. 10.

themselves who become the Arbitrator and applied law. Essentially, Arbitrator is a private judge that has a competence to make an award. The decision of Arbitration is final and binding and win-lose solution.

**e. International Chamber of Commerce (ICC)**

ICC is the world's largest business organization working to promote international trade, responsible business conduct and a global approach to regulation to accelerate inclusive and sustainable growth to the benefit of all.<sup>42</sup> A longstanding history of ICC was founded in the aftermath of the First World War when no world system of rules governed trade, investment, finance or commercial relations. ICC was established in 1919, 4 years later in 1923 they established the International Court of Arbitration. The headquarter and hearing centre of ICC is located in Paris but the national committees are spread in over 5 continents.

ICC is a global network of over 6 million members in more than 100 countries, ICC works to promote international trade, responsible business conduct and a global approach to regulation through excellent advocacy and standard setting activities – together with market leading dispute resolution services. As the world's leading Arbitration Institution, ICC have been handled more than 22.000 disputes in 137 countries and territories until 2017.<sup>43</sup> It is not doubtful that ICC have to handled more than 300 disputes every year.<sup>44</sup>

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<sup>42</sup> ICC, 2017, "Who We Are (ICC Index)", taken from <https://iccwbo.org/about-us/who-we-are/> accessed on Monday, November 13th 2017, 8:40 p.m.

<sup>43</sup> *Ibid*,

<sup>44</sup> Mauro, *et.al.*, 1996, *International Arbitration Law*, The Hague, Kluwer, p. 167.

If ICC Arbitration is chosen as the preferred dispute resolution method, it should be decided when negotiating contracts, treaties or separate arbitration agreements (Pactum de Compromitendo). However, if both parties consent, this can be included after a dispute has arisen as well (compromise clause). ICC recommends their own standard clause to the parties involved in their Arbitration<sup>45</sup>, namely:

*“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”*<sup>46</sup>

The ICC Rules mostly are adopted for almost majority of Arbitration’s body across the world.<sup>47</sup> Besides that, ICC also made ‘Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration’ that intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations under the 2017 ICC Rules of Arbitration (“Rules”) as well as the practices of the International Court of Arbitration of the International Chamber of Commerce (“Court”). In its latest Rules, ICC has governed the conduct of proceedings, inter alia: how claims are to be filed; the constitution of arbitral tribunals; the conduct of proceedings; the decision and award making; and the determination of

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<sup>45</sup> Redfern, *et.al.*, 1986, *Law and Practice of International Commercial Arbitration*, London, Sweet Maxwell, p. 3.

<sup>46</sup> See the ICC Arbitration Clauses Part in ICC 2017 Arbitration & Mediation Rules as enacted from 1<sup>st</sup> March 2017. The Rules are available for download at <http://www.iccwbo.org>.

<sup>47</sup> Jason Chuah, *Op. cit.*, p. 808.



costs. The ICC Rules also support the parties' independency in choosing the arbitrators, the place, and the language of Arbitration.<sup>48</sup>

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<sup>48</sup> *Ibid*, p. 809.