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Bankruptcy Petition Based on Debt Arising from Agreement with Arbitration Clause

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Abstract

The business world requires efficient and cost-effective methods of resolving business disputes. With the presence of Arbitration Institutions as an alternative for resolving business disputes outside the judicial system, the business world has various options tailored to their characteristics and needs. Apart from going through arbitration institutions, it turns out that debt dispute resolution can also be done through PKPU (Postponement of Debt Payment Obligations) and filing for Bankruptcy at the Commercial Court. The disharmony between the absolute authority of arbitration which is extra-judicial in nature and the absolute authority of the Commercial Court which is an extraordinary court in examining and adjudicating bankruptcy applications gives rise to legal problems which can affect the confidence of the business world. This research aims to analyze bankruptcy applications based on debts arising from agreements with arbitration clauses. This research uses normative legal research methods with a statutory approach and a legal concept analysis approach. The research results show that the Commercial Court is an extraordinary court, so it has the authority to adjudicate bankruptcy applications even though there is an arbitration clause. To file a bankruptcy petition at the Commercial Court, it is necessary to fulfill the requirements of simple proof of the existence of at least two creditors, one of whose debts is due and can be collected.

Keywords Arbitration; Bankruptcy; Absolute Competence; Commercial Court

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1. INTRODUCTION

The business world is in dire need of a fair, fast and low-cost business dispute resolution mechanism. The history of the birth of arbitration in Indonesia dates back to the enactment of the Dutch Civil Procedure Law, which is regulated in Article 615 to Article 651 of the RV. With the enactment of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration is increasingly recognized and has become the main choice for the business world to resolve business disputes.

Because the arbitration process has no appeal and cassation, in the consideration of the business

world, settlement through arbitration tends to be cheaper and more measurable. Arbitration is seen as having fast, efficient and thorough characteristics because there are no appeals and cassations. In addition, the advantages of arbitration are that the decision is*binding* and*final* and the nature of the arbitration settlement is*confidential* where the arbitration settlement process is not published (Ariawan Gunadi et al., 2021).

Arbitration allows the disputing parties to settle without being bound by the formalities and procedures in accordance with the procedural law of the Court in accordance with the HIR civil procedural law. Arbitrators appointed in examining and deciding arbitration disputes not only have scientific provisions in the field of law, but can also come from academics or professionals who have special qualifications in the field of business or certain industries so that they are expected to have the ability to understand and explore aspects of justice and legal certainty in deciding disputes, so that maximum results are achieved.

Another advantage of Arbitration is that the arbitration settlement is*confidential* where the arbitration settlement process is not published. This is not possible in Court, because the procedural law in Court requires open examination of cases, which is certainly not favored by business people who have an interest in maintaining reputation and sensitivity to litigation publications (Lubis & Firmansyah, 2019).

The submission of disputes through the Arbitration Institution is regulated in Article 2 of Law Number 30 of 1999 which regulates the settlement of disputes or disagreements between parties who have entered into an arbitration agreement which expressly states that all disputes or disagreements that arise or may arise from the legal relationship are resolved by arbitration. This agreement or agreement can be made before or after the dispute occurs. An arbitration agreement made before a dispute occurs is called a *pactum de compromittendo* or arbitration calcula. Meanwhile, an arbitration agreement made after a dispute occurs is called an *acta compromite.*

Based on Article 3 of Law Number 30 of 1999, the authority of Arbitration is *extra judicial* to the court, meaning that with the arbitration clause, the Parties are absolutely unable (not authorized) to file a lawsuit at the District Court (Memi, 2017).

In practice, the binding and final nature of Arbitration awards in the implementation of their execution*(enforcement*) is not easy, because often the losing party does not want to voluntarily implement the arbitration award and the arbitration institution does not have an organ to be able to force the losing party to be forced to carry out the award, just like a court that has a bailiff organ to carry out execution, therefore a way out is sought by involving the state through the Court in the process of execution*(enforcement).* Because the arbitration award in its nature is to punish the losing party to pay the debt, the execution is carried out in accordance with Article 196 HIR, namely forced efforts to

confiscate the assets of the defeated party (Harahap, 2022).

During the monetary crisis of 1998, the Indonesian government failed to deal with the crisis caused by the collapse of the Rupiah against the US dollar, thus destroying every part of the Indonesian economy. The business world became uncontrollable and forced Indonesia to become a patient of the International Monetary Fund (IMF). As one of the conditions for the IMF to assist Indonesia in dealing with the crisis, the IMF required that in order to protect the national interest, the government immediately reform the Indonesian Bankruptcy Code inherited from the Dutch, which had been in effect since 1906. This was because the IMF wanted to protect the business world, especially foreign investment in Indonesia, so that the Indonesian business world had a set of laws for debt settlement.

The result of the bankruptcy reform was that on April 22, 1998 the Government promulgated Government Regulation in Lieu of Law No. 1 of 1998, concerning amendments to the Bankruptcy Law. Perpu No. 1 of 1998 was enacted into law by Law No. 4 of 1998 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 1998 on the Amendment to the Bankruptcy Law into Law. The next reform was the enactment of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (Dewi, 2019).

After the reform in the field of bankruptcy law in Indonesia, people who were previously unfamiliar with bankruptcy law became one of the popular laws to be used as an instrument of debt settlement and recovery against debtors.

Bankruptcy law reform is needed to restore business confidence in Indonesia. The difficulty of resolving debt disputes, which increased rapidly due to the monetary crisis, triggered a wave of distrust in the business world, especially foreign business actors such as banks and lenders and funding facilitators and trading partners (Abimanyu, 2023).

The most important impact of the Bankruptcy Law reform is the birth of a Special Bankruptcy Court authorized to examine and adjudicate Bankruptcy Applications. Hadi Shubhan, in a speech delivered at the Inauguration of his Professorship in Bankruptcy Law at the Faculty of Law, Airlangga University in Surabaya, explained that prior to 1998, precisely before the enactment of Perpu No. 1 of 1998, Bankruptcy Applications were examined and decided by the local District Court as part of General Civil Cases. Judges who heard bankruptcy petitions were General Civil Court judges, which meant that they were not specifically assigned to hear bankruptcy and PKPU cases. This means that bankruptcy cases are the competence of the General Court in the District Court. With the reformation of the new Bankruptcy Law, a special court was established to hear bankruptcy cases called the Commercial Court which is located under the District Court (Aprita, 2019).

Until now there are 5 (five) Commercial Courts, namely the Central Jakarta Commercial Court, Medan Commercial Court, Ujung Pandang Commercial Court (Makassar), Commercial Court at

Surabaya District Court, and Commercial Court at Semarang District Court.

Hadi Shubhan explained that with the existence of the Special Bankruptcy Court, the Commercial Court has absolute competence to hear bankruptcy and PKPU applications and other matters. The competence of the Commercial Court has derogated the competence of other courts that intersect with the competence of the Commercial Court related to other lawsuits, among others: civil, administrative, tax, religious, industrial relations court, and arbitration. This is according to Hadi Shubhan because bankruptcy is an unusual or abnormal collection procedure(*oneigenlijke incasspocedures*) Thus there is disharmony between the Arbitration Law and the Bankruptcy Law regarding the authority to adjudicate disputes and bankruptcy petitions based on agreements containing arbitration clauses.

Conflict or disharmony between the Arbitration Law and the Bankruptcy Law regarding the authority of the court to hear disputes and bankruptcy petitions based on agreements with arbitration clauses may occur due to the different provisions between the two laws. The Bankruptcy Law grants absolute competence to the Commercial Court in adjudicating bankruptcy and PKPU petitions and related matters, while the Arbitration Law authorizes arbitration institutions to resolve disputes mediated by arbitration agreements. To resolve the conflict or disharmony, steps that can be taken include the government can revise or harmonize the Arbitration Law and Bankruptcy Law to clarify the authority of courts and arbitration institutions in resolving disputes involving agreements with arbitration clauses. In addition, courts and arbitration institutions can work together to resolve disputes efficiently and effectively, taking into account the interests and needs of the parties involved and respecting the principles of applicable law.

Therefore, the purpose and scope of this journal are: First, what is the basis for waiving the absolute competence of the arbitration institution in the application for bankruptcy in the Commercial Court, and whether debt disputes originating from agreements with arbitration clauses must be submitted to the arbitration institution or bankruptcy. The writing of this journal is expected to be theoretically useful for the development of legal science in general and the development of the legal fields of Arbitration, PKPU and Bankruptcy in particular and practically to increase knowledge for academics, legal practitioners advocates, and other related parties.

2. METHOD

Research related to this paper is categorized as Normative Legal Research, which is research that focuses on analyzing legal norms and placing legal norms as objects of research. In discussing research problems, an*analytical conceptual approach* is used. Legal concept analysis, or analytical conceptual approach, is an approach in legal research or analysis that focuses on understanding and deciphering legal concepts in depth. This approach aims to identify, understand, and explain the legal concepts

underlying a regulation or legal system. In analyzing legal concepts, legal researchers or analysts will dissect these concepts from various perspectives, such as philosophical, historical, theoretical, and contextual aspects. Both approaches are used as a basis for researchers in building legal arguments in order to solve research problems.

This research uses primary legal materials in the form of laws and regulations, and secondary legal materials which include books, journals, and other written legal materials. Research legal materials are collected through document studies, in search of conceptions, theories, legal opinions relevant to research problems. In collecting legal materials for research, document studies are carried out with source identification, material collection, selection and identification, analysis and evaluation, interpretation and understanding.

In selecting primary and secondary legal materials, there are several criteria or considerations that are important to consider to ensure the accuracy and relevance of the information used in the research. The criteria used included sorting based on relevance, credibility and accuracy. The legal materials collected were analyzed qualitatively and comprehensively. After being analyzed, the legal material is then presented in a descriptive analysis.

3. FINDINGS AND DISCUSSION

Bankruptcy is a legal process that states that a debtor (person or business entity that has debts) is no longer able to pay its debts. A bankruptcy petition can be filed by a creditor (a person or business entity with a debt) to the Commercial Court. In some cases, the debt that forms the basis of a bankruptcy petition arises from an agreement containing an arbitration clause. An arbitration clause is a clause in an agreement stating that the settlement of disputes arising from the agreement will be carried out through arbitration.

Basis for Waiver of Absolute Competence Abitrase

Conflict or disharmony between the Arbitration Law and the Bankruptcy Law regarding the authority to hear disputes and bankruptcy petitions based on agreements with arbitration clauses may occur due to the waiver of the absolute competence of arbitration. This waiver concept refers to a situation where the district court, in this case the Commercial Court, overrides or negates the arbitration authority that has actually been stipulated in the agreement. Based on Article 3 of Law Number 30 of 1999, the authority of Arbitration is *extra judicial* to the court, meaning that with the arbitration clause, the Parties are absolutely unable (not authorized) to file a lawsuit at the District Court.

The authority of the Commercial Court in examining and deciding on bankruptcy applications is regulated in Article 1 paragraph (7) jo Article 300 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and PKPU which reads: "The*court as referred to in this Law, in addition to examining and*

deciding on applications for bankruptcy statements and postponement of debt payment obligations, is also authorized to examine and decide on other cases in the field of commerce whose determination is made by law."

The authority of the Commercial Court to examine bankruptcy petitions even though there is an arbitration clause is confirmed in Article 303 of Law Number 37 of 2004 concerning Bankruptcy and PKPU which reads: "The*court remains authorized to examine and resolve applications for bankruptcy statements from parties who are bound by agreements containing arbitration clauses, as long as the debt that is the basis for the application for bankruptcy statement has fulfilled the provisions referred to in Article 2 paragraph (1) of this Law."*

The hierarchy of laws and regulations is regulated according to Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. The hierarchy of laws and regulations in Indonesia are: Law - Constitution of the Republic of Indonesia Year 1945; Decree of the People's Consultative Assembly; Law / Government Regulation in Lieu of Law; Government Regulation; Presidential Regulation; Provincial Regional Regulation; and Regency / City Regional Regulation. The material of lower regulations must not contradict the material of higher laws and regulations.

In conditions where there is conflict or conflict between laws and regulations, we use three legal principles to analyze and resolve conflicts of norms, namely: The principle of *lex superior derogat legi inferiori*, The principle of lex *specialis derogat legi generali*, The principle of lex *posterior derogat legi priori*.

The principle of lex *superior derogat legi inferiori* states that lower regulations must not conflict with higher regulations. Thus, the higher regulation will override the lower regulation. This principle only applies to two regulations that are not hierarchically equal and contradict each other.

The principle of *lex specialis derogat legi generali* states that more specific regulations override more general regulations. The principle of lex specialis derogat legi generali only applies to two regulations that are hierarchically equal and regulate the same material.

The principle of *lex posterior derogat legi priori* states that new regulations override old regulations. This principle aims to prevent legal uncertainty that may arise when there are two equal regulations based on hierarchy.

Based on the principle of *lex specialist derogate lex generalis*, the Bankruptcy Law is a special regulation (regarding debt disputes and bankruptcy) while the Arbitration Law is considered a general rule. Based on the principle of *lex posterior derogate legi priori*, the point is that the newly formed rules override the old rules, which means that the old rules do not apply if there are new laws and regulations, even though the intent and purpose of the formation of these regulations is different and may even be contrary to the old laws and regulations. This clarifies the competence and position of the Commercial Court so that the Arbitration clause can be overridden by the provisions of Article 303 of the PKPU and

Bankruptcy Law.

So based on these legal principles, the author argues that even though in an agreement there is a clause to submit to and resolve all disputes arising from the agreement within the legal authority (jurisdiction) of the arbitration institution, the clause does not necessarily make the Commercial Court not authorized to hear bankruptcy applications based on the agreement. This is because First, the authority of the Commercial Court does not arise from the clause but from the Law which specifically regulates that the Commercial Court is not subject to the choice of law and clauses stipulated in an agreement; Second, the Law does not provide a choice of law in bankruptcy and PKPU applications other than the Commercial Court as a special*court (extra ordinary court*).

The author summarizes several reasons why the absolute competence of the Arbitration institution can be derogated from the competence of the Commercial Court in terms of debt dispute resolution based on several reasons, namely:

1. In line with the concept of contractarian theory, which prioritizes the interests of all creditors, even creditors who do not have a contractual relationship that contains an arbitration clause with the debtor, because in fact these creditors also bear financial risks if the debtor is bankrupt.
2. Arbitration awards only involve parties involved in agreements with arbitration clauses and are condemnatoir in nature, while bankruptcy law is in the realm of public law and the Commercial Court's decision on Bankruptcy is declaratory which of course has the nature of erga omnes, which applies to all creditor parties even though they do not file for bankruptcy against the debtor.
3. In accordance with the principle of paritas creditorium contained in Articles 1131 and 1132 of the Civil Code, it is very unfair if the debtor can own property while the debtor's debt to the creditor is not paid. The Civil Code states that all assets of the debtor by law become collateral for his debts, even though the debtor's property is not directly related to the debt.
4. The bankruptcy petition against the debtor is in accordance with the principle of debt pooling and debt collection, which is a collective proceeding institution, namely liquidating all the assets of the bankrupt debtor which are then used to be distributed to the creditors according to the type of debt. Without this debt pooling principle, there is no protection for debtors and creditors because each creditor can independently compete to claim the debtor's assets for the benefit of each creditor.
5. Arbitration is extra judicial which should not override the authority of the Commercial Court which is an extra ordinary court that has the right to examine and hear PKPU and Bankruptcy applications. The Bankruptcy Court is a special court, therefore the Commercial Court has absolute competence to hear Bankruptcy and PKPU applications and other matters.
6. Bankruptcy is an unusual or abnormal collection procedure(oneigenlijke incasspocedures), therefore, the competence of the Commercial Court has derogated the competence of other courts

that intersect with the competence of the Commercial Court related to other lawsuits - among others: Civil, Administrative, Tax, Religious, Industrial Relations Court, and arbitration.

Thus, the absolute competence of arbitration can be derogated by the Commercial Court, provided that the conditions for bankruptcy petition are fulfilled in accordance with the Bankruptcy Law.

Whether Debt Disputes Originating from Agreements with Arbitration Clauses Should Be Submitted to Arbitration or Bankruptcy Institutions

After understanding the legal basis for the competence of the Commercial Court to derogate from the absolute competence of the Arbitration institution, a new question arises, namely if there is a debt dispute between the creditor and the debtor who has agreed in an agreement with an arbitration clause, whether the dispute resolution can be submitted through the arbitration institution or must go through the application for PKPU and Bankruptcy in the Commercial Court.

To answer this question, the author makes similarities and differences in the scope of procedural law between the arbitration institution and the Commercial Court: First, the Commercial Court and the Arbitration Institution are both authorized to hear debt disputes, but the arbitration institution is also authorized to hear all disputes within the scope of business; Second, settlement through arbitration can only be done if there is an agreement between the parties with an arbitration clause, while the settlement of debt disputes in the Commercial Court applies without an agreement between the parties.

Both arbitration institutions and the Commercial Court are authorized to adjudicate debt disputes. The condition of when a debt dispute can be resolved through the PKPU and Bankruptcy Petition process at the Commercial Court, lies in the requirements of the bankruptcy petition itself. The requirements for a bankruptcy petition are stated expressis verbis in Article 2 paragraph (1) in conjunction with Article 8 paragraph (4) of the Bankruptcy Law.

According to Hadi Shubhan, the requirements for a bankruptcy petition are the 2+1 theory, namely the Bankruptcy Law determines that the requirements for a bankruptcy petition are two things plus one thing. The first requirement is that the debtor has a debt that is due and collectible but not paid in full, and the second requirement is that the debtor has at least two creditors. While the other plus one is that the material requirements must be proven simply.

This opinion is supported by Elyta Ras Ginting in her book Bankruptcy Law, Bankruptcy Theory, which explains that the most important requirement that must exist from a bankruptcy petition for an engagement containing an arbitration clause is the existence of *concursus creditorum* or the debtor has 2 (two) or more creditors, one of whose debts is due and collectible. This is in accordance with the meaning contained in Article 303 of Law Number 37 of 2004 concerning Bankruptcy and PKPU.

Thus, if there is a debt dispute between the creditor and the debtor originating from an agreement with an arbitration clause, it must first be seen whether the creditor can prove simply *prima facie* that

the debt is due, collectible but not paid in full by the debtor. If this requirement cannot be met either because the creditor fails to prove simply the existence of the debt, the maturity of the debt or because of the *Exceptio Non Adimpleti Contractus*, then the creditor can only submit the debt dispute settlement to the arbitration institution.

Exceptio Non Adimpleti Contractus in Black's law dictionary is defined as "an exception is a contract action involving mutual duties and/or obligations, to the effect that the plaintiff may not sue if the plaintiff's own obligations have not been performed"

The final and binding arbitration award must first be registered with the Court in order to be implemented and if the debtor refuses to voluntarily implement the arbitration award, it can be forced by requesting execution from the Head of the Court. If the debtor has been arrested and the execution of the decision has been carried out, but the debtor still does not pay the debt, then that is when it is proven that there is a debt that is proven to be due and collectible but has not been paid off by the debtor, so that a strong right and basis arises for the creditor to submit a PKPU and Bankruptcy application against the debtor.

An example of a Court decision that supports the independence and authority of the Commercial Court in examining and deciding debt dispute cases in bankruptcy petitions even though there is an arbitration clause, is the Supreme Court Decision Number 12 K/N/1999 between PT. ENVIRONMENTAL NETWORK INDONESIA (PT ENINDO) against PT. PUTRA PUTRI FORTUNA WINDU, PPF INTERNATIONAL CORPORATION and TAMBAK FARMERS GROUP FSSP MASERROCINNAE which was decided by the Panel of Judges H. Soeharto, SH, with members Dr. Paulus Effendi Lotulung, SH and Mrs. Supraptini Sutarto, SH on May 12 1999.

The considerations of the Supreme Court of Justice which decided to grant the bankruptcy petition even though there was an Arbitration clause were quoted as follows:

> "That this objection can be justified, because there is an Arbitration clause in an agreement, does not in itself mean that the Commercial Court in bankruptcy matters has no authority to adjudicate it.

Whereas based on Article 615 Rv (Reglement op de Rechtsvoerdering, S 1847-52 jo 1849-63) what can be submitted to be the authority of Arbitration is a dispute regarding rights that can be controlled freely by the parties, meaning that there are no statutory provisions that have regulated these rights. In fact, article 615 Rv states, among other things, that regarding gifts, divorce, disputes over a person's status and other disputes regulated by statutory provisions cannot be submitted to arbitration;

Whereas in the case of bankruptcy cases, it turns out that there are statutory regulations that specifically regulate bankruptcy, namely Law Number 4 of 1998. This means that this bankruptcy case cannot be submitted to arbitration, because it has been specifically regulated in Law Number 4 of 1998

and in accordance with the provisions of article 280 paragraph (1) of Law Number 4 of 1998 which has the authority to examine and decide on this case is the Commercial Court;"

4. CONCLUSION

Arbitration institutions and Commercial Courts both have the authority to resolve debt disputes between debtors and creditors, however, to be able to apply for debt dispute resolution through PKPU and Bankruptcy applications, it is necessary to have a concursus creditorum of at least two creditors, one of whose debts is due and can be collected but have not been paid by the debtor and these debts must be proven simply. Apart from being able to resolve debt disputes, arbitration institutions can also resolve all disputes within the scope of business, while the Commercial Court is limited only to resolving debt disputes through Bankruptcy applications that meet the requirements in accordance with the provisions of the Bankruptcy Law. The impact of the Arbitration decision only involves the parties involved in the agreement with the arbitration clause and is condemnatoir in nature, whereas bankruptcy law is in the realm of public law and the Commercial Court's decision on Bankruptcy is declaratory in nature which of course has the nature of erga omnes, namely that it applies to all creditors even if they do not apply. bankruptcy of the debtor.

Based on the key findings, it can be concluded that both arbitration institutions and the Commercial Court have a role and authority in resolving debt disputes between debtors and creditors. However, there are differences in the process and impact of resolving these disputes. Arbitration institutions can resolve debt disputes and all disputes within the scope of business, while the Commercial Court is limited to resolving debt disputes through bankruptcy petitions that meet the requirements in accordance with the Bankruptcy Law. The results of this research have important applications in a legal context because they provide a deeper understanding of the role and process of resolving debt disputes between arbitration institutions and the Commercial Court. These findings also provide added value in assessing and selecting the dispute resolution method that best suits the needs and characteristics of the case at hand. In practice, these findings can influence legal practitioners in choosing dispute resolution strategies for their clients. They need to consider the advantages and disadvantages of each method, as well as the legal implications and practical impact on the parties involved in the dispute. In addition, parties involved in the agreement also need to understand the consequences of including an arbitration clause in their agreement, as well as the process and results of resolving disputes through arbitration institutions or the Commercial Court.

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