RECONSTRUCTION OF AUTHORITY OF ARBITRATION INSTITUTION IN BUSINESS DISPUTE SETTLEMENT BASED ON THE VALUE OF JUSTICE

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ABSTRACT

The aim of this study to to review and analyze implementation the authority of the arbitration institution in the settlement of business disputes. And to reconstruct the authority of the arbitration institution in the settlement of business disputes Based on the value justice. Paradigm in this research is constructivism paradigm. approach method used is normative-legal research. Legal research conducted by examining library materials or secondary data. then the data are analyzed descriptively analistic. the results of this study are that the authority of the arbitration institution in the settlement of the current business dispute, in which the authority of the arbitration institution in the settlement of the dispute through arbitration is absolute. The absolute of the authority of this institution is regulated in Article 3 of Law. 30 of 1999 on Arbitration and Alternative Dispute Settlement, then the Arbitration clause promulgated by both parties has legal consequences, the Court is not authorized to examine the case. Reconstruction of Authority of Arbitration Institution in Business Dispute Settlement Based on The Value of Justice Is With Constraints Article 3 Act No.30 Th.1999.

Keywords: Reconstruction, Authority, Arbitration, Business Dispute, Justice

A. Introduction

Globalization as a new form of capitalism expansion, globalization is not only about economic factors, but it also grows and enters the wide area and covers various aspects, including economic and legal aspects. Especially in this era of economic globalization, in order to support development and the current rapidly growing national economy, the regulation on dispute settlement among business actors is needed. The dispute resolution rules are expected to support and ensure certainty, order, law enforcement with justice and truth.[1]

According to Adam Smith, one of the most favorable factors in the pursuit of improving economic progress that can improve the welfare of the people of a nation is an acceptable judiciary, in the sense of a judicial system capable of resolving business disputes quickly and cheaply[2]. The dynamics of the world economy needs to be supported by the justice system and a good dispute resolution pattern. In some major countries including the United States, it is rather difficult to cope with the many cases raised, the frequent delays in sessions, high court costs, pressures during the process, scholars there trying to find alternatives other than this litigation that we are familiar with ADR (Alternative Dispute Resolution).

Disputes or disagreements do not arise by accident. I is the occurrence of differences of opinion because there is a relationship between the two. Legal relationships in the business world are commonly poured in a contract agreement. According to Rutten agreement is a legal act that occurs in accordance with the formalities of the existing legal act depending on the conformity of the will statement of two or more persons intended for the emergence of legal consequences for the benefit of either party on the expense of another party or for their own interest or expense -the parties mutually. [3]

[1]Anis Mashdurohatun, M. Ali Mansyur, *Product Capabilities Dynamic On Industrial Design Carved Wood In Small And Medium Enterprises(Smes) Jepara Furniture In Promoting The Protection Of Intellectual Property Right.* International Journal of Applied Engineering Research ISSN 0973-4562 Volume 12, Number 19 (2017). *page* 8217

[2] This opinion is recited in Nurnaningsih Amriani, Mediasi Alternatif Penyelesaian Sengketa Perdata di Pengadilan,(Jakarta: Radja Grafindo Persada,2011), page 39

[3]Purwahid Patrik, *Dasar-Dasar Hukum yang Lahir dari Perjanjian dan dari undang-Undang,*(Bandung : Mandar Madju, 1994), page 46

Our covenant legal system is an open system, meaning that parties may enter into any agreement even though it has not been regulated in the Civil Code. It is possible that both the form and the contents of the agreement of the business actors are not bound by certain forms, as long as agreed by the parties.

Cooperation agreements in all its forms made by the parties basically have a purpose to provide legal certainty for the parties in the implementation, so that the parties are subject and abide by the contents of the agreements that have been agreed. One of the unavoidable matters in the implementation of the agreement is the risk of non-performance of agreement by either party, which means that one of the parties has defaulted.

Not executing the agreement by either party may result in conflict or dispute between the parties. Conflict is any form of interaction of an opposition or an interaction that is antagonistic (opposite or contradictory). Conflict occurs because of differences in gaps and scarcity of power, differences or scarcity of social position and position of resources or due to extreme different value and rating systems. [4]

The emergence of conflicts or disputes in the business world greatly affects the viability of business actors involved in such conflicts or disputes, so that parties will seek to resolve disputes. A general dispute resolution process can be conducted by the parties through two channels, namely litigation through a public court/commercial court or through an alternative dispute resolution route based on good faith to the exclusion of a litigation settlement in court.

Court Paths or litigation is a process of dispute settlement that has been known for a long time, in essence, it has a tendency to produce new problems because of its win-lose unemployment, time consuming process and open to the public[5], while the dispute resolution process through alternative solutions for closed disputes result in a win-win solution.

The choice of the parties to resolve the dispute can also be done through the outer court, the arbitration institution. Under the provisions of Article 1 Sub-Article 1 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration is the means of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. The Arbitration Institution under the provisions of Article 1 Sub-Article 7 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement is a body chosen by the parties to the dispute to give a decision on a particular dispute, the institution may also provide a binding opinion regarding a legal relationship certain in the event of no dispute arising.

The authority of the arbitration institution in the settlement of the dispute through arbitration is absolute, so that other institutions including the judiciary are not authorized to resolve this dispute. The absolute of the authority of this institution is regulated in Article 3 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement, then the Arbitration clause promulgated by both parties has legal consequences, the Court is not authorized to examine the case.

Article 10 Paragraph (1) of the Law of the Republic of Indonesia Number 48 Year 2009 on Judicial Power regulates that the Court is prohibited from refusing to examine, hear and adjudicate a case filed under the pretext that the law is absent or unclear but obliged to examine and prosecute. The provision of Article 10 paragraph (1) is clearly not in line with the provisions of Article 3 of Law No. 5/1999. 30 of 1999 on Arbitration and Alternative Dispute Settlement, so that the provisions of Article 3 of Law No. 30 of 1999 need to be reconstructed.

The above facts give rise to an imbalance to the principle of justice in the process of dispute resolution. According to Aristotle, law can only be established in relation to justice and justice must be understood in terms of equality[6]. Justice in an Islamic perspective is a universal and comprehensive benefit. The universality of justice in Islam encompasses all aspects of human life, both in the past, present and future[7]. This means that in the Islamic perspective, the choice of using an arbitrage institution should be based on a universal and comprehensive benefit, thereby providing room for the parties to use litigation lane even if there is a contract agreement either at the beginning or after a dispute arose.

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[4]Eman Suparman, *Arbitrase dan Dilema Penegakan Keadilan*,(Jakarta : Fiskahati Aneska bekerjasama dengan BANI, 2012), page 17, lihat pula Kusnadi, *Teori dan Manajemen Konflik* (*Tradisional, Kontemporer & Islam*),(Malang : Taroda, tanpa tahun), page 11

[5] Frans Hendra Winarta, *Hukum Penyelesaian Sengketa, Arbitrase Nasional Indonesia dan Internasional*,(Jakarta : Sinar Grafika, 2011), page 9

[6] Carl Joachim Friedrich, *Filsafat Hukum Perspektif Historis*, (Bandung : Nuansa dan Nusamedia, 2004), page 24

[7]Apridar, *Keadilan dalam Islam*, http://aceh.tribunnews.com/2014/02/07/keadilan-dalam-islam, accessed on 10 November 2015

Based on the phenomenon regarding the settlement of business completed through the arbitration institution, then the issues to be raised can be formulated as follows: How does the exercise of the authority of the Arbitration Institution in resolving business dispute based on the value of justice, and How to reconstruct the authority of the arbitration institution in resolving business dispute based on the value of justice.

B. Research Methods

Paradigm in this research was constructivism paradigm which views that reality of social life is not a natural reality. The concentration of the constructivism paradigm is how such an event or reality is in social reconstruction, in what way it is constructed. The flow of constructivism suggests that reality exists in various forms of mental construct based on social experience, local and specific, and depend on the side by doing so. [8]

The paradigm of constructivism is called a denial of the positivist paradigm. If within the paradigm of positivism it is believed that reality can be observed repeatedly and the result is the same and can be generalized, then the paradigm of constructivism deny it. Constructivism understands the truth of reality relative, in accordance with the specific context relevant to the social actors. Constructivism rejects generalizations to attempt to produce a unique description. [9]

The problem approach used in this paper was the method of approach of normative-legal research, or according to Zainudin called normative law research or doctrinal law research, that is legal research using secondary data. According Soerjono Soekanto, normative legal research is a legal research conducted by examining the library materials or secondary data only[10]. This research tried to criticize the concept of authority of arbitration institution in the settlement of business dispute based on justice value.

Discussion

1. Implementation of Authority of Arbitration Institution in Resolving Business Disputes Based on Value of Justice

1.1. Position and Function of Arbitration Institution in Resolving Business Disputes

Subject to the authority of the arbitration body is regulated in the Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement. Under the provisions of Article 4 paragraph (1) of the Law of the Republic of Indonesia Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement, it is mentioned that in the event that the parties have agreed that the dispute between them shall be settled by arbitration and the parties have authorized. The arbitrator shall be authorized to determine in its decision on the rights and obligations of the parties if this is not regulated in their agreement. Such Authority may be affected if the parties have previously entered into a contractual agreement to settle the existing matter by the arbitration. The legal consequence of the contract or clause of this agreement is that the District Court is not authorized to adjudicate the dispute of the parties which have been bound by the arbitration agreement. Further, this authority is set out in Article 3 of Law No. 30 of 1999.

The existence of arbitration institution in Indonesia is currently regulated in Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Settlement. The term arbitration itself comes from the word arbitrate (*latin*) which means the power to accomplish something according to wisdom[11]. The power to settle things according to the policy is exercised by an arbitrator or arbitral tribunal which, according to Soebekti, the arbitrator or arbitral tribunal, applies the law as to what the judge or court does[12]. According to Article 1 Sub-Article 1 of Law Number 30 Year 1999 concerning Arbitration and Alternative Settlement of Disputes, it is stated that, Arbitration is a means of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. Based on this understanding, it is understood that arbitration is one form of settlement of a civil dispute outside the general court.

In relation to the problem of settlement of a dispute or case, the settlement of civil cases in Indonesia in general can be done through two channels, namely the general court (litigation), regulated by Law no 48 of 2009 on Judicial Power and Law No. 49

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[8] Lexy J Moleong, *Metode Penelitian Kualitatiif*,(Bandung:Remadja Rosda Karya, 2013), page 69:

[9] http://www.google.com/, FX. Adji Samekto, *Menempatkan Paradigma Penelitian dalam Pendekatan Hukum Non-Doktrinal dan Penelitian dalam Ranah Sosio-Legal*, accessed on 20 December 2017.

[10] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif suatu Tinjauan Singkat,* (Jakarta: Raja Grafindo Persada, 2010), page 10, lihat pula Peter Mahmud Marzuki,*Penelitian Hukum*, cet 2,(Jakarta: Kencana, 2008), page. 90.

[11] Sudiarto dan Zaeni Asyhadie. *Mengenal Arbitrase*,(Jakarta : Raja Grafindo Persada, 2004), page 27, lihat pula Frans Hendra Winarta, *Hukum Penyelesaian Sengketa, Arbitrase Nasional Indonesia dan Internasional*, (Jakarta:Sinar Grafika, 2013), page 36

[12] R Soebekti, *Arbitrase Perdagangan*,(Bandung: Angkasa Offset, 1981), page 1

of 2009 on General courts. The second is the settlement of cases through arbitration and alternative dispute resolution (outside the general judicial system). The settlement of cases outside the court is also known as non-litigation as opposed to litigation. It is regulated in Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement. The settlement is divided into 2 (two), namely:

a. Settlement of dispute through arbitration institution

Arbitration is a means of settling a civil dispute outside a general court based on arbitration agreements made in writing by the parties to the dispute (Article 1 number 1 of Law Number 30 Year 1999).

b. Dispute resolution through alternative dispute resolution

Alternative Dispute Resolution is a dispute settlement or disagreement institution through a procedure agreed upon by the parties, namely non-court settlement by means of consultation, negotiation, mediation, conciliation or expert judgment (Article 1 number 10 of Law Number 30 Year 1999).

An arbitration body shall be an agency elected by the parties to the dispute to give a decision on a particular dispute; the agency may also provide a binding opinion regarding a particular legal relationship in the event of a dispute arising. [13]

Article 34 Paragraph (1) of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement states that Settlement of dispute through arbitration may be conducted by using national or international arbitration institution based on agreement of the parties. Article 34 Paragraph (2) of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement states that the Settlement of disputes through arbitration institutions as referred to in paragraph (1) shall be conducted according to the rules and events of the selected institutions, unless otherwise stipulated by the parties.

The existence of an arbitration institution in Indonesia, has been known for a long time before the enactment of Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement, has long been known before independence. After independence, in the field of trade there are several arbitration bodies fixed by various trade associations and organizations in Indonesia which are of course no longer active. [14] A juridical institution of arbitration has gained a stronger place and position in the legal system of dispute settlement in line with the judicial system since the enactment of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Based on the above understanding attributed to the position of the arbitration body, the position of the arbitration institution may be defined as the status of the arbitration body as an entity in the settlement of a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute.

The position of arbitration institution can be traced in the sound of Article 1 number 8 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement which states:

> An Arbitration Institution shall be an agency elected by the parties to the dispute to give a decision on a particular dispute; the agency may also provide a binding opinion regarding a particular legal relationship in the event of a dispute arising.

It is understandable that the arbitration body shall have the position of the body elected by the parties to the dispute to provide a decision on a particular dispute. The arbitration body shall also be a body which provides a binding opinion regarding a certain legal relationship in the event of a dispute arising. The arbitration body thus according to its definition has a position:

a. As the body that provides a decision on a particular dispute
b. As a body which provides a binding opinion regarding a certain legal relationship in the event of no dispute arising.

Judging from the aspect of the position of the arbitration institution as described above, the arbitration institution has the following functions:

a. Providing of a decision on a particular dispute
b. Providing a binding opinion concerning a particular legal relationship in the event of a dispute arose.

The status and function of arbitration institution in Indonesia is currently referring to Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement, which can be seen in Article 1 point 8 juncto Article 7 stating that the Parties may agree to a dispute arising or to be occurs between them to be settled through arbitration.

[13]Pasal 1 angka 8 Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa
[14] Sudiarto dan Zaeni Asyhadie. *Loc.cit*

The selection of the arbitration institution as a body that is expected to resolve the disputes of the parties outside the court cannot be separated from certain considerations which assume the arbitration institution has advantages compared to the judiciary, which are among others: [15]

a. Guaranteed confidentiality of parties' disputes
b. Can be avoided delays caused by procedural and administrative matters
c. The parties may choose arbitrators who believe in having sufficient knowledge, experience and background on issues of disputes, fairness and fairness
d. The parties may decide the choice of law to resolve the matter and the process and place of arbitration; and
e. The arbitral award shall be a decision binding on the parties and by a simple or straightforward procedure.

Dispute settlement through arbitration institution is basically based on the principles of the arbitration agreement. The principles of the arbitration agreement are as follows:

a. The principle of agreement

The principle of agreement means the parties' agreement to settle disputes peacefully. This principle can be seen in the provisions of Article 4 paragraph (1) of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement

b. The principle of deliberation (*musyawarah*)

The principle of deliberation contains meaning, every dispute is attempted to be resolved by deliberation between the arbitrator and the parties as well as between the arbitrators themselves. This principle can be seen in the provisions of Article 45 of Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Settlement.

c. Limitative principle

This principle implies a limitation in the settlement of disputes through limited arbitration to trade/business and industry disputes. This principle can be seen in the provisions of Article 5 paragraph (1) of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement.

d. Final and binding principles

The final and binding principles imply that an arbitral award is final decision which cannot be continued by other legal means. This principle can be seen in the provisions of Article 60 of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement.

e. Good Faith Principle

Settlement of disputes through the litigation lane is as a final means if non-litigation liabilities do not work. The settlement of this dispute provides a final and quick decision and low cost and as set forth in Law No.30 of 1999 Article 6 stating that extrajudicial settlement through alternative dispute resolution must be based on good faith. [16]

Based on the foregoing principles, the objectives of dispute settlement through arbitration shall be based on the consideration of the settlement in the field of trade and on the rights which, by law and legislation, are fully controlled by the disputing parties in a simple manner without any formality or complicated litigation procedures.

One of the arbitration agencies in Indonesia is the Indonesian National Arbitration Board (BANI) was established in 1977 initiated by several lawyers, among others, Mr. Haryono Tjitrosubono and Prof Dr Priyatna Abdulrasyid and received full support from the Indonesian Chamber of Commerce (KADIN). [17]

The birth of an arbitration institution in Indonesia was led by the Indonesian National Arbitration Board (BANI). It is essentially inseparable from the growing need to resolve business or economic trade disputes (in a broader sense) quickly and better meet what is expected by the world of business or eco-trade ie efficiency in time and cost and maintaining professionalism and trust in handling trade disputes. Another factor that also encouraged the birth of the Indonesian National Arbitration Board (BANI) was that in the 1970s the General Courts, especially the Supreme Court had been overwhelmed by the accumulation of number of cases from year to year to be resolved. [18]

[15] General Elucidation of Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Settlement..
[16] Widnyana, I Made, *Alternatif PenyelesaianSengketa dan arbitrase*,(Jakarta, FikahatiAneska, 2014), page. 18
[17] M. Husseyn Umar, *BANI dan Penyelesaian Sengketa*,(Jakarta:PT Fikahati Aneska,2013), page 3
[18] *Ibid*

Based on the results of the study it is found that the Indonesian National Arbitration Board (BANI) was established with the aim of providing a fair and prompt settlement in civil disputes arising on trade, industry and finance issues, both national and international. [19]

The Indonesian National Arbitration Board (BANI) in its capacity as an arbitration institution is free (autonomous) and should not be interfered with by any other authority (independent). The principle of autonomy, freedom and justice is the necessary basis for ensuring that the Indonesian National Arbitration Board (BANI) as the institution giving a decision on a particular dispute and providing a binding opinion regarding a certain legal relationship in the event of a dispute has the same status with the judiciary general standing on all sides of the dispute, being objectively fair and honest.

Arbitration is seen as one of the alternatives to non-court dispute settlement. In many countries, in addition to dispute settlement through ad-hoc arbitration, which is hosted by the parties to the dispute, there are also institutions supported by associations or chambers of commerce/industry to deal with both national and international business dispute issues. [20]

The presence of an arbitration body wrapped up in Law No. 30 of 1999 on the Alternative Dispute Settlement makes the District Court unlawful to adjudicate the disputes of the parties which have been bound by the arbitration agreement. This is stipulated in the provisions of Article 3 of the Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement. In the process of examination of arbitration cases, in accordance with the provisions of Article 27 of the Law of the Republic of Indonesia Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement. It is stated that All disputes by the arbitrator or arbitral panel are conducted in private. In the event that the parties come before the appointed day, the arbitrator or arbitral panel shall first seek peace between the parties to the dispute. [21]

Furthermore, if the peace fails to be achieved, then in accordance with the provisions of Article 46 paragraph (1) of the Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution The examination of the subject of the dispute will be continued.

The authority of the arbitration institution in deciding arbitration cases is absolute. This is realized in the form of a final arbitral award and binding the parties to the dispute. The arbitrator in examining the arbitration case must have a neutral inner attitude, a brush that has an inwardly independent mental attitude that is solid, objective and absolutely impartial. This inner attitude is manifested in outward behaviors that prioritize peace efforts. The parties seek points of contact optimally during the arbitration process and so on.

1.2. Authority of Arbitration Institution in Checking and Cutting Business Disputes

The arbitration body, as previously described, is the body elected by the parties to the dispute to provide a decision on a particular dispute and may also provide a binding opinion regarding a particular legal relationship in the event of a dispute arising. The arbitration body shall be an agency for the settlement of a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute.

Based on the aforementioned position, the arbitration body has the authority to settle a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. Authority in theories, according to HD Scoud as quoted by Ridwan HR, is the whole of the rules concerning the acquisition and use of governmental authority by the subject of public law in public law. [22]

Authority is different from competance. This is confirmed by Ateng Syafrudin which gives the distinction between authority and competence. The authority according to Ateng Syafrudin only concerns a certain part of authority, so that the scope of authority is wider than the competance. [23] There are two elements contained in the definition of authority as described by HD Scoud, namely: [24]

a. Elements of legal rules

[19]Interviewed with Panitera BANI di Jakarta, September 2015, lihat pula M. Husseyn Umar, BANI dan Penyelesaian Sengketa,(Jakarta:PT Fikahati Aneska,2013, page 4
[20] M. Husseyn Umar,*Loc.cit*
[21] See Pasal 45 (10 UU no 30 tahun 1999 tentang Alternatif Penyelesesaian sengketa Hukum dan ADR.
[22] Ridwan HR, *Hukum Administrasi Negara*,(Jakarta : Radja Grafindo Persada, 2008), page 110
[23]Ateng Syafrudin, *Menuju Penyelenggaraan Pemerintahan Negara yang Bersih dan Bertanggung Jawab*, Jurnal Pro Justisa edisi IV, (Bandung : Universitas Parahiayangan, 2000), page 22
[24]H Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi*, Jakarta, Radja Grafindo Persada, 2013, page 184

Within the authority there is a whole set of rules concerning the acquisition and use of authority by the subject of law. Authority without any legal rules governing it then has no legality or binding power, so every authority requires clear rules of law. [25]

b. The element of the nature of the legal relationship

The nature of the legal relationship between the acquisition and use of mutually binds authority by legal subjects. The legal relationship between the powers acquired by the legal subject and the use of authority by the legal subject shall be in accordance with the purpose of the given authority. [26]

Listening to the elements of authority as mentioned above, the authority of the arbitration institution in examining and dismissing business disputes can be tested by examining the elements of authority obtained by arbitration institutions through the provisions contained in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, such as which is contained in Article 3 of Law no 30 of 1999.

2. Reconstruction of the authority of the arbitration institution in the settlement of business dispute based on the value of justice

As has been reviewed above that authority according to Ateng Syafrudin is different from competence. Competence is one part of authority[27]. In general authority is defined as power, while power is the ability of a person or class to control other people or other groups based on authority, authority, charisma, or physical strength[28]. This is in accordance with the theory of authority is the theory that examines and analyzes the power of government organs to exercise their authority both in the field of public law and private law. [29]

The authority of the arbitration institution normatively can be seen in the provisions of Article 2 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement stating that this Law regulates dispute settlement or disagreement among the parties in a certain legal relationship which has entered into an arbitration agreement which expressly states that any dispute or disagreement arising out of or arising out of such legal relationship shall be settled by arbitration or through an alternative dispute resolution.

This arbitration authority is reinforced by the provision of Article 3 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement which states that the District Court is not authorized to adjudicate disputes of parties that have been bound by the arbitration agreement. The authority of the arbitration institution in the settlement of disputes through this arbitration is absolute, so that other institutions including the judiciary are not authorized to resolve this dispute. The absolute authority of this arbitration institution has placed the arbitration in the capacity of law and legal position to resolve the dispute arising out of the agreement as an extra judicial body dealing with the District Court as well as the Commercial Court as an ordinary State Court.

Authority of the arbitration institution, although it is absolute but remains limited, meaning that the authority is only for cases that the settlement is based on arbitration agreement and only covers judge actions in the field of trade and the rights under the laws and regulations fully occupied by the parties disputes. [30]

Regarding the absolute authority, there are two theories that developed against the validity of the arbitration agreement as the basis of the right of the authority of the arbitration institution, namely: [31]

a. The theory that the arbitration clause is not public order

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[25]By merefer understanding of the authority of HD Scoud, according to the Author in authority there is a whole set of rules relating to the acquisition and use of authority by legal subjects. This has resulted in the law against the absence of authority without any legal rules governing it, causing the legal subject to have no legality to exercise such authority. Therefore every authority requires clear rules of law.

[26] The author is more relate the nature of legal relations as an element of authority in the aspect of the purpose of giving authority to the subject of law, so that the authority obtained must be used in accordance with the purpose of granting that authority to the legal subject.

[27] *Ibid*, page 22

[28]Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia,*(Jakarta : Balai Pustaka, 1989), page 468

[29] *Ibid*

[30] Lihat ketentuan Pasal 5 UU no.30 tahun 1999

[31] Suyud Margono, *ADR & Arbitrase*,(Jakarta:Ghalia Indonesia, 2002), page 125-127

This idea states that the arbitration agreement is not public policy or public order. It argues that arbitration is not absolute. The arbitration clause must be retained by the parties to remain binding. If a dispute arises in the execution of the arbitration agreement and one of the parties apply to the court, the court will still have jurisdiction to prosecute. The judicial authority shall be declared only if the Defendant has submitted an exception to the arbitration clause.

b. The theory that the arbitration clause is bound by the principle of *pacta sun servanda*

This theory is based on the existence of the *pacta sun servanda* principle which states that all legitimate agreements are binding and valid as legislation to the party making it. Agreement cannot be withdrawn without the consent of both parties making it.

Based on both theories mentioned above, then dispute resolution based on the arbitration clause may be brought to court. The theory of "arbitration clause is not public order". The theory continues to acknowledge the absolute nature of the arbitration authority's authority in settling a dispute based on an arbitration agreement with the exception that if one party does not challenge another party filing a lawsuit to the Court, the counterpart is deemed to agree to waive the settlement by arbitration.

The authority to settle disputes outside the court such as the Arbitration Institute is also recognized by Law No. 48 of 2009 on Judicial Power. It can be seen in the provisions of Article 58 of Law Number 48 Year 2009 regarding Judicial Power stating that civil disputes settlement efforts may be conducted outside the district court through arbitration or alternative dispute settlement.

Authority always provides a legal relationship between the subjects receiving authority with the subject requiring the services of the subject who is the recipient of the authority. The legal relationship between the state court organizer and the seeker of justice can be seen from the obligations and rights of each party. Article 4 of Law Number 48 Year 2009 regarding Judicial Power states:

(1) The courts shall judge by law without discrimination.
(2) Courts help seek justice seekers and try to overcome all obstacles and obstacles to achieve a simple, speedy, and low cost trial.

Based on the above provisions, it can be understood that the legal relationship between the judicial authorities and the seeker of justice is evident from the obligation of the Court to judge according to law by not discriminating people. It is done to assist the justice seeker and to overcome all obstacles and obstacles in order to achieve a simple, fast, and low cost. The birth of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement has reduced the authority of the General Courts institution, namely the District Court. This is seen in the provisions of Article 3 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement which states that the District Court is not authorized to adjudicate disputes of parties that have been bound by the arbitration agreement. Whereas based on the provisions of Article 10 of Law No. 48 of 2009 on Judicial Power of the Court, it is prohibited to refuse to examine, hear, and decide upon a case filed under the pretext that the law is absent or less clear, but obliged to examine and prosecute. Based on the provisions of Article 10 paragraph (1) above, it indicates that the court has the authority as the executor of the judicial power, so it is prohibited to refuse to examine, hear, and decide upon a case filed under the pretext that the law is absent or less clear. The court is obliged to examine and adjudicate every case it submits.

The district court as an ordinary court has the authority that such authority may be granted to special courts still within the scope of the general court.

Based on the fact, there is actually a contradiction between the provisions of Article 3 of Law Number 30 Year 1999 regarding Arbitration and Alternative Dispute Settlement with the provisions of Article 10 of Law of the Republic of Indonesia Number 48 Year 2009 on Judicial Power, so that there should be an effort to reconstruct the provisions of Article 3 Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement that does not deviate from the norm as contained in Article 10 of the Law of the Republic of Indonesia Number 48 Year 2009 on Judicial Power.

Reconstruction is a way to rebuild things in the sense is no longer relevant to the existing circumstances. With regard to the authority of the judiciary not authorized to examine cases with arbitration clauses, it is necessary to reconstruct by authorizing the Court to examine cases with arbitration classes. The reconstruction of the value of justice Pancasila[32] is a form of balance

[32] Pancasila is the main basic values which is as crystallization of various values that live in society. It is the soul of the nation (volksgeist) in society and nation of Indonesia which is the guiding star (leidstar) in the life of society, nation and state of Indonesia. See in Anis Mashdurohatun,Hayyan Ul Haq, Sony Zulhuda, *Social Function Reconstruction Of Intellectual Property Rights (Ipr) Based On Justice Values,*International Journal of Law Reconstruction Volume I, Issue 1, September 2017,page.145.

between the rights and obligations of citizens as citizens in the settlement of business disputes on arbitration institutions in order to get a cumutatif justice. therefore justice is judgment by giving to anyone according to what is his right, that is by acting proportionally and not violating the law. Justice is closely related to rights, in the conception of the Indonesian nation the right can not be separated by obligations.[33]

Until now the existence of justice as the executor of judicial power is still needed. The place and position of justice in the rule of law and the democratic society is still reliable, including its role as a pressure valve for all violations of law, public order and public order offenses. . The judiciary is still expected to act as the last resort or the last place to seek truth and justice so that the judiciary will still be relied upon as a functioning agency for the enforcement of truth and enforce justice. [34]

Reconstruction of Article 3 of Law no. 30 of 1999

Article 3 **UU Number 30 Year 1999**	**Reconstruction of Article 3** **UU Number 30 Year 1999**
The District Court is not authorized to adjudicate disputes of the parties that have been bound by the arbitration agreement. Elucidation of Article 3 Quite clear	(1) The District Court is not authorized to adjudicate the disputes of the parties which have been bound by the arbitration agreement. (2) The provisions of paragraph (1) of this Article shall be exempted in the event of a law which expressly authorizes the court to examine and adjudicate a particular case even if there is an arbitration agreement Explanation Paragraph (1) Quite clear Paragraph (2) In principle, the court is not authorized to adjudicate cases of disputes of the parties to which the treaty is bound, but to a case which is legally constituted as the court's special powers, the court is still authorized to examine and adjudicate the case, for example a bankruptcy case which is the jurisdiction of the court commerce, material rights disputes cases which are the powers of the district courts
By maintaining the character of the arbitration authority, the provisions of Article 3 need to be reconstructed and amended into 2 (two) paragraphs. Paragraph (1) shall remain in the original provisions of Article 3. Paragraph (2) considers the authority of the law based on the *lex specialis deroga t lex generalis* principle, so that on the one hand the arbitration as an extra judicial forum retains a limited absolute authority, and on the other hand the court is also authorized to examine and adjudicate even though the parties have been bound by the arbitration agreement on the basis of an extraordinary ordinary court and legal authority	

C. Conclusion

1. Implementation of Authority of Arbitration Institution in Resolving Business Disputes Based on Value of Justice

This arbitration authority is reinforced by the provision of Article 3 of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement which states that the District Court is not authorized to adjudicate

[33] Said Gunawan, Anis Mashdurohatun, Teguh Prasetyo I Gusti Ayu Ketut Rachmi Handayani, *Development Concept Of Non Alutsista Abuse By Indonesian National Army*, International Journal of Business, Economics and Law, Vol. 13 , Issue 4 (August) ISSN 2289-1552.2017.page.180.

[34]Suyud Margono, *ADR (Alternative Dispute Resolution) & Arbitrase: Proses Pelembagaan dan Aspek Hukum*, Cet I,(Jakarta : Ghalia Indonesia, 2000), page 64-65

disputes of parties that have been bound by the arbitration agreement. The authority of the arbitration institution in the settlement of disputes through this arbitration is absolute, so that other institutions including the judiciary are not authorized to resolve this dispute. The absolute authority of this arbitration institution has placed the arbitration in the capacity of law and legal position to resolve the dispute arising out of the agreement as an extra judicial body dealing with the District Court as well as the Commercial Court as an ordinary State Court.

2. Reconstruction of the authority of the arbitration institution in the settlement of business dispute based on the value of justice

Based on the provisions of Article 10 of Law No. 48 of 2009 on Judicial Power Courts are prohibited from refusing to examine, hear, and decide upon a case filed under the pretext that the law is absent or less clear, but obligatory to examine and to prosecute. Based on the provisions of Article 10 paragraph (1) above, it indicates that the court has the authority as the executor of the judicial power, so it is prohibited to refuse to examine, hear, and decide upon a case filed under the pretext that the law is absent or less clear. The court is obliged to examine and adjudicate every case it submits.With regard to the authority of the judiciary which is not authorized to examine cases by arbitration clauses, it is necessary to be reconstructed by authorizing the Court to examine cases with arbitration classification. Until now the existence of justice as the executor of judicial power is still required. The place and position of justice in the rule of law and the democratic society is still reliable, including its role as a pressure valve for all violations of law, public order and public order offenses. The judiciary is still expected to act as the last resort or the last place to seek the truth and justice so that the judiciary is still relied on. Article 3 of Law no 30 of 1999 declared to be: Article 3 reconstruction

(1) The District Court is not authorized to adjudicate the disputes of the parties which have been bound by the arbitration agreement.
(2) The provisions of paragraph (1) of this Article shall be exempted in the event of a law which expressly authorizes the court to examine and adjudicate certain cases even if there is an arbitration agreement.

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