

## CHAPTER I INTRODUCTION

### A. Background of Research

Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a rule of law state.<sup>1</sup> As a state governed by the rule of law, it is our obligation to provide legal guarantees and certainty to Indonesian citizens. According to Article 28D of the 1945 Constitution, every person has the right to fair legal recognition, guarantees, protection and certainty, and to be treated equally before the law.<sup>2</sup> The phrase "fair legal certainty" means that every Indonesian citizen has the right to legal certainty commensurate with his or her rights in accordance with applicable laws and regulations. This confirms that Indonesia is a legal state as stipulated in the 1945 Constitution.<sup>3</sup>

It is not uncommon for conflicts to occur in social, national, and state life. Conflicts can be resolved either through litigation or non-litigation processes.<sup>4</sup> Not all disputes need to be resolved in court. Apart from that, the Indonesian legal system provides alternative dispute resolution, namely through Arbitration and Alternative Dispute Resolution institutions, as regulated by Law Number 30 of 1999.<sup>5</sup>

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<sup>1</sup> Siti Halilah and Mhd. Fakhurrahman Arif, 2021, "Asas Kepastian Hukum Menurut Para Ahli", *Siyasah: Jurnal Hukum Tata Negara*, Vol. 4, No. 1.

<sup>2</sup> The Indonesian 1945 Constitution.

<sup>3</sup> Mohammad Agus Maulidi, 2017, "Problematika Hukum Implementasi Putusan Final dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum", *Jurnal Hukum Ius Quia Iustum*, Vol. 24, No. 4, p. 535-557.

<sup>4</sup> Muhammad Rifqi Hidayat and Parman Komarudin, 2020, "Penyelesaian Sengketa Wakaf Melalui Jalur Litigasi dan Non-Litigasi", *Al-Adl: Jurnal Hukum*, Vol. 11, No. 2, p. 184-196.

<sup>5</sup> Mosgan Situmorang, 2017, "Pelaksanaan Putusan Arbitrase Nasional di Indonesia", *Jurnal Penelitian Hukum De Jure*, Vol. 17, No. 4, p. 310.

Resolving problems through litigation means resolving problems through judicial institutions in accordance with the provisions of the 1945 Constitution.<sup>6</sup> One of the institutions that holds judicial power in Indonesia is the Supreme Court and its subordinate judicial bodies. The general court, which is authorized by law to examine, try and decide cases, is one of the judicial bodies under the Supreme Court which has the authority to exercise judicial power in Indonesia.<sup>7</sup>

In a business agreement, what actions the parties will take if a dispute occurs is the most important aspect that must be regulated and discussed to ensure its success.<sup>8</sup> Disputes in this context are civil disputes, usually involving quite large sums of money. However, some disputes may relate to the rights and obligations of the parties, as well as other aspects of trade.<sup>9</sup> Currently, the role of arbitration in handling disputes in the world of business and commerce is increasing. Arbitration clauses have often been used as a method of conflict resolution in various national and international contracts.<sup>10</sup>

The method of resolving disputes through Arbitration and Alternative Dispute Resolution (ADR) institutions is preferred by business people

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<sup>6</sup> Ahmad Baihaki and M. Rizhan Budi Prasetya, 2021, "Kewenangan Absolut Pengadilan Agama Dalam Penyelesaian Sengketa Ekonomi Syariah Pasca Putusan Mahkamah Konstitusi Nomor 93/PUUX/2012", *Krtha Bhayangkara*, Vol. 15, No. 2, p. 289-308.

<sup>7</sup> Romi Librayanto, Marwati Riza, Muhammad Ashri, Kasman Abdullah, 2019, "Penataan Kewenangan Mahkamah Konstitusi Dalam Memperkuat Independensi Kekuasaan Kehakiman", *Amanna Gappa*, Vol. 27, No. 1, p. 43-66.

<sup>8</sup> Dedy Mulyana, 2019, "Kekuatan Hukum Hasil Mediasi Di Dalam Pengadilan dan Di Luar Pengadilan Menurut Hukum Positif," *Jurnal Wawasan Yuridika*, Vol. 3, No. 2, p. 177.

<sup>9</sup> Priyatna Abdurrasyid, 2018, *Arbitrase dan Alternatif Penyelesaian Sengketa, Edisi Revisi*, Jakarta: PT Fikahati Aneska, p. 4.

<sup>10</sup> Ni Nyoman Adi Astiti and Jefry Tarantang, 2018, "Penyelesaian Sengketa Bisnis Melalui Lembaga Arbitrase", *Jurnal Al Qardh*, Vol. 5, No. 2, p. 110.

because of its family nature, so they use it as a more peaceful alternative. This option is considered a legal solution and an effort to maintain social harmony by prioritizing solutions that do not spread to society.<sup>11</sup> Many companies don't want their competitors or the general public to know their secrets.<sup>12</sup>

Arbitration has several advantages compared to judicial institutions, including:<sup>13</sup>

1. All confidentiality related to disputes between the parties is guaranteed. According to Article 27 of the Alternative Dispute Resolution Law, every dispute examination conducted by an arbitrator or arbitration panel is carried out behind closed doors. To ensure that disputes or disputes between parties remain confidential, the article uses the phrase "conducted behind closed doors".
2. It is possible to avoid delays due to administrative and procedural issues. According to Article 48 of the Alternative Dispute Resolution Law, dispute investigations must be completed within a maximum of 180 (one hundred and eighty) days from the formation of the arbitration panel or arbitrator. This is to determine the completion time for the arbitration examination.
3. According to the general provisions of the Alternative Dispute Resolution Law, the parties can choose their own arbitrator. The parties

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<sup>11</sup> Susanti Adi Nugroho, 2015, *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, Jakarta: Prenada Media Group, p. 1.

<sup>12</sup> Andi Jukia Cakrawala, 2015, *Penerapan Konsep Hukum Arbitrase Online di Indonesia*, Yogyakarta: Rangkang Education, p. 181.

<sup>13</sup> Ni Nyoman Adi Astiti and Jefry Tarantang, 2018, "Penyelesaian Sengketa Bisnis Melalui Lembaga Arbitrase", *Jurnal Al Qardh*, Vol. 5, No. 2, p. 110.

can select an arbitrator who they deem to have sufficient knowledge, experience and background on the issue in dispute, to be honest and fair.

4. The parties are given the freedom to choose for themselves which legal option will be used to resolve their dispute. This is in accordance with Article 56 of the Alternative Dispute Resolution Law, which states that the parties have the right to choose which type of law will apply for possible dispute resolution or has happened between them. The place and choice of law for conducting this arbitration can be regulated in one of the clauses of the agreement or can be regulated separately in another agreement.
5. An arbitration award is a binding for the parties made through a simple process or method. In other words, it can be done voluntarily by the parties as stated in Article 60 and Article 61 of the Alternative Dispute Resolution Law.

Article 58 of Law Number 48 of 2009 on Judicial Power states that efforts to resolve civil disputes can be carried out outside of court. This confirms that the Judicial Power Law recognizes the existence of Arbitration and Alternative Dispute Resolution.<sup>14</sup> The word arbitration comes from Latin (*arbitrare*) which means the right to resolve disputes outside the court.

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<sup>14</sup> Law Number 48 of 2009 on Judicial Power.

Arbitration as an alternative dispute resolution outside of court has long been known in the Indonesian legal system.<sup>15</sup>

Arbitration was introduced in Indonesia at the same time as the RV (*Regulation op de Rechtsvordering*) in 1847, which is covered by the provisions of Articles 615 to 651 RV, however the provisions of these articles no longer apply after the promulgation of Law Number 30 of 1999 on Arbitration and Alternative Settlements Dispute. Based on Article 1 point (1) of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, arbitration is a method of resolving a civil dispute outside the general court which is based on an arbitration agreement made in writing by the parties to the dispute.<sup>16</sup>

Meanwhile, as stated in Article 1 point (3), 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. The arbitration agreement does not discuss the implementation of the agreement but how to resolve and appoint an authorized institution to resolve disputes that occur between the disputing parties.<sup>17</sup> Regarding the choice of law, the parties are free to determine the choice of law that will be applied to resolve disputes that will occur or have occurred between the parties. An arbitration agreement

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<sup>15</sup> Bambang Sutiyoso, 2008, *Hukum Arbitrase dan Alternatif Penyelesaian Sengketa*, Yogyakarta: Gema Media, p. 107.

<sup>16</sup> Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution.

<sup>17</sup> M. Yahya Harahap, 1991, *Arbitrase*, Jakarta: Pustaka Kartini, p. 97.

cannot stand alone and cannot be implemented if it does not coincide with the main agreement.<sup>18</sup>

The object of the arbitration agreement is regulated in Article 5 paragraph (1) of Law Number 30 of 1999 which states that disputes that can be resolved through arbitration are only disputes in the field of trade and regarding rights which according to law and statutory regulations are fully controlled by the parties to the dispute. Meanwhile, disputes that cannot be resolved through arbitration are disputes that according to statutory regulations cannot be reconciled.<sup>19</sup>

The following are the objects of arbitration according to the ADR Law:

1. Civil Disputes

Only commercial or civil disputes can be resolved through arbitration. This includes business contracts, cooperation, investments, property and various other commercial transactions.

2. Disputes that are civil in nature and can be fully controlled by the parties

This means that arbitration only applies to disputes involving rights that can be owned or regulated freely by the parties to the dispute.

3. Disputes determined by an arbitration agreement

The parties to the dispute must agree to resolve the dispute through arbitration and agree in writing to an arbitration agreement.

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<sup>18</sup> Rahmad Rosyadi and Ngatino, 2002, *Arbitrase dalam Perspektif Islam dan Hukum Positif*, Bandung: PT. Citra Aditya, p. 68.

<sup>19</sup> Felly SURIANTY, 2014, *Pelaksanaan Eksekusi Atas Putusan Badan Arbitrase Nasional Indonesia (BANI) Dan Singapore International Arbitration Center (SIAC)*, Batam: Fakultas Hukum Universitas Internasional Batam, p. 13-54.

Even though arbitration is a body that resolves disputes outside of court, there is still a role for district courts in carrying out the case resolution process. In the explanation of Article 3 paragraph (1) of Law Number 14 of 1970 which has been amended to become Law Number 48 of 2009 on Judicial Power, it is stated that settling cases outside of court on the basis of peace or through arbitration is still permitted, however, the arbitrator's award only has executorial power after obtaining permission or an order to be executed (executor) from court.

Article 62 paragraph (4) of Law Number 30 of 1999 states that the independent nature of arbitration institutions is a form of protection provided by law so that arbitration awards remain independent, final and binding. This certainly creates confusion because the final and binding nature of the arbitration award that binds the parties is not appropriate if in its implementation the arbitration institution must rely on the district court to enforce its award.

Therefore, it is necessary to clarify the provisions in the Alternative Dispute Resolution Law regarding the nature of arbitration awards so that the arbitration process can be carried out quickly and effectively without any intervention from the district court in the implementation of the arbitration award. Because the discussion above is substantial significance, the author will explain this in detail by raising the thesis topic "**THE RELEVANCE OF THE ROLE OF DISTRICT COURTS TO THE EXECUTORIAL**

## **POWER OF ARBITRATION AWARDS IN CIVIL DISPUTES RESOLUTION".**

### **B. Problems Formulation**

Based on the background explained above, the author formulates the research problem as follows:

1. What is the role of district courts to the executorial power of arbitration awards viewed from Law Number 30 of 1999?
2. What obstacles are faced in the process of implementing arbitration award in Indonesia?

### **C. Objectives of Research**

Some of the objectives of this research are:

1. To understand and analyze the role of the District Court in implementing executorial powers over arbitration awards, by referring to the provisions regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. In addition, to explore the legal aspects governing the relationship between courts and arbitration.
2. To analyze and explore the obstacles faced in implementing arbitration awards in Indonesia.

### **D. Benefits of Research**

Some of the objectives of this research are:

1. Theoretical Aspects

The research is expected to make a significant contribution in enriching and developing legal studies, especially in the field of civil law. By



focusing on the use of arbitration methods in resolving civil disputes, this research will deepen understanding of arbitration practice in Indonesia, as well as review the effectiveness and relevance of its application in accordance with applicable laws and regulations. It is also hoped that the results of the research can become a reference for academics, legal practitioners and policy makers in improving the quality of regulations and the implementation of arbitration in the Indonesian civil law system.

## 2. Practical Aspects

The research can contribute to the development of legal and business studies, especially in resolving disputes through arbitration. This thesis enriches the literature on peaceful dispute resolution mechanisms, which can be used as a reference for academics, legal practitioners and entrepreneurs. Apart from that, it also has the potential to be an important input for the Indonesian National Arbitration Board (BANI) to improve arbitration procedures so that they are more in line with the characteristics of final, binding and independent arbitration.