International Journal of Social Science And Human Research

ISSN(print): 2644-0679, ISSN(online): 2644-0695

Volume 05 Issue 07 July 2022

DOI: 10.47191/ijsshr/v5-i7-01, Impact factor- 5.871

Page No: 2782-2786

The Implementation of The Pacta Sunt Servanda Principle to Annul The Arbitration Award By Court

Husni Kurniawati[1], Yunanto[2]

[1,2] Master of Law,Faculty of Law, Universitas Diponegoro

ABSTRACT: Settlement of disputes through arbitration is based on a written agreement that has been agreed upon by the parties. The agreement is valid and binding based on Article 1338 of the Civil Code, which contains the pacta sunt servanda principle and excludes third parties from interfering in the settlement. However, regarding the arbitration award, it may be filed for annulment to the court. With the submission to the district court, there is third-party intervention in settling disputes. This research used a normative juridical approach with descriptive-analytical research specifications. The sources and types of data used were secondary data collected through the literature, which was then analyzed descriptively-qualitatively. The research results showed that in the annulment of the arbitration award, the pacta sunt servanda principle was still upheld with the limitation of the court's authority only to declare the annulment and was not authorized to take action to adjudicate itself. Thus, the pacta sunt servanda principle remained valid because the arbitration institution still carried out the settlement following the agreed agreement.

KEYWORDS: Pacta Sunt Servanda Principle, Annulment, Arbitration Award

I. INTRODUCTION

Every agreement made by the parties must be implemented voluntarily based on *good faith* and *goodwill*. However, the agreements are often problematic over time, so it is necessary to consider a settlement pattern to accommodate the parties' best interests.

Two dispute resolution patterns include the *binding adjudicative procedure* (settlement in a binding and structured way) and the *non-binding adjudicative procedure* (not binding settlement pattern). The two settlements have differences that lie in the binding strength of the decisions made by these institutions. In the *binding adjudicative procedure* pattern, the power of the decision made by the institution that decides the case binds the parties. Meanwhile, the *non-binding adjudicative procedure* settlement pattern does not bind the parties. It means that the parties to the resulting decision can agree to or reject the contents of the decision (Nugroho, 2015).

Settlement outside the court is considered more capable of accommodating the parties' interests, requiring a relatively short time and prioritizing win-win solutions. The advantages that exist in this out-of-court settlement are more popular, especially in the business world.

Arbitration is an option for resolving disputes. Arbitration, in a simple explanation, is a term used to describe a procedure for resolving disputes that arise to achieve a particular result that legally emphasizes the principle of *final and binding*. The main prerequisite for an arbitration process is the obligation of the parties to make a written agreement or arbitration agreement and then agree on the law and procedures for how they will end the dispute resolution.

It is under the provisions in Article 1 Number 1 of Law Number 30 of 1999 concerning Arbitration and alternative dispute resolution, which states, "Arbitration is a way of settling a civil dispute outside of a general court based on an arbitration agreement made in writing by the parties' dispute".

The arbitration agreement arises because of a written agreement by the parties to submit dispute resolution to an arbitration institution or *ad hoc* arbitration. The agreement made by the parties containing the choice of law that will be used to resolve the dispute must be explicitly stated in the agreement. This arbitration agreement can be included in the main agreement, its introduction, or a separate agreement after a dispute arises. In addition, whether or not an arbitration agreement is valid refers to the conditions specified in Article 1320 of the Civil Code (Khoidin, 2013).

In practice, although the agreement to use the arbitration settlement has been agreed in the arbitration agreement, there may be dissatisfaction with the decision given. Parties who object to the arbitration award may request an application for the annulment of the arbitration award to the district court. Efforts to annul the arbitration award must meet the reasons set out in Article 70 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which mentions:

"Against the arbitration award, the parties may apply for annulment; suppose the award is suspected of containing the following elements:

a. The letter or document submitted during the examination, after the decision is rendered, is admitted to be false or declared false;
b. After the decision is made, decisive documents are found which were hidden by the opposing party: or
c. Decisions are taken from the deception results by one of the parties in the dispute examination."

If the court grants the application for the arbitration award's annulment, the arbitration award's executive power becomes null and void (Rengganis, 2011). Meanwhile, according to Article 1338 paragraph (1) of the Civil Code, which contains the pacta sunt servanda principle, all agreements legally apply as law for those who make them. It is because the selection of the arbitration forum is an agreement that has been stated in an agreement to be further adhered to. Thus, the third parties should not have the right to interfere in the settlement of arbitration disputes. Based on this, this research discussed the implementation of the pacta sunt servanda principle in terms of the annulment of the arbitration award by the court.

II. RESEARCH METHOD

This research used a normative juridical method. The normative juridical approach was an approach to legal research that focused on applicable laws and regulations. The specification of the research was descriptive-analytical research. Analytical descriptive means that the research aims to describe a specific situation associated with applicable legal theories and/or statutory regulations related to the object under study.

In research that used a normative juridical approach, the data type was secondary data. The secondary data was obtained by a researcher indirectly from the source (Suteki & Taufani, 2018) in the form of legislation and other literature related to the research object. The data collection technique aimed to obtain precise data through library research. Library research is a data collection technique by conducting searches related to legal materials related to the topic of discussion.

The analysis used a qualitative descriptive method, which was a method of data analysis by grouping and selecting the data obtained from research according to its quality and truth. Furthermore, the data was connected with theories and laws, and regulations obtained from the study of documents so that answers to the research problem were obtained.

III.DISCUSSION

a. Agreement as a Prerequisite for Arbitration Settlement

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Article 1 point 1 defines arbitration: "Arbitration is a way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties". Based on the article, the settlement of disputes using arbitration is carried out by making a written agreement on the primary condition in the settlement of arbitration.

The parties make binding or not an agreement is based on the validity or not of an agreement. The validity of the agreement is based on the conditions contained in the provisions of Article 1320 of the Civil Code, namely:

1. There is an agreement between the parties;
2. The ability of the parties to take legal actions;
3. Agree on some issues;
4. The agreed object is a legal cause.

Two conditions are obtained if it is narrowed again, i.e., subjective and objective (Widjaja, 2001). Subjective terms include the subject of the agreement. In the case of an arbitration agreement, the subject of the agreement may include a person, legal entity, organization, or country. The parties must agree on the use of arbitration as a means of resolving disputes. It is under Article 7 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which states, "the parties can agree that disputes between them are resolved through arbitration". The agreement on the settlement method through arbitration must also be stated in writing based on Article 9 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. With this written agreement, the dispute can only be resolved through arbitration. Furthermore, objective conditions are conditions related to the object of the agreement. The object of the agreement is regulated in Article 5 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which mentions, "Disputes that can be resolved through arbitration are only disputes in the trade sector and regarding rights which according to law and statutory regulations are fully controlled by the disputing parties." Furthermore, in the explanation of Article 66 letter b of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the scope of trade law means activities, among others, in the fields of commerce, banking, finance, investment, industry, and intellectual property rights.

The force of the validity of an agreement made legally by the parties applies as law. It is following Article 1338 paragraph (1) of the Civil Code, which states, "All agreements made legally apply as law for those who make them". The meaning of "apply as law" provides an understanding that the position of the agreement that has been made legally has the same position as the law (Yunanto, 2019).

The enactment of an agreement, such as the entry into force of law, is the essence of the pacta sunt servanda principle. The pacta sunt servanda principle or the principle of legal certainty relates to the consequences of the agreement. This principle's existence

impacts other parties to respect the substance of the agreement and may not interfere with the substance of the agreement that has been agreed upon (Salim, 2015).

b. The Effort to Annul the Arbitration Award

The annulment of an arbitration award can be understood as a legal remedy that can be taken by the disputing parties to request the district court to annul an arbitration award, either in part or in the whole of the content of the award (Fuady, 2006). Although the basic concept of the arbitration award is final and binding, there is still an opportunity for the parties to file for the annulment of the arbitration award. An attempt to annul is not an appeal against the arbitration award. Annulment is an extraordinary legal remedy, so without being based on clear and specific reasons, an annulment of an arbitration award cannot be made (Nugroho, 2015).

An application for annulment of an arbitration award can only be made based on the reasons stated in Article 70 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which mentions:

"Against the arbitration award, the parties may apply for an annulment, if the award is suspected of containing the following elements:

a. the letter or document submitted in the examination, after the decision is rendered, is admitted to be false or declared false;
b. after the decision is taken, decisive documents are found which were hidden by the opposing party; or
c. the decision is taken from the results of deception by one of the parties in the dispute examination.

In the provisions of Article 71 in conjunction with Article 72 paragraph (2) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, it is stated that the annulment of the arbitration award is submitted to the Head of the District Court within a maximum period of 30 days from the day of submission and registration of the arbitration award to the Registrar of the District Court.

c. The Implementation of Pacta Sunt Servanda Principle to Annul the Arbitration Award

Efforts to annul the arbitration award cannot be separated from the court's authority. In general, courts do not have the authority to interfere in resolving disputes that contain an arbitration agreement. It is following Article 3 in conjunction with Article 11 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which states that district courts are not authorized to adjudicate disputes between parties with an arbitration agreement. In addition, the existence of an arbitration agreement negates the rights of the parties to submit a settlement to the district court, and the district court is obliged to refuse an agreed dispute resolution using arbitration.

In the norms contained in Articles 3 and 11, it is clear that Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution adheres to the pacta sunt servanda principle to agreements containing arbitration clauses. The arbitration agreement based on pacta sunt servanda negates the court's authority to settle disputes. With the pacta sunt servanda principle, all agreements made by the parties are valid and binding as laws, so the parties must carry out the agreement in good faith (Dewi, 2018).

The meaning of the pacta sunt servanda principle in article 1338 of the Civil Code, when connected to an arbitration agreement, can be understood as follows (Dewi, 2018):

a. Each arbitration agreement is binding on the parties, and the binding force is the same as the force of law;
b. If a dispute arises in the arbitration agreement, then the authority to decide and adjudicate is absolutely the authority of the arbitration institution;
c. The absolute authority of the arbitration institution makes the court not authorized to examine and adjudicate the disputes of the parties to which the arbitration agreement has been agreed;
d. Changes or termination of the arbitration clause can only be made by agreement of the parties;
e. It cannot be withdrawn unilaterally.

However, there are exceptions regarding the authority of the court in terms of arbitration, one of which is regarding the annulment of the arbitration award. The District Court has the authority to examine the procedure's validity for making arbitration decisions, including selecting an arbitrator for the application of the law chosen by the parties in dispute resolution (Winarta, 2013).

The function and authority of the District Court for examinations are only limited to examining facts regarding the presence or absence of the three elements specified in Article 70 of Law No. 30 of 1999 as reasons that can annul the arbitration award (Ariprabowo & Nazriyah, 2017). Suppose the district court finds facts regarding the reasons for the annulment of the arbitration award. In that case, the district court only has the authority to annul the arbitration award without being accompanied by actions and authority to adjudicate itself. Hence, the district court's function and authority in examining the annulment request is only "declarative" (Harahap, 2005).

The limitation of the district court's authority in the annulment of the arbitration award is a manifestation of the pacta sunt servanda principle. In this case, the limitation of the court's authority is only the authority to declare the annulment of the arbitration award

without being accompanied by an act of adjudicating itself. It is because the district court has no right to examine the subject matter of the dispute between the parties to whom the arbitration agreement has bound. Thus, the pacta sunt servanda principle remains valid to annul the arbitration award.

The pacta sunt servanda principle in the parties' agreement can be ruled out if the dispute over the parties' debts is a bankruptcy dispute and Suspension of Debt Payment Obligations. In the case of a dispute, the authority to adjudicate is absolutely the authority of the commercial court and not the authority of the arbitration institution (Andreas and Ariawan, 2020).

Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations regarding the court's authority to settle disputes contains an arbitration clause. In bankruptcy disputes, the Commercial Court has the right to settle disputes that contain an arbitration clause. The authority of the Commercial Court to settle bankruptcy disputes is regulated in Article 300 Paragraph (1), which states, "The courts as referred to in this Law, apart from examining and deciding applications for declaration of bankruptcy and Suspension of Debt Payment Obligations, are also authorized to examine and decide other cases in the commercial sector whose stipulation is carried out by law" and Article 303, "The court remains authorized to examine and complete the petition for declaration of bankruptcy from the parties bound by the agreement containing the arbitration clause, as long as the debt which is the basis for the petition for declaration of bankruptcy has complied with the provisions as referred to in Article 2 paragraph (1) of this Law."

The difference in the authority of the Court in dispute resolution, which contains an arbitration clause in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations in its implementation adheres to the *Lex Specialist Derogat Legi Generali* principle. The *Lex Specialist Derogat Legi Generali* principle means that specific laws override more general laws. The discussion in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations only specifically regulates bankruptcy cases. Meanwhile, Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution regulates the overall resolution of disputes outside the court. Hence, it is more general.
With this provision, in the event of a bankruptcy dispute and Suspension of Debt Payment Obligations, the pacta sunt servanda principle does not apply because even though an arbitration agreement has been made, it cannot negate the authority of the commercial court to participate in resolving disputes between the parties.

CONCLUSION

The settlement of disputes through arbitration is based on an arbitration agreement made by the parties. It must be adhered to in good faith and eliminate intervention from other parties to participate in dispute resolution under the pacta sunt servanda principle. However, for the arbitration award, efforts can be made to annul the arbitration award to the district court by fulfilling the elements in Article 70 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The implementation of the pacta sunt servanda principle to annul the arbitration award can be seen from the district court's authority only to declare the annulment of the arbitration award and does not have the authority to adjudicate itself so that the absolute authority of dispute resolution remains with the arbitration institution. However, applying the pacta sunt servanda principle can be ruled out in the case of bankruptcy disputes and Suspension of Debt Payment Obligations.

REFERENCES

1) Andreas.D. dan Ariawan. (2020). ANALISIS PENERAPAN ASAS PACTA SUNT SERVANDA DALAM PERJANJIAN YANG TERDAPAT KLAUSULA ARBITRASE APABILA ADANYA GUGATAN KEPAILITAN DAN PENUNDAAN KEWAJIBAN PEMBAYARAN UTANG. Jurnal hukum Adigama. Vol.3(No.2).184-203.
2) Ariprabowo.T. dan Nazriyah .R. (2017). Pembatalan Putusan Arbitrase oleh Pengadilan dalam Putusan Mahkamah Konstitusi Nomor 15/PUU-XII/2014. Jurnal Kosntitusi. Vol.14 (No.4). 701 – 727.
3) Dewi, A.D. (2018). TARIK ULUR KOMPETENSI ABSOLUT LEMBAGA ARBITRASE (Kajian Terhadap Prinsip Niet van Openbaar Orde dan Pacta Sunt Servanda Dalam Klausul Arbitrase). Dialogia Iuridica Jurnal Hukum Bisnis dan Investasi. Vol.9(No.2).41-59.
4) Fuady, M. (2006). Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis. Bandung: Citra Aditya.
5) Harahap, M.Y. (2005). Hukum Acara Perdata: Gugatan, Persudangan, Penyitaan, Pembuktian, dan Putusan Pengadilan, Jakarta: Sinar Grafika.
6) Khoidin. (2013). Hukum Arbitrase Bidang Perdata. Yogyakarta: CV Aswaja Pressindo.
7) Nugroho,S.A. (2015). Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya. Jakarta: Kencana Prenadamedia Grup
8) Rengganis. (2011). Tinjuan Yuridis Pembatalan Putusan Arbitrase Nasional Berdasarkan Pasal 70 Undang-Undang No 30 Tahun 1999 (Studi Kasus Terhadap Beberapa Putusan Mahkamah Agung RI). Tesis. Jakarta: Universitas Indonesia.
9) Salim. (2015). Hukum Kontrak: Teori dan Praktik Penyusunan Kontrak. Jakarta: Sinar Grafika.
10) Suteki dan Taufani.G. (2018). Metodologi Penelitian Hukum: Filsafat, Teori dan Praktik. Depok: Rajawali Pers.
11) Widjaja, G. (2001). Seri Hukum Bisnis: Alternatif Penyelesaian Sengketa. Jakarta: PT Raja Grafindo Persada.

12) Winanta, F.H. (2013). Hukum Penyelesaian Sengketa. Jakarta: Sinar Grafika
13) Yunanto, Y. (2019). Hakikat Asas Pacta Sunt Servanda Dalam Sengketa Yang Dilandasi Perjanjian. Law, Development and Justice Review. Vol 2 (No 1).33-49.