

# Questioning the Indonesian Capital Market Arbitration Board

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## ABSTRACT

The state has an important role in national economic activities, including Indonesia. One of the policies taken by the government is to activate and encourage capital market activities in Indonesia to further develop as one of the pillars of economic success indicators in addition to banking and other direct investment. Although the role of the capital market in development is very close, potential disputes, violations or legal problems often occur. Violations of the law that occur in the capital market are certain to harm the capital market, including capital market investors. To overcome this problem, one of the policies taken by the government is to form a body that can specifically solve problems regarding the capital market. This is important, because law enforcement in the capital market aims to protect the interests of investors and the public from harmful practices carried out by both issuers and capital market legal consultants.

**Keywords:** Indonesian Capital Market Dispute Resolution Institution, Capital Market Investors.

## INTRODUCTION

Economic activity cannot be separated from every society. Such activities at the initial stage are aimed at meeting the needs of life. In a further stage, economic activity is aimed at obtaining the greatest profit, this is also the case in Indonesia. The state has a role in national economic activities. Based on the constitution, Article 33 paragraph (4) of the Constitution of the Republic of Indonesia of 1945 results of the 4th Amendment of 2002 (hereinafter abbreviated as the 1945 RI Constitution),

regulates that the national economy is implemented based on economic democracy with the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.

One of the growing activities is the field of financial services, one of which is the capital market. The capital market is one of the important aspects in national development activities considering that the capital market functions as a means of financing and a means of investment. Based on its regulation, Law Number 8 of 1995 concerning the Capital Market (hereinafter abbreviated as UUPM) formally defines the capital market as "*activities related to Public Offering and Securities Trading, Public Companies related to the Securities issued by it, and institutions and professions related to Securities*".

The capital market itself is a market for various long-term financial instruments that can be traded, both debt securities (bonds), equities, mutual funds, derivative instruments and other instruments. The capital market is a means of funding for companies and other institutions (for example the government, private sector and others) as well as a means for investment activities. Thus, the capital market facilitates various facilities and infrastructure for buying and selling activities and other related activities. Financial instruments traded in the capital market are long-term instruments (period of more than 1 year) such as stocks, bonds,

warrants, rights, mutual funds, and various derivative instruments such as options, futures, and others. (Wenge Wang, 2019)

One of the policies taken by the government is to activate and encourage capital market activities in Indonesia to further develop as one of the pillars of economic success indicators in addition to banking and other direct investment (Nindyo Pramono, 2013). Although the role of the capital market in development is very close, potential disputes, violations or legal problems often occur. Violations of the law that occur in the capital market are certain to harm the capital market, including capital market investors.

The legal apparatus provides a mechanism for the aggrieved party in the capital market to demand its rights. Article 111 of the UUPM stipulates that any party who suffers losses as a result of violations of the UUPM or its implementing regulations can demand compensation, either individually or jointly with other parties who have similar claims, against the parties or parties responsible for the violation. One of the mechanisms that can be used to claim their rights is through dispute resolution mechanisms, both formally and non-formally. As a legal state that is being built, there is a formal dispute resolution mechanism.

In national development activities, the development of clear dynamics of tasks and roles between the branches of legislative, executive and judicial power. The legislature along with the executive acts as a policy maker which is set forth in the form of a law that is binding on the public. The executive institution carries out all policies that have been decided in the form of binding law, while the judicial institution acts as a referee who adjudicates if disputes, conflicts, discretion, disharmony or conflicts arise between norms containing economic policies in the law and the basic and highest policies contained in the 1945 RI Constitution. (Jimly Asshiddiqie, 2016)

Settlement of civil disputes in cases of lawlessness in the capital market through the district court is still rarely found, even though one of the judicial institutions that

plays a role in law enforcement is the district court. Several reasons certainly underlie this condition; therefore, it is necessary to be examined in the hope that if a problem or legal obstacle is found, a legal recommendation can be sought.

## **RESEARCH METHOD**

The type of research used is normative juridical, namely research that is focused on testing the application of rules or norms in applicable positive law and the approach used is the Statute Approach (Peter Mahmud Marzuki, 2013). Regarding the data sources used in this study using secondary data which are classified into three groups, namely primary legal materials, secondary legal materials and tertiary legal materials. Sources of primary legal materials used such as treatises, academic manuscripts of laws and regulations, and so on. The sources of secondary legal materials used are in the form of textbooks, law journals, legal magazines, expert opinions and various kinds of references related to this research. As well as sources of tertiary legal materials as supporting material for research in the form of legal dictionaries, internet media, encyclopedias and books on the terms used regarding this research (Peter Mahmud Marzuki, 2013). Data collection is carried out with literature studies, this technique is used by the author in order to collect data to answer matters related to the problems to be discussed.

## **DISCUSSION**

### **Dispute Resolution through the Indonesian Capital Market Arbitration Board**

The capital market is one of the institutions that is taken into account for economic development and has an important role in the financial sector of a country. The capital market offers a new alternative for businesses to obtain sources of funds for their businesses and investors to invest outside of banking investments and other forms of investment. Therefore, the state or

government has a reason to participate in regulating the movement of the capital market. If you carry out business relations and agreements, there will definitely be the possibility of a dispute. But no one wants a dispute with someone else to happen. Therefore, in a business relationship or an agreement, each party must anticipate the possibility of a dispute that may occur at any time in the future. The dispute that needs to be anticipated is how to implement the clauses of the agreement what the content of the agreement is or is caused by other things ( Anna Rokhmatussa, 2011)

In general, law enforcement can be interpreted as the act of applying certain legal means to impose legal sanctions to ensure compliance with the stipulated provisions. In another sense, law enforcement is a process of realizing the wishes of the law (i.e. the thoughts of the law-making body formulated in the regulations of the law) and becoming a reality. Forms of law enforcement such as courts, police and other out-of-court dispute resolution agencies (non-litigation) (Satjipto Rahardjo, 2003).

In law enforcement, an effort is also needed to resolve a legal problem or dispute in the event that an individual or community feels disturbed or feels that his rights are disturbed. Efforts to resolve the problem so that the situation can be restored in accordance with applicable law, it is also called a dispute resolution as an effort to enforce the applicable law. With regard to law enforcement, therefore the goal is to achieve the purpose of the law itself.

Related to disputes that occur in the capital market realm, it is necessary to resolve legally in the context of law enforcement or in order to return everything to what it should be. If legal problems occur, there are legal violations. With these violations, the party who violated his rights also has the right to make a claim for his rights to be returned. After all recovered, then the law is re-enforced in conflict situations. Likewise, in cases in the capital market realm, any violation of the law committed, which is

likely to harm many parties, needs to be addressed by being resolved legally, so that each of the aggrieved parties gets legal recovery (Sherly Ayuna Putri, et al, 2019).

In capital market activities, industry players before entering into cooperation and agreements with other parties are advised to first ensure that the forum to be chosen in resolving disputes more clearly, because the vagueness of the choice of forum makes dispute resolution difficult to quantify. The use of the dispute resolution forum choice clause is essentially the freedom of the parties. Basically, the use of alternative methods of dispute resolution to resolve business disputes has long been an option.

The most well-known settlement of disputes is through the courts, but in reality, many parties avoid this method. This is not only because the litigation process in the courts takes a long time and complicated procedures, but also because judges in courts are not equipped with adequate knowledge of the substance of business law. As a result, the judge was unable to provide a solutive option for problem solving. The adjudication process is also unable to support the increase in business activities but instead closes the opportunity for business actors in disputes to cooperate again. The length and length of the dispute resolution process through the court certainly has consequences related to the high costs required, as well as other reasons related to court hearings in the District Court which are carried out openly, even though in trade activities the priority is confidentiality. In the dispute resolution process, business actors need certainty and legal protection in order to ensure the continuity of economic activities. With the limitations of the court guaranteeing these two things, causing access to justice for business people to be neglected. Dispute resolution through negotiation, mediation, conciliation, or arbitration is able to answer the needs of these business actors (Herlina dan Irna Nurhayati, 2010).

Arbitration is one of the most preferred ways of resolving out-of-court disputes by

entrepreneurs, as it is considered the most suitable way of being compatible with the needs in the business world. In fact, arbitration is considered as an independent court of entrepreneurs in order to resolve disputes according to their wants and needs (Gatot Soemartono, 2006).

Along with the passage of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as the government's response to the need for a dispute resolution institution that is conducive to business actors and able to support economic activities, then the establishment of special dispute resolution institutions that focus on resolving certain business disputes.

Disputes that occur between capital market participants are generally due to policies in the economic sector, namely in the form of an increase in the role in the capital market sector, allowing disputes to arise between several parties. As one of the means to resolve capital market disputes, an arbitration institution was established under the support of rules issued by the Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK), namely Law Number 8 of 1995 concerning the Capital Market and various rules of the Capital Market supervisory Agency and Financial Institutions (Frans Hendra Winarta, 2012).

Business dispute resolution, especially in the capital market, the use of dispute resolution methods through alternative dispute resolution has become an option for the parties to the dispute. Article 1 number 10 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution defines *"Alternative dispute resolution is an institution for resolving disputes or opinions through procedures agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment"*. One of the institutions that provide Alternative Dispute Resolution (APS) is the Indonesian Capital Market Arbitration Board (BAPMI)

which specializes in civil disputes in the capital market field (Rachmadi Usman, 2013).

The Indonesian Capital Market Arbitration Board (BAPMI) was established for dispute resolution in the capital market sector which was formed in 2002. BAPMI as a manifestation of the government's efforts in providing protection to investors and the public, namely by providing certainty and fair law enforcement. The goal is to provide better protection to investors and the public in the event of a dispute (Bacelius Ruru).

BAPMI provides dispute resolution services if requested by the parties to the dispute through an out-of-court dispute settlement mechanism. BAPMI offers four types of out-of-court dispute resolution that can be chosen by the parties to the dispute, namely binding opinion, mediation, adjudication, and arbitration. Through these four ways of settlement, it is hoped that it will produce a verdict that provides a win-win solution for the parties (Frans Hendra Winarta, 2012).

The establishment of BAPMI as an effort to resolve disputes from many vulnerable points in the capital market sector that require a helping hand from the juridical sector to fix it. With the establishment of BAPMI, issuers, public companies, shareholders, and parties who feel aggrieved due to capital market transactions already have competent institutions to resolve their disputes. In addition to guaranteed effectiveness and confidentiality, the output produced can also be accounted for, both in terms of law and in terms of its economy (Bambang Sutiyoso, 2008).

This large number of business transactions certainly has the potential to give birth to conflicts or disputes between the parties. Every dispute that occurs certainly requires quick resolution and resolution. Because allowing business disputes to be resolved too late will result in inefficient economic development, decreased productivity, the business world regressed, and production costs increased. This will certainly harm consumers and hinder the improvement of welfare and social progress of the workers.

In practice, BAPMI urges parties in capital market business transactions to pay attention to several things to be able to resolve their disputes through BAPMI, namely: (BAPMI)

1. If the parties have not included the forum choice clause in the agreement, then the dispute that arises is likely to be resolved through the court because the settlement forum outside the court can only take place on the basis of a written agreement. The consequence is that the parties will face a lengthy settlement process until the court's ruling is of permanent force. If the parties intend to choose an out-of-court settlement then the parties must first make an addendum to the agreement.
2. If the arbitration is deemed to be a settlement mechanism whose validity corresponds to a court award, then the parties shall choose one of the existing forums. In other words, the choice in the clauses of the contract cannot be both if ambiguous. For example, the forum choice clause states "*the dispute will be resolved through a court or arbitration*", or if it is not biased resolved through arbitration it will be submitted to the judiciary". It ostensibly gives the parties an option whether to bring justice or to arbitration. This is usually due to the ignorance of the parties or is considered the most neutral to accommodate the wishes of the parties when negotiating the contract. Though such a clause is a fatal mistake. The consequence is that the clause is called the "*nonsense arbitration clause*" for its existence is futile and unenforceable the alternative for the parties is to immediately make amendments and replace them with clauses that choose expressly between the two options of the forum, whether the forum of the court or whether the forum of arbitration.
3. The third important factor that needs attention if the parties choose the arbitration forum as a form of dispute resolution, then the clauses in the

dispute resolution agreement through the arbitration forum need to make the following:

- a. Whether the arbitration will be conducted through an arbitral institution or in the form of an ad hoc arbitration. If it is through an arbitral institution then it must be mentioned the name of the institution, for example BAPMI;
- b. Contains arbitration procedures or rules. If you have chosen an arbitral institution, it will usually follow the procedures or rules published by the arbitral institution concerned;
- c. The place where the arbitration took place;
- d. Choice of law;
- e. Composition of arbitrators whether single or tribunal – If in the form of an assembly it must be odd at least three arbitrators;
- f. Language used in the arbitration;
- g. A statement of affirmation from the parties that the arbitral award is final and binding; and
- h. How is the execution of the arbitral award and the imposition of arbitration costs.

Although BAPMI has guaranteed its professionalism, neutrality and independence in resolving capital market disputes, in fact since its establishment in August 2002 until now only a few disputes have been resolved by arbitration through BAPMI. Currently, it is recorded that BAPMI has only handled disputes related to share liens and several cases that have entered the arbitration level, the rest are only limited to settlement through mediation (Kabar Bisnis).

The cases that BAPMI has handled are the first case, a dispute between an investment manager and an institutional investor in connection with the failure of the investment manager to provide returns as agreed. The second case, a dispute between the underwriter and the investor in connection with a misunderstanding regarding the size of the commission for allotment of shares. The third case, a dispute

between the parent company and the subsidiary in connection with the execution of the pledge of shares. The subsidiary did not obtain approval from the parent company to withdraw its dispute which is being processed in court to BAPMI arbitration/mediation. The fourth case, a dispute between a selling broker and a buying broker in connection with a default, (Bacelius Ruru). The fifth case through BAPMI arbitration is a capital market dispute case between PT Nikko Securities Indonesia (PT NSI) and PT Bank Permata, Tbk (PT BP).

Alternative dispute resolution, both through district courts and arbitration channels actually have different justice values, namely District Courts which have the value of procedural justice, while Arbitration (BAPMI) has the value of substantive justice which means that the justice provided is justice derived from the substance justice of its law without regard to the error of the procedural. The two dispute resolution forums have the value of justice that can function in resolving capital market disputes even in different ways.

## **CLOSING**

### **A. Conclusion**

The capital market is a financial sector that plays an important role in national development. The capital market itself is regulated in Law Number 8 of 1995 concerning the Capital Market. This arrangement is needed in order to create a reasonable, orderly and efficient capital market so that the capital market is able to become part of national economic activities that contribute to the nation's economic development. Legal problems in the financial services sector, especially such as the capital market, are increasingly common. The types of disputes that occur also vary because they follow new types of capital market products and the flexibility of transactions that are disrupted by technology. An important aspect that must be considered in disputes that occur in the capital market is law enforcement, because

in realizing a reasonable, orderly and efficient capital market, it is also necessary to play a role in dispute resolution, so that the situation that occurs can recover and create legal certainty for parties carrying out activities in the capital market and protect the interests of capital market participants from harmful practices. The parties must be able to properly estimate strategies in resolving disputes, both through district courts and arbitration channels, although the characteristics of the two methods are different, but basically both have justice values that can function in resolving capital market disputes even in different ways.

### **B. Suggestion**

It is necessary to increase the role of law enforcement in resolving disputes in the Capital Market sector, because this is a policy in the economic field that can strengthen each other. Therefore, law enforcement in the Capital Market is the most important tool to protect the interests of investors and the public from harmful practices carried out by both issuers and Capital Market legal consultants. Law enforcement officials should continue to improve their capacity and professionalism in resolving capital market disputes, especially for judges who examine lawsuit cases related to capital market law to pay more attention to and carefully consider the regulations, principles and doctrines that apply in the field of capital market law that are notoriously complicated, so that the legal certainty to be achieved by the parties seeking justice can be realized. Thus, capital market law enforcement through dispute resolution can be created properly and can also give confidence to the public in the judiciary and contribute to developing the national economy.

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