

ALTERNATIVE MODEL OF CONSUMER DISPUTE SETTLEMENT FINANCIAL SERVICE SECTOR IN INDONESIA

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ABSTRACT

Consumer dispute resolution can be reached through court (litigation) or outside the court (non-litigation) based on the voluntary choice of the parties to the dispute. This means that consumers are given the freedom to claim their rights if they are harmed by business actors both through litigation and non-litigation. The method of approach is taken in this research is a normative juridical approach and is supported by empirical research. This research is descriptive-analytic, that is research by explaining and describing in a clear, systematic, real, and precise way of an alternative model of consumer service disputed in the financial services sector in Indonesia. The litigation process produces conflicting (adversarial) decisions that have not been able to embrace common interests, and even tends to create new problems, is slow to settle, require expensive, unresponsive costs, and create hostility among the parties to the dispute. While the non-litigation process as a model for the settlement of the consumer service sector financial disputes also still has obstacles and has not been effective. The financial service sector consumer losses can be anticipated by enforcing laws related to law enforcement and by building and developing models of financial service sector consumer dispute resolution that are currently available optimally by stakeholders so that can provide a sense of justice and guarantee legal certainty.

Keywords: Consumer, Consumer Dispute Resolution, Financial Services Sector.

INTRODUCTION

The current globalization that has swept the world has changed in all aspects of human life, especially in developing countries, including Indonesia. As a result of the flow of globalization is a change in the value system in people's lives that raises various problems so that it needs to be regulated by the rule of law as law making and the need for law enforcement as law enforcement. This is important to be implemented because changes in values will continue to occur and is a reality that cannot be denied (Manan, 2014).

Globalization has proven to have grown inequality which is getting worse, among other things has given birth to the winner-take-all society, disempowerment and impoverishment of the weak, so it is widely expressed and popular that the gap between the haves and the have-nots is

widening. Where as according to George Soros this is the beginning of a crisis and possible failure for global capitalism (Soros, 1998).

Technological and industrial advancements have strengthened the differences between the traditional and modern people's lifestyles. This phenomenon shows that the law of consumer protection is closely related to the globalization of trade and industry in a country's economic activities. In this case consumer protection must receive more attention, one thing or another because foreign investment has become part of Indonesia's economic development, where the Indonesian economy is also related to the world economy. International trade competition can be a negative implication for consumers (Rajagukguk, 2000).

Consumers International (2010) in September 2010 launched a global campaign related to a fairer financial services sector. CI has campaigned and lobbied globally through the World Consumer Day Campaign and in the G20 countries, the Organization for Economic Co-operation and Development (OECD) and the Financial Stability Board to establish new processes and principles that will support the improvement of consumer sector protection financial services worldwide (<http://www.consumersinternational.org/our-members>).

The growth of community economic activities in various fields has driven the growth of the financial services sector so rapidly, both in terms of the quantity of business actors and the types of services offered, such as banking services, insurance services, consumer financing services, and various other types of financial services such as selling by foreign exchange, exchange money, and others. Government regulations and policies in the field of financial services are also running dynamically as changes and developments in the community, and even tend to facilitate growth. These conditions on one side are very beneficial for the interests of consumers because the desired needs can be fulfilled and the more wide open freedom to choose various types of quality of the financial services sector offered (Satory, 2015).

On the other hand, these conditions and phenomena can result in the position of financial service businesses (PUJK) and consumers becoming unbalanced. Where as consumers are only used as objects of business activity from PUJK to reap maximum profits through advertising tips, promotions, ways of selling, as well as the application of standard agreements that harm consumers. Consumers with low awareness of their rights and obligations due to lack of consumer education are the entry points of the traps that are spread by PUJK.

In such situations and conditions, it can be seen that the use of standard agreements in business transactions can create an imbalance between PUJK and consumers, so that a strong legal foundation is needed for the government and the community to make efforts to protect and empower consumers through the guidance and education of consumers. This effort is important to compensate for PUJK activities that carry out economic principles to get the maximum profit possible with minimal capital, which can harm the interests of consumers, both directly and indirectly.

The low awareness and knowledge of the consumer community, it is not impossible to be used as a land for business actors in transactions that do not have good intentions in running a business, which is principally seeking maximum profit by utilizing as efficiently as possible the available resources (Oughton & Lowry, 1997). An increasingly complex economic system has an impact on changes in legal construction in the relationship between producers and consumers. Changes in legal construction begin with a change in the paradigm of the relationship between consumers and producers. The relationship that was originally built on the principle of caveat

emptor (which emphasizes that consumers must be careful in making transactions with producers), is transformed into the principle of *caveat venditor* (which emphasizes the awareness of producers to protect consumers). (Samsul, 2004).

The construction of legal relations between PUJK and consumers should be equaled. But *de facto* and *de jure* consumers are in a weak position before service providers. There are many factors that cause weakness to consumers, including the ignorance of consumers or lack of information and the lack of bargaining power of consumers, as well as the position of consumers that seems to be one step behind the business actor. Thus, in the midst of an imbalance in position, the legal relationship between consumers and PUJK is built which often results in various types of losses at the consumer level.

Based on these conditions, it is necessary to empower consumers through the establishment of laws that can protect the interests of consumers in an integrated and comprehensive manner and can be applied effectively in society. Legal tools are not intended to shut down businesses of business people, but rather to encourage a healthy business climate and the birth of strong companies in the face of competition through the provision of services and the provision of quality goods and / or services. Attitude towards consumers is also intended as a form of wise consumerism (Shofie & Awan, 2004).

Finally, on April 20, 1999 the Law Number 8 of 1999 concerning Consumer Protection (UUPK) was born. The main objectives of this law are, among others, to improve the dignity of consumers by avoiding negative access to goods and / or services, as well as fostering the awareness of business people about the importance of consumer protection, so that an honest and responsible attitude in business grows. This law is expected to be effective for consumer protection for more than 260 million Indonesian citizens who are consumers.

Then in addition to the issuance of the UUPK as an umbrella act in consumer protection, the consumer protection law in Indonesia, especially the financial services sector consumers, experienced a significant development after the issuance of Law Number 21 of 2011 concerning the Financial Services Authority. Commitment to consumer service protection in the financial services sector has been implemented in Indonesia, under the supervision of the Financial Services Authority (2014). In an effort to empower the financial services sector consumers through consumer protection and increased access to finance to the public, in 2013 the OJK had issued OJK Regulation Number 01 / POJK.07 / 2013 concerning Consumer Protection in the Financial Services Sector. In addition, in 2014 the OJK also issued OJK Regulation Number 1 / POJK.07 / 2014 concerning Alternative Dispute Settlement Institutions (LAPS) in the Financial Services Sector.

Theoretically dispute resolution can be done in 2 ways. The way to resolve the first dispute is through litigation in the court, then the dispute resolution process develops through (cooperative) outside the court. The litigation process produces conflicting (adversarial) decisions that have not been able to embrace shared interests, and even tend to create new problems, slow in their settlement, require expensive, unresponsive costs, and create hostility among the disputing parties (Usman, 2003).

In Article 45 the UUPK states that every aggrieved consumer can sue a business actor through an institution in charge of resolving disputes between consumers and business actors or through a court in the general court environment. Consumer dispute resolution can be reached through court or outside the court based on the voluntary choice of the parties to the dispute. This

means that consumers are given the freedom to claim their rights if they are harmed by business actors both through litigation and non-litigation. Thus for financial service sector consumers who are disadvantaged by the PUJK, the consumer can choose the existing financial services sector consumer dispute resolution model, namely as follows:

Litigation

1. Default Claims;
2. Lawsuit of Action Against the Law;
3. Group Representative Lawsuit (Class Action);
4. Organizational Claims Rights (Legal Standing);
5. Simple Claim (Small Claim Court).

Non Litigation

1. Through the Consumer Dispute Settlement Body (BPSK);
2. Through an Alternative Dispute Settlement Institution (LAPS).

Today, there are many legal instruments that are not applicable or ineffective in the practice of their application, or even there are legal rules that are unique because they are never or rarely applied, these problems are part of the management of legal development in Indonesia (Barkatulah, 2008). These include legal instruments related to the field of consumer protection that cannot be applied in accordance with its objectives, which turns out to be inequality in law enforcement and creates confusion for those involved in the implementation process.

In Indonesia, consumer protection is still questionable because there have been many complaints from consumers regarding the products or services they have used. It has often been heard, either through mass media or electronic media about consumers who complain after using the products or services offered by PUJK. But consumers still don't know where to complain about the problem.

Empirical experience of the writer as a member of BPSK Bogor City since 2005 until now, the author handles many cases or claims that go to BPSK to be examined and resolved related to the financial services business transactions (which are dominated by financing, banking and insurance disputes). For example, standard agreements applied by finance companies (leasing) still use standard clauses that are detrimental to consumers, stating the granting of power from consumers to PUJK, directly or indirectly, to take all unilateral actions on goods pledged by consumers. For example unilaterally withdrawing a vehicle and executing an object that is the object of a fiduciary guarantee without the consent of the consumer.

The existence of various laws and regulations in the field of consumer protection that are expected to establish a more harmonious relationship between consumers and PUJK, as well as the various models of consumer dispute resolution mentioned above, should have been able to provide legal protection for consumers in a fair manner and obtain a guarantee of legal certainty (*das sollen*), but in reality consumers' bargaining position is very weak compared to PUJK, so there are still many financial service sector consumers who are disadvantaged by PUJK (*das sein*).

Based on the foregoing, the author raises the issue of how the alternative models of financial service sector consumer dispute resolution in Indonesia provide a sense of justice and legal certainty.

METHODS

The method of approach is taken in this research is a normative juridical approach and is supported by empirical research. This research is descriptive-analytic, that is research by explaining and describing in a clear, systematic, real, and precise way of an alternative model of consumer service disputes in the financial services sector in Indonesia, related to the theory and practice of its implementation. The data processing is done qualitatively.

RESULT AND DISCUSSION

Framework for Financial Services Sector Consumer Dispute Settlement Regulation in Indonesia

A strong regulatory framework is a prerequisite for the creation of a financial services sector whose overall activities are organized regularly, fairly, transparently and accountably, capable of creating a financial system that grows sustainably and stable, and is able to protect the interests of consumers and society. One of the regulatory frameworks is the regulation on dispute resolution mechanisms in the financial services sector that must guarantee legal certainty for dispute resolution in the financial services sector, both for the parties to the dispute, and legal certainty for the LAPS position in a series of dispute resolution mechanisms in the financial services sector. The financial services sector consists of the banking sector, capital markets, insurance, pension funds, financing institutions, and other financial services institutions. Each sector has different arrangements for dispute resolution mechanisms, both in terms of scope and depth of regulation. To be able to realize justice and legal certainty in the dispute resolution mechanism in the financial services sector, it is necessary to have several strategies, namely:

1. Harmonizing internal dispute resolution mechanisms in the financial services sector;
2. Develop regulations regarding LAPS in the financial services sector based on needs and industrial development;
3. Increasing the active role of the financial services industry actors in the preparation of arrangements for dispute resolution mechanisms in the financial services sector.

Financial Services Sector Consumer Dispute Resolution Model

According to Article 45 paragraph (2) the UUPK stipulates that the settlement of consumer disputes can be taken through court or outside the court based on the voluntary choice of the parties to the dispute. This means that consumers are given the freedom to claim their rights if they are harmed by business actors both through litigation and non-litigation.

Thus for financial service sector consumers who are disadvantaged by the PUJK, the consumer can choose the financial service sector consumer dispute settlement model, as follows:

Litigation

Default Claims

According to Abdul Halim Barkatullah, that consumer compensation claims on the basis of broken promises that are stated openly or expressly stated by the producer is a minimal form of consumer protection, because consumer claims are only limited to matters that are expressly agreed upon. Even though the limited ability and knowledge of consumers to know the condition of the product, as well as the forms of standard agreements that tend to limit the responsibility of the producers resulted in reduced responsibility of the producers (Barkatulah, 2008).

Lawsuit of Action against the Law

Before the enactment of the UUPK, Article 1365 KHUPerdata was used in suing the PUJK which caused losses to consumers. To be able to hold the PUJK accountable, consumers must be able to prove in advance that the error is in the PUJK. If the aggrieved consumer fails to prove, the PUJK is considered innocent and the claim is rejected. Even though to be able to prove the mistakes made by PUJK that caused losses to the consumers is not easy. Because those who know the ins and outs of the production process are business actors, not consumers. Therefore, in Article 28 UUPK the burden of proof is reversed so that it becomes the basic obligation of the business actor to prove that the business actor is innocent. If a business actor cannot prove, then the business actor is considered guilty which causes loss to the consumer. Business actors must be responsible for all losses suffered by consumers.

Class Action

Article 46 paragraph (1) letter b of the UUPK determines that a lawsuit over a violation of a business actor can be carried out by a group of consumers who have the same interests. In his explanation, it is stated that this law recognizes class action. Class action must be submitted by consumers who are truly harmed and can be proven legally, one of which is the existence of proof of transaction.

Legal Standing

The UUPK also accepts the possibility of proceedings conducted by certain institutions that have legal standing. The legal standing formulation in the UUPK is contained in Article 46 paragraph (1) letter c and paragraph (2) of the UUPK, where a lawsuit against a violation of a business actor can be submitted by a Non-Governmental Consumer Protection Agency (LPKSM) in the general court.

Small Claim Court

Small claim is a type of lawsuit that can be submitted by consumers, even though it is seen economically the value of the lawsuit is very small. In the law of consumer protection in various countries, the process of small claims is a widely adopted principle. According to the

Supreme Court Regulation Number 2 of 2015 concerning the Small Claim Court Procedure that consumer disputes include disputes that can be resolved by submitting a simple lawsuit to the district court (Indonesia, Perma No. 2/2015).

Non-Litigation

Through the Consumer Dispute Settlement Body (BPSK)

BPSK as an alternative dispute resolution institution outside the judiciary that is given judicial authority to resolve consumer disputes quickly, easily, and cheaply. The speed is determined from 21 working days that must produce a decision. The ease lies in administrative procedures and a very simple decision-making process. His generosity lies in the financing of the trial charged to the business actor in accordance with the proven value of the loss. Each consumer dispute settlement by BPSK is carried out by an assembly which must be an odd number and consists of at least 3 BPSK Members who represent elements of the government (as chairman) and elements of consumers and business actors as members. While the clerk is appointed from the members of the BPSK Secretariat. The procedure for the trial is carried out in a manner agreed upon by the parties, namely through conciliation, mediation or arbitration.

Through an Alternative Dispute Resolution Institution (LAPS)

Arrangements regarding dispute resolution mechanisms in the financial services sector are the implementation of the mandate of Article 29 letter c of Law Number 21 of 2011 concerning the Financial Services Authority (2014). The dispute resolution mechanism in the financial services sector is carried out through 2 stages, namely internal dispute resolution in the financial service institutions and external dispute resolution through the Alternative Dispute Resolution Institution in the financial services sector (LAPS). Dispute resolution by LAPS is the last level in the pyramid of dispute resolution mechanisms in the financial services sector. The choice of an independent alternative dispute resolution process must be available for consumer complaints that cannot be resolved internally in the financial services institution at an early stage. In order to realize the formation of LAPS which is able to resolve disputes quickly, cheaply, fairly and efficiently as an external dispute resolution in the financial services sector, OJK has issued Financial Services Authority Regulation Number: 01 / POJK.07 / 2014 concerning Alternative Disputes Settlement Institutions. LAPS in the financial services sector that has been established by OJK to date is: (Prabowo, 2015).

1. Indonesian Capital Market Arbitration Board (BAPMI);
2. Indonesian Insurance Mediation Board (BMAI);
3. Pension Fund Mediation Board (BMDP);
4. Alternative Institution for Indonesian Banking Dispute Settlement (LAPSPI);
5. Indonesian Financing and Pawnshop Mediation Board (BMPPI);
6. Indonesian Guarantee Company Arbitration and Mediation Agency (BAMPPI);
7. Indonesian Venture Arbitration Board (BAVI)'.

Challenges Faced in Implementing the Alternative Model of Financial Services Sector Consumer Dispute Resolution in Indonesia

Challenges in the Consumer Dispute Resolution Model Litigation

As it is known that the litigation process produces conflicting (adversarial) decisions that have not been able to embrace common interests, even tend to create new problems, slow in their settlement, require expensive, unresponsive, and hostile costs among the parties to the dispute.

Challenges in the Consumer Dispute Resolution Model Non-Litigation

Some challenges or obstacles in the empirical level faced by BPSK in the framework of carrying out their duties and authorities, among others, are related to institutions, funding, human resources, legislation, lack of socialization and low levels of consumer legal awareness, lack of public response to the UUPK and BPSK and understanding of the judiciary against consumer protection policies;

The existence of LAPS has a challenge to immediately implement the OJK policy contained in the regulations concerning internal dispute resolution and external dispute resolution. Until now, the majority of LAPS only existed in big cities, especially Jakarta, so that financial service sector consumers outside Jakarta are still having difficulty accessing directly to LAPS offices. In order to reach consumers of the financial services sector, especially for consumers outside the city, LAPS needs to continue to develop effective communication strategies. In addition to using electronic media, LAPS in the future also needs to cooperate with financial service institutions that are members to socialize the existence of LAPS. Challenges related to independence are very important for LAPS in building public trust in general and consumers in particular, to take advantage of LAPS as a trustworthy platform for dispute resolution in the financial services sector. Challenges in fulfilling the principles of justice are closely related to how the decision making process by mediators, adjudicators and arbitrators in resolving disputes in the financial services sector to eliminate the possibility of partiality in decision making. Challenges related to the lack of coordination mechanisms between OJK, LAPS and existing dispute resolution bodies, it is very possible to create friction or overlap related to the regulation and guidance and supervision of dispute resolution mechanisms. This will potentially create uncertainty in the implementation of the consumer protection function.

FINDING AND CONCLUSION

Regulations regarding LAPS in the financial services sector are needed to provide legal certainty for the LAPS position in a series of dispute resolution mechanisms. The LAPS arrangement is not intended as a form of OJK intervention on alternative dispute resolution mechanisms that already exist, but to provide guidance on principles that can meet the needs, both in terms of consumers and financial service institutions in resolving disputes. Similar to regulations concerning consumer protection, the nature of the arrangement is a principle based approach. There are 5 principles that need to be applied by LAPS, namely accessibility, independence, fairness, effective and efficient.

Consumer dispute resolution can be reached through court or outside the court based on the voluntary choice of the parties to the dispute. This means that consumers are given the freedom to claim their rights if they are harmed by business actors both through litigation and non-litigation. Thus for the financial services sector consumers who are disadvantaged by the PUJK, the consumer can choose the existing financial services sector consumer dispute resolution model.

The author finds that in the litigation process it will produce adversarial decisions that have not been able to embrace common interests, even tend to cause new problems, are slow to solve them, require expensive, unresponsive, and cause hostility among the parties in dispute. While in the non-litigation process through BPSK and LAPS, it is expected that as an alternative model of consumer dispute settlement financial service sector there are still obstacles and not yet effective.

Finally, with the various challenges faced in this era of globalization, like it or not the Indonesian people accept the onslaught of various kinds of financial services sector products offered by businesses both domestic and foreign. This is certainly a critical point of ignoring the consumer rights of the financial services sector. The financial service sector consumer losses can be anticipated by enforcing laws related to law enforcement and by building and developing models of financial service sector consumer dispute resolution that are currently available optimally by stakeholders so as to provide a sense of justice and guarantee legal certainty.

SUGGESTION

It is better if the financial service sector consumers who are harmed by PUJK if they want to take litigation, it is recommended to submit a small claim court rather than using another claim model, because the examination is carried out in a simple, light and fast way (25 days after the first trial day). Whereas if consumers take a non-litigation path, it is better to file a lawsuit through BPSK than through LAPS, because the principle of consumer dispute resolution at BPSK is easy (the procedure is not complicated), cheap (until now still free) and fast (21 days there has been a decision).

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