

Models of Industrial Relation Mediation in Indonesia

Jumiarti¹, AdiSulistiyono², Hari Purwadi³ & I Gusti Ayu Ketut Rachmi Handayani⁴

Abstract

Mediation has widely been used in settlement of industrial relation disputes in Indonesia. Various laws and regulations have been enacted to enable mediation in resolving various disputes in industrial relations. The purpose of this paper is to describe the models of industrial mediation in Indonesia. This paper shows that there are many models of mediation practices in Indonesia, namely settlement mediation, facilitative mediation, therapeutic mediation, and evaluative mediation. Among the various models of mediation, evaluative mediation has been the dominant model in practices. Mediation processes that ended up with recommendations have mainly been characterized by an evaluative model of mediation. Meanwhile, mediation processes that resulted in agreements have been characterized by a facilitative model of mediation. We believe that facilitative model of mediation would be an ideal condition to stimulate the realization of a joint agreement between the parties in settling their industrial relation disputes. To make a facilitative model of mediation works effectively, there is a need to improve the roles of industrial relation mediators in the mediation process. At the normative level, there is a need to amend technical stipulations concerning mediations. At the practical level, there is a need to improve technical capacity of the mediators through various structured and continuous seminars and training on industrial relation mediation

Keywords: mediation models, industrial relation, industrial relation dispute, industrial dispute settlement.

Introduction

Mediation has widely been used in Indonesia to resolve both juridical and no juridical problems. While mediation has traditionally been used to resolve civil legal problems, mediation has currently also been used to resolve penal problems, such as minor offenses, domestic violence, environmental pollution, and land disputes. In Indonesia, the practices of mediation can be classified into two groups, namely mediation in the court under Supreme Court Regulation No. 1/2016 concerning Mediation Procedures in the Court and mediation out-of-court under Law No. 30/1999 on Arbitrage and Dispute Resolution Alternatives and other regulations that specifically address special fields such as capital market, banking, insurance, environment, coastal areas and small islands, consumer protection, intellectual property right, forestry, water resources, land, construction services, antimonopoly and unfair business competition, and industrial relation. Of the various laws and regulations governing the use of mediation, Law No. 2/2004 concerning Industrial Relations Dispute Settlement has been the most comprehensive and detail form of arrangement in the use of mediation in settlement of industrial disputes. Law No. 2/2004 specifically regulates the ways of resolving industrial disputes through bipartite negotiations, deliberation and consensus, conciliation, arbitration, mediation, and industrial relations court.

¹ Lecturer, the Faculty of Law, Satya Wacana Christian University, Salatiga, Central Java, Indonesia, Certified Mediator, Judge at the Industrial Relation Court at the District Court of Semarang, Central Java, Indonesia.

² Professor of Law, the Faculty of Law, Universitas Sebelas Maret, Certified Mediator.

³ Lecturer, the Faculty of Law, Universitas Sebelas Maret, Certified Mediator.

⁴ Professor of Law, the Faculty of Law, Universitas Sebelas Maret. Email: ayu_igk@staff.uns.ac.id

In practice, mediation has several problems. Firstly, mediation has been regarded as merely a formality in settlement of industrial relation disputes, so that the mediation process has been undertaken by the parties halfheartedly. Secondly, the mediation session has been very formal and rigid, in which the presence of the mediator has not been able to shift the dispute from the dispute in the position to that of conflict of interests. Thirdly, there has also been a problem of multiple interpretations of labor law as the legal source of the mediation. Mediators have been considered siding with one party. Fourthly, there has also been a problem of the fear of the mediator that the recommendation being issued could be legally disputed by one of the parties who feel aggrieved by the content of the recommendation. Lastly, there has been a problem of being harassed in which mediators have been positioned as witnesses in the Industrial Relations Court. Such problems have made industrial relations mediation ineffective. The abovementioned problems in the mediation practices have provided the backdrop for the need to study the industrial relations mediation models. It is interesting to investigate the models of industrial relations mediation given the fact that the mediation has widely been used to resolve industrial disputes when deliberations have not resulted in agreements. Moreover, the settlement through mediation has also been a prerequisite for a dispute to be filed in the Industrial Relations Court. Laurence Boulle put forward four models of mediation, namely settlement mediation, facilitative mediation, therapeutic mediation, and evaluative mediation. Based on the features of each of the mediation model, this paper portrays the models of mediation at the industrial relations mediation in Indonesia. This paper provides insights to improve the effectiveness of industrial relations mediation in Indonesia, particularly concerning the role of industrial relations mediator.

This paper is organized as follows. The second section discusses the mediation as one of Settlement Mechanisms for Industrial Relation Disputes in Indonesia. This part covers two issues, namely the relation between Mediation and Other Mechanisms of Industrial Relation Dispute Settlements and the Process of Industrial Relation Dispute Settlement. The third section describes the Characteristics of Mediation Models according to Laurence Boulle. In the fourth section, models of Industrial Relation Mediations in Indonesia are described. The fifth section concludes this paper.

Mediation as one of the Mechanisms for Industrial Relations Dispute Settlement in Indonesia

Article 13 Sub h Chapter XI of Law Number 13 of 2003 on Manpower [from now on referred to as UU K (Manpower Law)] stipulates that one of the means for carrying out industrial relations is the industrial relations dispute settlement institution.

This provision is then described in Article 136 Paragraph I Section Eight on Industrial Relations Dispute Settlement Institution as follows:

- (1) The settlement of industrial relations disputes shall be carried out by employers and employees or labor unions amicably for consensus.
- (2) In the event such amicable settlement for consensus referred to in paragraph (1) is not achieved, the employer and employees or labor union shall settle the industrial relations dispute through the procedures for industrial relations dispute settlement as set out by the law.

Based on the above provision, it is clear that the UUK regulates that the settlement of industrial relations disputes shall be carried out by employers and employees or labor unions amicably for consensus. In the event such amicable settlement for consensus is not reached, the employer and employees or labor union shall settle the industrial relations dispute through the procedures for industrial relations dispute settlement as set out by the law. The Law referred to in Article 136 of the UUK was just passed on 14 January 2004 that is Law on Industrial Relations Dispute Settlement (from now on referred to as UU PPHI). The UU PPHI should have been in effect one year as of its promulgation, that is 14 January 2005. However, given that the means for industrial relations dispute settlements were not ready yet, the implementation of UU PPHI was postponed until 14 January 2006 through Government Regulation In Lieu of Law Number 1 of 2005 on the Postponement of Implementation of Law Number 2 of 2004 concerning Industrial Relations Dispute Settlements. The UU PPHI regulates completely the institutions for industrial relations dispute settlement as mandated by Article 13 in conjunction with Article 136 of UU K. Mediation as one of the mechanisms for industrial relations dispute settlement in Indonesia is regulated by UU PPHI⁵, and also in the Decision of the Minister of Manpower and Transmigration of the Republic of Indonesia No.

⁵The Supreme Court of the Republic of Indonesia, *Naskah Akademis: Penyelesaian Perselisihan Hubungan Industrial*, the Supreme Court of the Republic of Indonesia, 2007, page 173

KEP-92/MEN/2004 on the Appointment and Termination of a Mediator and the Work Procedures for Mediation (from now on referred to as Decision of the Minister of Manpower (*Kepmenaker*) No. KEP-92/MEN/2004)⁶, and the Decision of the Director General of Industrial Relations Development and Manpower Social Security No. KEP-96/PHIJSK/2006 on the Guidelines for Mediators, Conciliators and Arbitrators for Industrial Relations (from now on referred to as Kepdirjen PHI and Jamsostek No. KEP-96/PHIJSK/2006)⁷ as its implementing regulation. Based on the abovementioned regulations, explained below are some matters concerning mediation relationship with the mechanism of another industrial relations settlement, and the mediation process of industrial relations carried out at the Municipal Level of Manpower Office (*Dinas Tenaga Kerja*).

Mediation Relationship with another Mechanism for Industrial Relations Dispute Settlement

The UU PPHI defines Industrial Relations Disputes as a difference of opinion causing a conflict between an employer or a group of employers with the employees or labor union due to disputes concerning rights, conflict of interest, termination of the employment relationship, and dispute between labor unions within the same company. The UU PPHI differentiates four types of industrial relations disputes. Firstly, the dispute on rights, that is the dispute which arises due to non-fulfillment of the rights because of difference in the performance or interpretation of the provisions of law, employment agreements, company regulations, or collective labor agreements. Secondly, conflict of interest, that is the conflict arising in an employment relationship due to different opinions concerning the construction and amendment to the work requirements set out in an employment agreement, or company regulation, or collective labor agreement. Thirdly, the dispute on termination of the employment relationship, that is a dispute arising due to different opinions about the termination of employment relationship carried out by one of the parties. Lastly, a dispute among labor unions, that is the dispute between a labor union with another labor union in one company, due to different opinions concerning membership, rights, and obligations of the unions.

Also, the UU PPHI also regulates the types of methods to settle industrial relations disputes and determines the authority of each method based on the abovementioned types. The types of methods for the settlement of industrial relations disputes consist of bipartite deliberation for consensus, mediation, conciliation, arbitration, and industrial relations court⁸.

The bipartite deliberation, mediation, and first level industrial relations court are authorized by the UU PPHI to settle all types of disputes, including disputes on rights, conflict of interest, termination of the employment relationship, and disputes among labor unions in the same company. Industrial relations court at the cassation level is authorized by the UU PPHI to settle the disputes on rights and disputes on termination of the employment relationship. Conciliation is authorized by the UU PPHI to settle disputes on conflicts of interest, disputes on termination of the employment relationship, and dispute among labor unions in the same company. Arbitration is authorized by the UU PPHI to settle the disputes on conflict of interest and disputes among labor unions in the same company. In the settlement process of industrial relations disputes, it is regulated that each dispute arising in a company shall be settled through bipartite deliberation to reach a consensus between the employer and employees and or labor union.

If the efforts to settle a dispute through bipartite negotiation fail, one or both of the disputing parties shall register the case of dispute with the competent local authority in charge of manpower affairs with evidence of such bipartite settlement efforts that have been carried out. The competent authority in charge of manpower affairs at the provincial or regional level, after reviewing the case dossier, if the dispute relates to rights shall handover the dispute to a mediator to promptly carry out a mediation.

⁶This research was based on Decision of the Minister of Manpower and Transmigration of the Republic of Indonesia No. KEP-92/MEN/2004 concerning the Appointment and Termination of Mediators and Procedures of Mediation. On 24 September 2014 the Government issued a Regulation of the Minister of Manpower and Transmigration of the Republic of Indonesia Number 17 of 2014 on the Appointment and Termination of a Mediator for Industrial Relations and the Procedures for Mediation.

⁷ILO, *Manual Mediasi, Konsiliasi, Arbitrasi; Bahasa Indonesia and English*, Office of International Labor, 2006, page 11, vide ILO, *Pedoman Kerja Mediator, Konsiliator dan Arbiter Hubungan Industrial*, Office of International Labor, 2006, page 11

⁸See Article 3, Article 4, and Article 5 of UU PPHI

In the event of a conflict of interest and a dispute among labor unions in the same company, the institution in charge of manpower affairs shall offer to the parties to settle the dispute by an arbitrator or conciliator. If both parties within seven (7) business days fail to select an arbitrator or conciliator, the agency in charge of manpower affairs shall handover the settlement of the case to be handled by a mediator. Similarly, to settle a dispute on termination of the employment relationship, the agency in charge of manpower affairs shall offer to the disputing parties to use a conciliator and if one of the parties refuses such offer, the agency in charge of manpower affairs shall automatically handover the case of termination of employment to a mediator. If mediation fails to produce an agreement, one of the parties may file a claim to the first level industrial relations court. Should there be any party who refuses to accept the decision of the first level industrial relations court, the party concerned may seek a legal remedy at the cassation level.

Based on the above explanations we know that mediation may be used in settlement of industrial relations disputes when a deliberation for consensus fails, and the disputing parties do not choose conciliation or arbitration. If mediation fails to produce an agreement, one of the parties may file a claim of industrial relations dispute to an Industrial Relations Court. Therefore, having conducted mediation in settlement of a dispute shall become the condition for filing a claim of industrial relations dispute at the Industrial Relations Court. Based on the provision as contained in Article 83 of the UU PPHI, the filing of claim shall be furnished with a summary of dispute settlement through mediation or conciliation. The settlement of a dispute through mediation shall be led by a mediator. In the Decision of Minister of Manpower No.KEP.92/MEN/VI/2004 Particularly CHAPTER VI Article 10 regulates the Position of a Mediator. A Mediator shall be positioned at:

- a. The Ministry of Manpower and Transmigration;
- b. The Office/Agency/Institution in charge of Provincial Manpower affairs;
- c. The Office/Agency/Institution in charge of Regional Manpower affairs.

Then in Article 11 Paragraph (1), (2), (3) and (4) of Decision of the Minister of Manpower No.KEP.92/MEN/VI/2004 regulates about the jurisdiction of a mediator based on his position, that is:

- (1) A mediator positioned at the Ministry of Manpower and Transmigration, shall carry out mediation for industrial relations disputes occurring in more than one Provincial area.
- (2) A mediator positioned at an agency in charge of Provincial manpower affairs, shall carry out mediation of industrial relations dispute occurring at more than one Regency/City.
- (3) A mediator positioned at an agency in charge of Regional manpower affairs, shall carry out mediation for industrial relations disputes at the Regency/City where the employees work.
- (4) In the event a Regional area does not have any mediator or the number of existing mediators is not sufficient, in order to settle an industrial relations dispute, the head of the agency in charge of Regional manpower affairs concerned may request an assistance of mediator to the head of the closest agency in charge of manpower affairs within the same Province.

Further, Article 3 Paragraph (1) of Decision of the Minister of Manpower No.:KEP.92/MEN/VI/2004 sets out the requirements for a mediator as follows:

- a. A Civil Servant at an agency/office in charge of manpower affairs;
- b. Is faithful and be devout to the Almighty God;
- c. Being an Indonesian Citizen;
- d. Be in good health based on a doctor's certificate;
- e. Knowledgeable of the laws and regulations in manpower sector;
- f. Respectful, honest, fair, and have good deeds;
- g. Has a tertiary education of minimum *Strata Satu/S1* (equivalent to Undergraduate Degree);
- h. Has the legitimacy from the Minister of Manpower and Transmigration. To obtain the legitimacy, the Civil Servant concerned shall meet the requirements as set out in Article 3 Paragraph (2) of the Decision of Minister of Manpower No.:KEP.92/MEN/VI/2004 that is:

a. has taken and passed a technical education and training in the industrial relations and work requirements as evidenced by a certificate from the Ministry of Manpower and Transmigration of the Republic of Indonesia.

b. Has carried out duties in the area of industrial relations development minimum one (1) year after passing the technical education and training in industrial relations and work requirements. Mediators who have met these requirements shall be authorized to carry out mediation hearings.

The Process of Industrial Relations Mediation

In the Attachment to Decision of the Director General of PHI and Jamsostek No.KEP-96/PHIJSK/2006, the process of mediation shall start from a review of dispute documents; summons to the parties, and a mediation session. The process of industrial relations mediation can be explained as follows:

Review of Dispute Documents

After a mediator receives a handover of dispute settlement from the head or official appointed by the agency in charge of manpower affairs and or a mediator who receives an appointment from the parties to settle their dispute, within seven (7) business days he shall have reviewed the dispute documents as follows:

- i. A letter of request from a party or parties;
- ii. A summary of Bipartite Deliberation;
- iii. Power of Attorney from the parties;
- iv. Examiner's report on the type of dispute being brought up.

Summons to the Parties

- i. Setting a schedule for a Mediation session;
- ii. The written summons is sent to the disputing parties.

Mediation Session

- i. Preparation Before the Session:
 - 1) Understanding the case or the essence of dispute based on the dossier received;
 - 2) Examining the background of dispute including the matters that cause the arising of such dispute, both the internal and external causes;
 - 3) Seeking information whether such dispute has ever happened in a similar company and what is the result of settlement as well as the basis and form of settlement;
 - 4) Preparing some documents and laws and regulations concerning the disputes;
 - 5) Room for the mediation session is prepared.
- ii. Conducting a Mediation Session
 - 1) Opening the session;
 - 2) Reading the power of attorneys from the parties if they have proxies;
 - 3) Giving an opportunity for the parties to give their statements;
 - 4) If necessary, the Mediator may call a witness/expert witness;
 - 5) Attempting to have the parties settle the dispute amicably for consensus;
 - 6) If an agreement is reached, a Joint Agreement shall be drawn up by the parties and witnessed by the Mediator;
 - 7) The Joint Agreement shall be registered with the Industrial Relations Court by the parties;
 - 8) If no settlement is reached, the parties are advised to continue carrying out their obligations;
 - 9) In the event there is no agreement reached, the Mediator shall, within ten (10) business days, give some recommendations;
 - 10) As of receiving such recommendations, the parties shall give a response to accept or reject them within ten (10) business days;
 - 11) If the recommendations are accepted by the parties, a Joint Agreement shall be drawn up, and if one of the parties refuses and fails to give any response, the mediator shall prepare a summary of dispute settlement;
 - 12) The summary of dispute settlement shall become an attachment for the parties or one of the parties to take a legal remedy by claim through the Industrial Relations Court at the local District Court.

Characteristics of Mediation Models according to Laurence Boulle

Laurence Boulle⁹ writes that due to definition issues and due to different practices of mediation, these are the factors that differentiate four mediation models, namely settlement, facilitative, therapeutic and evaluative models. These four models of mediation do not have different paradigms one with the other. In practice, mediation shows two or more models. In the beginning, a mediation model starts with facilitative then it goes through a transformation into an evaluative model. The assumption is that there are differences in mediation models, and there is no single analytical model to support several definitions about mediation. Many articles and discussions state that the facilitative model is often said as pure mediation or the classic mediation process. In practice nonetheless, the three models influence and oppose the facilitative mediation.

Models of Industrial Relations Mediation in Indonesia

To describe the industrial relations mediation models, the writer will compare the features in the settlement mediation, facilitative mediation, the therapeutic mediation, evaluative mediation models with the features in the normative industrial relations mediation. Also, the writer will also examine 77 mediation cases. The mediation cases being examined were taken from a Summary of Mediation which was a written report of a mediator on each mediation process he carried out. From the Summary of Mediation, the writer will research four (4) mediation features, namely the main purpose of mediation, the understanding of dispute, the main role of a mediator, and the other characteristics of industrial relations mediation in order to find out what industrial relations mediation has the feature of settlement mediation, and/or facilitative mediation, and/or therapeutic mediation, and/or evaluative mediation. These four features of mediation are essential because they become basic differentiators from the existing mediation models.

Comparison of Features of Settlement, Facilitative, Therapeutic and Evaluative Mediation with Normative Industrial Relations Mediation

Industrial Relations mediation has a model of Settlement Mediation as it is also known as compromise mediation. The main purpose is to encourage the increase of bargaining towards compromise at the “central point” between the interests of parties. In a dispute concerning termination of employment relationships and a dispute concerning rights, usually, the issue is the nominal amount of money. In this kind of situation usually, the mediator will facilitate the increase of bargaining towards a compromise at the “central point” between the interests of the parties. The meaning of dispute, regarding positioning, based on the understanding of the parties concerning the issue. In an industrial relations dispute usually, the parties stand in their respective position, defending what one party thinks is true and the other wrong. Mediator type: high status (judge, lawyer, manager, government official); does not need expertise in the process and techniques in mediation. This feature does not fully exist in the Industrial Relations Mediation because although a mediator is a government official¹⁰, he needs the expertise in the process and techniques in mediation¹¹. The main role of a mediator is to determine the “main problem” of the parties and through a persuasive intervention transfer from their positions into a compromise. This feature is found in the Industrial Relations mediation. Before a mediator carries out a mediation session, the mediator shall study the case dossier so that he can figure out the main problem of the parties, and through his role and function, the mediator can shift from the position towards a compromise. Another feature, a limited procedural intervention by the mediator, bargaining of position by the parties. The industrial relations mediator also functions as a mediator, but the decision on the dispute settlement lies with the parties. Power, understood by the parties, is accepted culturally, not difficult to do, little preparation needed. This feature does not fully exist in the Industrial Relations Mediation because sometimes a mediation process is tough therefore requiring a preparation which is not simple.

⁹Laurence Boulle, *Mediation: Principles Process Practice*, Butterworths, Australia, 1996, page. 28, vide Laurence Boulle, The Hwee Hwee, *Mediation : Principles Process Practice*, Butterworths, Asia, 2000, pages 28-30

¹⁰See Article 11 Paragraph (1), (2), (3) and (4) Decision of the Minister of Manpower No. KEP.92/MEN/VI/2004 on the requirements for an industrial relations mediator.

¹¹See Article 3 Paragraph (2) Decision of the Minister of Manpower No.: KEP.92/MEN/VI/2004 on the requirements for a Civil Servant to obtain legitimacy as a mediator of industrial relations.

Weakness, exceeding the interest and needs of the parties, can be manipulated through a false claim, difficult to mediate a gap. This feature does not fully exist in the Industrial Relations Mediation as there is already legal foundation which regulates it.

Sometimes a gap between the parties is difficult to mediate. Areas of application: commercial, personal accident, industrial disputed. The areas of application of Settlement Mediation also cover industrial disputes in the form of industrial relations disputes. Industrial Relations Mediation also has the Facilitative Mediation model. The Facilitative Mediation is also known as interest-based mediation, problem-solving mediation. The main purpose of Facilitative Mediation is to avoid positioning and negotiating related to the interests and needs of the parties, rather than their rigid legal interests. This feature can also be found in the Industrial Relations Mediation.

In the dispute concerning termination of the employment relationship and the dispute of rights, usually, the issue is the nominal amount of money. Therefore, a mediator must avoid positioning and negotiate related to the interests and needs of the parties and not hold firmly on the regulation rigidly. This can be seen from the results of joint agreements of the parties most of which do not follow the applicable regulations, where the agreement of the parties is below the nominal standards as set out in the applicable regulation. As an example, in the 2006 Joint Agreement, from eighteen (18) cases of Termination of Employment dispute, ultimately fourteen (14) Joint Agreements were materialized where the amounts of compensation for Termination of Employment were not in line with the UU K, and four (4) cases complied with the UU K. More detailed explanations can be seen in Table 5 of Attachment. From the 2007 Joint Agreement, we can see that from thirteen (13) cases of Termination of Employment relationship 12 cases were finally settled with a Joint Agreement with compensation for the Termination of Employment, not in line with the UU K, and one (1) case was in line with the Law. Whereas from three (3) cases of Rights Disputes two (2) cases where the amount of compensation agreed upon by the parties was in line with the UU K and one (1) not in line with the UU K.

In the industrial relations disputes, a dispute arises due to non-fulfillment of the rights and obligations by each party, both substantively, procedurally or psychologically. Also, we often face an employer's or employee's act which is not in line with the procedures as prescribed in the provisions of law. For example, the procedures for termination of employment that have been set out in the UU K which are not followed by the employer as well as employees. Type of mediator, expertise in the process and techniques of mediation, do not necessarily know in the dispute case. This type of mediator does not fully exist in the Industrial Relations Mediation. Often the mediator is expert in the mediation process and techniques. Also, the mediator also has the competency in the dispute case. However, sometimes although a mediator is not expert in mediation, the mediator is competent in the dispute case. The main roles of a mediator are to carry out the process, to maintain a constructive dialogue between the parties and to promote a negotiation process. This feature can be found in the Industrial Relations Mediation. Other features, the low intervention role for a mediator, the parties are urged to produce a creative result in equitable interests. This feature can also be found in the Industrial Relations Mediation. The power existing in the facilitative Mediation becomes the power in the Industrial Relations Mediation that is it can make the most efficient use of an opportunity for negotiation, controlled by the parties. The weakness is, it may not be able to achieve the result, may take a long time, and require the expertise of the parties. In an Industrial Relations Mediation, if the parties do not reach an agreement, the mediation is considered failed. The time limit for carrying out mediation is maximum thirty (30) days. This mediation model can be applied in the areas aimed to settle disputes in the societies, families, environments, partnerships, and also in the Industrial Relations Mediation.

Next, the comparison of features of Therapeutic Mediation with Industrial Relations Mediation Models will be presented. From the entire features that the Therapeutic Mediation has, there are two features that are also present in the Industrial Relations Mediation. The first feature is reconciliation. This feature can be seen in the attempts carried out by a mediator to reconcile the employees and the employer who is in dispute, whether it is a dispute regarding the rights, termination of employment, interests, or dispute between the labor unions within the same company¹².

¹²See Article 1 Point 22 of Law No. 13 of 2003 concerning Manpower in conjunction with Article 1 Points 1-5 and Article 2 of Law No. 2 of 2004 on Settlement of Industrial Relations Disputes which regulates about the types of industrial relations disputes.

The tense relationship between the parties is overcome with an effort to find a settlement in the form of peace agreement produced. The second feature is the understanding of dispute in the sense of attitude, emotion, and luck. The understanding of a dispute in an industrial relations mediation although it arises due to the non-fulfillment of the employees' rights by the employer, a dispute may arise due to the conduct of employees which does not meet the company's house rules. Conversely, is the conduct of an employer which gives rise to dispute because the employer fails to obey the applicable legal procedures.

Further, the Industrial Relations Mediation also has the Evaluative Mediation model also known as advisory, managerial mediation. This can be seen when the parties are unable to reach an agreement on the timeline as set out in the UU PPHI¹³. A mediator will give a Recommendation. The main purpose of an Evaluative Mediation is to reach an agreement on the legal rights of the parties within reach of an anticipated result of a court. At the Industrial Relations Mediation, usually at the beginning, the parties are in the position to stick on their legal rights which are very normative. The dispute is defined in terms of legal rights and duties, industry standards and social norms. In the Industrial Relations Mediation, a dispute is understood as a dispute over the rights, interests, termination of employment, and a dispute among labor unions in the same company¹⁴. Type of mediator, expertise in the substantive area of the dispute, does not require any qualification in the mediation techniques. In the Industrial Relations Mediation, a mediator is required to have the expertise and competency in the substance of dispute and has the qualification in mediation techniques. However, in practice, these requirements are not always fulfilled. We find some mediators who do not master the procedures and techniques of mediation and do not have the knowledge of the substance of the case. An example of the case is¹⁵: an employee worked in Kendal, while he lived in Semarang. When a dispute arose, there was a conflict of jurisdiction between the Kendal Manpower Office and Central Java Provincial Manpower Office. The basis of the Provincial Office to claim was because the dispute is considered to cross over the regional border. Therefore, it is the province which is authorized to process the mediation. This is based on Article 11 Paragraph (2) of Decision of the Minister of Manpower Number KEP.92/MEN/VI/2004 concerning the Appointment and Termination of a Mediator and the Procedures for Mediation as follows: "A mediator positioned at an agency in charge of Provincial manpower affairs, shall carry out mediation of industrial relations disputes occurring at more than one Regencies/Cities". Meanwhile, the Kendal Manpower Office based its authority on Article 11 Paragraph (3) of Decision of the Minister of Manpower Number KEP.92/MEN/VI/2004 concerning the Appointment and Termination of Mediators and Procedures of Mediation.

The evidence that a mediator does not master the substance of a case including the underlying laws and regulations can be found in several cases where the mediator still used the legal ground that was no longer applicable that is Decision of the Minister of Manpower Number 150/MEN/2000 on the Settlement of Termination of Employment and Determination of Severance Pay, Service Pay, and Compensation in a Company. This Ministerial Decision was still used as the basis for legal consideration by the mediator, whereas at the time the UU K is put into effect the Decision of Minister of Manpower Number 150/MEN/2000 was no longer valid, based on the principle of *lex superior derogatelex inferior*. This happened in the case of TokoPelangi with Fahrudin in Klaten in 2006. In the mediator's legal consideration number 4, the mediator wrote as follows: "That as the legal consequence of the unilateral termination of employment by the Employer Toko Pelangi with the Employee (Mr. Fahrudin), the Employee shall be entitled to a severance pay, service pay and other compensation in accordance with Decision of the Minister of Manpower Number 150/MEN/2000 Article 27 in conjunction with Law Number 13 of 2003 Article 156 Paragraph 2, Paragraph 3 and Paragraph 4."

The main role of a mediator both in the Evaluative Mediation and Industrial Relations Mediation is the same that is to provide additional information, to give advice and to assure the parties, and to bring professional expertise towards the content of negotiation. Another feature is the high intervention of a mediator, lack of control of the parties over the result. The mediator's power, substantial expertise is used, and the result lies within the scope of a court's ruling.

¹³See Article 15 of :Law No. 2 of 2004 concerning the Settlement of Industrial Relations Disputes which regulates about the period for settlement of industrial relations disputes through mediation.

¹⁴See Article 1 Point 22 of Law No. 13 of 2003 on Manpower in conjunction with Article 1 Points 1-5 and Point 2 of Law No. 2 of 2004 concerning the Settlement of Industrial Relations Disputes which regulates about the types of industrial relations disputes.

¹⁵Interview with the HRD staff of Bank Danamon on Wednesday, 8 May 2013

The weakness is, mediation with unclear/different arbitration, does not give the expertise for the parties in the future, additional responsibility of the mediator. Another feature is, the weakness and strength in the Evaluative Mediation also exist in the Industrial Relations Mediation.

The areas of application of the Evaluative Mediation include commercial, personal accidents, trade practices, anti-discrimination, the dispute on marriage properties, and is extended even more into the area of industrial relations disputes. Based on the above explanations we can see that the models of industrial relations mediation contain the features that exist in the four (4) models of mediation, namely: Settlement Mediation, Facilitative Mediation, Therapeutic Mediation and Evaluative Mediation. The same thing is said by the HRD staff of PT Djarum Kudus¹⁶. It was also added that the outstanding models of mediation in the Industrial Relations Mediation are the Facilitative Mediation and the Evaluative Mediation. The Facilitative Mediation model exists in mediation carried out by regional Offices of Manpower, whereas the Evaluative Mediation model tends to be used in mediations carried out by urban Offices of Manpower. Meanwhile, the dominant model in the process of industrial relations mediation is the Evaluative Mediation model.

Comparison of Features of Settlement, Facilitative, Therapeutic and Evaluative Mediation with the Empirical Industrial Relations

If we look at the Main Purpose of Mediation, the Meaning of Dispute, Main Role of Mediator, and Other Characteristics, of the seventy seven (77) mediation cases being researched, there were forty one (41) cases which were ended with Mediator's Recommendations, and thirty six (36) cases with Joint Agreements.

Cases Ended with a Mediator's Recommendation

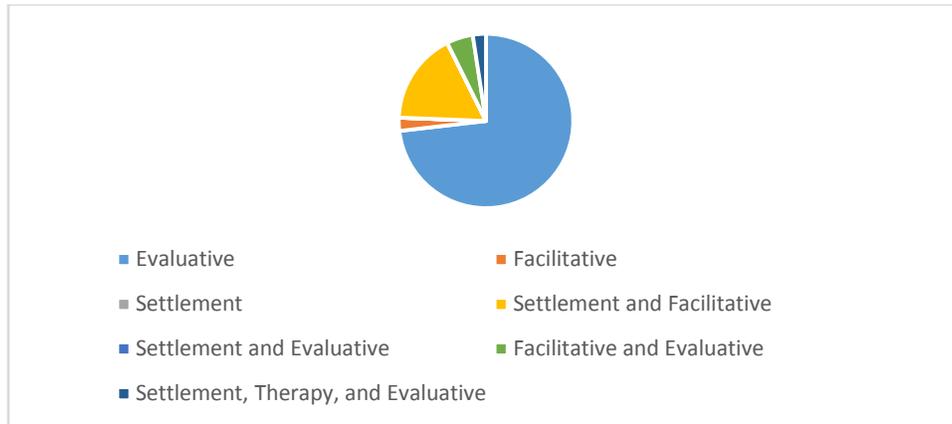
From the research of forty one (41) Summary of Dispute Settlements which contained the process of mediation where the parties failed to materialize any Joint Agreement and were ended with Mediator's Recommendations, it was found out that the most outstanding model of mediation was Evaluative Mediation used in thirty (30) cases (73.2%). The other model was Facilitative Mediation one (1) case (2.4%), followed by a combination of Settlement Mediation model and Facilitative Mediation model in seven (7) cases (17.1%). Then a combination of Facilitative Mediation model and Evaluation Mediation model found in two (2) cases (4.9%). And lastly, a combination of Settlement Mediation model, Therapeutic Mediation model, and Evaluative Mediation model found in one (1) case (2.4%). If we order them from the most used model will be as follows:

1. Evaluative Mediation (73.2%);
2. Combination of Settlement and Facilitative Mediation (17.1%);
3. Combination of Facilitative and Evaluative Mediation (4.9%);
4. Facilitative Mediation (2.4%);
5. Combination of Settlement, Therapeutic and Evaluative Mediation (2.4%).

The composition of mediation models ended with Recommendations can be explained in the following figure:

¹⁶Interview on Thursday, 18 July 2013

Figure 1 Models of Industrial Relations Mediation in Mediator’s Recommendations



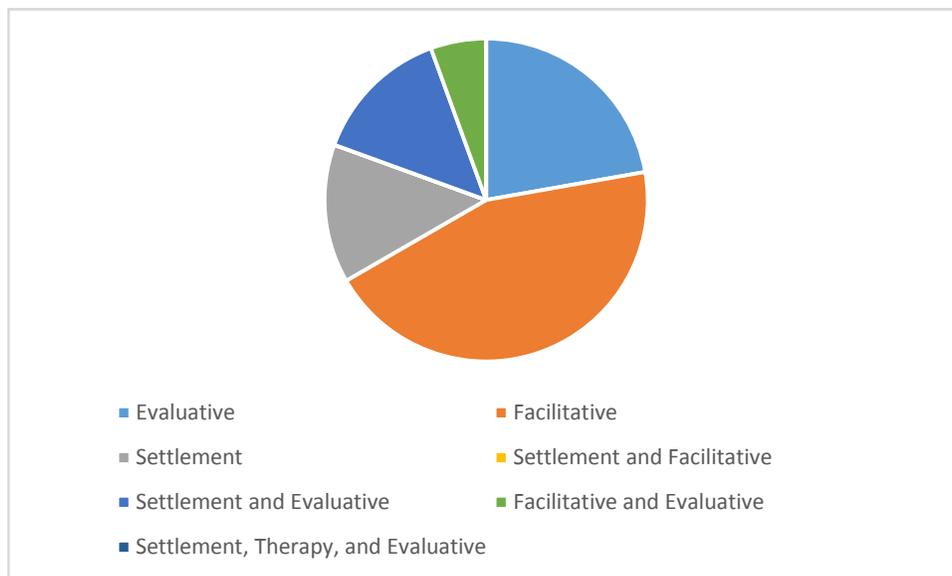
Cases Ended with a Joint Agreement

From the thirty six (36) Summary of Dispute Settlements which contained the process of mediation where the parties succeeded in realizing a Joint Agreement, the outstanding model of mediation were Facilitative Mediation sixteen (16) (51.6%), and five (5) cases contained the features of Settlement Mediation (16.1%). Then eight (8) cases contained the feature of Evaluative mediation (25.8%), followed by five (5) cases containing the feature of a combination of Settlement and Evaluative Mediation (16.1%). And lastly, the feature of a combination of Facilitative and Evaluative Mediation found in two (2) cases (6.5%). The order of mediation model from the most used is as follows:

1. Facilitative Mediation (44.4%);
2. Evaluative Mediation (22.2%);
3. Settlement Mediation (13.9%);
4. Combination of Settlement and Evaluative Mediation (13.9%).
5. Combination of Facilitative and Evaluative Mediation (5.6%);

The composition of mediation models ended with a Joint Agreement can be explained in the following figure:

Figure 2 Models of Industrial Relations Mediation in a Joint Agreement

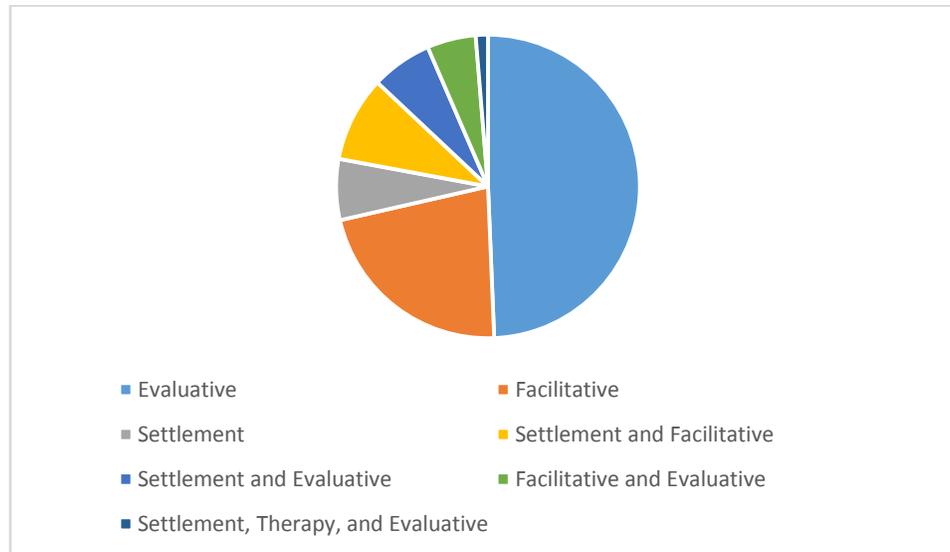


Overall, from the seventy-seven (77) cases being researched, we found seven (7) outstanding mediation models in the Industrial Relations Mediation, namely:

1. Evaluative Mediation (49.4%);

2. Facilitative Mediation (22.1%);
 3. Settlement Mediation (6.5%);
 4. Combination of Settlement and Facilitative Mediation (9.1%);
 5. Combination of Settlement and Evaluative Mediation (6.5%).
 6. Combination of Facilitative and Evaluative Mediation (5.2%);
 7. Combination of Settlement, Therapeutic and Evaluative Mediation (1.3%).
- The overall composition of mediation model can be explained in the following Figure.

Figure 3 Models of Overall Industrial Relations Mediation



Industrial Relations Mediation Has a Variety of Mediation Models with the Evaluative Model being Dominant

Based on the research results from the normative and empirical approach described above, we learn that in the model of industrial relations mediation used in Indonesia we find various models from the mediation models by Boule. From those various combination models of mediation, we find out that the evaluative mediation model is dominant, followed by facilitative mediation model, then settlement model, and the combination of various models in the case by case basis. The mediation models found in practice have supported what is stated theoretically that is mediation presents two or more models. From the exposure of industrial relations mediation model found in practice, it shows that the Evaluative Mediation model is mostly used; followed by Facilitative Mediation; then a Combination of Settlement and Facilitative Mediation; a Combination of Settlement and Evaluative Mediation is comparative with Settlement Mediation Model; then a Combination of Facilitative and Evaluative Mediation; and lastly a Combination of Settlement, Therapeutic and Evaluative Mediation.

From those models, if we observe, there is something interesting to be studied, that is there is a certain distinction between the mediation model found in the mediation process with a Recommendation result with the mediation model found in the mediation process with a Joint Agreement result. In the mediation process with Recommendations results, we found out that the Evaluative Mediation model was most dominant, while in the mediation process with Joint Agreements results, we found out that the Facilitative Mediation model was most dominant. If the industrial relations mediation model is seen as a whole, we can see that the Evaluative Model is outstanding followed by the Facilitative Model. Based on these facts, we learn that the practice of industrial relations mediation tends to use the Evaluative model. But, if the mediation practice is seen from the mediation process which produced a Joint Agreement, we can see that the Facilitative model (44.4%) is more dominant compared with the Evaluative model (22.2%). Whereas, if the mediation practice is seen from the process that produced Recommendations, the Evaluative model (73.2%) is more dominant than the Facilitative model (2.4%).

The tendency of industrial relations mediation practice to use the Evaluative mediation model shows that the approach of industrial relations mediation is advisory, which is also called managerial mediation. The main purpose of this mediation is to reach an agreement in accordance with the legal rights of the parties and within reach of an anticipated result of a court. Then, the understanding of dispute that is in terms of legal rights and obligations, industrial standards and social norms. Mediators have the expertise in the substantive area of the dispute, do not require any qualification in the mediation techniques.

Further, the main duties of a mediator are to provide additional information, to give advice and to assure the parties, to bring professional expertise towards the content of negotiation. Intervention from a mediator is due to lack of control of the parties over the results. The mediator's substantive expertise is used, and the result lies within the scope of a court's ruling. The weakness is, unclear/different mediation with arbitration, does not give the expertise for the parties in the future. These characteristics can be seen in the Attachment to Decision of the Director General of PHI and Jamsostek No. KEP-96/PHIJSK/2006¹⁷. The picture of this kind of industrial relations mediation process strengthens the findings of the function, role, and skills of mediators which are not yet optimum, mediators seemed not quite flexible, and still look rigid. Such inflexibility is due to the mediator getting trapped in the approach to give advice, and the understanding of dispute as a conflict of legal rights and obligations, therefore the settlement orientation is focused on the fulfillment of the legal rights and obligations. Thus, the mediator is not too much required to have technical competencies and skills in leading the mediation but is required to have substantial mastery of the dispute. As a result, this mediation process would not give the expertise for the parties to have the ability to settle the dispute by themselves through negotiation. This evaluative approach very much contributes to the issuance of a Mediator's Recommendations because the parties fail to reach an agreement in their negotiations. On the other side, at the time the disputing parties succeed in materializing an agreement which is then put in a Joint Agreement, data shows that the outstanding mediation model used in that process is the Facilitative model. This fact can be explained that the facilitative model approach more directs the parties to be able to materialize an agreement.

The Facilitative Mediation model is oriented to an interest-based approach, a problem-solving mediation. The main purpose of mediation is to avoid positioning and negotiating related to the interest and needs of the parties rather than their rigid legal interest. A dispute is understood as the interest of the parties substantially, procedurally or psychologically. Mediators are required to be expert in the process and techniques of mediation; not necessarily knowledgeable in the dispute case. Then the main roles of a mediator are to carry out the process, to maintain a constructive dialogue between the parties and to promote a negotiation process. There is low intervention role of a mediator, so the parties are urged to produce a creative result in equitable interests. The strength is, mediation can make the most efficient use of the opportunity for negotiation, controlled by the parties. While the weakness is, maybe mediation could not achieve the result, may take a long time, and require the expertise of the parties.

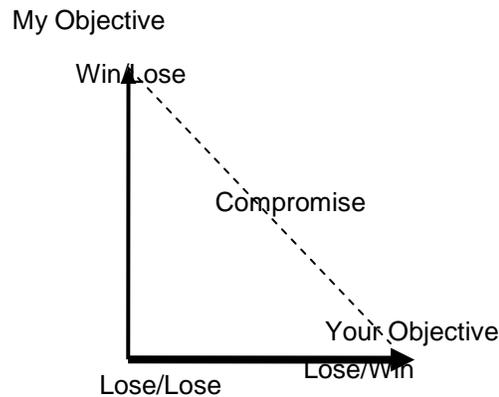
The Facilitative Mediation model which prioritizes on the interesting approach and the needs of the parties both substantively, procedurally or psychologically will be able to shift the dispute that rests on the position that is based on the legal rights and obligations. Therefore, the agreement produced by the parties is no longer shackled by a rigid legal provision but arising from the understanding of the interests and needs of each party. This is shown in the 2006 Joint Agreement, from eighteen (18) cases of Termination of Employment disputes, finally fourteen (14) can be realized in a Joint Agreement where the amount of compensation of Termination of Employment deviated from the provision of the UU K, and four (4) cases followed the UU K. Similarly with the 2007 Joint Agreements we can see that from thirteen (13) cases of Termination of Employment, finally twelve (12) cases were settled with a Joint Agreement with compensation for Termination of Employment deviated from the UU K, and one (1) case followed the UU K. From the three (3) cases of Rights Disputes the amount of compensation agreed upon by the parties among others two (2) cases followed the UU K, and one (1) case deviated from the UU K. The essence of negotiation mediation is where the negotiating parties are assisted by a third party. "Mediation is negotiation carried out with the assistance of a third party," it is essential for a mediator in mediation to carry out his role to direct the parties in negotiation to rest on the interest (interest-based bargaining), not on the position (positional-based bargaining)¹⁸.

¹⁷See Attachment to Decision of the Director General of PHI and Jamsostek No. KEP-96/PHIJSK/2006 concerning the process of industrial relations mediation

¹⁸Completed discussion on negotiation that rests on the position and negotiation that rests on the interest is written by Roger Fisher, William Ury, Bruce Patton, *Getting to YES : Teknik Berunding menuju Kesepakatan Tanpa Memaksakan Kehendak*, Yayasan Obor Indonesia, Jakarta, 2008, page 3

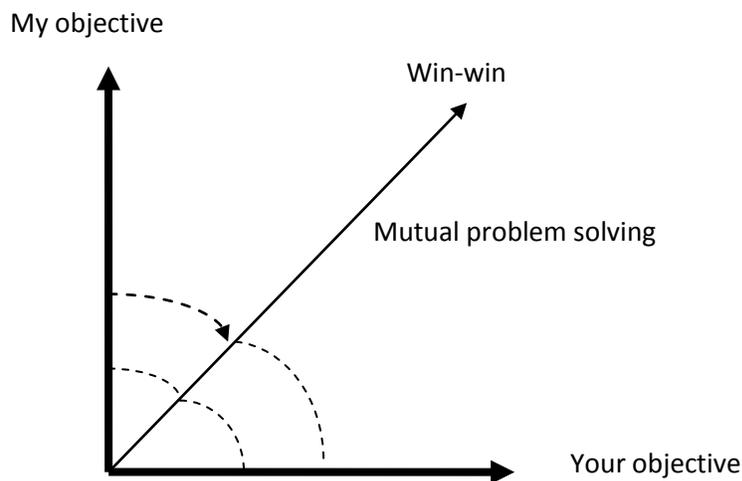
The basic teaching of a negotiation approach which emphasizes the importance of considering the actual needs and interest behind the position taken by the other party, not the position itself, is said by Jim Thomas as an Academic Approach¹⁹.The negotiation that rests on position is marked with always started with a solution, and the parties mutually propose a solution and negotiate until they come up with one point acceptable to both, as can be seen in figure 5 below:

Figure 4 Negotiations Which Rest on Position



A negotiation which rests on the interest starts with developing and maintaining relationships. The parties teach one another of their needs and together settle the problem based on the needs/interests, as can be seen in the figure below.

Figure 5 Negotiations Which Rest on Interests



The argument concerning position will produce an unwise agreement and becomes the main cause of inefficiency. The argument about the position will harm the existing good relationship. Bargaining about position would become even harder if many parties are involved.

¹⁹Jim Thomas, *Negotiate to Win : 21 Jurus Ampuh untuk Memenangkan Negosiasi*, PT Gramedia Pustaka Utama, Jakarta, 2007, page 8

Therefore, in negotiations, a mediator needs to encourage the parties to focus their attention on the interest, not the position. To achieve a wise solution, the mediator should reconcile the interest, not the position. Problems are determined by interests. Behind the opposing attitude, there are interests which are not only contradictive but also the interest to share and feel agreeable.

The mediator should motivate the parties to understand the interest of the other party, in the way, each party personally²⁰:

- Ask, "Why?";
 - Ask, "Why not?"; Each party also considers the other party's choice;
 - Realize that each party has different interests;
- A strong interest is human being's basic needs; Make a list.

Discussions of the parties should be directed to discuss the interests by presenting each party's interest lively. The parties acknowledge the other party's interest as a part of the problem. Also, the parties need to place the problem before they answer each other. The mediator should remind the parties to look forward not backward. The parties are willing to have a concrete stance but flexible, be tough on the problem but soft with the negotiating partner. Negotiations between the parties should attempt to avoid confrontative negotiations with the feel, felt, found a formula to give time to the parties to think and feel until they find something wise before they answer or give clarification to the other party who shows a hostile attitude²¹. By applying the feel, felt, found the formula, the confrontative atmosphere can be changed into the communicative atmosphere.

Concluding Remarks

The models of Industrial Relations Mediation in Indonesia have been explored using two approaches, namely normative and empirical approaches. Under the normative approach, we compare the features of settlement, facilitative, therapeutic, and evaluative mediation models with the norms of industrial relations mediation. Under the empirical approach, we compare the features of settlement, facilitative, therapeutic and evaluative mediation models with the practices of industrial relations mediation. Based on the two approaches, it is found out that industrial relations mediation in Indonesia has the features that exist in the four (4) mediation models, namely: Settlement Mediation, Facilitative Mediation, Therapeutic Mediation and Evaluative Mediation. In several mediation cases there appeared one pure mediation model, but in several other mediation cases, there were combinations of several mediation models.

In the mediation process that resulted in Recommendations, we found out that the evaluative mediation model has been the most dominant model. Meanwhile, in the mediation process that resulted in joint agreements, we found out that the facilitative mediation model has been the most dominant model. If the industrial relations mediation model is seen as a whole, we found that the evaluative model has been the dominant model of mediation, followed by the facilitative model. We believe that facilitative model of mediation would be an ideal condition to stimulate the realization of a joint agreement between the parties in settling their industrial relation disputes. To make a facilitative model of mediation works effectively, there is a need to improve the roles of industrial relation mediators in the mediation process. At the normative level, there is a need to amend technical stipulations concerning mediations. Specifically, there is a need to amend the Decision of Director General of PHI and Jamsostek Number KEP-96/PHIJSK/2006 concerning the Guidelines for Mediators, Conciliators and Arbitrators of Industrial Relations in the Section on Stages during a Mediation Session, and Stages Post a Mediation Session. At the practical level, there is a need to improve technical capacity of the mediators through various structured and continuous seminars and training on industrial relation mediation.

²⁰Roger Fisher, William Ury, Bruce Patton, *Getting to YES : Teknik Berunding menuju Kesepakatan tanpa Memaksakan Kehendak*, Yayasan Obor Indonesia, Jakarta, 2008, page 51

²¹Roger Dawson, *Secrets of Power Negotiating: Rabasia Sukses Seorang Negosiator Ulung*, PT Gramedia Pustaka Utama, Jakarta, 2003, page.41

References

- Goldberg, Sander, Rogers, Cole, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, Aspen Publishers, 1185 Avenue of the Americas New York, 2003
- Jim Thomas, *Negotiate to Win: 21 Jurus Ampuh Untuk Memenangkan Negosiasi*, PT Gramedia Pustaka Utama, Jakarta, 2007
- Laurence Boulle, *Mediation: Principles Process Practice*, Butterworths, Australia, 1996
- Laurence Boulle, *The HweeHwee, Mediation: Principles Process Practice*, Butterworths, Asia, 2000
- Roger Fisher, William Ury, Bruce Patton, *Getting to YES: Teknik Berunding Menuju Kesepakatan Tanpa Memaksakan Kehendak*, Yayasan Obor Indonesia, Jakarta, 2008
- The Supreme Court of the Republic of Indonesia, *Naskah Akademis: Penyelesaian Perselisihan Hubungan Industrial*, the Supreme Court RI, 2007
- ILO, *Manual Mediasi, Konsiliasi, Arbitrasi*; Bahasa Indonesia and English, Kantor Perburuhan Internasional, 2006, hlm. 11, lihat juga pada ILO, *Pedoman Kerja Mediator, Konsiliator dan Arbiter Hubungan Industrial*, Kantor Perburuhan Internasional, 2006
- Law No. 13 The year 2003 on Manpower
- Law No. 2 The year 2004 on Industrial Relation Dispute Settlement
- The Decree of the Minister of Manpower and Transmigration of the Republic of Indonesia No. KEP-92/MEN/2004 on the Appointment and Termination of Mediator and the Working Procedures of Mediator
- The Decision of the Directorate General for the Development of Industrial Relation and Social Manpower Security No. KEP-96/PHIJSK/2006 on the Guidance for the Working Procedures of Industrial Relation Mediator, Conciliator, and Arbitrator