

Government's Legal Responsibility Upon Entrepreneur's Economic Loss Caused by the Failure in Implementing the Legislation Regarding Business Licensing and Registration

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Abstract

The Regulation of Minister of Trade No. 14 Year 2016 (Permendag 14/2016) Regarding Trading Business License (SIUP) and Company Registration ID (TDP) states that SIUP and TDP should be issued no longer than 2 working days. However, this regulation failed to be implemented by Regional Government of Kabupaten Bekasi when PT. EIM managed their SIUP and TDP in five working days. It caused economic losses for PT. EIM because they need the documents as a requirement to earn training project worthed Rp. 50.000.000. This research tried to examine the government's responsibility upon entrepreneur's economic loss caused by the failure in implementing the legislation regarding Business Licensing and Registration. The methodology used in this research is Normative-Empirical Legal Research. Normative-Empirical Legal Research is a research which the object including the legislation (in abstracto) and its implementation at the concrete situation. The Result showed that the economic loss gained by PT. EIM is the responsibility of Regional Government of Kabupaten Bekasi since their failure to issue SIUP and TDP on time is a tort. As result, every party committed to tort have to pay compensation. Form of the compensation consists of material and immaterial compensation. To apply the compensation, PT. EIM could follow the non-litigation and litigation procedures.

Keywords: *government's legal responsibility, entrepreneur's economic loss, legislation, business licensing and registration*

CHAPTER I. INTRODUCTION

The Economic Policy Package XII which was issued by President Joko Widodo in 2016 aims to speed up the process of obtaining licenses in business activities. Nevertheless, it is still far from the reality. This was happened to Mr. Andi and

colleagues, industrial consultants who wanted to establish a Limited Liability Company (PT) because they got a project to give industrial training services to PT. MNO. However, PT. MNO required them to propose the training project on behalf of a formal institution and provided bank account number on behalf of the institution within a week for the training is needed immediately. Mr. Andi then as the representative started to propose the legality requirement to establish a PT namely PT.EIM and visited several bank to open account on behalf of PT. However, no bank approved the application because "Surat Izin Usaha Perdagangan" (SIUP) and "Tanda Daftar Perusahaan" (TDP) was not provided. Thus, he needed to manage SIUP and TDP first.

Mr. Andi applied the SIUP and TDP through *sipo.kemendag.go.id*. After receiving an email to wait for further process, he was not given any further progress regarding the registration. After waiting for four days, Mr. Andi went to 'Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu' Kabupaten Bekasi to propose SIUP and TDP manually. Mr. Andi was surprised when the official stated that SIUP and TDP will be issued in five working days. Mr. Andi complained and notified the official that based on The Regulation of Minister of Trade No. 14 Year 2016 (Permendag 14/2016), SIUP and TDP should be issued no longer than 2 working days. However, the official remained in his decision. As result, PT.EIM lost project worth Rp.50.000.000.

This case showed that Permendag 14/2016 is not practically applied. There has been deviation in the conduction of the rule. It is attractive for the Researcher because normatively there is no provision that punish government to pay compensations to the entrepreneur if they obtained losses because of the government's failure in implementing the law. Nevertheless, the loss is truly existing and law must enforce the fairness for everybody. Hence, Researcher try to make this research entitled **"Government's Legal Responsibility Upon Entrepreneur's Economic Loss Caused by The Failure In Implementing The Legislation Regarding Business Licensing and Registration.**

Researcher have tried to find another research regarding the government's responsibility upon Entrepreneur's economic loss caused by the failure in conducting

legislation regarding business licensing and registration. However, Researcher did not find any research that focus that closed to this research. Thus, this research is necessary to be conducted to answer the legal issues and provide the certainty of law.

Problem in this research is: How is the government's legal responsibility upon entrepreneur's economic loss caused by the failure in implementing the legislation regarding business licensing and registration?

CHAPTER II. METHODOLOGY

The research methodology in this research is Normative-Empirical Legal Research. Normative-Empirical Legal Research is a research which the object including the legislation (*in abstracto*) and its implementation at the concrete situation.¹ The type of the research is descriptive and using applied law approach. The research tries to examine the concrete situation using the existing regulation (norm).

Data collection method in Normative-Empirical Legal research are through literature as explained below:

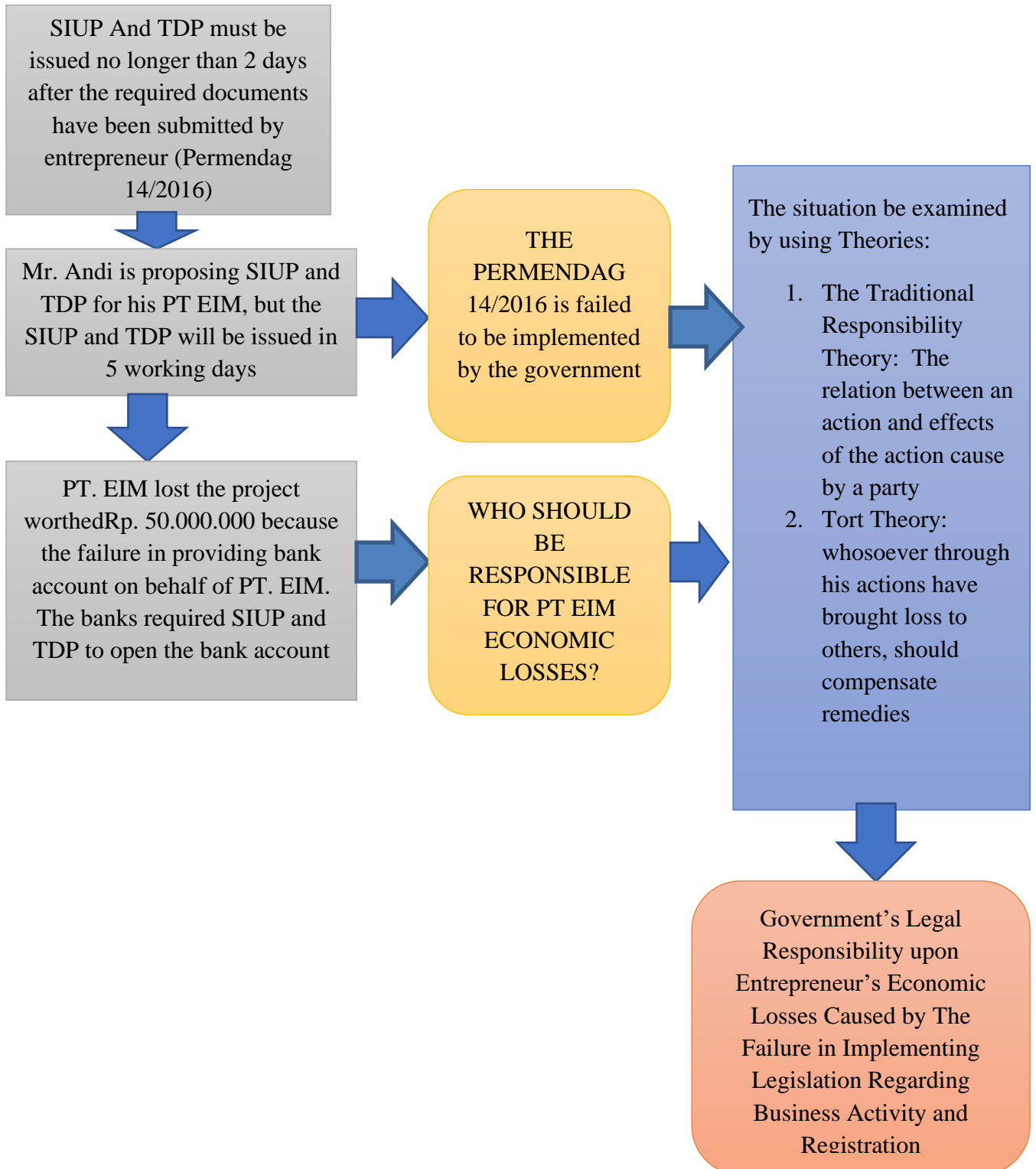
1. The literature study, is searching and collecting theoretical materials by studying and quoting materials associated with the research topic;
2. The documents study, by searching and collecting documents related to the government's responsibility upon entrepreneur's economic losses caused by the failure of the government in implementing legislation in business license and registration area.

After the data is collected, the data will be analyzed using qualitative analysis. Qualitative analysis tries to reveal and explain the collecting data in the form of sentences which are structured in detail, logic, and systematic in accordance to the government's legal responsibility upon the entrepreneur's economic losses caused by the failure in implementing legislation regarding business license and registration.

After all the data processed qualitatively, then there will be some specific identification to answer the research problem. The identification is to determine and elaborate the government's legal responsibility upon the entrepreneur's economic losses caused by the failure in implementing legislation regarding business license and registration.

¹Abdulkadir Muhammad. (2004). *Hukum dan Penelitian Hukum*. PT. Citra Aditya Bakti, Bandung, p. 201

The theoretical framework in this research is provided in the diagram below:



Two theories are used to examine problems in this research, they are traditional Responsibility theory and tort theory. traditional Responsibility theory states that legal responsibility is divided into two forms, which are based on fault and absolute responsibility.² It is enough to determine that such action had deemed harm which means showing the external relation between their action and its effects. Mental self-consciousness of the actors and its effects is not necessary. This such of responsibility is called absolute.³

The theory states that an action or negligence that are contrary to the rights of others, or contrary to the actor's responsibility, either by decency, promiscuity on another person or objects. Meanwhile, whosoever through his actions have brought loss to others, should compensate remedies.⁴

Chapter III. RESULT AND DISCUSSION

According to Suhady, the government are the authoritative direction and administration of the affairs of men/women in a nation, state, city, etc. It is the guidance and administration that authorized upon the community activities in a state, city and so others. The government could also be defined as the governing body of a nation, a state, city, and etc.⁵

The powers of government is divided into 3 which was also known as the concept of the Trias Politica. Trias Politica is a teaching of having a thought that the powers of the state consist of three kinds of power: legislative, executive, and judicative. Legislative power is to make the act, executive power is the power to conduct the act, and judicative is the power to judge the violation of the act.

The management authority in issuing the legal paper for corporation is upon the authority of executive, in this case "Pemerintah Daerah Kabupaten Bekasi". Entrepreneurs as the part of society deserve proper services from the government regarding the interest of their company. According to Article 1 number 5 Law no. 5 Year 1999 (Antitrust Law), entrepreneur

² Jimly Assidique dan M. Ali Syafaat. (2006). *Teori Hans Kelsen Tentang Hukum*. Jakarta: Sekjen Mahkamah Konstitusi. p. 65.

³ M.A. Moegni Djojodirjo. (1982). *Perbuatan melawan hukum*. Jakarta: Pradnya Paramitha, p. 25-26.

⁴ *Ibid*

⁵ Riawan. (2009). *Hukum Pemerintahan Daerah*. Bandung: Citra Aditya Bakti. p. 197

shall be any individual or business entity, established and domiciled or conducting activities within the jurisdiction of the state of the republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy.

Several form of business entity in Indonesia are:

- a. Business entity without legal entity status including sole proprietorship, firm, and limited partnership (CV).
- b. Business entity with legal entity status including Limited Liability Company (PT), Foundation (Yayasan), and Cooperative (Koperasi).⁶

Mr. Andi and colleagues company is in form of PT. According to Law number 40 of 2007(UU PT), PT is a capital alliance, not the fellowship, which means that a limited liability company as a capital alliance is not founded based on the forming capital. This means that the shareholders of PT can be substituted but the existence of the PT is remained.⁷

Services that Mr. Andi and other entrepreneurs deserve from the regional government is including the ease of licence and registration matters of the company. The form of business entity founded by Mr. Andi and colleagues is limited liability company (PT). So the PT must meet the business license and registration including SIUP and TDP. According to Article 1 number 4 Regulation of The Minister of Trade No. 36/M-DAG/PER/9/2007 Concern on Issuance of Trade License, SIUP is a license to carry out trade business. Meanwhile, according to Article 1 Number 2 Regulation of The Minister of Trade No. 37/M-DAG/PER/9/2007 Concern on Company Registration Organization, TDP is sign of authorization presented by office of Company Registration to company that has made company registration.

This obligation of the government is also an order from the legislation. According to article 7 Law no 12 Year 2011, The hierarchy of legislation in Indonesia is as follow:

1. Undang-Undang Dasar Negara Republik Indonesia 1945;
2. Undang-Undang atau Peraturan Pemerintah Pengganti Undang-Undang;
3. TAP MPR;
4. Peraturan Pemerintah;
5. Peraturan Presiden;
6. Peraturan Daerah Provinsi; and
7. Peraturan Daerah Kabupaten/Kota.

⁶ Dijan Widijowati. (2012). *Hukum Dagang*. Yogyakarta: Andi. p. 20-21

⁷ Janus Sidabalok. (2012). *Hukum Perusahaan*. Bandung: Nuansa Aulia, p. 114.

So, Where is the position of Permendag? Article 8 of the Law no 12 Year 2011 stated that other types of regulation exclude the ones mentioned in Article 7 including regulation governed by Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Mahkamah Agung, Mahkamah Konstitusi, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Menteri (Minister), body, or the other same level institution which is established by the law are considered as legislation in Indonesia. Based on the provision, Permendag 14/ 2016 is also a legislation.

The failure of the government in issuing legal documents needed by PT. EIM in two days is a falsity in fulfilling the rights of citizens that bring losses and qualified as a tort. When there is an action caused losses for someone in business activity, then according to law, one who conduct a certain action that cause losing for someone else are committed to tort (Perbuatan Melawan Hukum).

According to Moegni Djojodirjo Tort could also be interpreted as:

*“suatu perbuatan atau kealpaan yang atau bertentangan dengan hak orang lain, atau bertentangan dengan kewajiban si pelaku atau bertentangan, baik dengan kesusilaan, pergaulan hidup terhadap orang lain atau benda, sedang barang siapa karena salahnya sebagai akibat dari perbuatannya itu telah mendatangkan kerugian pada orang lain, berkewajiban membayar ganti kerugian”.*⁸

According to the opinion above, tort is an action or negligence against other's right, or against the obligation of the actor or against the orderliness. Hence, An action by the Regional government is a part of an action against their responsibility. The law force the regional Government to issue SIUP and TDP no longer than 2 working days. However, by issuing it longer than 2 working days, The Regional Government of Kabupaten Bekasi have againsted their obligation regarding the issuance of SIUP and TDP.

The regulation upon tort in Indonesia is as stipulated in Article 1365 Indonesian Civil Code which states:

“Tiap perbuatan melanggar hukum, yang membawa kerugian kepada orang lain, mewajibkan orang yang karena salahnya menimbulkan kerugian itu, mengganti kerugian tersebut.”

Identifying tort in PT EIM case is to analyze the existence of tort in the case. According to the Article 1365 provision, the first element of tort is an unlawful action. In the other words, the act conducted is not coherence with the law. The Regulation of Minister of Trade No. 14

⁸ M.A. Moegni Djojodirjo. (1982). *Perbuatan melawan hukum*. Jakarta: Pradnya Paramitha. p 25-26.

Year 2016 (Permendag 14/2016), SIUP and TDP should be issued no longer than 2 working days. However, The Regional Government of Kabupaten Bekasi issued it in five working days. The Regulation of Minister of Trade No. 14 Year 2016 is a kind of legislation in Indonesia that is admitted by Article 8, The Law No. 12 Year 2011 Regarding The Law Making. Hence, this regulation is a part of legislation. Therefore, this regulation is a law. Based on this reasoning, Author can infer that the government's failure is not coherence with the existing law regarding the issuance of SIUP and TDP. So, Author can state that the government is breaking the law.

The second aspect is "Loss" (kerugian). The background showed us that the failure of PT EIM in obtaining the legal documents for the company has caused their potential client dismissed the cooperation. Hence, They finally lost the project worth Rp. 50.000.000. Should the SIUP and TDP issued on time as it has been governed in the regulation then the project would belong to PT. EIM. Losing the project caused PT. EIM gain economic lost worthed Rp. 50.000.000.

Based on the two components, it is confirmed that the failure of the government in issuing the legal document required for the company (EIM) is fulfilling the violation upon Article 1365 Indonesian Civil Code. As consequences, The law forced the one who committed to the tort to pay remedies to the party who gain the disadvantages upon the misconduct. So, Researcher can conclude that the Regional Government of Kabupaten Bekasi should pay compensation of the economic loss to PT. EIM.

According to William Bianco, economic losses includes damages for disaapointed expectations, whether relating to a product or structure that does not perform promised us or to other types of financial harm, such as the fear of potential profits, delay damages , the fear of potential losses of the benefit of a bargain, and the reduced value of property.⁹

According to Niewenhuis as it was quoted by Urwahid, losses is the reduced of the wealth of one party caused by action things against the norms by other parties. Losses formed by the comparison between the factual situation on how the reality of the wealth as the consequences of a violation to norms (in this case: Event of Default) with hypothesis regarding how would the situation be if the violation of norms never happened (in this case: Event of Default). Losses are consisting of two components, such as:

- a. The apparent loss suffered (*damnum emergens*) , includes: the cost and losses; and
- b. Profits that are not obtained (*lucrum cessans*) , in the form of interest.¹⁰

⁹ William A. Bianco. (2007). *Claims Resources*, San Francisco: URS Corporation. p.1

¹⁰Purwahid Patik. (1994). *Dasar-Dasar Hukum Perikatan*. Bandung: Mandar Maju. p. 14.

In case of tort, In Indonesian Law, there are two part of compensation causes by tort:

a. Material Loss

Material loss consist of the real lost that is gained and the profit that should be obtain should the tort did not occur. Purwahid Tatik divided them into: 1) The apparent loss suffered (*damnum emergens*) , includes: the cost and losses; and 2) Profits that are not obtained (*lucrum cessans*), in the form of interest.¹¹

In the case of Regional Government of Kabupaten Bekasi vs PT. EIM, The cost that should be paid by the government are the total expenditure of PT. EIM in arranging the legal licenses document, including the transportation cost, equipment, like paper, pen, and other item as the part of arranging the documents, and also expenditure in doing coordination to their candidate client for a chance of business cooperation, including transportation and communication cost.

Moreover, the losses part is the real disadvantage that gain by PT. EIM. In this case, causing by the failure of The Regional Government of Kabupaten Bekasi in issuing the documents, PT. EIM lost project worth Rp. 50.000.000. This is the real lost that should be paid by The Regional Government of kabupaten Bekasi.

Profits are the potential profit that could be gain in the future day. In this case, should the first project between PT. EIM and his potential client was succeed, then there would be potential that the both parties will continue their cooperation in another project. If that was the case, then there would be another potential profit that could be gain by PT. EIM in the future day. However, it would not happen because their first prohect has failed caused by the failure of Regional Government of Kabupaten Bekasi in issuing the SIUP and TDP that makes the trust of the client to PT. EIM disappear. This lost can be calculated and Regional Government of Kabupaten Bekasi are obligated to pay for it.

b. Immaterial Lost.

Tort could causes immaterial lost such as hurt, feeling threatened, and the losing of the life pleasure. Immaterial lost compensation is free to be set up according to the victim in assessing the immaterial lost. The amount is unlimited. Hence, PT EIM could even sue the

¹¹Purwahid Patik, 1994, *Dasar-Dasar Hukum Perikatan*, Bandung: Mandar Maju, page. 14.

Regional Government of Kabupaten Bekasi as much as total of the government financial year budget or even more if PT. EIM considered it worthed.

Based on the explanation above, it is clear that the economic loss gained by PT. EIM is the responsibility of Regional Government of Kabupaten Bekasi since their failure to issue SIUP and TDP on time is a tort. As result, every party committed to tort have to pay compensation. In this case, as the legal subject Regional Government of Kabupaten Bekasi are obligated to pay the remedies.

The next discussion is about how to apply this sanction. What can PT. EIM do to enforce their right? What if Regional Government do not have a willingness to pay the compensation? What are the lawful procedure could be followed by PT. EIM to fight for their right?

In enforcing right upon a tort, there are two ways that recognized by the law. They are:

1. Non- Litigation Process

Non litigation procedure is an effort to enforce law without involving trial procedure in court. This non litigation process imply personal and negotiation approach. PT EIM can use non litigation procedure to ask Regional Government of Kabupaten Bekasi to pay them compensation. One of the way PT. EIM can do is to make a contact and notified The Regional Government of Kabupaten Bekasi upon their mistake and their responsibility to pay compensation upon the negligence.

If this contact does not responded by the Regional Government of Kabupaten Bekasi, then PT. EIM could send a formal warning Letter (Somasi) to Regional Government of Kabupaten Bekasi. This letter is a prove to proceed the process to the court trial if the Government of Kabupaten Bekasi does not give the expected reaction.

Some other non litigation process that can be taken by PT. EIM are:

a. Mediation

A dispute settlemet through negotiations between the disputed parties with the assistance of a third party who is neutral and independent, which is called as a mediator who is chosen by by the parties;

b. Negotiation

A disputes settlement by the parties without following the court procedure in order to reach a consent with cooperation basis in harmonization and creativity.

c. Conciliation

A settlement by appointing a conciliator who acts as intermediary for the parties based on agreement of the parties to seek a acceptable solution.

d. Expert Opinion

Expert Opinion for a technical issue in accordance to their area of expertise coherence with the dispute.

e. Arbitration

The act of arbitration also allows the parties who want to solve their business disputes in arbitration. Arbitration is dispute settlement by giving authority to check and examine the dispute at the first and final level to a third party who are neutral and independent called arbitrators. Settling case by arbitration, then the parties must first follow an agreement that the parties will use the arbitration which is stated in a written agreement or a notarial deed. It is based on the provision of article 9 numbers (1) the act of arbitrage and alternative disputes settlement that stated:

"Dalam hal para pihak memilih penyelesaian sengketa melalui arbitrase setelah sengketa terjadi, persetujuan mengenai hal tersebut harus dibuat dalam suatu perjanjian tertulis tertulis yang ditandatangani oleh para pihak"

Paragraf (2) stated:

"Dalam hal para pihak tidak dapat menandatangani perjanjian tertulis sebagaimana dalam ayat (1), perjanjian tersebut harus dibuat dalam akta notaris"

Both provisions above show that the selection of arbitration in the resolution of a dispute can be taken before or after the matter. In terms of it is elected before the dispute, usually the elections made in a written agreement that approved by the parties which regulates the right and obligation the parties along with the dispute settlement resolution in the future. When this choice taken after the dispute, so this choice also should be based on a written agreement of the parties.

2. Litigation Procedure

Litigation procedure is a procedure in settling case through the court procedure. The corporation could also settle the dispute by filling a lawsuit through the court. The settlement

through the court be conducted by submitting a lawsuit to the government for committed to tort. The court committed by the government is as stipulated in Article 1365 Indonesian Civil Code.

The litigation effort must be preceded by the warning (Somasi) as explained in a section of a non-litigasi procedure. A warning is an effort to remind the opponent regarding their mistake, and for them to conduct the remedies. This warning is mandatory before someone submit a lawsuit to other party. Through this litigation process PT. EIM could sue PEMDA both upon material and immaterial compensation.

Chapter V. CLOSING

Based on the discussion above, Researcher can conclude that the economic loss gained by PT. EIM is the responsibility of Regional Government of Kabupaten Bekasi since their failure to issue SIUP and TDP on time is a tort. As result, every party committed to tort have to pay compensation. Form of the compensation consists of material and immaterial compensation. To apply the compensation, PT. EIM could follow the non-litigation and litigation procedure.

As response to the conclusion, Researcher suggests The Regional Government of Kabupaten Bekasi to follow the provision of the duration of the issuance of SIUP and TDP. It will brings the fairness and legal certainty in administrative management of business licensing and registration. In addition, for entrepreneur, Author suggest to support the government in enforcing the legislation, thus, entrepreneur could also notify the government about the regulation in order to creat positive coordination, check, and balance between the government and entrepreneurs.

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Regulation of The Minister of Trade No. 36/M-DAG/PER/9/2007 Concern on Issuence of Trade License