

Position of Arbitration Clause in Relation to Absolute Competence in Bankruptcy Disputes

Rahayu Hartini
Faculty of Law
Universitas Muhamadiyah of Malang
Malang, Indonesia
rahayuartini5@gmail.com

A.A.A. Ngurah Tini Rusmini Gorda
Faculty of Law and Social Science
Universitas Pendidikan Nasional
Denpasar, Indonesia
ttinirusmini@yahoo.co.id

ABSTRACT

During the validity of Law No. 37 of 2004 (2004-2013), out of 5 bankruptcy cases, all decisions stating that the Commercial Court is authorized to settle bankruptcy cases based on Article 303 of Law No. 37 of 2004 concerning Bankruptcy. Although the substance of Article 303 is contrary to the legal principle of the contract "*Pacta sunt servanda*". Article 303 raises deviations in the principle of systematization law, which will weaken law enforcement in Indonesia, and can even cause the loss of legal principles as a rule of law at the basic level of norms.

Keywords—*Arbitration, Bankruptcy, Contract legal principles, Pacta sunt servanda*

I. INTRODUCTION

In the settlement of trade disputes, there are two laws and regulations that are equally stipulated or can be called finished when a dispute arises. First, Law Number 4 of 1998 concerning Bankruptcy and Suspension of Debt Payment Obligations (PKPU), Article 280 Paragraph (1) regulates the settlement of bankruptcy issues through the Commercial Court and second, is Law Number 30 of 1999 concerning Arbitration and APS.

Article 3 of the Arbitration Law regulates the settlement of trade disputes by arbitration outside the District Court. Article 11 Paragraphs (1) and (2) that there is a written arbitration agreement to eliminate the right of the parties to submit disputes or differences of opinion contained in the agreement to the Court, even the District Court must refuse and do not interfere in the dispute that has been determined through arbitration.

To resolve the conflict, the authority to revise the Bankruptcy Law becomes Law no. 37 of 2004, among others, by adding one article, namely Article 303. With the implementation of positive law if this seems to have been completed, but unfortunately instead of Article 303 is very contrary to the principle of the existence of *Pacta sunt servanda* or the strength of the tie agreement is one of the principles in arbitration. There is an inconsistency between norms and principles as Meta norms, it is necessary to study the deep philosophy of the birth of Article 303 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Payment (PKPU).

Article 303 of Law 37/2004 on Bankruptcy and Suspension of Payment Law (PKPU) states that the Court still has the authority to investigate and settle bankruptcy declarations for one of the parties in the agreement that contains an arbitration clause, as long as the debt is the basis of the statement of bankruptcy request has fulfilled the provisions as stated. Referred to in Article Paragraph (1) of this law.

II. LITERATURE REVIEW

In practice there are several streams of justice regarding this arbitration clause, for example when the Arbitration Law No. 30 of 1999 concerning unborn babies, there is a lack of legal practitioners' sharpness regarding the matter of this arbitration clause. Based on the theory and observation in practice contained in several decisions, according Yahya Harahap [1] there are two types, namely: (1) the arbitration clause is not public order, (2) the arbitration clause is *Pacta sunt servanda*.

Bankruptcy is a commercial way to get out of debt problems that press a debtor's account, where the debtor no longer has the ability to pay the debt to creditors. When the state of the inability to pay obligations that are due is recognized by the debtor, the steps to submit an application to determine the status of bankruptcy against him (voluntary application for bankruptcy itself) becomes a possible step in determining the status of bankruptcy by the court against the debtor if later evidence is found that the debtor no longer able to pay debts that are past due and collectible [2] [3].

Questioned and conducted in-depth studies, comprehensive information about the existence of Article 303 of the UUK and PKPU the provisions of Article 303 are very confusing for the public, and especially for national and international businesspeople. Regarding absolute competence, there is a point of contact between a bankruptcy institution and an arbitration institution. This is a legal problem in this study. The author examines the application of the principle of deviation or the principle of legal freedom of contract in judicial practices in Indonesia, especially in bankruptcy cases.

Understanding of arbitration takes longer for world public courts only, it is evident that they still accept examination of cases that contain arbitration clauses, for example: BUN District Court Base, April 12, 1983 decision No. 7/Pdt/1982 which should have declared itself incompetent, but the decision was upheld by the Central Kalimantan High Court and even the Supreme Court (MA) reaffirmed the decision of December 24, 1985 No. 1851 K/Pdt/1985 This is a reality of how far behind the views and insights of arbitration judges in Indonesia. But when the government has issued Presidential Decree No. 34 of 1981 on 5 August 1981 which ratified the New York Convention of 1958 which basically "acknowledged" and "upheld" the award of foreign arbitration. Then the possibility for the adoption of a foreign arbitral award in Indonesia and vice versa. By itself in accordance with the principle of territorial sovereignty, not all foreign decisions can be easily implemented in Indonesia, even though there is an agreement for that. There are several requirements that must be met for recognition and implementation. General requirements include jurisdiction, notice, public policy and finality matters.

To answer the problem in research, it is necessary to pay attention to legal theories about the strength of the agreement (arbitration clause), to be excluded by the parties. There are three streams [4], first, a flow which states that the arbitration clause/arbitration agreement is not a public policy. For example, the *Hoge Raad* was decided by the Netherlands, January 6, 1925. Second, the flow emphasizes the principle of "*Pacta sunt servanda*" on the strength of the clause/arbitration agreement, clause or arbitration agreement that binds the parties and can be overwritten only with mutual agreement of the parties in a way firm for that. This flow is pretty much followed by the court, including the Supreme Court Decision No. 225/K/Sip/1981. Third, the controversial flow, in fact the splinter is very contrary to the flow of *Pacta sunt servanda*, because as the example was decided by the Supreme Court No.1851 K/PDT/1984. In principle, the flow of this controversial arbitration clause states that everything is in the agreement of the parties, in the case chosen is BANI, and although there is a refusal from one of the parties when having to go to the District Court, the Court still claims to be competent and the Supreme Court justifies it. The reason is because the parties are not serious (the term State court is concerned: "In the hearts of the parties have no intention of using arbitration").

III. RESEARCH METHOD

This research uses a normative juridical approach. A normative juridical approach is adopted for the laws governing bankruptcy, arbitration and alternative dispute resolution (ADR) and other implementing regulations relating to research issues. By using the approach method: 1).

a legal approach (statute approach) to discover the basic philosophies and legist ratios of laws related to the problem under study. 2). conceptual approach (conceptual approach) to understand and discover concepts in the field of bankruptcy law and the field of arbitration. 3). Case approach (case approach) to commercial court decisions that have permanent legal force (*inkracht van gewijsde*), this is done to find the ratio of decidendi or reasons for consideration of the court to take a decision.

IV. RESULT AND DISCUSSION

Application of Deviation of Legal Principles in Legal Practices in Indonesian Principles (Period 1998-2004).

A. *Legal Irregularities in the Commercial Court*

Of the five cases, all have been studied with the general conclusion of arbitration clauses that can be separated from arbitration clauses that are at the same level as having to settle non-litigation, but the parties that litigate through the Commercial Court (litigation). This would be contrary to the principle of *Pacta sunt servanda* which is the agreement of the disputing parties written/stated in the agreement. Of the five bankruptcy cases it is clear that in general there is a dispute between the parties, it will be resolved in non-litigation.

In principle it is based on the existence of Article 1338 of the Civil Code with the principle of the principle of freedom of contract (*Pacta sunt servanda*), which binds the parties and 1320 of the Civil Code with the principle of consensus. From this, two authority disputes will arise as a result of deviations from these principles. The first is the absolute authority of the Commercial Court area in the case of bankruptcy as an extraordinary court. Both of the arbitration clauses which adhere to the applicable principles, the case must be resolved at the arbitration institution.

However, of the five cases, all parties to settle the case to the Supreme Court as the highest-level Supreme Court in Indonesia. This makes a precedent that any problem in Indonesia must be resolved in court. In fact, if we look further, that there is agreement with the Lex law principle of applicable law, the court must reject the problems that arise if the arbitration clause is contained therein [5] [6] [7] [8]. In general cases, on average the Commercial Court initially rejected an example of a bankruptcy request submitted by the principle of *acta de compromittendo* and *Pacta sunt servanda* as a decision to settle the guidelines.

B. *Legal Principles of Deviations in the Supreme Court's Cessation Decision*

In Indonesia, an appeal is an act of the Supreme Court to uphold the law and correct, if the law is opposed by the judges' decision at the highest level. It can also be considered as the highest supervisor by the Supreme Court over other court decisions.

The appeal by the Supreme Court is not a third-level examination. In the appeal, the case that had not become "raw" anymore, so that the facts can no longer be reviewed. Here the Supreme Court will only examine the application of legal issues, whether the decision or determination of the cassation court petition against the law or not [9] [10] [11] [12].

The term law and unlawful use, both in terms of formal and substantive law, which broadly encompasses public and

private law, thereby including written and unwritten law, namely customary law. Violation of formal law, civil procedural law is also a reason to overturn a decision or determination of a judge. The facts are not to be studied anymore, it is not a problem that must be checked again on appeal. So it is clear that it is a reversal of the decision of the court of appeal and the highest level is not a third court.

The Supreme Court in the cassation examination is only based on letters and only if deemed necessary, the Supreme Court will hear the parties or witnesses themselves or order the court or appeal the case to decide to hear the parties or witnesses. In practice, the trial itself was almost never carried out by parties or witnesses by the Supreme Court. They decision is not bound by the reasons submitted by the appellant's appeal in the cassation memory, but because of its position can be submitted for other legal reasons.

Court of cassation or appeal based on article 22 of Law No. 4 of 2004 concerning Judicial Power, carried out by the Supreme Court. This tells us, contrary to the decision of the appellate court, can appeal to the Supreme Court as requested by the parties concerned. This provision is similar to that described in Article 11 paragraph (2) letter a of the law which states that, against decisions made at the final stage by another court by the Supreme Court, an appeal can be sought from the Supreme Court. What is regulated in the Act, is confirmed in Law No. 14 of 1989 as amended by Law No. 5 of 2004 concerning the Supreme Court. In Article 28 paragraph (1) letter a, say, one of the Supreme Courts of power, duty and authority to examine and decide on an appeal, further said article 29, the Supreme Court ruled an appeal against the decision of the appellate court or the final level of all judicial domains.

C. Principles of Legal Irregularities in the Supreme Court in Review

Re-examination decision that already has permanent legal force. That is the special rights of justice seekers in our country. So special is the extraordinary legal solution. Examining and adjudicating a court decision has gained permanent legal force. In fact, every decision that has permanent legal force is absolutely absolute. That is, every decision that has permanent legal force is absolute. He already has absolute binding power for the parties, those who get their rights or for their heirs. Also according to the law, it has the absolute evidence power to the party and simultaneously has the absolute power to execute them [1].

But behind all that, lawmakers are aware and very realistic. Humans are still human. Humans cannot turn into angels but can be ferocious. Humans do not escape the range of accidents that are always limited in ability. But a clear observation of someone, one day must be wrong and make mistakes. Judges are also people that at times can be wrong and negligent. After the decision is based on permanent legal force, the losers find important evidence. During the examination process, no evidence was found. Were the evidence found in the trial. Decisions handed down are likely to be subject to the most likely depend on that evidence. This is referred to as *Novum* [1].

It is not feasible to allow flawed decisions in law to be maintained in public life. So to get rid of injustice and untruthfulness and injustice it is not appropriate to be given an extraordinary opportunity for the injured party, to obtain the supremacy of law, truth and justice. The trick is to take

extraordinary remedies by submitting a review to the Supreme Court with extraordinary reasons. Namely, the reason is very limited and limited. Unlike the reasons for appeal or cassation.

However, it is unfortunate, fortunately legal experts instituted this effort as a very extraordinary effort, it has been misused by the parties. Many people litigate through lawyers, many people filed for reconsideration. Enough reasons or not, no problem. Anyway, just ask for reconsideration, so the application for review becomes a training method. As a result, the volume of reconsideration cases corresponds to the number of existing case cassations. An unhealthy symptom in a world of justice today. As a judicial review body this becomes the fourth level, but it is not.

When is a decision said to have permanent legal force? In commercial terms, if relevant to the cassation of cases that have been closed to the Supreme Court. This is a general legal principle for determining cases that have permanent legal force. In general, commercial courts only stipulate in first instance courts in provincial commercial courts, and appeal to the Supreme Court. So, when the Supreme Court informs the litigants must have permanent legal force.

That is, if we determine that the commercial court's decision has permanent legal force. With regard to such a decision it is still open to propose an extraordinary legal remedy called reconsideration. As long as the court has not yet received permanent legal force, open remedies are the usual remedy in the form of appeals. Such a decision still includes a review. The review effort must not go further than the usual legal remedies [13] [14] [1].

In accordance with the existing rules, the authority to handle this review is the Supreme Court which acts as the first and final court and there is no further effort after the decision, final and binding on all parties. Rationalization is for the sake of legal certainty of litigants and the legal certainty of this country.

According to the existing provisions, reconsideration has the right to submit from the parties in the persona, their heirs, and the competent authority for that. If outside of that, then what happens is this persona error [13] [14].

One other principle regarding requests for reconsideration, determining applications for review can be submitted only once. The point is, when reviewing the case has been decided, there is the right of the parties to submit an application for reconsideration. This provision applies to related parties that have litigated in the review of the decision. Both those who registered and did not.

Another principle that the application for review does not delay attempts to stop the implementation or execution of the cassation decision. So the application for review should not be used as an excuse to delay the implementation of the decision. It should also not be used as an excuse to stop an ongoing execution. However, in practice in the community, applications for review are not absolute delays or stopping execution. Soften the growing practice that requests for reconsideration might not be used as an excuse to delay or stop execution. Even recently, casuistic applications are increasingly blurred. And developing an application now is a generalization of the form: "every request to reconsider to

delay or stop execution. You could say no execution is not delayed when the request for reconsideration".

This is a principle which states that the application for review does not delay or stop execution is logical and in accordance with the principle of upholding the rule of law. Because, in principle, every case submitted for reconsideration is a decision that has permanent legal force (inkracht) meaning that the decision has an executive power.

If we see from several observations of court decisions in the field of bankruptcy, there is rarely a reconsideration by the Supreme Court, the ratio can be 1: 300. Therefore, the main motivation for reconsideration is not aimed at seeking truth and justice. But it was transferred with the aim of stalling the execution time of the corner. This motivation is clearly detrimental to partners. Therefore, the principle must be restored to its proper function. At least it can only be tolerated in basic extraordinary cases.

The reason for reconsideration requests is very limited and limited. It should not deviate from the reasons specified. In the rules, an application for review can be submitted because: (1) if the decision is based on the lie or deception of the opponent after the case is interrupted or based on evidence which is later declared false by the judge; (2) if after the case is resolved, a letter of evidence is found which determines that at the time the case was examined there was not found; (3) if something is not needed or more than required, (4) if the parties are together on the same question, on the same basis by the same court or the same staff after being given another conflicting decision; (5) whether there is a judge's decision or real mistake.

The reasons stated above are to be alternative and not cumulative. One of these reasons can be stated. It does not have to be all, but it can be conveyed all, as long as the exact target. One of them struck, which was enough ground to overturn the verdict. But in the case of bankruptcy of existing commercial courts, many requests to be reconsidered for the same reasons are randomly appealed. Even in cassation it is as if the reconsideration request submitted is no different from an appeal. This can happen in practice as if asking for reconsideration of the decision does not contain defects. Applications for reconsideration are based solely on revenge motivation and delay execution long [1].

In accordance with the rules, the deadline to submit a review is 180 days. However, not all of these grace limits are based on the same legal standards. The application is different in every reason. Every reason has its own way of considering the limits of the grace period. In practice this is often ignored by the search for justice. According to the rules are as follows: (1) limit the deadline by reason of lying or guile 180 days from the date known to lie or guile.

V. CONCLUSION

Based on the discussion of the results of this study it was concluded that:

1). During the validity of Law No. 1 of 1998 concerning the 1998-early 2004 period, the decisions of the bankruptcy court at the first level in the Commercial Court, Cassation at the Supreme Court level and at the Review level (PK) at the Supreme Court were not the same. This is related to the enactment of two different laws governing the same thing in

Bankruptcy Law No. 1 of 1998 for the resolution of problems and the Bankruptcy Law 30 of 1999 concerning Arbitration and APS for the settlement of civil dispute trade. Both of these laws act as positive laws to resolve business and bankruptcy cases in Indonesia. Legal certainty is difficult to achieve because decisions in the Commercial Court are often not the same as decisions in the Supreme Court both in appeal and PK, because the judge in that case decides to use the legal basis with different considerations. If the judge uses the Bankruptcy Commercial Court to be exceptional/is the exclusive application of the Arbitration Law sidelined, whereas when the judge uses the Arbitration Law as an extra judicial court against the District Court cannot override the special nature of the Commercial Court authority (Extraordinary Court); then in this case the principle of *Pacta sunt servanda* is more advanced and becomes the rule of law principle that functions as a basic norm for all products in the form of any legal regulations in accordance with the desired law (*das sollen*).

2). In the period of the application of Law No. 1, 1998 (1998-2004 Period), several decisions have become the jurisprudence of the Supreme Court, which shows the existence of special authority not including the Commercial Court, for example, in (1). A. Cassation Decree No. 12 K/N/1999, in which the Cassation judges overturned the decision of the Commercial Court No.14/Pailit/ 1999/PN. which states that the Commercial Court is not authorized to examine and adjudicate bankruptcy applications submitted by PT. Environmental Network Indonesia to PT. Putra Putri Fortuna Windu and PPF International Corporation because of the arbitration clause in the agreement between the parties.

REFERENCES

- [1] M. Yahya Harahap, *Arbitrase Ditinjau dari: Reglement Civil Procedure (RV), Aturan Prosedur BANI, ICSID, Aturan Arbitrase UNCITRAL, Konvensi Pengakuan dan Penegakan Penghargaan arbitrase asing, PERMA No. 1 (1990)*. Jakarta: Sinar Grafika, 1991.
- [2] Ricardo Simanjuntak, *Esensi Bukti Sederhana Dalam Kebangkrutan, dalam Yuhaarie Emmy (ed.) Hukum dan Pengembangan Kebangkrutan*. Jakarta: Pusat Studi Hukum, 2005.
- [3] M. Hadi Subhan, "Prinsip Hukum Kebangkrutan," Universitas Airlangga, 2006.
- [4] Munir Fuady, *Hukum kebangkrutan, Teori dan Parctise*. Bandung: Citra Aditya Bakti, 1999.
- [5] Gunawan Widjaya and A. Yani, *Hukum Arbitrase*. Jakarta: Raja Grafindo Persada, 2003.
- [6] Billy Sumarno, *Arbitrase dan Mediasi di Indonesia*. Jakarta: Raja Grafindo Persada, 2006.
- [7] HMN. Purwosutjipto, *Understanding the Law of Trade of Indonesia*, Buku 8. Jakarta: Djambatan, 1992.
- [8] Tony Budidjaya, *Recognitin dan Penegakan Penghargaan Arbitrase Asing di Indonesia*. Jakarta: PT Tata Nusa, 2002.
- [9] HMA. Kuffal, *Menetapkan Nine Act*. Malang: UMM Press, 2005.
- [10] Supomo, *Hukum Acara Perdata Pengadilan Negeri*. Jakarta: Pradnya Paramitha, 2005.
- [11] R. Sutantio and I. Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*. Bandung: CV. Mandar Maju, 1997.
- [12] M. Yahya Harahap, *Status Otoritas dan Peradilan Pengadilan Agama*. Jakarta: Sinar Grafika, 2003.
- [13] Tim Citra Umbara, *UU Republik Indonesia Nomor 14 tahun 1985 tentang Mahkamah Agung*. Bandung: Citra Umbara, 2003.
- [14] Tim Redaksi Pustaka Yustisia, *Undang Nomor 5 Tahun 2004 tentang Mahkamah Agung*. Yogyakarta: Pustaka Yustisia, 2010.