

# Jurnal Pak Habib

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## THE ROLE OF NOTARISTS IN FORMULATING THE INCLUSION OF ARBITRATE CLAUSES IN NOTARISTS ACT IN THE FORM OF PACTUM DE COMPROMITTENDO

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### ABSTRACT

In various acts of the agreement made before a Notary relating to the rights and obligations of the parties (the presenters), there is almost always a dispute resolution clause between the disputing parties. Dispute resolution clauses most choose a court (district court) this is a custom only or often done in a Notary deed, requested or without request settlement of disputes is always listed in the court (district court) or sometimes deliberation for consensus or mediation. The Notary can offer the payment of the debate through arbitration in the parent agreement (Pactum de Compromittendo) or after a dispute (Deed of Compromise). In this case, the Notary has the role in formulating, directing, and explaining to the parties/the parties if the person concerned chooses and determines the forum for resolving the dispute through arbitration.

**Keywords:** Arbitration Clause, District Court, Notary,

### INTRODUCTION

In practical reality, not everyone who makes a contract or agreement has understood the dispute resolution clause contained therein unless the person concerned is accompanied by their legal representative or the parties themselves have understood it themselves. This happens when the dispute resolution clause is listed in the parent agreement (*Pactum de Compromittendo*).

When the contract or written agreement is made by the interested parties, of course, a clause will be made that protects the rights and obligations of the contracting parties (contractors). In a business relationship or agreement, there is always the possibility of a dispute. Disputes that need to be anticipated are about how to implement the clauses of the deal, the content of the agreement, or other things.

The clause in the contract is made following the substance desired by the parties. One of the substances in the contract clause is that if there is a dispute between the parties, have determined the forum for settlement, or those who do not

include the dispute resolution forum. The dispute resolution clause is the parties' free will and must be complied with by those who make it. The parties have the right to determine the forum for resolving the dispute, such as deliberation for consensus, to the court. The dispute resolution clause through Arbitration is a way that can be done to be included in the agreement made by the parties.

The Dispute Resolution Forum often chosen by the contracting parties is Arbitration. Article 1, number 1 of Law Number 30 of 1999 (AAPS Law) stipulates that Arbitration is a means of resolving a civil dispute outside the general court based on the Arbitration Agreement made in writing by the disputing parties.

Frank El.koury and Edna El.koury that Arbitration is a process, a simple or simple one chosen by the parties voluntarily who wish so that a neutral interpreter decides the matter following the choice those where the decision is based on the propositions in the case. Para, the parties agree to accept the decision as final and binding from the beginning. Thus, the parties

have realized that it will be resolved through Arbitration if they have a dispute.

Regarding the forum for resolving disputes through Arbitration<sup>8</sup> also stated in Articles 59 and 60 of the Laws of the Republic of Indonesia Number 48 of 2009 About Judicial Powers are:

Article 59:

- (1) Arbitration is a<sup>22</sup> means of resolving a civil dispute out of court based on an arbitration agreement made in writing by the disputing parties.<sup>9</sup>
- (2) The arbitration decision is final and has permanent legal force and is binding on the parties.<sup>11</sup>
- (3) In the event that the parties do not execute the arbitration decision voluntarily, the decision shall be executed based on the order of the chairman of the district court on the application of one of the disputing parties.

Article 60:

- (1) An alternative dispute resolution is an Institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlement out of court by way of consultation, negotiation, mediation, conciliation, or expert assessment.
- (2) Dispute resolution through alternative dispute resolution as referred to in paragraph (1), the result of which is stated in a written agreement.
- (3) The agreement in writing as referred to in paragraph (2) is final and binds the parties to be implemented in good faith.

Basically, the Arbitration clause can take 2 (two) forms, namely:

1. Arbitration Clause<sup>4</sup> which is listed in (include) a written master agreement made by the parties before the dispute arises (*Pactum de Compromittendo*); or
2. A separate Arbitration agreement made by the parties after a dispute arises (*Deed of Compromise*).

Specifically for the Compromis<sup>3</sup> Deed, the terms and conditions have been regulated in

Article 9 of Law No. 3<sup>3</sup> of 1999 of the AAPS Law stipulating that in the event the parties agree to choose the settlement of a dispute through Arbitration after the dispute occurs, the agreement must be made in writing and contain

- a. disputed;<sup>4</sup>
- b. full name and residence of the parties;
- c. full name and residence of the Arbitrator/Arbitration Council;
- d. where the Arbitrator/Arbitration Council will take the decision;
- e. the full name of the conference secretary;
- f. dispute resolution period;
- g. statement of willingness from the Arbitrator.

That Article 1 number 1 of the AAPS Law only indicates *Pactum de Compromittendo*, made included in (include) the principal agreement (parent) or made by the parties who in one of its articles include a dispute resolution clause through Arbitration which is part of the parent agreement. In this regard it is necessary to discuss the *Pactum de Compromittendo* which can actually be offered by the Notary to the parties in order for the settlement forum through Arbitration.

### Formulation Of The Problem<sup>33</sup>

If referring to Article 1338 of the Civil Code which states that the agreement made by the parties shares the law for the parties who made it, in this case there is free will from the parties as long as it does not contradict or violate Article 1337 of the Civil Code. Similarly, with the procedure or forum for the selection of dispute resolution, the parties are free to determine it. In this regard, when the parties make an agreement in the presence of or by a Notary's deed, the Notary should be able to suggest to the parties that the settlement forum be held in Arbitration or the Notary has the role to suggest the dispute resolution forum through Arbitration. Already if it is done by a Notary who suggests that it is obligatory to have knowledge and knowledge of Arbitration, for example, do not let there be a *nonsense arbitration clause in the Notary's deed*, namely the dispute resolution clause in

addition to arbitration also to the court, if such a thing happens it will be difficult when it will be applied.

Notaries must also know the settlement of disputes through arbitration, in theory and practice has two forms, namely *ad hoc* (*ad hoc arbitration*) and institutional arbitration (*institutional arbitration*). *Ad hoc* is incidental and tied to a specific institution. *Ad hoc* is established and is not tied to a specific institution. *Ad hoc* is established and has the authority to deal only with certain cases, and its arbitrators are selected and determined by themselves based on the agreement of the parties. Unlike *ad hoc arbitration*, institutional arbitration is a form of permanent arbitration that is held under the supervision of an institution that is also permanent (*permanent arbitral body*). The jurisdiction of institutional arbitration can be national, regional or international.

## METHODOLOGY

The research method used by the author in compiling the journal of this article is Normative Juridical Research. The author also uses the Deductive Thinking Method, which is a way of thinking that is used when drawing a conclusion from something that is general and has been proven to be true and then the conclusion is intended for something specific. Because of the things that the author has explained above, the object that is analyzed by qualitative research is a research method that refers to the norms and legal provisions contained in the Legislation.

## RESULTS

### The Arbitrase Clause by *Pactum De Compromittendo* in The Party Act Made In The Presence of A Notary

In the making of a Notary deed, the provisions on the requirement<sup>12</sup> of a Notary deed must be met as mentioned in Article 38 of the Law of the Republic of Indonesia Number 2 of 2014 on Amendments to Law Number 30 of 2004 on the Notary Office or the Notary Office Law Amendments (UUJN- P), namely:

- (1) Each Deed consists of:

- a. the beginning of the Act or the head of the Act;
- b. the body of the Act; and
- c. the end or closing of the Deed.

(2) The beginning of the Act or the head of the Act contains:

- a. title of Deed;
- b. Deed number;
- c. hour, day, date, month, and year; and
- d. full name and place of position of the Notary.

(3) The Body of the Act shall contain:

- a. the full name, place and date of birth, nationality, occupation, position, position, residence of the attendees and/or the person they represent;
- b. evidence of the acting position of the face;
- c. the contents of the Act which are the wishes and desires of the interested parties; and
- d. the full name, place and date of birth, as well as the occupation, position, position, and residence of each identifying witness.

(4) The end or closing of the Act contains:

- a. description of the reading of the Deed as referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7);
- b. a description of the signing and place of signing or translation of the Act if any;
- c. the full name, place and date of birth, occupation, position, position, and residence of each witness of the Deed; and
- d. a description of the absence of changes that occurred in the making of the Deed or a description of the changes that may be in the form of additions, deletions, or replacements and the number of changes.

(5) Substitute Notary Deeds and Temporary Notary Officers, in addition to containing the provisions as referred to in paragraph (2), paragraph (3), and paragraph (4), also contain the number and date of appointment, as well as the official who appointed it.

Arbitration clause or dispute resolution forum can be made (1) in the relevant deed, for example in the Debt Agreement in the last article which is part of the End of the Deed (before the End of the Deed) will include the dispute resolution clause. That the inclusion of the

clause is an integral part of the Contents of the Deed, so that if the parties cancel the deed then the deed becomes no longer valid including the clause inclusion of the dispute settlement clause, for example there is an agreement made in the form of a Notary deed<sup>30</sup> violate the Subjective Conditions as set out in Article 1320 of the Civil Code resulting in the agreement Can be Revoked<sup>31</sup> or violate the Objective Conditions as set out in Article 1320 of the Civil Code resulting in Cancellation By Law, if the agreement includes a clause for settlement of disputes through arbitration should also be invalid?

If it happens as described, it turns out that Article 10 of Law Number 30 of 1999 of the AAPS Law has anticipated it which states "An arbitration agreement shall not be void due to the following circumstances:

1. <sup>14</sup> death of one of the parties;
2. Bankruptcy of one of the parties;
3. Novation (debt renewal);
4. Insolvency of one of the parties (state of inability to pay);
5. Inheritance;
6. The enactment of the conditions for the abolition of the principal alliance;
7. When the execution of the agreement is transferred to a third party with the consent of the party entering into the arbitration agreement; or
8. Termination or cancellation of the principal agreement.

Based on the above provisions of a Dispute Resolution clause through Arbitration which is part of the Principal Agreement, if the Principal Agreement expires or is void does not result in the arbitration clause being void, but remains in force or remains or does not become void, such as the *Separability Principle*. ) This is the doctrine of autonomy of the arbitration clause (*The Autonomy of Arbitration Clause*).

That the *Separability Principle* remains valid despite having met the provisions mentioned in Article 10 of Law Number 30 of 1999 of the AAPS Law. It must be related to the legality of the Notary deed, if an agreement is made which contains the Dispute Resolution Forum clause

listed in the Notary deed must meet 3 (three) conditions, namely:

In connection with the discussion, three aspects:

- a. The procedure for making the deed must be done gradually and sequentially as set out in several articles in UUJN/UUJN-P, which in general are:
  - 1) make an introduction to the person, based on his identity shown to the Notary;
  - 2) ask, then listen and observe the wishes or desires of the parties (question - answer).
  - 3) examine the evidence of the letter relating to the wishes or desires of the parties.
  - 4) provide advice and create a deed framework for attendees to
  - 5) meet all administrative techniques of deed making
  - 6) provide copies, and filing for minutes perform other duties related to the performance of the duties of a Notary.
  - 7) if in the making of the deed there is a procedure that is not followed/performed then the deed can be qualified as an invalid or invalid notarial deed, because it does not comply with the procedure specified in UUJN/UUJN - P.

a. **Authority**

authority is a limitation that is given by law/regulation to a particular department that applies to give rise to legal consequences. The Notary in carrying out his office must be in accordance with the Authority regulated in uujn-p as mentioned in article 15 UUJN-P

Notary in carrying out the duties of his office must be based on the authority mentioned above. If the Notary makes a deed at the request of the witnesses not in accordance with his authority, such as making a determination that is the authority of another official, then the action can be qualified as an act outside the authority, and the action becomes the responsibility of the Notary concerned if any party feels harmed, and the deed meant to have no binding force whatsoever.

b. **Substance**

Article 38, paragraph (3) letter c of UUJN-P states that the content of the deed is the will and desire of the witnesses themselves who making it the Notary must also pay attention to the provisions of Article 1337 of the Civil Code. Notaries can only act within the scope of civil law. Notaries do not grant the wishes of witnesses who are materially outside civil law.

If the above three methods are done and can be proved, then the Notary deed has perfect proof of power, but if only one element is not met, then the deed in question is invalid and has no binding legal force. In Article 41 of UUJN - P, it is confirmed that the violation of the provisions as referred to in Article 38, Article 39 and Article 40 results in the Deed having only the power of proof as a deed under band. So in this case if there has been a violation of the Formal Requirements in the making of a Notary deed that violates the provisions of Article 38 UUJN - P which causes the Notary deed degraded the value of proof to be as the deed under hand then the whole Notary deed does not have the power of proof as a Notary

deed When the deed degraded value of proof only has the power of proof as a deed under hand does not happen immediately, but must be through a court decision this can be reviewed based on Article 1868 of the Civil Code that is "an authentic deed is a deed made in the form prescribed by law by or before the public official authorized for it at the place where the deed was made "and Article 1869 of the Civil Code is" a deed that cannot be treated as an authentic deed, either because of the incompetence or incompetence of the public official concerned or because of a defect in form, has the power as handwriting when signed by the parties ". The degradation is equivalent to a defect in form due to a violation of the formal aspects of the making of a Notary deed, although it remains a tool of evidence for the parties as long as there is no denial from the parties.

With other deeds that the Notary deed on the Principal Agreement has not been examined (which includes the Dispute Settlement clause) has not been examined, but which has been examined only the aspect of formality (procedures and procedures for making the deed), in the event of such a degraded deed, will remain as evidence for the parties, so that the Dispute Settlement clause remains in force.

That the urgency of the inclusion of the Arbitration clause in the Notary deed in the principal agreement will have legal force binding on the parties if all the conditions of the making of the deed mentioned in Article 38 UUJN - P are met. Even if there is a violation of the formal aspects in the making of the deed, it will still have power as a tool of evidence for the parties, and all clauses therein can be implemented including the Dispute Resolution clause, because if the disputing parties the clause can still be enforced.

Based on Article 11 paragraph (2) of the AAPS Law in the case of disputes of the parties whose disputes have been determined through an arbitration institution, the Judicial Institution is required to respect the arbitration institution, that the district court is not authorized to adjudicate disputes of the parties who have been bound by the arbitration agreement. The District Court must refuse and not intervene in a dispute resolution that has been determined through arbitration (principle of *limited court involvement*).

Prior to the enactment of the Arbitration and Alternative Dispute Resolution Law (AAPS Law) number 30 of 1999, there was always a seizure of authority to resolve a dispute, although in the agreement they made by *Pactum de Compromittendo* after the enactment of the AAPS Law did not go smoothly - smoothly for several reasons:

1. Inclusion of the Dispute Resolution Clause through Arbitration that is not clear/multi interpreted
2. The inclusion of the Dispute Resolution Clause through Arbitration which is optional, for example, is also mentioned by the court.

parties inclusion of a clear Dispute Resolution Clause through Arbitration and a duty by *Pactum de Compromittendo* or The Deed of Compromise will simplify and clarify the authority of the Institution that will resolve the dispute between the parties. This ambiguity will already require court assistance to decide accordingly:

Article 13:

- (1) In the event that the parties are unable to reach an agreement on the selection of an arbitrator or no provision is made on the

appointment of an arbitrator, the Chairman of the District Court shall appoint an arbitrator or arbitral tribunal.

(2) In an ad hoc arbitration for any disagreement in the appointment of one or more arbitrators, the parties may apply to the Chairman of the District Court to appoint one or more arbitrators in order to resolve the dispute of the parties.

Article 14:

(1) In the event that the parties have agreed that the dispute arising will be examined and decided by a single arbitrator, the parties are obliged to reach an agreement on the appointment of a single arbitrator.

(2) Applicants by registered letter, telegram, telex, facsimile, e-mail or by expedition book must propose to the respondent the name of the person who can be appointed as the sole arbitrator.

(3) If within a maximum of 14 (fourteen) days after the applicant receives the petitioner's proposal as referred to in paragraph (2) the parties do not succeed in determining a single arbitrator, at the request of one of the parties, the Chairman of the District Court may appoint a single arbitrator.

(4) The Chairman of the District Court shall appoint a single arbitrator based on a list of names submitted by the parties, or obtained from an arbitration organization or institution as referred to in Article 34, taking into account both the recommendations and objections submitted by the parties to the person concerned.

In accordance with Article 60 of the APS Law it is confirmed that the arbitration decision is final and has permanent legal force and is binding on the parties. So that when the parties who have already made a dispute settlement clause in the form of Pactum de Compromittendo then the clause must still be followed, even if the parties are not satisfied with the arbitration decision is still open the possibility to file a lawsuit for annulment of the arbitration decision to the district court provided that mentioned in Article 70 of the APS Law: "Against the arbitration decision, the parties may apply for annulment if the decision is suspected to contain the following elements:

a. letter or document submitted in the examination, after the decision is passed, is declared

b. false or declared false;

c. after the decision is taken a decisive document is found, which is hidden by the opponent; or

d. a decision is taken from the result of fraud committed by one of the parties in the investigation of the dispute.

Explanation of Article 70 of the APS Law: "An application for annulment can only be filed against an arbitration decision that has been registered in the court. The reasons for the request for revocation referred to in this article must be proven by a court decision. If the court declares that the reasons are proven or not proven, then this court's decision can be used as a basis for consideration for the judge to grant or deny the application."

In Article 72 paragraph (4) of the APS Law it is stated "Against the decision of the District Court, an appeal may be filed with the Supreme Court which decides in the first and last instance." Explanation of Article 72 paragraph (4) of the APS "What is meant by" appeal "is only to the annulment of the arbitration decision as referred to in Article 70".

Explanation of Article 70 of the APS legal force binding based on Constitutional Court Decision No. 15/PUU-XII/2014 dated 11 November 2014:

"Granting the Applicants' application in full;

1.1 Explanation of Article 70 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (State Gazette of the Republic of Indonesia of 1999 Number 138, Supplement to State Gazette of the Republic of Indonesia Number 3872) is contrary to the Constitution of the Republic of Indonesia of 1945;

1.2 Explanation of Article 70 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (State Gazette of the Republic of Indonesia of 1999 Number 138, Supplement to State Gazette of the Republic of Indonesia Number 3872) does not have binding legal force;

Although Explanation of Article 70 of the APS has been declared to have no binding legal force, not a few applicants then use this as a legal loophole to file an application for revocation of an arbitration decision without including a court

decision to prove the reasons for the application for revocation. It is also emphasized that with the repeal of the Explanation of Article 70 of the AAPS Law, this can be interpreted as the article to stand alone and does not need to be interpreted elsewhere because the sound of the article itself is very clear (expresses verb's). Therefore, the applicant for cancellation must still be able to prove the arguments of his application.

The parties' compliance with the *Pactum de Compromisso* must be exercised, as it is the choice of the parties themselves, and the parties must be consistent in any decision. It did become a little strange, against his own choice, an application for annulment was filed because he was not satisfied with the arbitration decision, even though there was an opportunity to do so.

## CONCLUSION

The inclusion of the Arbitration clause "include" the agreement contained in the Notary deed (which is not separated from the principal/parent agreement) is a clearer and more explicit effort in the event of a dispute between the parties because the parties have promised each other from the beginning, when the agreement or deed is signed, only in this case it needs to be confirmed in a sentence that is not multi interpreted, for example only mentioning "settled through arbitration", but in a clear and concise sentence by saying "settled through the Arbitration (BANI) Representative .....". The term "Agency" means that it will be resolved by the BANI Arbitration Institution so that all and the provisions of the settlement procedure are subject to the provisions of the procedure in force in BANI. If the sentence "settled through arbitration" is possible and construed through Ad Hoc arbitration.

In this regard, the Notary's role is to convey to the parties/presenters that the dispute resolution forum is not only through the courts, but can also be through Arbitration.

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