Mandatory Clause Implications on Arbitration Disputes in Indonesia

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ABSTRACT
Whether the other party on arbitration dispute did not have good faith to enforce the arbitral tribunal's decision, this award will require other legal remedies to be executed later. There is an obscure norm in the mandatory clause of arbitration disputes; in-depth research is needed to examine this problem scientifically. Arbitration arrangements are contained in Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which until today has not yet been reconstructed against this Law even though several provisions are not precise and not in line with business developments in Indonesia. The research questions investigated in this study are (i) Mandatory clause regulation on arbitration disputes in Indonesia and (ii) Implications of the mandatory clause on arbitration disputes in Indonesia. This study employs a normative legal research method. The characteristics of the research object guide normative legal research yet remains limited by the expected outcome of the norms initially established. The approaches used in this study are (i) the analytical and conceptual approach and (ii) the statutory approach. The theories applied in investigating the problems in this research are the effectiveness theory and economic-legal theory. Through this study, the Implications of the mandatory clause on arbitration disputes in Indonesia can be identified, and the Mandatory clause regulation on arbitration disputes in Indonesia can be determined.

Keywords: *Arbitration disputes, Mandatory clause.*

1. INTRODUCTION

The dynamics of the rapidly growing economy and business are impossible to avoid disputes between the parties involved. Disputes may occur because of differences in the interests of each party; one party believes that its interests are inequal with the interests of the other party. Every dispute occurring constantly demands that a speedy dispute resolution and settlement be realized. If not, it will result in inefficient economic development, decreased productivity, fruitless business, and increased production costs.

The presence of foreign capital in the Indonesian economic sector accompanied by an understanding that a dispute resolution through the courts can take a long time has increased interest in resolving disputes through arbitration. Moreover, some disputes are cross-border in nature. [1]

Settlement of disputes through the courts has usually been an option if the two parties to the dispute are not oriented to problem-solving that prioritizes win-win solutions but rather a win-lose decision. As a result, the dispute resolution process takes a long time, and the company or the disputing parties experience uncertainty. Business dispute resolution is considered ineffective, inefficient, too formalistic, convoluted, unresponsive, open to the public, and relatively expensive. Any court decision-oriented to a win-lose solution can stretch the relationship between the two disputing parties in the future. Therefore, litigation settlement is not accepted in the business world since it is not by its development demands. Courts are considered an ineffective institution for the resolution of business disputes. In addition to the amount of time required to go through the trial process, an open court decision can also destroy the reputation of a business person. Meanwhile, in the business world, reputation is an essential element.

Settlement of business disputes through arbitration forums has become the preferred way of resolving disputes in the business world. The arbitration forum has served as an existing "court for entrepreneurs" to resolve disputes between them (business circles) and is a forum that suits their needs/wants.[2]

By this arbitration contract, the target to be reached is an agreement (before or after the occurrence of a dispute) between the disputing parties to bring their dispute to the arbitration of each dispute.

Subekti defines arbitration as a settlement or resolution over a dispute by a judge or a body of judges according to the agreement that the parties will submit to or obey the decision given by the judge or body of judges they choose or appoint to decide their case. [3] Eisenberg and Miller assert that if a form of alternative dispute resolution, such as binding arbitration, provides more excellent social benefits than litigation, the dynamics of the process should tend to induce the parties to include a clause submitting future disputes to arbitration. [4]

Sophar Maru Hutagalung stated that business people tend to choose arbitration with several factors, namely:[5]

a. The confidentiality of the dispute between the parties is guaranteed safe because the decision is kept confidential;

b. Delays caused by procedural and administrative matters are avoidable;

c. The concerned parties may choose an arbitrator who in their belief has adequate knowledge, experience, and background regarding the issue being disputed;

d. The disputing parties may determine the choice of law to resolve their dispute as well as the process and venue of the arbitration; and

e. The arbitrator's decision represents a decision that is binding on the disputing parties and is carried out through simple procedures or can be implemented directly.

If a party chooses an arbitration institution to manage their dispute, the rules applying comprise the arbitral institution's rules. However, there is an *ad hoc* arbitration. Usually, the parties will use a national arbitration act to agree on procedures or arbitration rules designed for *ad hoc* arbitration, such as the UNCITRAL Arbitration Rules.

As previously mentioned, the parties are given the freedom to choose the place/location of the arbitration. They tend to choose a location that has no connection to either party; that is to say, a neutral venue for both parties. They will also be allowed to select an arbitrator with subject-specific expertise. If the tribunal consists of three arbitrators, two of them may be selected by the parties separately, and a third will be selected by the arbitrators to be appointed. In this way, the arbitral tribunal is considered neutral for both parties. Neutrality refers to one of the main attractions of arbitration. Another major attraction includes the international recognition and support for the arbitrations that have been achieved. The 1958 New York Convention ensures broad acceptance of treaties that refer a dispute to arbitration regardless of the jurisdiction in which they are made. Both cover several reasons why arbitration has become the favorite legal choice for resolving disputes, especially for entrepreneurs experiencing rapid developments in international and domestic trade.

Another advantage of arbitration in which the process is resolved exclusively and closed to the public is that the arbitrator chosen by the parties is a competent and experienced person or people. This is important to avoid the publicity common in open court by judges who may not have particular expertise on the matters in dispute. The non-public nature of arbitration is also considered to have played an essential role in the success of the arbitration.

2. METHOD

This research was conducted for one year using normative legal research because it was alleged that there was a norm void in the Arbitration and Alternative Dispute Resolution Act (*UUAAPS*). There are three approaches to the problems under the study used: the statutory approach, the conceptual approach, and the analytic approach. The data used are in the form of primary data and secondary data collected through documentation and note-taking. Data were analyzed employing hermeneutic and qualitative techniques.

This research belongs to normative legal research. With this type of method, the research examines legal norms through the principles of legislation. The problem approaches used to encompass the statutory approach, conceptual approach, and analytical approach. Secondary data or legal materials were collected through documentation and note-taking techniques using a file system.

3. RESULT AND DISCUSSION

3.1 Mandatory Clause Regulation in Arbitration Disputes in Indonesia

A mandate clause means the District Court is not authorized to adjudicate the disputes of the parties. [6]. This is confirmed in Article 11 of the Law of the Republic of Indonesia No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("*UUAAPS*"), which stipulates that:

a. "The existence of written arbitration agreement shall nullify the rights of the parties to submit a resolution for any dispute or difference of opinion contained in the agreement to the District Court;

b. The District Court is obliged to refuse and not intervene in a dispute resolution that has been determined through arbitration, except in specified cases stipulated in this Law." [7]

The general court is considered to have not provided solutions and facilities in processing cases submitted by justice seekers. In fact, the longer the judiciary is increasingly becoming a judicial body, that is difficult to be touched by all circles of society. "Science continues to develop, and the search for truth has characteristics or attributes, that is to say, always relying on the three pillars of the development of science, comprising ontological, epistemological and axiological in nature." [8] "Ontology talks about what reality exists in the universe; epistemology talks about the methodology, validation, and validity of knowledge; and axiology talks about values and goals." [9]

When an object of the arbitration agreement is about to be examined, the arbitration mandate clause, which is the object of the agreement, necessarily needs to be reviewed first by the arbitral tribunal to ascertain whether it has referred to the competence of the arbitral tribunal. [10]. With the function of the arbitration mandate clause which is the standard method, later it will serve as a determination of judicial competence that is capable of creating justice and legal certainty for all disputing parties in the arbitration institution. Thus, business actors in litigation do not have to worry about whether overlapping claims will occur in arbitration institutions and general courts in Indonesia. This is by the theory of legal certainty developed by Radbruch, a German philosopher, who views that the regulation regarding the scope of the mandate clause must be regulated clearly and firmly in the general provisions of the *UUAAPS*.

By its function in resolving disputes between the parties who have agreed, arbitration plays a crucial role for the parties who need a solution to resolve the dispute they are facing. The first thing that must be analyzed is the cause of the dispute. Differences of opinion on agreements that have previously been mutually agreed upon must be explored more deeply because in arbitration agreements and other commercial agreements, in general, the clauses have set forth the solutions and sanctions for problems or disputes between the parties. However, suppose one of the parties insists on submitting their case to an arbitration institution. In that case, the arbitration institution should first examine the competence of the case to ensure whether the case can be classified as a case belonging to international arbitration disputes.

The main reason business actors choose dispute resolution forums is a sense of trust in achieving a sense of justice and legal certainty for those who are disputing parties. If the function of this arbitration mandate clause can be stated by the actual function in national and international law products, the benefits by Bentham's theory - namely the greatest happiness of the most significant number - will be achieved; it is that legal products related to the function of the arbitration mandate clause can guarantee to maximize benefits for national and international business actors.

3.2 Implications of Mandatory Clauses on Arbitration Disputes in Indonesia

UUAAPS has regulated the arbitration mandate clause, but the limit of this mandate clause is not regulated in general provisions. The limit of the arbitration mandate clause is arbitration disputes because only disputes that are the standard of the competence of the arbitration institution, apart from disputes, it is not a national and international arbitration competence.

Problems regarding the scope of the mandate clause of arbitration often arise due to the following reasons:

1. The public is not always able to distinguish between a dispute and a case of default;
2. Legal practitioners are also not always able to distinguish between a case of default and a dispute;
3. Judges of the District Courts tend to only look at the presence or absence of a mandate clause in material facts; if so, the case will be rejected; and
4. Arbitration judges tend to only look at the presence or absence of a mandate clause in material facts; if so, it will be accepted.

The UNCITRAL Model Law, which covers the drafting of UUAAPS, has regulated the meaning of arbitration in article 7 (1): "Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not…." An arbitration agreement is an agreement between the disputing parties to bring to the arbitral tribunal all or specified disputes that have arisen or will arise between them concerning the established law. Similarly, Article 25 (a) regulates the default of a party, especially regarding the negligence or default of the parties. In the provisions of the article, it is determined, "the claimant fails to communicate his or her statement of claim by Article 23 (1); the tribunal shall terminate the proceedings". If a plaintiff fails to file a statement of his or her claim by Article 23 (1), the court will terminate the trial. It has been mentioned that in the UNCITRAL Model Law, it is specified that there is a difference in the meaning of the word *dispute* and *default*. *Dispute* refers to a clash or disagreement, while the default signifies negligence.

Nevertheless, UNCITRAL did not confirm the nature of the dispute itself. This model law assumes that everyone has understood the concept of arbitration disputes, but it is not the case in practice. Several arbitration cases overlap and are sued through international arbitration institutions or in general courts in a particular country. This shows that there is no

apparent limit to the standard mandate clause in the arbitration agreement. Steve Ngo outlined the UNCITRAL arbitration rules, namely that the UNCITRAL arbitration rules represent comprehensive procedural rules. This covers all aspects of the arbitration process, from the appointment of arbitrators to the conduct of the arbitration process, as well as arrangements relating to the form and interpretation of arbitral awards. [11]

Model Law is designed to assist countries in reforming and modernizing their state's arbitration law, particularly regarding arbitration procedures taking into account the characteristics and needs of international commercial arbitration. [12] Also; the purpose of establishing the Model Law is stated, that is, to achieve uniformity and harmonization of arbitration laws in general.

Article 2 of the *UUAAPS* specifies, "This law provides regulation regarding the settlement of disputes or differences of opinion between the parties in a certain legal relationship that has entered into an arbitration agreement which expressly states that all disputes or differences of opinion that arise or that may arise from the legal relationship shall be resolved by arbitration or through alternative dispute resolution."

4. CONCLUSION

The mandatory clause results in the District Court is not authorized to adjudicate the disputes of the disputing parties as regulated in Article 11 of the Law of the Republic of Indonesia No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The use of mandatory clause arbitration in the recruitment of workers, consumers, and franchise contracts has generated significant controversy among legislatures, courts, administrative bodies, and scholars. Before the parties sign the arbitration agreement, the parties should have fully understood and comprehended the meaning, function, and implications of the arbitration agreement so that the risk of disputes during the agreement can be minimized.

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