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Scopping the Dispute Submitted Before Indonesia Arbitration

I Gusti Agung Ayu Gita Pritayanti Dinar[1], I Nyoman Bagiastra[2]
I Nyoman Gede Sugiartha[3]

[1]Faculty of Law Warmadewa University, E-mail: gitadinar@gmail.com
[2]Faculty of Law Udayana University, E-mail: nyoman_bagiastra@unud.ac.id
[3]Faculty of Law Warmadewa University, E-mail: nyomansugiartha14@gmail.com

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Corresponding Author:
I Gusti Agung Ayu Gita Pritayanti Dinar, E-mail : gitadinar@gmail.com

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Abstract
The problem of equating the concepts of dispute and default results as legal practitioners tending to assume that every case with an arbitration clause is a dispute that must be examined at an arbitration institution even though the case is not necessarily a dispute because cases, disputes and default have different concepts, nature and causes. According to international instrument, arbitration clause is mandatory for cases that submitted to the arbitration. It shall have clearly regulated under agreement of the parties to the dispute. Thus if there a dispute when implementing their agreement then the settlement brought before arbitration. Unfortunately in the reality is different. This research is used normative legal research methods with approaches: (1) Analitical and Conceptual Approach, and (2) The Statue Approach. The result of this research is between arbitration institutions and general justice must implimentated in harmony and must contribute to each other in creating justice, certainty and benefit of the law in carrying out their duties. Only with this harmony will creating a suitability of judicial competence which is fair to all parties. Regulation regarding the definition of arbitration dispute should be clearly and explicitly stipulated in the general provisions of the Arbitration Law and Alternative Dispute Resolution so that all parties may understanding to and the justice, legal certainty in determining in related cases of the competence of arbitration can be achieved.

I. Introduction

Dispute control mechanism is implemented through the establishment of consultation mechanism and mediation mechanism. Disputes lead the project to be costly in terms of time, cost, even its quality decline and lost business opportunity, and eventually the failure of the project.[1] Dispute resolution agreements are made by placing a dispute resolution clause in its entirety, be it institutional, requirement or procedural.

[1] Anup Sauden and Surya Chhetri, "An Assessment of the Effectiveness of Alternative Dispute Resolution Methods," *Journal of Productive Discourse* 01, no. 01 (2023): 53–64.

Arbitration, as an out-of-court legal dispute resolution procedure, is nothing new in Indonesia and international dispute settlement system. Arbitration has become quite important in the choice of forum for dispute resolution in the world. Business stakeholders expect and have trust to arbitration institutions as professional alternative dispute resolution institutions which have advantages over public courts with competent practitioners. "Although arbitration is essentially a type of procedure, one of many mechanisms for resolving disputes between private parties."[2] Arbitration is even considered an essential legal institution that serves as a method of resolving disputes beyond judicial procedures in commercial law such as commerce, banking, finance, investment, industry and intellectual property right. Commercial dispute resolution by arbitration is only effective in certain disputes such as:

1) when the level of tension between the parties to the conflict remains moderate;
2) when the parties have good faith to settle the dispute through arbitration; and
3) where there is a mandatory provision in the agreement between the parties that if a dispute arises between them, they shall use arbitration to resolve the dispute in question[3].

The primary source of arbitration law is the arbitration clause or agreement signed by the parties concerned. The agreement is the law for the parties to it. The arbitrator's power to perform the arbitration and the terms to be performed are generally governed by the agreement of the parties. International conventions are the most effective method of creating an international legal system governing international arbitration. International conventions had made connection to national legal systems into a legal network which have similar purposes to enforcing the international legal system of arbitration agreements and arbitral awards.

The court administration system in Indonesia has also welcomed technological advances through the socialisation of e-courts that have been implemented in several regions through Supreme Court Regulation Number 3 of 2018 concerning electronic court case administration.[4] Limitations on the Internet and technology (networks connected to each other) are one of the obstacles that slow down the implementation of e-courts in four directions. The business contract agreed upon by the parties is the law of each party and each provision of the contract is binding on the parties to perform such contract.[5] The same applies to the enforceability of key terms and other provisions contained in a business contract; they must be respected by the parties because their binding power comes from mutual agreement, which is the will of the parties.

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[2] Charless L. Knapp, "Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device," *San Diego Law Review* 46, no. 3 (2009): 609–28, hlm. 610, https://digital.sandiego.edu/sdlr/vol46/iss3/6/.

[3] Ida Bagus Wyasa Putra, *Alternative Dispute Resolution: Bahan Kuliah Hukum Bisnis Internasional Pada Program Sarjana Hukum Fakultas Hukum* (Denpasar: Universitas Udayana, 2013), hlm. 21.

[4] I Gusti Agung Ayu Gita Pritayanti Dinar, "Komparasi Hukum Acara Pembuktian E-Arbitration Di Indonesia Dengan Shenzhen, Cina," *Acta Comitas: Jurnal Hukum Kenotariatan* 5, no. 3 (2020): 632–38, https://doi.org/https://doi.org/10.24843/AC.2020.v05.i03.p17.

[5] I Gusti Agung Ayu Gita Pritayanti Dinar and I Nyoman Putu Budiartha, "A Comprehensive Force Majeure Model Clause in Corporate Transactions in Indonesia," *Sociological Jurisprudence Journal* 3, no. 2 (2020): 138–44, https://doi.org/https://doi.org/10.22225/scj.3.2.1901.138-144.

Law of the Republic of Indonesia No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (referred to as UUAAPS) provides for a mandatory arbitration clause, but the limitation of this mandatory provision is not provided in the regulations.
Typically, issues with the scope of a binding arbitration clause arise and they are caused by one of the following:

1. public opinion does not always distinguish between disputes and shortcomings;
2. Law practitioners also do not always distinguish between infringement and litigation;
3. District court judges tend to see only if there is a mandatory provision in the material circumstances, if so, the case is dismissed; And
4. Arbitral judges tend to look only at the presence or absence of the mandatory provision in important circumstances, if so, the case will be admissible.

An agreement usually contains a breach/failure clause and a dispute clause. The concepts in these two clauses are often overlooked in determining the jurisdiction of an arbitrator. Arbitration bodies often claim direct jurisdiction without conducting a jurisdictional test before the arbitration clause is found in an agreement, while each agreement typically distinguishes between the disputed clause and default terms. Such problems often arise because law practitioners are not aware of the problems associated with the concept of litigation as a standard of arbitration skill.

Stemming from the above context, the legal issues raised in this study are:
(i) What is the scope of dispute settlement under the jurisdiction of international arbitration? and (ii) what is the concept of arbitration in the future national legal system? This paper has its own uniqueness because it has a different research subject than similar studies done before, such as the one conducted by:
(1) Gita Pritayati Dinar and Budiartha[6] with the title Comprehensive Force Majeure Model Clause in corporate transactions in Indonesia examines the factors that cause failure in the performance of obligations. contract service as well as a complete model of force majeure for Business Transactions in Indonesia and (2) Mostafa Al-Dirani[7] with the title The Value of Electronic Arbitration in the Legal System of the Day Now considers methods of dispute resolution through Internet arbitration (E-Arb) related to the increase in cross-border e-commerce and cross-border transactions.

2. Research Method

This study uses legal research method. Legal research serves to provide legal arguments in the event of a void of norm, ambiguity and conflict of norms.[8] The approaches used in this study are (i) analytical and conceptual approach, which orients all problems to be analyzed on the basis of concepts, theories, principles and applicable laws and regulations, and (ii) the statutory approach used to research, compare and analyze Act No. 30 of 1999 on Alternative Dispute Resolution and

[6] Ibid.
[7] Mostafa Al Dirani, "The Value of Electronic Arbitration in Today's Legal System," *Journal of Research in International Business and Management* 10, no. 2 (2023): 1–4, https://doi.org/http:/dx.doi.org/10.14303//jribm.2023.006.
[8] I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2016), hlm. 11.

Arbitration with UNCITRAL (United Nations Commission on International Trade Law).

3. Results and Discussion

3.1. Dispute Arrangements in Arbitration Competence

Commercial disputes are often cited as the source of unexplained cost inefficiencies. Therefore, dispute prevention or effective dispute resolution is part of the ideal business concept. A dispute is the basis of arbitration skills. In many cases where there is an agreement, only the cases that constitute a dispute fall under the jurisdiction of the arbitration. This stems from the general trend of constructing arbitration clauses. In general, the arbitration clause is conceived as a dispute settlement clause, i.e. it only deals with disputes that fall within the jurisdiction of the arbitration. Dispute is defined as a conflict or controversy that may lead to a lawsuit.[9] Dispute is disagreement. According to Black's Law Dictionary, a case refers to a civil or criminal case, action, lawsuit, or controversy in the field of law or justice. The case is a problem arising in the management of activities and relations between the two parties or better in civil or criminal relations. Not every case is a dispute. Only cases with disputed elements or differences of opinion are disputed.

When the parties breach the agreement and they already agreed to settle the dispute before arbitration which is regulated under their agreement then they could submit the dispute into the arbitration body. According to Article 3 UUAPS[10] "The district court has no jurisdiction to hear disputes between the parties bound by the arbitration agreement." Article 11(2) of the UUAAPS reads as follows:"A certain district court refuses and will not intervene in the resolution of a dispute determined by arbitration, except in certain circumstances provided for by this Act." These two clauses state the mandatory provision of arbitration as set forth in Article 11 of UUAAPS but do not provide information on the explicit limitation of the dispute in question.

Although UUAAPS provides for arbitration and alternative dispute resolution, with the provisions contained therein, this law does not interpret the concept of arbitration as the basis of the jurisdiction of the law itself because the Limitation Clause governs International arbitration clauses are not yet available. The UNCITRAL Model Law has not provided a clear definition of a dispute, thereby raising fundamental conceptual issues concerning the practice of dispute and default resolution.

The law provides that the arbitration agreement must be in writing and recorded in any form, including by electronic message if the information therein is available for further use. An arbitration dispute is characterized by the existence of the disputing parties, the existence of disagreement or difference of opinion between the parties, the existence of a particular object in question and the existence of an agreement with arbitration clauses.

Compulsory arbitration creates many cases outside of the court system, and therefore it is difficult for judges to voluntarily submit. David also said that some errors in the

[9] Bryan A. Garner, *Black's Law Dictionary*, 10th Editi (Canada: Thomson West, 2014), hlm. 540.
[10] "Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution" (1999).

award occurred during the arbitration due to binding arbitration which caused the court to lose its jurisdiction to consider the relevant cases. This shows that, in practice, before conducting the examination at the arbitral tribunal, it is necessary to conduct a preliminary examination procedure to check the capacity of the judicial authority for the case submitted. Furthermore, the court did not determine whether an arbitration clause introduced unilaterally by an employer could constitute a "voluntary" waiver[11].

Justice is always a top priority in any Rule of Law, which can never be achieved if the functions of the judicial authorities are inconsistent with the case handled by law practitioners. To determine whether the arbitral institution has jurisdiction to consider cases relating to an agreement with this arbitration clause, a preliminary examination should be carried out in accordance with the instructions in the UNCITRAL Note on Arbitration Institutions. financial 1996.

There are some international instruments which are regulating the arbitration jurisdiction:

1. Article 5 of the UNCITRAL model law states: *In matters governed by this law, no court shall intervene except where so provided in this law;*[12]
2. Article 2(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958[13]: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958* mengatur *The court of Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreements is null and void, inoperative or incapable of being performed*; and
3. Article 1 of the Convention on the Arbitration of Civil Law Disputes arising from Economic, Scientific and Technical Cooperation, Moscow, 1972[14]: *All disputes between economic organizatiins resulting from contractual and other civil law cases arising between them in the course of economic and scientific technical cooperation of the countries parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law*.

These three sources of international arbitration law stipulate that only cases of commercial dispute can be submitted to international arbitration. Therefore, law practitioners need to clearly understand the difference between commercial disputes and non-commercial disputes such as default, difficulty, force majeure.

The usefulness of the importance of arbitration in economic development around the world will have a positive effect on increasing the economic activity of communities, with the ultimate aim of achieving shared happiness. Utilities can serve as the basis for decision making to achieve the desired benefits. Of course, the expected benefits must

[11] Tanya J. Axeson, "Mandatory Arbitration Clauses and Statutory Right: The Legal Landscape after Nelson," *Harvard Negotiation Law Review* 3, no. Spring (1998): 271–84, hlm. 283 https://shorturl.at/bcnxM.

[12] United Nations, "UNCITRAL Model Law on International Commercial Arbitration 1985/2006" (1958).

[13] Ibid.

[14] "Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation" (Moscow, 1972).

take into account a sense of justice and legal certainty so that the disputing parties can accept the decision made. In the development of modern economics, Bentham's theory of utility can be measured on a basic scale and can be compared between individuals. This theory also evolved, especially in the field of modern law and economics, once again promoted by Richard A. Posner.[15]

Posner's ideological contributions focus more on the economic efficiency of explaining common law. When legal regulations create favorable conditions for interactions and transactions, new legal regulations take effect. Posner's thinking about effectiveness in keeping with the ethos of arbitration is often considered to be more effective than resolving disputes through lengthy and complex public courts. The final and binding arbitration process has received great attention from Indonesian businessmen in deciding how to resolve disputes between the parties.[16]

3.2 The Concept of Dispute Settlement by Arbitration in The Future National Legal Order

In the case of legislation, many bills do not deviate from the full theoretical legal framework. The biggest problem with managing this type of legal process is the legal design as such a workflow can contain logical flaws[17]. It should be mentioned that the growth of information and communication technology creates both technological benefits and the ability to engage in more commercial and financial transactions online. A direct result has been the development of online dispute resolution technologies[18]. Given the amount of conflict generated by online transactions, interactions, and relationships, the development of processes that use the Web to resolve such problems deserves considerable attention[19].

Legal concepts are the basis for writing down concepts related to some parts of law and methods of identifying scientific tools in the process of researching and analyzing law (Putra 2016). As part of arbitration law reform in a country, legislatures and governments are required to be able to provide theoretical input in the form of legal concepts that are relevant and able to meet the needs of changing international law, especially in the study of cooperation between states in the promulgation of relevant legal products. Every legal product produced must be followed by all stakeholders: classes of society, practitioners, the legal apparatus and the government. Thus, the ideal legal product must be clearly conceived and more precisely because it will later benefit the whole community, both domestically and internationally. Thus, legal documents will not only become ceremonial documents serving to support participation in the outcome of international conventions.

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[15] Fajar Sugianto, *Economic Analysis of Law* (Jakarta: Kencana, 2014): hlm. 26.

[16] Ibid.

[17] Ida Bagus Wyasa Putra, *Teori Hukum dengan Orientasi Kebijakan (Policy-Oriented Theory of Law): Pemecahan Problem Konteks Dalam Proses Legislasi Indonesia* (Denpasar: Udayana University Press, 2016): 77, https://lib.atmajaya.ac.id/default.aspx?tabID=61&src=k&id=220266.

[18] Ibid, hlm. 88.

[19] Ethan Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace," *International Review of Law Computers & Technology* 11, no. 2 (2007): 97–107, https://doi.org/10.1080/13600860701492096.

Arbitral competence is essential to avoid the error of judicial jurisdiction in Indonesia. Every judicial authority, including arbitration, must perform a capacity test arising from an agreement to determine whether the authority has jurisdiction over the case[20]. The qualification test may be conducted by means of a preliminary examination by the arbitral tribunal. In the UNCITRAL Notes on the Organization of Arbitration, it is stated that:[21]

The special proceedings meetings of the arbitrators and the parties to the separate hearing are *de facto* referred to by terms such as "prehearing meeting", "prehearing conference", "prehearing conference", "prehearing review" or similar terms. means. The terms used depend in part on the stage of the proceedings at which the meeting took place[22].The notes recommend holding some preliminary meetings outside of mediation. In the opinion of the researcher, this is to ensure that cases submitted to international arbitration fall within the jurisdiction of the institution.

UNCITRAL completed its notes at its 29th session (New York, 28 May-14 June 1996). In addition to the 36 member countries of the Commission, representatives of many other countries and a number of international organizations also participated in the deliberation. During the preparation of the draft documents, the secretariat consulted with experts from different legal systems, national bodies and international professional associations. In the introduction, pre-trial was briefly mentioned, but so far it has not been applied to the laws and regulations governing arbitration in different countries, including Indonesia.

The urgency for a pre-trial concept in an arbitral institution is useful to define the jurisdiction of the arbitral institution over the case to be handled in order to achieve legal certainty through fairness in jurisdiction. The third element of the idea of law, legal certainty, serves to compensate for the weaknesses of the first two. These weaknesses have a perceived character. We can talk here about the matter of factual knowledge[23]. Radbruch refers in conceptualization to the third element of the legal idea that legal certainty compensates for the weaknesses of the first two. This weakness is epistemological. Here we can talk about the problem of factual knowledge that can arise impediments to the legal certainty that justice seekers desire in the process. The previous two elements will not be achieved without legal certainty because court decisions are not necessarily followed.

4. Conclusion

[20] Ida Bagus Wyasa Putra, *Hukum Kontrak Internasional = The Law of International Contract* (Bandung: Refika Aditama, 2017), hlm. 252, https://opac.perpusnas.go.id/DetailOpac.aspx?id=1053096.

[21] United Nations, UNCITRAL Model Law on International Commercial Arbitration 1985/2006.

[22] United Nations, *UNCITRAL Notes on Organizing Arbitral Proceedings* (Vienna: United Nations Office, 2016), https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings.

[23] Robert Alexy, "Gustav Radbruch's Concept of Law," in *Law's Ideal Dimension*, First (USA: Oxford University Press, 2021). https://academic.oup.com/book/41215/chapter-abstract/350682967?redirectedFrom=fulltext.

Provisions regarding the scope (limitation) of the mandatory provision, which defines the dispute as the basis of arbitration, do not exist in the general provisions of the UUAAPS. The provisions relating to the scope of the compulsory arbitration clause in the international legal system are mentioned in Article 1 of the Convention on the Arbitration of Civil Law Disputes arising from Business Cooperation. Economics, Science and Technology, Moscow, May 26, 1972. The concept of developing a mandatory arbitration clause in a future national legal order should include a clear and precise definition of the dispute in article 1 of the UUAAPS general articles. Thus, the general public and law practitioners can understand the concept of litigation and there should be no problems in understanding the binding concept that limits the arbitration clause to litigation. By including the definition of the dispute, the clause will be able to clarify each concept of dispute as mentioned in the following terms of UUAAPS, so that all parties can understand and can create certainty legal aspects of international arbitration.

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