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The Non-Arbitrability of Business Disputes and Denial of the Arbitration Clause by the Parties

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Not all disputes can be resolved through arbitration. Article 5 of the Arbitration Law has limited disputes to the field of trade and disputes that, according to the law, cannot find peace. It means that there are disputes in the field of trade that can be arbitrated (arbitrability) and cannot be arbitrated (non-arbitrability). The Regulation of the Supreme Court (Perma) on mediation procedures in the court stated that every dispute brought before the court must seek peace. Article 4 of Perma excludes peace in certain disputes. According to the Arbitration Law, the court is not authorised to examine and decide on disputes that have an arbitration clause. However, in practice, violations in the form of arbitration denial are found and become legal issues. It is important to note the trade disputes that cannot be arbitrated and also to find the solutions to disputes that have an arbitration clause but still go to court. To study this, a statutory and conceptual approach are used. The conclusions obtained, regarding the trade disputes that cannot be arbitrated, are Bankruptcy and PKPU. The court must declare that the claim cannot be accepted if the contents of the arbitration clause are found. If a dispute with an arbitration clause is to be brought to trial, the parties must first revoke the arbitration authority with a written agreement to the same degree. Revocation or denial of an arbitration clause cannot merely be an assumption.

Key words: *ignoring arbitration clause, non-arbitrability, without peace.*

Background

Activities in the field of trade are currently more popular as business activities. According to Djuhaendah Hasan (2007) the word 'business' means a business activity/movement or business activity in the field of trade or industry involving various products (both goods and services) as well as their management and protection.[1]

The hope of the parties is to make the business successful. However, sometimes expectations cannot be fulfilled and instead lead the parties to disputes. Disputes that are related to business relationships are in many cases in the form of claims for compensation. Compensation can be requested for losses arising from nonfulfillment of a contract through a breach of claim. Sometimes, the loss is not caused by default but rather by certain actions that can be classified as unlawful acts *(onrechtmatege daad)*. The concept of default in law is based on legal relations that originate from agreements. The concept of an unlawful act, as a legal relationship that is not based on an agreement, is based on certain activities, actions or deeds that cause harm to others.

According to Maxwell J. Fulton regarding business disputes or commercial disputes '...a commercial dispute is one which arises during the course of the exchange or transaction process that is central to the market economy,' (Arus and Andi, 2010). A business dispute resolution can be brought before the court (in/by court dispute resolution) or be handled out of court (out of court dispute resolution). Settlement of disputes in the court is carried out by the state court, while dispute resolution that is out of court includes negotiation, mediation, conciliation, med-arb (hybrid), arbitration and other agreed methods (Adolf, 2007).

Dispute resolution through court or arbitration is basically an adjudication process. Settlement of disputes by adjudication involves submitting the settlement to a third party that is authorised to decide (Sujayadi dan Faizal, 2013). Thus, in the adjudication of dispute resolution there is a choice between court or arbitration. The disputing parties are given the choice to settle the dispute by adjudication through the court or through arbitration. The birth of arbitration authority is solely due to the agreement of the parties in an arbitration clause. Without an arbitration clause, there will not be arbitration authority to examine and decide on disputes.

In Indonesia, business dispute resolution through litigation currently becomes the authority of the religious court (for the Sharia economy), the general court (for the non-Islamic economy) and the commercial court (for certain intellectual property rights). However, the parties can

[1] Rights that are fully controlled by the parties, which are intended as private rights that are relative in nature, are rights of which the fulfilment can only be requested from the opposing party with whom the legal relationship is held.

waive the resolution of the dispute in court by making an arbitration clause. If the parties have chosen to settle the dispute through arbitration, the settlement through the court must be set aside.

In Indonesia, the legal provisions underlying dispute resolution through arbitration are Law No. 30 of 1999 concerning arbitration and alternative dispute resolution. This will hereinafter be referred to as the Arbitration Law (Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution). The law has limited disputes that are able to be resolved through arbitration to the field of trade and cases concerning rights that are fully controlled by the parties and cannot seek peace.[2] Based on Supreme Court Regulation No. 1 of 2016 concerning mediation procedures in the court (hereinafter referred to as Perma), Article 3, Paragraph (1) states: 'Every judge, mediator, party and/or attorney must follow the procedure for dispute resolution through mediation.' It means that every dispute, including business disputes, if settled through the litigation process in court, is burdened with the obligation to undertake peace efforts.

Article 5, Paragraph (2) of the Arbitration Law states: 'disputes that cannot seek peace cannot be resolved through arbitration and do not become an absolute competency of arbitration (cannot be arbitrated, non-arbitrability).[3] Thus, there are business disputes that can be arbitrated (arbitrability) and there are also business disputes that cannot be arbitrated (non-arbitrability). Borrowing the terms used by Sujayadi (Sujayadi dan Faizal, 2013), arbitrability refers to disputes that can be resolved through arbitration.

The choice of dispute resolution through arbitration can also be related to the provisions of Perma No. 1 of 2016. In particular, the provisions in Article 4, Paragraph (2), refer to disputes that are exempted from the mediation procedure in the court. A dispute that is of arbitrability and involves the arbitration clause becomes the absolute authority of the arbitration. Thus, there is a charge in the arbitration clause that gives birth to the authority of arbitration.

According to Article 3 and Article 11 of the Arbitration Law, the court is not authorised to examine and adjudicate a dispute that has an arbitration clause. However, in practice, arbitrability disputes are often found to contain an arbitration clause but the settlement is still submitted to the court. The dispute submitted is examined and decided by the court, even to the point of involving legal remedies. The incident raises legal issues, at least about legal

[2] Vide Article 5, Paragraph (2) of the Arbitration Law.
[3] Sujayadi uses the term arbitrability for disputes that can be resolved through arbitration. This paper uses the term of non-arbitrality. It means a dispute that cannot be resolved through arbitration.

uncertainty. This is consistent with the results of Karen Mills' research, which concluded that Indonesia as a country that is not friendly with arbitration (Mills, 2003).[4]

For this reason, it is necessary to find business disputes that are non-arbitrary because peace cannot be sought, as referred to in Article 5, Paragraph (2) of the Arbitration Law. It is also necessary to find the legal settlement of the breach of absolute competence of arbitration. This is because the dispute containing arbitration clauses is still proceeded, examined and decided by the court.

To examine the issues raised, normative juridical research is done through library research. The research approach is mainly related to laws and regulations, especially the Arbitration Law, Law of Judicial Power, Regulation of Supreme Court (Perma) No. 1 of 2016 and others. The case is laso studied with the conceptual approach related to disputes that cannot seek peace and the principles of *pacta sunservanda* and absolute competence.

Discussion

Non-arbitrability disputes

A dispute is defined as the emergence of differences in interests between the parties in the form of differences in civil rights and obligations. These are regulated in material civil law, which always complies with formal civil law or is commonly referred to as civil procedural law (Sutantio dan Iskandar, 2002; Mujahidin, 2008). According to Soerjono Soekanto, a dispute is an incompatibility between individuals or groups that have a relationship due to the rights of one party being disturbed or violated (Soekanto, 1979).

In the Indonesian legal system, the choice of dispute resolution through arbitration is part of nonlitigation settlement (out-of-court settlement). Although the settlement is out of court, arbitration is not part of the alternative dispute resolution. Arbitration and its product resolve the dispute so that it is adjudicated. The product of alternative dispute resolution is not a decision but a recommendation, so it may not be binding. This can be seen in the nomenclature of Law No. 30 of 1999 concerning 'arbitration' and 'alternative dispute resolution.' Therefore, arbitration is not part of the alternative dispute resolution.

On the other hand, according to Adolf, (2015) arbitration is an independent dispute resolution institution *(sui generis)*. Arbitration is not an alternative and is not a court that is judicial in nature. It is an institution that is independent and provides decisions by adjudication. Adolf, (2015) states that arbitration can be grouped into two meanings: arbitration in the narrow sense and arbitration in the broad sense. Arbitration in the narrow sense is arbitration that

[4]The paper was presented in the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitration, Kuala Lumpur, 1 March 2003.

specifically handles and resolves disputes in the field of trade. Arbitration in the broad sense is arbitration as dispute resolution for all disputes.

The Indonesian Arbitration Law currently adheres to the definition of arbitration in the narrow sense, namely arbitration as a settlement of disputes in the field of trade. Although the Arbitration Law adheres to the definition of arbitration in the narrow sense, it turns out that under Article 5, Paragraph (2), not all business disputes can be resolved through arbitration.

To find out about non-arbitrability disputes, it is necessary to first discuss arbitrability disputes. Based on Article 1, Number 1 of the Arbitration Law: 'Arbitration is a way to settle civil disputes outside the court of law based on an arbitration agreement made in writing by the disputing party.' This provision states that arbitration is declared valid for the settlement of civil disputes. The settlement of civil disputes, in the broadest sense, is in the form of claims for compensation due to default and due to unlawful acts. Based on the provisions of Article 1, Number (1), it can be seen that the Arbitration Law does not limit a default dispute to an arbitration authority but it is limited to a civil dispute. Thus, civil disputes should be in the form of claims for compensation due to breach of contract or due to unlawful acts that can be resolved through arbitration. This is so as long as the parties have agreed and have written arbitration clauses.

The provisions of Article 2 of the Arbitration Law broaden the enforcement of arbitration provisions, which include all disputes or differences of opinion that arise or may arise from a particular legal relationship. The phrase 'a certain legal relationship' and 'all disputes or differences of opinion' should be noted. The phrase 'all disputes or disagreements' can be interpreted as disputes that can be examined and decided by arbitration in general sense. This means it concerns all disputes involving parties in the dispute, whether in the form of default or unlawful acts, etc. The condition of the dispute is related to the implementation of the agreement containing the arbitration clause, (Ybp.law.com, 2019), which is also under the arbitration authority. This is in line with Hikmahanto Juwana's opinion: 'If there is an arbitration agreement, then the legal settlement must go through arbitration.' This includes lawsuits for violating the law.

Article 5, Paragraph (1) of the Arbitration Law further determines that 'Disputes that can be resolved through arbitration are only those in field of trade and those concerning rights which, according to the laws and regulations, are fully controlled by the disputing parties.' Paragraph (2) determines that 'Disputes that cannot be resolved through arbitration are those that, according to the law, cannot make peace.'

Article 5, Paragraph (1) of the Arbitration Law limits civil disputes that can be resolved through arbitration. They only include disputes in the field of trade and disputes concerning

rights that, according to laws and regulations, are fully controlled by the disputing parties. Article 5 of the Arbitration Law determines disputes that can be resolved through arbitration (arbitrability). They contain three elements:

1. Disputes in the field of trade. Today, these are more popularly referred to as business disputes. Some experts also refer to commercial activities, which include (among others) the fields of commerce, banking, finance, investment, industry and intellectual property rights (Ginting, 2016).
2. Disputes concerning rights which are fully controlled by the disputing parties. According to Marzuki (2008), 'in terms of the relationship between rights and community life, there are private rights, consisting of absolute rights, and relative rights.' According to Peter Mahmud, the meaning of rights is 'a right which is fully controlled by the disputing party' in the sense of a relative private right. Relative rights allow the holder to sue for a certain legal right. Relative rights arise due to legal events, legal relations and legal actions.

Business activities are legal actions. They give birth to legal relations by determining rights and obligations. In business, if rights and obligations are not voluntarily fulfilled, then forceful efforts can be made by making lawsuits. Lawsuits are carried out through courts or arbitration choices based on arbitration clauses. What is being demanded is rights that are not fulfilled as intended. These are directed against the opposing party with whom legal relations are established. This is what is meant by rights which are fully controlled by the parties and do not conflict with the provisions of the legislation.

3. Disputes in which peace cannot be sought:
   Peace is defined as a settlement through deliberation to reach consensus or alternative efforts to settle disputes without arbitration. This means these disputes can only be resolved through a court decision. There is no opportunity or space for the parties to resolve their dispute by deliberation to reach consensus. This includes alternative efforts to resolve disputes.

Regarding business disputes, if the parties do not choose a settlement through arbitration, the dispute becomes the absolute authority of the court. This is based on Perma No. 1 of 2016, Article 2, Paragraph (1): 'The provisions regarding the mediation procedure in this Supreme Court Regulation apply in litigation in the court, both in the general court and religious court.'

In the provisions of Article 5, Paragraph (2) of the Arbitration Law, cases that cannot seek peace cannot be settled through arbitration (non-arbitrability). Disputes that cannot seek peace can be determining using the provisions of Perma. Article 4, Paragraph (1) of Perma states, 'All civil disputes submitted to the court include a case of resistance (verzet) on the

verdict decision and litigation party resistance (partij verzet) or a third party (derden verzet) against the implementation of decisions that have permanent legal force. Mandatory completion must be sought in advance through mediation, unless otherwise specified. The obligation to seek peace through mediation is understood as needing to be fulfilled and obeyed. Nevertheless, Article 4, Paragraph (2) of Perma has determined criteria for exemption from the mediation obligation in the settlement of certain disputes:

1. disputes at trial that are set to have a grace period;
2. disputes where the examination is carried out without the presence of the plaintiff or defendant who has been properly summoned;
3. counter claims (reconventions) and the inclusion of a third party in a case (intervention);
4. disputes concerning the prevention, rejection, cancellation and ratification of marriage; and
5. disputes brought to court after mediation outside the court is sought and is declared unsuccessful.

There are 5 groupings of exceptions to the mediation obligation as a peace effort. Discussion on grouping No. 1 will be conducted after discussion No.5 is finished. Grouping No. 2 involves disputes in which the examination is carried out without the presence of the plaintiff or defendant who has been properly summoned. In this case, peace is not forbidden, but peace is basically not possible. This is because the parties cannot be found in one forum.

Grouping No. 3 involves a counter-lawsuits (reconciliation) and the inclusion of a third party in a case (intervention). It concerns the continuation of a trial that has begun or the entry of a third party with an interest after the trial is running. Peace efforts through mediation are no longer an obligation because the trial process has already taken place. In this case, the trial would not be able to stop the mediation again. However, as long as the dispute has not been resolved, the parties can still make voluntary peace, even in the stage of legal remedy.

Grouping No. 4 involves disputes over the prevention, rejection, cancellation and ratification of marriages that are not given space to seek peace. Disputes over the prevention, rejection or cancelation of marriages may provide opportunities for violations of the law due to nonfulfillment of marital requirements and/or procedures. Accordingly, disputes over the prevention, rejection or cancellation of marriage must instead be examined and decided, whether or not there is a violation of the law and must be resolved by a decision. Moreover, grouping No.4 concerns family disputes, not a business disputes, so they cannot be resolved through arbitration (non-arbitrability).

Grouping No. 5 involves disputes that are submitted to the court after efforts to settle out of the court through mediation have failed to produce peace. Peace is no longer required in court

because peace has unsuccessfully been sought first. These disputes immediately enter the trial stage. In grouping No.5, peace efforts have been implemented through alternative dispute resolution. However, it is possible for disputes resolved by mediators outside the court to be business disputes. In principle, peace has been sought to no avail. Excluding the mediation obligation does not actually mean that a level of peace is prohibited from the dispute in question.
The exceptions in grouping No. 1, (disputes in which the examination at the hearing has determined a time limit for settlement), are regulated by Article 4, Paragraph (2), letter a in Perma as follows:

1. Settlement of disputes through Commercial Court procedures:
Disputes resolved through Commercial Court procedures are disputes regarding intellectual property rights, which consist of disputes over copyright, patents, trademarks, industrial designs and layout designs of integrated circuits. IPR disputes in the form of trade secrets and plant variety protection disputes become the absolute authority of the District Court. In addition, the authority of the Commercial Court is to examine and decide on bankruptcy and postponement of debt payment obligations.

Regarding intellectual property disputes, litigation settlement is under the authority of the Commercial Court. Although the procedure in the Commercial Court does not recognise mediation, the regulation of related intellectual property recognises the existence of a settlement through an alternative mechanism of dispute resolution. In Law No. 13 of 2016 concerning patents, Chapter XIII Part Four precisely regulates alternative dispute resolution (in Article 153 and Article 154 specifically). Even before filing criminal charges against patent infringement, the parties must first take the mediation route. Thus, intellectual property disputes, especially patent disputes, can be pursued peacefully according to statutory regulations, so that patent disputes are arbitral.

For intellectual property in the form of industrial design, Law No. 31, Chapter VII of 2000 regulates the settlement of disputes, especially in Articles 46-47. Article 47 of Law No. 31 of 2000 concerns industrial design: 'In addition to settling claims in the Commercial Court, the parties can settle disputes through arbitration or alternative dispute resolution. Therefore, intellectual property disputes, especially industrial design disputes, can be resolved through peace and arbitration. Industrial Design Disputes, thus, are arbitral.

For intellectual property in the form of layout designs of integrated circuits (DTLST), Law No. 32, Chapter VII of 2000 regulates the settlement of disputes. Article 39 of the DTLST Law states, 'In addition to settling claims in the Commercial Court, the parties can settle disputes through arbitration and alternative dispute resolution.' Thus, disputes over the layout design of integrated circuits can make efforts to make peace so that they are arbitrable.

For intellectual property in the form of copyright, Article 95, Paragraph (1) of Law No. 28, Chapter XIV of 2014 determines, 'Settlement of copyright disputes can be done through alternative dispute resolution, arbitration, or in court.' The provisions of Article 95, Paragraph (1) state expressly that the settlement of copyright disputes can made peace even though dispute resolution is the absolute authority of the Commercial Court. Therefore, copyright dispute is arbitral.

Law No. 20 of 2016 concerns trademarks and geographical indications. Article 93 stipulates, 'In addition to settling claims in the Commercial Court, the parties can resolve trademark disputes through arbitration or alternative dispute resolution.' Thus, trademark disputes can seek peace so that they arbitral.

Other disputes under the authority of the Commercial Court are bankruptcy procedures and requests to postpone debt payment obligations (PKPU). These are based on Law No. 37 of 2004. Bankruptcy procedures and PKPU are not aware of any peace efforts through alternative dispute resolution or arbitration. In the context of bankruptcy, the existence of an accord is known as peace, but it is different from peace in the mediation procedure. An accord or peace can occur after the debtor is declared bankrupt. In bankruptcy, an account is determined in the framework of an agreement on the manner and amount of bankrupt debtor payments to its creditors. Bankruptcy must be based on the decision of the Commercial Court. It means that in the mechanism of bankruptcy and PKPU, there is no peace. This implies that bankruptcy and PKPU cannot be arbitrated. This is because Law No. 37 of 2004 states that bankruptcy and PKPU is determined by the decision of the Commercial Court. Bankruptcy and PKPU are business relationships requiring more than one creditor (concursus creditorum). In legal relations, the parties agree on an arbitration clause. The power of the law cannot certainly be defeated by agreement. Agreements that are contrary to law make the consequences of the agreement null and void. A deal breeds an agreement, as long as the agreement does not conflict with the law, public order and morality. It means that bankruptcy and PKPU procedures in the Commercial Court cannot be carried out as a peace efforts, according to Perma No. 1 of 2016. Therefore, bankruptcy and PKPU are non-arbitral.

2. Settlement of disputes through the procedures of the Industrial Relations Court:
   Industrial relations disputes are differences of opinion that result in disputes between employers or a combination of employers and workers. This is due to disputes over rights, disputes of interest, disputes about termination of employment and disputes between trade unions.[5] In principle, any settlement of labour disputes or industrial relations disputes must be pursued through deliberation and peaceful resolution. According to Article 3, Paragraph (1) of Law No. 2 of 2004, peace in industrial relations disputes must be sought in advance

[5] Article 1, Paragraph (1) of Law No. 2 of 2004 concerning Settlement of Industrial Relations Disputes.

through deliberate bipartite negotiations to reach consensus.[6] In alternative literature on dispute resolution, bipartite negotiations are commonly referred to as negotiations (Mu'azd, 2005). Thus, settlement through negotiations is a mandatory effort (imperative) for the settlement of industrial relations disputes. Furthermore, Law No. 2 of 2004 has determined that alternative efforts to resolve disputes must be carried out. This is regulated in Article 4, Paragraphs (4), (5) and (6):

(4) In the event that the efforts of the parties do not determine a settlement option through conciliation or arbitration within 7 working days, the agency responsible for labour affairs delegates the dispute resolution to the mediator.
(5) Settlement through conciliation is carried out for the settlement of conflicts of interest, disputes over termination of employment or disputes between trade unions.
(6) Settlement through arbitration is carried out to settle conflicts of interest or disputes between trade unions.

Industrial relations disputes are not included in business disputes. They are considered disputes between workers and employers (as work givers) or disputes between unions in one company. Although they are not business disputes, disputes over interests and disputes between trade unions can be sought through arbitration. However, disputes over rights and disputes over termination of employment cannot be resolved through arbitration (non-arbitrability).

Through the regulation of industrial relations dispute settlement in Law No. 2 of 2004, it appears that peace efforts are actually an obligation that must take precedence in being pursued. In fact, it has also been determined that arbitration can be pursued in the resolution of conflicts of interest or disputes between trade unions.

3. Objection to the decision of the Business Competition Supervisory Commission:
The objection referred to is a request for inspection of the District Court submitted by the reported party that did not accept the decision of the Business Competition Supervisory Commission (KPPU).[7] Decisions of Business Competition Supervisors that are submitted to the court are certainly not in the format of the dispute. Precisely, the objection raised is an effort to reject the supervising product imposed by Law No. 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition involving the Business Competition Supervisory Commission. The product of supervision is the performance of the KPPU supervision process because the parties in the decision violated Law No. 5 of 1999.

[6] Negotiation is intended as an effort to establish peace by involving the disputing parties actively in ending the dispute by consensus agreement. This including efforts to use alternative dispute resolution facilities in the form of mediation, conciliation and arbitration.
[7] Article 1 Number 1 Perma No. 3 of 2019.

KPPU itself is a forum to resolve any problems or various disputes related to monopolistic practices and unfair business competition (Kagramanto, 2013). KPPU's supervision products that are not accepted by the parties must instead be examined and tested in court to determine whether the decision made by KPPU has a strong legal basis or not. Therefore, KPPU's supervision products fall under public jurisdiction. These do not include business disputes and are certainly not worthy of peace efforts. Therefore, the KPPU products of supervision are non-arbitral.

4. Objection to the decision of the Consumer Dispute Resolution Board:
Decisions made by the Consumer Dispute Settlement Agency (BPSK) are as a result of negotiations for peace sought by BPSK over disputes that occur between consumers and business actors. Thus, if the parties object to the BPSK's decision, which is the product of a peace effort, a dispute is certainly no longer worthy of being resolved by a peace effort. Therefore, it is non-arbitral.

5. Request for cancellation of an arbitration decision:
The annulment of an arbitration decision is an attempt by the parties to derail the arbitrator's product, which they initially agreed on as a dispute resolution. Thus, the arbitrator's decision becomes binding and final and must be fulfilled by the parties. Nevertheless, the Arbitration Law of Article 70 allows the parties to make an arbitral decision as long as it meets the requirements. The effort to cancel an arbitration award is not included in business disputes. Peace can no longer be sought and it is non-arbitral.

6. Objection to a decision of the Information Commission:
Information commission decisions are not classified as being part of business disputes, so objections to the Information Commission's decisions are non-arbitral.

7. Settlement of political party disputes:
Political party disputes are not a business disputes. Thus, disputes and resolutions of political party disputes are non-arbitral.

8. Disputes that are resolved through simple lawsuit procedures:
Based on Perma No. 4 of 2019,[8] disputes with a maximum value of five hundred million rupiah and simple verification procedures are settled through a simple lawsuit. The focus is on the procedure for inspection, not on the prohibition of holding peace. A simple lawsuit does not prohibit disputes resolved through peace, so the settlement can be held through arbitration (arbitrability).

[8] Perma No. 4 of 2019 concerns amendments to Supreme Court Regulation No. 2 of 2015. The latter concerns procedures for settling a simple lawsuit.

9. Other disputes that are examined at the trial and the time limit for resolution, which is determined in accordance with statutory provisions:

In examining the nine disputes that were submitted to the court and excluded from mediation obligations, it can be inferred that not all disputes are referred to as civil disputes. They include disputes that object to the KPPU's decision, objections to the decisions of the Consumer Dispute Settlement Agency, requests for cancellation of the arbitration decision, objections to the information commission's decision, industrial relations dispute settlements, political party disputes and disputes regarding marriage prevention, rejection and ratification. These are is non-arbitral.

Included in business disputes are requests for bankruptcy and PKPU as well as intellectual property rights disputes. Therefore, business disputes that are non-arbitral involve the settlement of Bankruptcy and PKPU requests as well as industrial relations disputes. The latter may be in the form of rights disputes and disputes regarding termination of employment.

A. The court's proceedings in lawsuits that deny the arbitration clause:

In the settlement of civil disputes, the court generally functions as a last resort (ultimum remedium), if other means have been undertaken without a result. However, for business disputes that have agreed on and stipulated arbitration clauses, the function of the court is set aside so that it can no longer be placed as a last resort. The Arbitration Law has instead made the court unauthorised to examine and decide on disputes that contain arbitration clauses.

On the other hand, based on Article 10 of Law No. 48 of 2009 concerning judicial power, the court also uses the justification that the court must not reject a case. As a result, there is a jurisdictional tug-of-war between the arbitration and the court in resolving business disputes.

The presence of law in society concerns the integration and coordination of interests that can collide with one another. By law, these are integrated in such a way that the collision can be minimised (Rahardjo, 2006). The legal way to coordinate the collision of dispute resolution through arbitration and the court is to set it firmly. Conflict resolution between arbitration and the court is legally coordinated by law overriding the settlement in court. This is stipulated in Article 3 and Article 11, Paragraph (1) and Paragraph (2) of the Arbitration Law:

- In Article 3, the court is not authorised to adjudicate disputes between parties who have been bound by an arbitration agreement.
- Article 11, Paragraph (1) states, ‘The existence of a written arbitration agreement negates the right of the parties to submit a dispute resolution or dissent contained in the agreement with the court.’

- Article 11, Paragraph (2) states, 'The court is obliged to refuse and will not interfere in the settlement of a dispute that has been determined through arbitration, except in certain cases stipulated in this law.'

The existence of Article 3 and Article 11 of the Arbitration Law reinforce the existence of arbitral institutions for dispute resolution outside the court (Fakhriah, 2017). The phrase 'unauthorised' implies prohibition, which means prohibition to prosecute. According to Prododikoro, (1995) a prohibition in the law should be an obstacle for the party concerned to prevent the formation of a legal relationship that is in violation of the prohibition.

Article 11, Paragraph (2) of the Arbitration Law contains norms that expressly, brightly and clearly state that the court is obliged to refuse to examine and decide on disputes that have arbitral content. The court can no longer intervene in examining and deciding disputes that have an arbitration clause. It must be formally and legally outlined based on Article 3 and Article 11 of the Arbitration Law. The court is not authorised to examine and decide on disputes containing the content of the arbitration clause.

According to Sudargo Gautama, 'The court must, because of its position (ambtshalve), declare that it is not authorised.' The court, based on its own initiative (and also because of its position), can declare no authority. This is so even though the parties do not submit an objection stating that the court is not authorised to examine the case (Gautama, 1999).

The existence of an arbitration forum as a dispute resolution is based on the full autonomy of the parties. Autonomy is given form in the shape of holding and establishing a written arbitration clause. The agreement of the parties to choose an arbitration forum is contained in an arbitration clause or *pactum de compromitendo.* This is incorporated in the master contract and is made before the dispute occurs. Agreements can also be made in the form of an arbitration agreement (acta van compromise) in a separate deed. This deed is drawn up from a master contract and made after a dispute occurs. The agreement of the parties through an arbitration clause is the basis of the legality of the submission of dispute resolution through arbitration. According to Ginting, (2016) an arbitration clause and separate arbitration agreement are a legally binding agreements of arbitration that are binding on the parties. In line with Basuki Rekso Wibowo, the essence and legal consequences are the same. The parties have agreed to choose arbitration as a dispute resolution strategy, as well as waive their right to submit a dispute before the court (Wibowo, 2018). The existence of the arbitration clause gives birth to the authority for arbitration. Without the existence of an arbitration clause, an arbitration forum cannot be formed and does not have the authority to resolve a dispute. An arbitration clause is an agreement that adheres to the principle of binding the makers (pacta sunservanda). Reciprocal agreements cannot be changed, except by agreement of the parties.

Sudargo's opinion above should be used as a chaotic resolution to the relationship between arbitration and the court. This form of adjudication/dispute resolution contains the arbitration clause. The submission of a dispute that contains an arbitration clause to the court injures and does not respect the agreement made.

Article 10 of Law No. 48 of 2009 concerning judicial power states that judges may not reject a case. The contents of Article 10 must be read in full. It states, 'The court is prohibited from refusing to examine, trying and deciding on a case filed under the pretext that the law is absent or unclear, but it is obligated to examine and try it.' This norm contains a rule that is clear and firm. The court is not justified in rejecting a case only in the context of there being no law or because the law is unclear. 'If the law does not exist or is unclear, the judge must make or find the law. Article 10 of the Law on Judicial Power contains norms, which contain orders.

This is very different from the provisions in Article 3 and Article 11, Paragraph (1) and Paragraph (2) of the Arbitration Law. It expressly and clearly states that the court has no authority to examine and decide upon it. The phrase no authority has the meaning of prohibition. This article contains norms with content that is prohibited. A prohibition in the law should be an obstacle for the court to examine and decide. This rule does not require further interpretation because the content is clear and the court is not authorised.

In the case of a lawsuit is based on or linked to an arbitration clause, the law makes it bright and clear that the court is no longer authorised. In the case of the existence of an arbitration clause, the parties (with their autonomy) form an arbitration forum and hand over the authority of dispute resolution to the arbitration. At the same time, they remove the right of the parties to submit a litigation settlement.

There is equality between the arbitration authority and the court's authority in resolving disputes. It is solely based on the arbitration clause. It is certain that without an arbitration clause in the form of a pactum de compromitendo or a compromise deed, the arbitration is not authorised to examine parties' disputes. A dispute without an arbitration clause falls under absolute authority of the examination and decision of a court.

On the other hand, if the parties have agreed and established an arbitration clause, the court must respect the law made by the parties. If a party submits a dispute that has an arbitration clause to the court, it means that the party does not respect and appreciate the agreement itself. The law and the court should be in charge of upholding the agreement. A form of respect and appreciation is to state that the court is not authorised to examine and decide upon

disputes submitted due to an arbitration clause. The lawsuit does not meet formal requirements, so it must be declared unacceptable.

The court is not authorised to examine disputes that have an arbitration clause because they do not meet the formal requirements, as determined by Article 3, Article 11, Paragraph (1) and Paragraph (2) of the Arbitration Law. In examining cases in court, the judges must first examine their absolute authority. Each court only has the authority to adjudicate the cases in which the law has been delegated (Harahap, 2017). In filing a lawsuit, attention must be paid to the absolute competence and the authority to judge according to this competence. Mistakes involving absolute competence are fatal. According to M. Yahya Harahap, the mistake of filing a lawsuit will result in the claim being unacceptable on the grounds that the intended court was not authorised to adjudicate. In other words, the lawsuit filed is outside its jurisdiction (Harahap, 2017). Judicial jurisdiction is a formal requirement for the validity of a lawsuit. Mistakes in filing a lawsuit in an unauthorised court will result in a misdirected lawsuit, making it invalid and declaring it unacceptable (Harahap, 2017).

The court cannot use an alibi stating that the defendant did not submit an exception regarding the arbitration clause that overrides the court's authority. The actions of the defendant do not convey the exception of the court's arbitration because of the arbitration clause that cannot be legally accepted.

An arbitration clause is an agreement that binds the parties (pacta sun servanda). Article 1338, Paragraph (2) of the Civil Code states that an agreement cannot be withdrawn (other than upon the agreement of both parties). As an agreement, the arbitration clause can be changed if the parties want it to do so. The parties must pay attention to the mechanism changing the arbitration clause. The arbitration clause must be in written form, so the changes must also be in written form. Orally amended agreements will not be legally binding. This is even more so if the changes are based on mere opinion or assumption.

The parties cannot be considered to have secretly revoked or removed the arbitration clause, (bearing in mind that written agreements cannot be amended with mere assumptions). In principle, verbal agreements can be revoked and agreed upon through verbal changes. At the same time, the arbitration clause must be in the form of a written deed. Accordingly, changes to the arbitration agreement must also be made in the form of a written deed. This deed is equivalent to the arbitration agreement (an authentic deed or underhanded deed). In law, there is a principle that consent may be given secretly but denial must be expressly stated. Denial cannot be assumed but must be clearly stated.

In order for a dispute containing an arbitration clause to be submitted for litigation to the court, the authority of the arbitration must first be abolished. Elimination of the power of

arbitration can be done with a change mechanism. It can be replaced with a litigation settlement. Changes can be made by an amendment or by a separate deed of agreement that contains changes in dispute resolution from arbitration to litigation. The change will involve the autonomy of the parties. This is because the forming of arbitration also involves the autonomy of the parties. As long as the existence of the arbitration clause has not been amended in writing, according to the law, the court will not be authorised and must declare the dispute unacceptable (Niet Onvankelijke Verklaard).

Closing

Conclusion

1. Non-arbitrability in business disputes is a request for bankruptcy and postponement of debt payment obligations, as regulated in Law No. 37 of 2004.
2. The court's attitude towards a lawsuit is based on or related to an arbitration clause. When submitted for litigation in court, it must be stated if the lawsuit does not meet formal and acceptable conditions (Niet Onvankelijke Verklaard). As long as the existence of the arbitration clause remains, the court remains unacceptable. The act of the defendant ignoring the exception of the court's authority cannot be considered as an arbitration agreement being revoked. The existence of a written arbitration clause is an absolute condition for the arbitration authority to examine and decide.

Suggestion

1. It is expected that businesspeople in the arbitration clause can specify more clearly and, in more detail, which disputes are to be resolved through arbitration. It should be initiated in the contract of the party appointed as the arbitrator in a more concrete manner so that dispute over the dispute can be anticipated.
2. The denial of arbitration authority cannot be carried out covertly or with assumptions. It must be firm to the same degree as the existence of the arbitration clause, authentic deed or underhanded deed. If a dispute with the contents of the arbitration clause is to be submitted to the court, the arbitration authority should be abolished or revoked by changing the arbitration clause into a written settlement in court.

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