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THE POWER OF PACTA SUNT SERVANDA PRINCIPLE IN ARBITRATION AGREEMENT

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ABSTRACT

Pacta sunt servanda is a legal principle that applies universally. With this principle, everyone is expected to carry out an agreement made with other parties voluntarily. To enforce the principle by the court in case of dispute in the implementation of the agreement, it requires conditions that must be met. In the context of an arbitration agreement, it must also meet specific rules stipulated in the Arbitration Law. In practice, there is still disobedience to this principle where the parties who have been bound by an arbitration agreement are still taking the litigation in solving their case. In this research, the problems examined are how the principle of pacta sunt servanda is regulated in the arbitration law and how strong this principle is applied. The method used in this research is normative juridical. Based on the research, it is concluded that the implementation of the pacta sunt servanda principle is regulated in several articles of the Arbitration Law. The pacta sunt servanda principle is not valid absolutely because it is deviated by other laws or legal principles. It is recommended that parties in an agreement shall understand the choice of dispute settlement well including the consequences of such choice.

Keywords: clause; arbitration; pacta sunt servanda

INTRODUCTION

One of the most important and universally recognized legal principles is the principle of *pacta sunt servanda* or *kept your promise*. The arrangement of the principle of pacta sunt servanda in positive law in Indonesia is regulated in Article 1338 Paragraphs (1) and (2) of the Civil Code which reads:

1. All agreements made in accordance with the law apply as law to those who make them;
2. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law.

Based on the above provisions, it can be interpreted that the parties who enter into an agreement must comply with the agreement they make. Agreements are very much needed to ensure the implementation of the balance of rights and obligations between the parties who are making promises.[1] The agreement made may not be ended or terminated unilaterally without mutual agreement. If one of the parties denies or does not carry out the agreement that has been mutually agreed upon, then the other party can file a lawsuit to the court to force the party who violates the agreement to continue to carry out the agreement that has been agreed upon. Because the agreement is a law for them, it must be implemented and obeyed by the parties. Based on the above provisions, it does not mean that all agreements are valid as law; only agreements made in accordance with the law apply as law for the parties who make them.

In order for an agreement to be valid as a law, it must meet certain conditions as regulated in Article 1320 of the Civil Code, as follows: 1. There is an agreement from those who bind themselves; 2. There is the ability to make an engagement; 3. It is about a certain matter; and 4. For a halal (lawful) reason.[2] The legal conditions of the agreement must always be applied in making an agreement

[1] Siti Maizul Habibah, Oksiana Jatiningsih, and Iman Pasu Marganda Hadiarto Purba, "Jaminan Hak Asasi Manusia Bagi Pekerja Rumah Tangga Melalui Perjanjian Kerja Di Surabaya," *Jurnal HAM* 12, no. 2 (2021): 252.

[2] Subekti and R Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata (KUH Perdata)* (Jakarta: Pradnya Paramita, 1996).

because without fulfilling the legal requirements, the agreement can be canceled if it does not meet the subjective requirements, namely: agreement of those who bind themselves and the requirements for the ability to make an engagement or the agreement can be null and void if it does not meet the objective requirements, namely: a certain matter and a lawful cause.

An arbitration agreement is an engagement or agreement made by parties as the basis for carrying out dispute resolution. Conflict is a dispute, with its parts in the form of a conflict of demands or rights. Disputes originate from non-fulfillment of the promised performance or defaults.[3] Arbitration as an out-of-court dispute resolution institution that is currently developing has an important role in resolving disputes, not only in terms of trade disputes such as sales and purchase but also in other civil disputes.[4] Arbitration as an out-of-court dispute resolution institution has existed for a long time. Formally, arbitration has existed and has been recognized for a long time.[5]

Initially,thearbitrationwascarriedoutwithout court intervention because it was in accordance with the independent nature of arbitration and it was established by the association of entrepreneurs. However, in subsequent developments in the context of legal certainty, especially in Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution, there is actually no provision that regulates whether a request for annulment of an arbitral award delays execution or not. Based on legal logic, the judge must postpone the execution of the arbitral award and the state is involved through the role of the court. Currently the role of the court is increasingly important in the implementation of arbitration.[6] Unlike the court (national). Those who have authority or power come from state power in the judicial field, arbitration authority is not from state power, arbitration authority is born because of the acceptance, trust and appreciation of parties towards arbitration.[7]

Based on Article 1 Number 3 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution "Arbitration agreement is an agreement in the form of an arbitration clause contained in a written agreement made by parties before a dispute arises or a separate arbitration agreement made by the parties after the dispute arises".[8] With the existence of an arbitration clause in a contract or agreement, the parties who make the agreement have lost their rights to resolve disputes that arise in the implementation of the main agreement through a litigation process in court. An arbitration clause basically arises from the conscious choice of the parties making the agreement. Dispute resolution is one of the options that can be chosen by the parties in addition to litigation or other out-of-court settlements.

The above is emphasized through Article 3 of Law Number 30 Year 1999 which reads "The district court is not authorized to adjudicate disputes of parties who have been bound in an arbitration agreement" in conjunction with Article 11 Paragraph (1) which reads "The existence of a written arbitration agreement nullifies the right of the parties to submit a dispute resolution or difference of opinion contained in the agreement to the District Court (2) The district court is obliged to reject and will not intervene in the settlement of disputes that have been determined through arbitration, except in certain cases stipulated by this law".[9] With this provision, it is actually very clear that the parties can no longer file a case that arises between them if a dispute arises in the course of the implementation of the main agreement. Likewise, judges lose their authority to examine a case if there is an arbitration agreement for that case before the case is submitted to court.

In practice there are still cases where the parties bound in an arbitration agreement bring their dispute resolution to court and the court does not reject the case and does not state that the court is not authorized to adjudicate the case. A case that has received a lot of attention from the general public and legal experts is the case of Televisi Pendidikan Indonesia, a dispute between

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[3] Henry Donald, "Penyelesaian Sengketa Hak Kekayaan Intelektual Melalui Acara Cepat," *Jurnal Penelitian Hukum De Jure* 17, no. 1 (2017): 77.

[4] Mosgan Situmorang, "Pembatalan Putusan Arbitrase," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 547.

[5] Ibid.

[6] Ibid., 576.

[7] Mosgan Situmorang, "Pelaksanaan Putusan Arbitrase Nasional Di Indonesia," *Jurnal Penelitian Hukum De Jure* 17, no. 4 (2017): 313–314.

[8] Republik Indonesia, *Undang- Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyeleasaian Sengketa*, n.d.

[9] Ibid

PT Berkah Karya Bersama and Siti Hardiyanti Rukmana (Mbak Tutut). In 2005 both parties agreed to resolve the dispute through BANI. When a dispute arises between them, one of them takes the case to court and the other party takes arbitration according to the agreement. In that case the court pronounced Siti Hardiyanti Rukmana won while BANI pronounced PT Berkah Karya Bersama won. The Central Jakarta District Court has issued a decision requesting the cancellation of the BANI Decision with Case Number: 24/Pdt.G/2015/ PN.Jkt/Pst. In this case acting as petitioners include Siti Hardiyanti Rukmana, PT Tridan Satriaputra Indonesia, PT Citra Lamtoro Persada, Purna Bakti Pertiwi Foundation, Mohamad Jarman, and PT Cipta Televisi Pendidikan Indonesia. Meanwhile, the respondents in this case include the Indonesian National Arbitration Board (BANI) and PT Berkah Karya Bersama. In its decision dated December 12, 2014, the panel of judges of the Central Jakarta District Court stated "Declaring the BANI decision Number 547/XI/ARB-BANI/2013 null and void and has no legal power,"[10] Arbitration Board may carry out a fair and faster dispute examination, but the Arbitration Board does not have the organs to be able to force the losing party to implement an arbitral award, just like a court that has a bailiff to carry out an execution. Then the role of the court in the implementation of this execution became part of the laws and regulations in many countries, including Indonesia.[11] Arbitration has a universal nature, namely in terms of legal principles known in various legal systems. One of the principles of law that is universally recognized by the legal system in the world is the principle of Pacta Sunt Servanda. With this principle, the parties who are already bound in an arbitration agreement will not resolve their dispute through the courts but through arbitration.[12]

Based on the results of previous research published by Pujiyono in the Rechts Vinding Journal Number 7 year 2018, it was found that there was disharmony between the Arbitration Law and the Judicial Power Law. Based on Article 3 in conjunction with Article 11 of the Arbitration Law, the District Court is not authorized to adjudicate a dispute, if the parties are bound in the arbitration agreement. However, Article 10 of the Judicial Power Law states that the Court is prohibited from refusing to examine, hear, and decide on a case submitted on the pretext that the law does not exist or is unclear, and the Court is obliged to examine and adjudicate it.[13]

In addition to the problem above, there is also reluctance of the parties to carry out decisions that have executorial power. The essence of the executorial power is the obedience of the parties towards the decision in good faith. This is suspected by the large number of cases of cancellation of arbitral awards submitted to the court, even though the arbitral award is one of the consequences of the existence of an arbitration agreement in which the agreement is subject to the principle of pacta sunt servanda.

Based on the description above, the statements of the problem in this research are how the principle of pacta sunt servanda is described in Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution and how the power of this principle is in the implementation of an Arbitration agreement.

RESEARCH METHOD

The approach method used in this research is normative juridical research (normative legal research method). The normative juridical research method is library legal research which is carried out by examining literature materials or secondary data only.[14] In this research, the materials used are primary legal materials in the form of laws and regulations, such as Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution, Civil Code, Law Number 48 Year 2009 concerning Judicial Power, Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations and the relevant international convention, namely the 1969 Vienna Convention on International Agreements. In addition, secondary legal materials in the form of books, research journals, and websites were also used. These materials were obtained by downloading the relevant regulations, while the

[10] Agustina Melani, "Babak Baru Perebutan Kepemilikan TPI," *Liputan6.Com*.

[11] Situmorang, "Pelaksanaan Putusan Arbitrase Nasional Di Indonesia," 311.

[12] Ibid., 312.

[13] Pujiyono, "Kewenangan Absolut Lembaga Arbitrase," *Jurnal Recthsvinding* 7, no. 2 (2018).

[14] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2013).

literature materials in the form of books were obtained from library and the author's personal collection. These materials were then sorted and analyzed by looking at the relationship among the provisions contained in the law and from other materials contained in the secondary materials, so that conclusions and recommendations were drawn that are qualitative.

DISCUSSION

A. Theory of Agreement

The definition of an agreement according to the KBBI or the Great Dictionary of the Indonesian Language is consent (written or verbal) made by two or more parties, each of whom agrees to obey what is stated in the agreement[15], in English agreement is called a contract. According to Black's Law Dictionary, Contract is an agreement, upon sufficient consideration, to do or not to do a particular thing[16]. In the Burgerlijk Wetboek (BW) or the Civil Code (KUHPer), the law of agreement is regulated in Book III concerning Engagement (*verbintennis*). The purpose of using the word "engagement" here is broader than the word agreement. There are engagements that come from an agreement, but there are also those that come from a legal act, both legal acts that violate the law (*onrechtmatige daad*) or those that arise from managing the interests of others that are not based on consent (*zaakwarneming*). This third book on engagements regulates rights and obligations arising from agreements, unlawful acts and other events that issue individual rights and obligations.

According to Article 1313 of the Civil Code, the definition of an agreement is an act by which one or more people bind themselves to one or more other people. An agreement or contract can be made by an individual or a legal entity. Whereas regarding the scope, an agreement can be valid nationally or internationally. In general, parties make agreements with an open system, meaning that everyone is free to enter into agreements, whether regulated or not regulated in a law as long as they meet the requirements as regulated in Article 1320 in conjunction with Article 1338 of the Civil Code. A contract generally consists of 6 (six) parts, namely the title of the agreement, the opening, the parties to the agreement, the recital, the contents of the agreement, and the closing. Of the six parts, there are several general clauses such as default, choice of law and choice of forum, domicile, and force majeure, the number of which depends on the agreement of the parties.

Based on theory, a contract is based on 5 (five) principles, namely:

1. The principle of freedom of contract, which can be found in Article 1338 paragraph (1) of the Civil Code, which reads: "All agreements made legally apply as law for those who make them." This principle is a principle that gives freedom to the parties to: make or not make an agreement, enter into an agreement with anyone, determine the content of the agreement, its implementation, and its requirements, and determine the form of the agreement, whether written or verbal.
2. The principle of consensualism, which is regulated in Article 1320 paragraph (1) of the Civil Code. In the article it is stated that one of the conditions for a valid agreement is consent between the parties. This principle is a principle which states that an agreement in general does not have to be made formally, but only with the consent of the parties. Consent is an agreement between a will and a statement made by both parties.
3. The principle of legal certainty, also known as the principle of pacta sunt servanda, is a principle related to the consequences of an agreement. The principle of pacta sunt servanda is the principle that the parties, judges or third parties must respect the substance of the contract.
4. The principle of good faith, which is stated in Article 1338 paragraph (3) of the Civil Code which reads: "Agreements must be carried out in good faith." This principle is the principle that the parties must carry out the contents of the agreement based on a firm belief as well as the good will of the parties. The principle of good faith is divided into two types, namely relative good faith and absolute good faith. In the first type, one pays attention to the real attitude and behavior of the subject. In the second type, the assessment lies in common sense and justice and an objective measure is made to assess the situation according to objective norms.

[15] Kbbi.web.id, "Www.Kbbi.Web.Id," *Kbbi.Web.Id*.
[16] thelawdictionary.com,"Www.Thelawdictionary.Com."

5. Personality principle, which is the principle that determines that a person who will enter into and/or make a contract is only for his personal interest. This can be seen in Article 1315 and Article 1340 of the Civil Code. Article 1315 of the Civil Code confirms: "In general, a person cannot enter into an engagement or agreement other than for himself." Article 1340 of the Civil Code reads: "An agreement is only valid between the parties who make it." This implies that an agreement made by parties only applies to those who make it. However, there are exceptions as regulated in Article 1317 of the Civil Code which states: "An agreement can also be entered into for the interest of a third party, if an agreement made for oneself, or a gift to another person, contains such a condition." This article constructs that a person can enter into an agreement/contract for the interest of a third party, if there are conditions that determine it. Whereas Article 1318 of the Civil Code does not only regulate agreements for oneself, but also for the interests of the heirs and for those who have rights thereof. Comparing the two articles, Article 1317 of the Civil Code regulates agreements for third parties, while Article 1318 of the Civil Code regulates agreements for the interest of oneself, his heirs and those who obtain rights from those who make the agreement. Thus, Article 1317 of the Civil Code regulates the exceptions, while Article 1318 of the Civil Code has a broad scope.[17]

B. Arbitration Agreement

1. The Definition of Arbitration Agreement

An arbitration agreement is basically an engagement whose contents promise that in the event of a dispute the parties agree to resolve it through arbitration. An arbitration agreement can be made before a dispute arises, as an anticipation if problems arise in the implementation of an agreement (Pactum de Compromittendo). An agreement regarding dispute resolution through arbitration can also be made after a dispute arises between the parties. Such an agreement is called an Acta Compromise.

According to UNCITRAL (United Nations Commission on International Trade Law: "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 or a defined legal relationship, whether contractual or not. An arbitration agreement may be in a form of arbitration clause in a contract or in the form in a separate agreement. According to legal expert/ former Supreme Court Justice Yahya Harahap, arbitration agreement is an engagement and agreement between parties, that they will resolve the dispute arising from the agreement through the arbitration board. The parties agree not to submit the arising dispute to the justice agency.

The following are some examples of arbitration clause:

2. Examples of Arbitration Clause

a. Indonesia (BANI) "all disputes arising from this agreement will be resolved and decided by the Indonesian National Arbitration Board (BANI) according to the rules of BANI arbitration procedure, the decision of which is binding on both parties in the dispute, as a decision at the first and final level"

b. Singapore "any disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Centre (SIAC Rules) for the time being in force which rules are deemed to be incorporated by reference into this clause"

c. ICC "all disputes arising in connection with the present contract or further contracts resulting thereof, shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules"

d. UNCITRAL "any disputes, controversy or claim arising out of or relation to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the ICC acting in

[17] M Muhtarom, *Asas Asas Hukum Perjanjian Suatu Landasan Pembuatan Kontrak, Publikasi Ilmiah Universitas Muhammadiyah Surakarta*, vol. 1 (Jakarta: SUHUF, 2014).

accordance with the rules adopted by the ICC for this purpose"

3. Subjective and objective conditions in an arbitration agreement

In Article 1 Number 2 of the Arbitration Law, it is stated that the parties are legal subjects, both according to civil law and public law". This provision implies that those who can enter into an engagement in an arbitration agreement are natural persons or legal entities, both private and public. In every agreement it must be ensured that the parties who make the agreement have the capacity or according to article 1320 of the Civil Code it is said to be competent. Competence or capacity of the parties making the arbitration agreement is not only considered based on age or external skills, but also based on legal aspect. For example, in an agreement involving a legal entity, it must be checked first whether the person who signed the agreement has the capacity according to the law or the deed of establishment of the legal entity. In this case, for example, the representative of the legal entity is the management of the legal entity or a person who obtains valid authority.

The objective requirement, namely regarding a certain matter in this case is what dispute/object of dispute can be resolved through arbitration. Disputes that can be resolved through arbitration are only disputes in the field of trade (including, among others, commerce, banking, finance, investment, industry, intellectual property rights[18] and regarding rights which according to laws and regulations are fully controlled by the disputing parties. Not all disputes can be resolved through arbitration, because Article 5 Paragraph (2) states that disputes that cannot be resolved through arbitration are disputes which according to laws and regulations cannot be reconciled" (for example, disputes in which there is a criminal element). Therefore, only disputes that occur in the field of trade and disputes which according to the law and legislation are fully controlled by the disputing parties that can be resolved through arbitration. This provision refers to Article 1320 as a lawful clause, meaning that in the arbitration law the lawful clause is only limited to the settlement of commercial disputes as described above.

[18] Republik Indonesia, *Undang- Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyeleasaian Sengketa*.

4. Pactum de Compromittendo and Deed of Compromise

a. *Pactum de Compromittendo* is an arbitration agreement made by the parties before a dispute occurs. Article 1 Number 3 of Law Number 30 year 1999 states "An arbitration agreement is an agreement in the form of an arbitration clause contained in a written agreement made by the parties before a dispute arises or a separate arbitration agreement made by the parties after a dispute arises." Article 7 states: "The parties may agree that disputes that have occurred or will occur between them shall be resolved through arbitration. Based on the articles above, the parties, based on the principle of freedom of contract, are allowed to make a clause in the agreement which contains an agreement that if in the future there is a dispute, they will submit the settlement to the Arbitration Board, not the court. In Law Number 30 Year 1999 there is no regulation regarding the form of the arbitration agreement, the law only mentions an agreement in the form of an arbitration clause stated in a written agreement. An arbitration agreement is an *accesoir* agreement that follows the main agreement. Yahya Harahap states that in general, arbitration agreements are complementary agreements or additional agreements that are often embedded in business agreements or commercial agreements. As an accesoir agreement, the arbitration agreement may not exceed the main agreement and whether or not an arbitration agreement is valid is determined by the validity of the main agreement. In practice the establishment of a pactum de compromittendo can generally be divided into:

1) The arbitration agreement is made as one of the clauses in a main agreement. This method is common considering that at this time in an agreement the parties usually directly determine the form of dispute resolution they choose in the event of a dispute in the future, in the event the chosen dispute resolution option is arbitration.
2) The arbitration agreement is made in a separate agreement made before the dispute and simultaneously with the

making of the main agreement and does not become one/combined in the main agreement so that there are two deeds, namely the deed containing the main agreement and the deed containing the arbitration agreement.

b. Deed of Compromise, also known as compromise and settlement, is an arbitration agreement in the form of a deed, made after a dispute occurs, as regulated in Article 9 of Law Number 30 Year 1999 which reads "In the event that the parties choose the dispute resolution through arbitration after the dispute occurs, approval regarding this must be made in a written agreement signed by the parties. In the event that the parties cannot sign the agreement, it must be made in a notarial deed. The written agreement must contain: the issue in dispute, the full names and address of the parties, the full name and address of the arbitrator or arbitral tribunal, the place where the arbitrator or arbitral tribunal makes decisions, the full name of the secretary, the period of dispute resolution, a statement of the arbitrator's willingness, a statement of the willingness of the disputing parties to bear all costs required for dispute resolution through arbitration. A written agreement that does not contain the above is null and void.

   The deed of compromise as required in Article 9 of the Arbitration Law must be made in writing, so that it takes the form of a deed which constitutes a proof that a legal event has taken place. It would be better if the compromise deed is made in the form of an authentic deed, as regulated in Article 165 of HIR: In the article it is stated that "a letter made by or before a public official who has power to make it constitutes sufficient evidence for both parties and their heirs as well as all those who have rights thereof, namely about all things mentioned in the letter as notification only, but what is later mentioned is only what was notified, it is directly related to the subject in the deed." Therefore, an authentic deed has perfect evidentiary power. The contents of the deed must be deemed correct by the judge unless it can be proven otherwise.

5. Elements in the Arbitration Agreement

According to Stephen R Bond, there are nine elements that must be agreed upon by the parties in an arbitration clause:

a. The parties must clearly determine whether the settlement of dispute that may arise is submitted to the arbitral tribunal that will be established after the dispute arises (ad hoc arbitration) or submit it to an existing Arbitration Board (institutional arbitration).
b. Standard arbitration clause
c. Place of arbitration
d. Choice of law
e. Composition of arbitrators
f. Language in the arbitration process
g. Final and binding decision
h. Implementation of the arbitral award
i. Arbitration fee

These elements basically aim to avoid problems in the implementation of the arbitration clause in the future. Arbitration clause must be carefully and clearly drafted. In practice many arbitration clauses are unclear or sometimes appear as 'nonsense clauses'[19]. For example, the arbitration clause which states that the arbitration will be carried out in a certain country or city without mentioning the choice of law and the method of appointing the arbitrator has the potential to cause problems in the future. Arbitration clauses do not have to be long or complex, but if they are to be effective, they must be clear. Ambiguity is the worst thing imaginable, which causes the arbitration clause to be ineffective or at the very least creates complications that will cost time and money. The following is an example of an arbitration clause which contains ambiguity: "Securities issuance agreements must be endeavored to be resolved amicably and if no agreement is reached, the dispute shall be submitted to the Indonesian National Arbitration Board (BANI) or the competent justice." It can be seen that in the arbitration clause it turns out that there is no agreement on choosing a permanent place for dispute resolution and there is no agreement whether to submit it to BANI or to the competent court. Therefore, it will only cause

[19] Stephen R. Bond, *Dalam Erman Rajagukguk, Arbitrase Dalam Putusan Pengadilan* (Jakarta: Chandra Pratama, 2000).

new problems if it turns out that the parties have different opinions in choosing a place for dispute resolution; one party wants to go through BANI and the other party wants to go through court. Therefore, it should be clear and careful in making an arbitration clause.

6. Severability Principle

Basically, an arbitration agreement can stand alone, namely in the form of a deed of compromise or in the form of a clause in an agreement as one of the clauses of the agreement, namely the arbitration clause. However, as an accessoir agreement, the arbitration agreement, either in the form of pactum de compromittendo or in the form of a deed of compromise, must still comply with the principles in the accessoir agreement[20]:

1. The contents of the accessoir agreement must not exceed the main agreement
2. The contents of the accessoir agreement must not conflict with the main agreement
3. There will be no accessoir agreement without the main agreement.

The arbitration agreement is not an 'ordinary' accessoir agreement because the arbitration agreement is not void if the main agreement is void, as regulated in article 10 letter h of the Arbitration Law: "an arbitration agreement shall not be void due to the following circumstances:

a. Death of one of the parties;
b. Bankruptcy of one of the parties;
c. Novation;
d. Insolvency of one of the parties;
e. Inheritance;
f. The validity of the conditions for the termination of the main engagement;
g. If the implementation of the agreement is transferred to a third party with the consent of the party entering into the arbitration agreement; or
h. Termination or cancellation of the main agreement." This is what is called the severability principle, namely that an arbitration agreement must be considered separate from the main agreement so that if the main agreement is terminated or canceled, the arbitration agreement remains in effect.

[20] Munir Fuady, *Arbitrase Nasional (Alternatif Penyelesaian Sengketa Bisnis)* (Bandung: PT Citra Aditya Bakti, 2000).

C. Arbitration Clause and Its Relation to Arbitration Absolute Competence

Article 1 Paragraph (1) of the Arbitration Law states that what is meant by arbitration is a method of settling civil disputes outside the general courts based on an arbitration agreement made in writing by the disputing parties. Based on the provision of the article, it can be concluded that the arbitration authority to resolve a dispute is based on an arbitration agreement. While the provisions regarding absolute competence of arbitration are regulated in Article 2 of Law Number 30 Year 1999 (Arbitration Law): "This Law regulates the settlement of disputes or differences of opinion between parties in a certain legal relationship who have entered into an arbitration agreement which expressly states that the dispute or difference of opinion that arises or that may arise from the legal relationship will be resolved by arbitration or through alternative dispute resolution." Article 3 of the Arbitration Law: "The district court is not authorized to adjudicate the disputes of the parties who have been bound in the arbitration agreement." As well as in Article 11 Paragraph of the Arbitration Law: "(1) The existence of a written arbitration agreement nullifies the rights of the parties to submit settlement of dispute or difference of opinion contained in their agreement to the District Court (2) The district court must refuse and will not intervene in the resolution of disputes that have been decided through arbitration, except in certain cases stipulated by this law." Based on the three articles, it can be concluded that the absolute competence of arbitration exists/is born as determined by the existence of an arbitration agreement.

The arbitration clause is the basis of rights, the legal basis on which the arbitrators sit and have the authority. Therefore, with the arbitration clause the arbitrators have the authority to examine and adjudicate disputes which are actually the authority of the court, but due to the existence of an arbitration clause, it becomes the authority of the arbitration institution. Because the arbitration clause is an agreement of the parties which is set forth in an agreement, in accordance with the principle of pacta sunt servanda or agreement must be kept, an agreement is valid as law for the parties who made it as long as the agreement in question does not violate the validity conditions of the agreement as regulated in Article 1320 of

the Civil Code. As a consequence (pacta sunt servanda), judges and third parties may not interfere with the contents of the agreement made by the parties.

D. Waiver of the Pacta Sunt Servanda Principle

1. Based on the Law

The arbitration clause is born because of an agreement between the parties in making the agreement. The arbitration clause is included in the agreement of the parties as a settlement of disputes that may arise between the parties in the future. This means that if the parties or business actors have included an arbitration clause in their agreement, then the Choice of Forum applies to the parties.[21] This means that the absolute authority is in the arbitration institution to resolve disputes that may arise between the parties in the future; the district court is not authorized to adjudicate the disputes of the parties.[22] As discussed above, according to Article 3 of Law Number 30 Year 1990 (Arbitration Law) the district court is not authorized to adjudicate disputes between the parties bound by the arbitration agreement. However, Article 303 Number 37 Year 2004 (Law of Bankruptcy and Suspension of Debt Payment Obligations) expressly states that the commercial court is still authorized to examine, resolve applications for bankruptcy statements and has absolute authority even though there is an arbitration clause between the parties, as long as the debt in the bankruptcy dispute is in accordance with the requirements in the Law of Bankruptcy and Suspension of Debt Payment Obligations.

In this case, two legal principles apply which are the reasons that Article 303 of the Bankruptcy Law is stronger than Article 3 of the Arbitration Law, namely:

a. The Lex Spesialis Derogat Legi Generali principle is a principle which states that more specific laws override more general ones. The Law of Bankruptcy and Suspension of Debt Payment Obligations are laws that are more specific because they only regulate the position of the arbitration agreement in the case of bankruptcy. The Arbitration Law regulates arbitration issues in general in terms of settlement of civil disputes outside the court so that this law is more general in nature.

b. The principle of Lex Posteriori Derogat Legi Priori, which means that the new law changes or abolishes the old law which regulates the same material. It can be seen that the Law of Bankruptcy and Suspension of Debt Payment Obligations is younger than the Arbitration Law. Therefore, it can be said that there has been a change in legal politics, therefore Article 3 of the Arbitration Law was annulled through Article 303 of the Law of Bankruptcy and Suspension of Debt Payment Obligations, although only in the context of bankruptcy cases.

In the business world, arbitration institutions have an important role in resolving disputes or conflicts arising from the agreement of the parties by prioritizing a win-win solution approach and the parties are given the freedom to choose arbitration (referee) to resolve disputes between the parties. The position of the arbitration clause of the parties, if one of the parties files a lawsuit of bankruptcy and suspension of debt payment obligations, the position of the arbitration clause of the parties can be set aside by the existence of Article 303 of the Law of Bankruptcy and Suspension of Debt Payment Obligations. Therefore, the principle of pacta sunt servanda in the agreement of the parties becomes invalid.

2. With the Consent of the Parties

The arbitration agreement cannot be cancelled unilaterally as regulated in Article 1338 Paragraph (2) of the Civil Code which is a logical consequence of the existence of the pacta sunt servanda principle: “an agreement cannot be withdrawn other than by consent of both parties or for reasons declared sufficient for that by the law.” This provision is also confirmed by Article 620 paragraph (2) Rv] which states that the power of the arbitrators may not be withdrawn except by unanimous agreement of the parties. The provisions regarding arbitration agreement which cannot be cancelled unilaterally are also regulated in jurisprudence, one of them is in the decision

[21] Susanti Adi Nugroho, dalam Daren Anderas & Ariawan, “Analisis Penerapan Asas Pacta Sunt Servanda Dalam Perjanjian Yang Terdapat Klausula Arbitrase Apabila Adanya Gugatan Kepailitan dan Penundaan Pembayaran Kewajiban Utang” , *Jurnal Adigama* 3 no 2 (2021),186

[22] Ibid. 191. Cut Memi, “Penyelesaian Sengketa Kompetensi Absolut Antara Arbitrase Dan Pengadilan,” *Jurnal Yudisial* 10, no. 2 (2017).

of the Supreme Court dated May 4 No. 317 K/ pdt/1984 which states that releasing the arbitration clause must be carried out explicitly with an agreement signed by both parties. Meanwhile, in the case of an exception, the Supreme Court is of the opinion that there is an exception or not, the arbitration clause by itself has absolute competence, so that the jurisdiction to adjudicate disputes arising from the agreement by law falls under the absolute authority of the Arbitration Court (arbitration tribunal). Therefore, every court facing such a lawsuit case must comply with the provisions of Article 134 of HIR and declare that it is not authorized to adjudicate[23]. Based on the description above, it can be said that with the agreement of the parties, the arbitration clause can be cancelled expressly and is no longer binding.

3. Based on the *Clausula Rebus Sic Stantibus*

The ***clausula rebus sic stantibus*** is a legal principle which states that an agreement is no longer valid due to a fundamental change in circumstances. This principle has not been regulated in the Arbitration Law in Indonesia. In the international law, this principle is basically an exception to the pacta sunt servanda rule. This principle is stated in Article 62 of the 1969 Vienna Convention. According to this article, the state can use this principle to terminate an agreement if the changing circumstances underlie the state's intention to be bound by the agreement. An example is the Council of Ministers of the European Community in 1991 which terminated the cooperation agreement with Yugoslavia from 1980 due to the Breakup of Yugoslavia which was considered a fundamental change in circumstances.[24]

Article 62 of the 1969 Vienna Convention states: Fundamental changes in circumstances that have occurred in relation to those existing at the time of the conclusion of the agreement, and which the parties did not foresee, cannot be used as a reason for terminating or withdrawing from the agreement unless: (a) the existence of these circumstances constitute the essential basis for the parties' approval to be bound by the agreement; and (b) the impact of the change radically changes the level of outstanding obligations under the agreement. The words of Article 62 show the extraordinary character of the rebus sic stantibus. This is subject to the more general principle of pacta sunt servanda, as regulated in Article 26 of the Vienna Convention.

In English law, inappropriate performance due to circumstances having changed such that the performance required by the contract is very different from that originally performed by the parties is understandable. In German law, the *Wegfall der Geschäftsgrundlage* (loss of transaction basis) theory includes the effect of changing circumstances on contracts. Paragraph 242 of the German Civil Code (BGB) requires that a contract shall be executed in good faith. However, when circumstances have changed substantially and unpredictably, the transaction bases have changed so that the parties are no longer bound by their original contractual commitments.

The Swiss Federal Court has recognized that some long-term contracts may be terminated due to unforeseen and fundamental changes in circumstances based on Article 2 of the Civil Code.

The impact of rebus sic stantibus in international arbitration has not been widely explored. Several decisions have recognized the overall principle that contracts should be adapted to changing circumstances. However, in general, the arbitrators are rather strict in applying the rebus sic stantibus. Although this principle has not been regulated in Indonesian legislation, according to the author, this principle is one of the important principles that need to be adopted.

CONCLUSION

The principle of pacta sunt servanda that applies in agreements, including arbitration agreements, has a strong position. This principle has the aim that the parties who promise each other are committed to carrying out their promises. This principle has also been strengthened through legal norms that have been included in the Arbitration Law. In Indonesia this is regulated in Article 3 in conjunction with Article 11 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution. Although this principle has a strong position, its position is not absolute. This principle can be deviated if it is mentioned in the law itself or in other laws. In addition, in contract

[23] Yahya Harahap dalam Disriani, "Perjanjian Arbitrase Dan Kompetensi Absolut Arbitrase," *2021*.

[24] wikipedia.id, "Aust, Anthony, Modern Treaty Law and Practice," *Wikipedia*. Acsessed September 17,2021

law there is also a principle called Clausula rebus sic stantibus, namely the legal principle which states that an agreement is no longer valid due to a fundamental change in circumstances. In international law as well as in some countries, this principle is basically an exception to the pacta sunt servanda rule.

SUGGESTION

Based on the results of this research, it can be suggested that the parties who make an arbitration agreement shall realize that the agreement is not absolute, even though there is the principle of pacta sun servanda. In certain cases, this principle can be set aside by other legal principles that apply in legal science or because of the law. However, all parties involved in a dispute are objective. For example, in a bankruptcy case, the provision which states that the commercial court has the authority to examine cases in which the parties are bound by the arbitration agreement shall not be used solely to deny the agreement contained in the arbitration agreement. Judges must also be observant to see whether objectively the dispute between the parties can only be resolved through bankruptcy or can still be resolved through arbitration. It must be considered that bankruptcy has a wider legal effect as well as effect on the sustainability of a business and economy compared to arbitration.

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