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Executorial Power of Arbitration Institution in Business Disputes

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ABSTRACT

This study aims to analyze the executorial power of arbitral institution decisions in business disputes. Arbitration is a legal issue that is currently hot and interesting to discuss, because it plays an important role in today's rapidly growing business world. In analyzing this problem, researchers used normative legal research methods. Data was collected through literature study, document analysis, and observation. The research findings show that decisions are meaningless if they cannot be implemented. However, even after a decision has been made, the losing party or the defendant for execution often refuses to enforce the award voluntarily or in good faith. Whereas the decision of the arbitral institution is final and has permanent legal force, and is binding on the parties to the dispute.

Keywords: *arbitration institutions; legal force; courts; business disputes*

1. INTRODUCTION

The use of arbitral institutions as a means of settling business disputes in addition to district courts reduces the burden on a formal judicial institution.[1] Arbitration is in demand because it has many advantages compared to courts including the effective and efficient nature of resolving a business dispute because the time required is relatively short [2], confidentiality, and also decisions produced by arbitral institutions have permanent, binding and final legal force like court decisions. However, what distinguishes it from court decisions is the executorial power of arbitral awards.

The birth of the Indonesian National Arbitration Board based on Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution has given new enthusiasm and hope in efforts to resolve disputes more effectively and efficiently.[3] At a conceptual level, the Indonesian National Arbitration Board offers faster resolution of business disputes with final and binding decisions. Even though it has advantages, the Indonesian National Arbitration Board has problems when executing the award. This weakness seems to raise doubts about the coercive or executorial power of the decision of the Indonesian National Arbitration Board itself.

In relation to the timeframe for handling cases, the longer the timeframe for settling cases will result in expensive costs, erode potential and affect relationships that are no longer harmonious. Conventional justice or litigation processes are also not necessarily able to embrace common interests.[4] Therefore, it is necessary to take a process or path that results in a more "win-win solution" agreement, avoids delays caused

by procedural and administrative matters, and maintains good relationships.

The enactment of Law Number 30 of 1999 is a new spirit and hope for the community through the role of the Indonesian government which can find ways that are faster and attract the interest of business people in resolving business disputes. There are several options regarding procedures for resolving business disputes outside the court in general, which can be in the form of agreements by way of negotiation, mediation, consultation or arbitration and other forms. Meanwhile, it turns out that one form of agreement that is in great demand by business people in the world of national and international trade lately is a way of resolving business disputes through refereeing or known as arbitration.

The choice of arbitration is a priority considering that conventional justice tends to take a long time to complete.[5] The advantages of arbitration include that the confidentiality of the parties' business disputes is guaranteed and delays caused by procedural and administrative matters can be avoided. Other advantages include that the parties can choose arbitrators who are experienced, honest, fair, and have sufficient background on the issues in dispute and the parties can determine the choice of law for solving the problem and at the same time can choose the place of holding the arbitration.[6] Finally, an arbitral award is a decision that is binding on the parties through a simple procedure or can be implemented immediately.[7]

Even though the settlement of business disputes through arbitration has advantages as described above, arbitration in fact has weaknesses.[8] The weakness referred to lies in the implementation or execution of the arbitral award. This is inversely proportional to the primacy of the decision of the Indonesian National Arbitration Board which is final and binding for the parties. Ideally, if it is final and binding, then there is no other choice for the parties to comply with and implement the arbitral award in accordance with the applicable provisions.

Weaknesses in the implementation or execution of the arbitral award seem to reflect a lack of compliance, as well as the intention of the parties to the settlement results that have been reached in the arbitration, and at the same time raises a question mark over the executorial power of the arbitral award itself. This is quite reasonable, because arbitration institutions such as the Indonesian National Arbitration Board do not yet or do not have their own executorial institution and still depend on the judiciary (District Court) for the implementation of their decisions.[9]

Whereas the legal force of the word is final and binding in an arbitration decision, meaning that the decision cannot be appealed, cassation and review.[10] In essence, it is a consequence of the choice of the parties who have agreed to voluntarily (Voluntary Method) establish an arbitration institution as a medium for resolving their disputes. The executorial implementation of an arbitrary decision basically (theoretically) can be carried out independently by the parties who, based on the arbitral decision, are declared the winning party in the dispute. Basically, the implementation of the contents of an arbitral decision, in accordance with its final and binding nature, cannot be rejected by the party which the arbitrator declared lost. This is a consequence listed as an executorial clause, namely based on Article 60 in conjunction with Law Number 30 of 1999.

Along with the pace of economic growth which is a manifestation of the development of trade which was previously still domestic trade has increased to become business between countries and if there is a dispute between fellow businessmen, it is hoped that the settlement of the dispute can be resolved quickly and accurately and obtain legal certainty, and if need not be exposed to the general public which will adversely affect the smooth running of their business.[11]

In Indonesia, people generally resolve disputes between them through the judiciary or by using litigation.[12] Arbitration as an alternative for business dispute resolution has not yet found a place[13], so that a number of cases are in arrears at the Supreme Court, so it is not surprising that outsiders question whether the Indonesian people, so Litigios is like in the United States, how about the business world like traders.

Settlement of business disputes through conventional courts tends to take a long time and is complicated, requires expensive costs and has a negative impact on the relationship or relationships of the disputing parties.[14] Things are different when taking business dispute resolution in an arbitration forum. Arbitration has the potential to produce an agreement that benefits the parties, saves costs and time, avoids delays caused by procedural and administrative matters, and maintains good relationships.

Choosing the arbitration route in resolving a business dispute is indeed more likely to present a fast and simple business dispute resolution process.[15] However, arbitration also has drawbacks or weaknesses in the execution of decisions. The weakness is caused by the fact that the Indonesian National Arbitration Board does not have its own executorial body and depends on the judiciary for the implementation of its decisions. In addition, the implementation of the arbitral award emphasizes whether or not there is good faith on the part of the disputing parties.

Dispute resolution through arbitration institutions is in great demand by business people[16], because dispute resolution through arbitration institutions has advantages over formal court institutions. Other advantages of arbitration institutions include fast and simple processes, low costs, confidentiality of disputes are maintained, decisions are embracing and beneficial to the parties (win-win solution), as well as maintaining the business relations of the parties, so that they are made the choice of business actors. This research is normative juridical research. Therefore, this study aims to analyze the executorial power of arbitral institution decisions in business disputes.

2. ANALYSIS AND DISCUSSION

2.1 Arbitration

Problems or disputes often occur in social life. Problems or disputes usually occur in various lines of economic and business activity. Differences of opinion, conflicts of interest, and the fear of being harmed are often the causes of these problems or disputes. The settlement of business disputes is mostly carried out using litigation or dispute resolution through the trial process. Settlement of the dispute begins with filing a lawsuit to the district court and ends with a judge's decision. However, besides resolving disputes through the litigation process, there is also a settlement of disputes through non-litigation.[17]

What is meant by non-litigation settlement? Settlement through non-litigation is the settlement of disputes that are carried out using methods outside the court or using alternative dispute resolution institutions.[18] In Indonesia, there are two types of non-litigation settlements, namely Arbitration and Alternative Dispute Resolution in accordance with Law Number 30 of 1999 Arbitration and Alternative Dispute Resolution (UU AAPS).[19]

In language, arbitration comes from the word arbitrare (latin) which means the power to resolve a case based on discretion. Arbitration is voluntary submission of a dispute to a neutral third party, namely an individual or ad hoc arbitration. According to Abdul Kadir, arbitration is the voluntary submission of a dispute to a qualified person to resolve it with an agreement that an arbitrator's decision will be final and binding. Meanwhile, according to Law number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, in article 1, Arbitration is a method of settling a civil dispute outside the general court

based on an arbitration agreement made in writing by the parties to the dispute.

The arbitration agreement must meet the requirements, namely the agreement regarding the arbitration agreement must be made in a written agreement signed by the parties.[20] Arbitration agreements are often also referred to as arbitration clauses that are in the body of the principal agreement. This can be interpreted as a principal agreement followed or supplemented by an agreement regarding the implementation of arbitration. This arbitration clause is placed in the main agreement so that it is referred to as an accessory agreement. Its existence is only in addition to the main agreement, so it does not affect the fulfillment of the main agreement. Without a principal agreement, this arbitration agreement cannot stand alone, because disputes or disagreements arise as a result of the principal agreement. From this understanding, it can be interpreted that arbitration is a civil agreement made based on the agreement of the parties to resolve their dispute which is decided by a third party called an arbitrator who is appointed jointly by the parties to the dispute and the parties declare that they will obey the decision taken by arbiter.

How can the parties resolve their dispute at an arbitration institution? Settlement of disputes through an arbitration institution must first be preceded by an agreement of the parties in writing to make a settlement using an arbitration institution. The parties agree and bind themselves to resolve disputes that will occur by arbitration before a real dispute occurs by adding clauses to the main agreement. However, if the parties have not included it in the main agreement clause, the parties can make an agreement if a dispute has occurred using a compromise deed signed by both parties and witnessed by a Notary.

Dispute resolution by using an arbitration institution will result in an Arbitration Award. According to law number 30 of 1999, the arbiter or arbitration panel must immediately pass an arbitral award no later than 30 days after the completion of the dispute examination by the arbitrator.[21] If there is an administrative error in the decision handed down, the parties within 14 days from the date the decision is made are given the right to request corrections to the decision. The arbitral award is a decision at the final level (final) and directly binds the parties. The arbitration award can be enforced after the decision has been registered by the arbitrator or his attorney at the district court clerk. After being registered, the chairman of the district court is given 30 days to issue an order to enforce the arbitral award.

Apart from going through the arbitration process, non-litigation dispute resolution can also be carried out by means of alternative dispute resolution or alternative dispute resolution (ADR).[22] Alternative dispute resolution is a form of dispute resolution outside the court based on an agreement (consensus) carried out by the parties to the dispute either without or with the help of neutral third parties. According to Law number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, in article 1 number 10, alternative dispute resolution is a dispute settlement institution or dissent through procedures agreed upon by the parties, namely settlement outside the court by way of consultation, negotiation, mediation, conciliation, or expert judgment.

Dispute resolution through ADR has advantages compared to dispute resolution through litigation, including the voluntary nature of the process because there is no element of coercion, fast procedures, non-judicial decisions, confidential procedures, flexibility in determining the terms of problem solving, economical time and cost-effective, high likelihood of executing agreements and maintenance of working relationships.

2.2 Indonesian National Arbitrage Agency

The Indonesian National Arbitration Board (BANI) is an arbitration institution that is recognized for its existence and authority to

examine and decide on disputes that occur between parties to disputes in Indonesia.[23] BANI is a judicial institution that has a free, autonomous and independent status. Article 5 (1) UU/30/1999 stipulates that the objective of establishing BANI or other arbitral institutions is to provide a fair and speedy settlement of civil disputes arising on matters of trade, industry and finance. BANI itself is domiciled in Jakarta and has representative offices in several major cities in Indonesia, including: Surabaya, Denpasar, Bandung, Medan, Pontianak, Palembang and Batam.

The Indonesian National Arbitration Board (BANI) is an independent institution that provides a variety of services related to arbitration, mediation and other forms of out-of-court dispute resolution.[24] BANI is domiciled in Jakarta with representatives in several major cities in Indonesia. BANI has a role as an independent institution that provides facilities to organize dispute resolution processes through arbitration. In general, BANI was established with the following objectives:

a) Participate in law enforcement efforts in Indonesia by organizing dispute resolution processes outside the court which in this case focus on the trade, industrial and financial sectors.
b) Providing services for the implementation of dispute resolution through arbitration or other alternative forms such as negotiation, mediation, conciliation and the provision of binding opinions in accordance with BANI's procedural regulations or procedural regulations that have been agreed upon by the parties to the dispute;
c) Act autonomously and independently in upholding law and justice, especially in the business sector.
d) Carry out studies and research as well as training or education programs regarding arbitration and alternative dispute resolution.

Disputes that can be filed through BANI are in the field of trade, rights disputes according to laws and regulations are fully controlled by the disputing parties and according to these laws and regulations peace can be held. In this case there are several areas of dispute that can be sued at BANI, namely corporations, insurance, financial institutions, banking, telecommunications, fabrication, mining, sea and air transportation. In addition, it also includes the fields of environment, trade, licensing, franchising, distribution and agency, intellectual property rights, maritime and shipping and construction.

2.3 Principles and Principles of Arbitration

Based on the theoretical concept that underlies the existence and existence of arbitration, that there are 5 (five) principles or principles of arbitration.[25] The five principles or principles referred to are:

a) Consensualism

Arbitration must be based on the agreement of the parties in the form of an Arbitration Agreement. Arbitration agreements can be made after a dispute occurs or before a dispute occurs. Without an arbitration agreement, alternative dispute resolution institutions or arbitral institutions will not be willing to provide arbitration services to the parties to the dispute.

b) Autonomy of the parties

In arbitration, the parties have full autonomy to choose arbitrators, choose alternative dispute resolution institutions, choose arbitration procedures and determine the dispute resolution period. The principle of the autonomy of the parties is also recognized in international agreements or conventions.

c) Legal certainty

Like agreements in general, arbitration clauses are also based on the principle of legal certainty *(pacta sun servanda)* which is accommodated in Article 1338 paragraph 1 of the Civil Code which reads: "all agreements made legally apply as laws to those who make them". This principle is

binding on the contracting parties and third-party court judges and arbitrators.

d) **good faith**

The principle of good faith in arbitration is accommodated in Article 1338 paragraph 3 of the Civil Code which states "an agreement must be implemented in good faith". Good faith is a major factor in the execution of business or other contracts. If the parties have good faith, the contract or agreement will work well so that there are no disputes that need to be resolved via arbitration.

e) Simple and fast

The principle of simple and fast relates to the process of examining cases via arbitration which is expected to be simpler and faster than via court. Arbitration decisions are final and binding, there are no appeals and cassation so that they can simplify and speed up the settlement of cases.

2.4 Executorial

The definition of executorial or execution has not been explicitly regulated in Law no. 30 of 1999 concerning Arbitration.[26] However, the definition of execution is implied in Article 195 *Herzien Inlandsch Reglement* (HIR)/ Article 207 *Recht Reglement voor de Buitengewesten* (RBg) which says:

"The matter of carrying out the District Court Decision in a case that is examined at the first level by the District Court is on the orders and duties of the Chief Justice of the District Court who at the first level examines the case according to the manner stipulated in the HIR Articles."

Then Article 196 HIR/Article 208 formulated the provisions:

"If the defeated party is unwilling or negligent to peacefully comply with the Court's Decision, the winning party in the case submits an application to the Chief Justice of the District Court to carry out the Court's Decision."

Guided by the HIR and RBg provisions above, it can be interpreted that execution is nothing but the implementation of a court decision that has permanent legal force. Where the implementation can be carried out as soon as possible by the executed/lost respondent or carried out by force by the applicant through the Chairperson of the District Court.

Each judge's decision, including the arbitral award, in principle has 3 (three) types of powers[27]: 1) Binding power; 2) Strength of proof; 3) Executorial power or power to be implemented. The arbitral institution's decision is always given a grace period to carry out voluntarily by the parties to the dispute, this time limit is not regulated in a limited manner and is left to the discretion of the Arbitrator. The implementation of the execution of the arbitration institution's decision by the District Court is dependent on a condition, that the arbitral award within 30 (thirty) days from the time the decision is pronounced must be registered with the District Court clerk's office. If within 30 (thirty) days the arbitral award is not registered or it is late to register it, then the arbitral award cannot be enforced or non-executable.[28]

The procedure for carrying out the execution of the arbitral institution's decision is regulated or determined in Articles 59 to 64 of Law no. 30 of 1999 authorizes the Chairperson of the District Court prior to carrying out the execution to examine whether the decision of the Arbitration Board has fulfilled the formal and material requirements. As for what is meant by formal terms is the agreement of the parties that their dispute will be resolved in an arbitration institution[29], the agreement must be stated in a written document. And whether their dispute is included in trade disputes and regarding rights which, according to law and statutory regulations, are fully controlled by the disputing parties. Furthermore, what is referred to as the material requirement is that the decision of the arbitral institution is not contrary to decency and public order.

Based on the author's analysis above, in a normative juridical way to enforce an arbitration award that is not implemented voluntarily, especially by a party declared to have lost the case, Law no. 30 of 1999 provides one form of coercion to parties who do not want to voluntarily carry out the arbitral award, namely in the form of execution. Execution of arbitration is an attempt by the state (in this case carried out by the District Court) to implement a decision from an arbitration institution (which is private law) which is not carried out voluntarily by the parties, especially the party who is declared to have lost. The implementation of the arbitral award (execution) is a legal product of an institution (Institution) carried out by another institution (Institution). In this case the decision of the arbitral institution is implemented by a judicial body, namely the District Court, thus making the arbitral institution's decision final and binding, with the implication that there is no remedy for the arbitral award[30], binding on the parties, efficiency and effectiveness are characteristics of the arbitration process.

3. CONCLUSION

In social life, problems or disagreements are common. Problems or disputes occur frequently in many areas of economic and business activity. These problems or disputes are often caused by differences of opinion, conflicts of interest, and fear of loss. Settlement of business disputes through arbitration institutions is carried out in two ways, namely through *factum de compromittendo*, before the arbitration clause dispute has been included in the main agreement, or through a compromise deed after the arbitration clause dispute has been completed in a written form separate from the main agreement. Meanwhile, according to Articles 27 to 60 of Law Number 30 of 1999, the process of resolving disputes through an arbitration institution and having an arbitration institution decision is final and has permanent legal force and is binding on the parties, the parties must be bound by the arbitral award, even though at the execution stage still requires the involvement of the District Court. Execution of arbitral institution decisions in the settlement of business disputes as stipulated in Articles 59 to 64 of Law no. 30 of 1999 within a maximum period of 30 (thirty) days from the date the decision was pronounced, the original or authentic copy of the arbitration award is submitted and registered by the arbiter to the Registrar of the District Court for material requirements to be reviewed by the Chairman of the District Court who made the arbitral award has binding legal force and is final and binding.

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