Journal of Law and Legal Reform
Vol. 5 Issue 1 (2024) 305–332
DOI: https://doi.org/10.15294/jllr.vol5i1.2144
Online since: January 31, 2024

Journal of Law & Legal Reform

journal.unnes.ac.id/journals/index.php/jllr/index

Reformulation of Commercial Court Authority Regulations Relation to the Arbitration Clause

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Abstract

The issue of jurisdiction in dispute resolution within the Commercial Court arises when the contract designates an arbitration clause as the preferred mechanism for resolving disputes. In the contractual agreement between PT. Swadaya Graha and PT. Rayon Utama Makmur (RUM), the chosen forum for dispute resolution is stipulated to be the National Arbitration Board (BANI). However, concurrently, there is a proposal for dispute resolution within the Commercial Court framework concerning defaulted debt and receivable disputes in PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg. This has

engendered a legal debate centring on the application of the "lex specialist derogat legi general" principle among the Arbitration Law, the Bankruptcy Law, and PKPU, with regard to the absolute jurisdiction of institutions authorized to examine, decide, and adjudicate incidents of defaulted debt and receivable disputes within the legal relationship between the PKPU Petitioner and the Respondent. The PKPU process is structured within a contract that includes an arbitration clause as the designated dispute resolution mechanism. Given the complications and hurdles posed by these issues, there is a pressing need for legal certainty in the future. Furthermore, there has been a conflict of norms between the Arbitration Law the Bankruptcy Law and PKPU, as evidenced in PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg. Hence, a reformulation of the Bankruptcy Law and PKPU regulations is essential to harmonize them with evolving norms and address emerging issues. A vital aspect of this reformulation involves the potential removal or replacement of Article 303 of the Bankruptcy Law and PKPU.

Keywords
Reformulation, Authority Arrangements, Commercial Court

Introduction

Recent years have witnessed a notable increase in the establishment of specialized courts specifically designed to handle and often attract commercial disputes.[1] The Commercial Court is a specialized judicial entity operating within the broader legal system, possessing the authority to examine, adjudicate, and render decisions concerning bankruptcy cases and the postponement of debt payment obligations (PKPU). Furthermore, the Commercial Court is empowered to address additional commercial disputes, including those pertaining to intellectual property rights (IPR) and disputes arising from bank liquidations overseen by the Deposit Insurance Corporation (LPS).

[1] Lucas Clover Alcolea, "The Rise of the International Commercial Court: A Threat to the Rule of Law?," *Journal of International Dispute Settlement* 13, no. 3 (2022): 413–42.

Article 300 of Law no. 37 of 2004 explicitly outlines two key provisions. Firstly, this Court, as outlined in this legislation, not only possesses the jurisdiction to handle applications for bankruptcy and PKPU declarations but also has the mandate to adjudicate on other commerce-related cases as defined by the law. Secondly, the establishment of this Court, as described in paragraph (1), is undertaken incrementally through Presidential Decree, considering the requirements and readiness of the necessary resources.[2]A commercial court is a specialized judicial entity instituted within the jurisdiction of a district court.[3] The primary objective behind the establishment of the Commercial Court is to provide a legal avenue for the expeditious, equitable, transparent, and effective resolution of financial disputes between involved parties, specifically Debtors and Creditors. Individuals and business entities, as part of their ongoing business operations, occasionally establish debtor-creditor relationships.

This initiative aims to enhance the conduct of commercial activities and bolster economic vitality as a whole. Additionally, it seeks to rebuild the confidence of foreign creditors in the private debt settlement process.[4] Creditors extend loans or credit to debtors based on the confidence that the debtor will fulfill the obligation of repayment in accordance with the mutually agreed-upon terms.[5] The issue of the competence of dispute resolution institutions is governed by various laws, including Law Number 14 of 1985 concerning the Supreme Court, most recently amended by Law Number 3 of 2009 regarding the Second Amendment to Law Number 14 of 1985 concerning the

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[2] Bicar Franki Leonardo Manurung, Elza Syarief, and Rina Shahriyani Shahrullah. "Legal Consequences of Bankruptcy and Postponement of Debt Payment Obligations: Are They Similar?." *Journal of Law and Policy Transformation* 7, no. 1 (2022): 85-96. *See also* Rado Fridsel Leonardus, Alexander Yovie Pratama Yudha, and Tata Wijayanta. "Practice of Applying Affidavits in Bankruptcy Law and Postponement of Debt Payment Obligations." *Unnes Law Journal* 9, no. 2 (2023): 467-488.

[3] Bambang Eryanto Hermawan, et al. "Simple Verification Principles in Bankruptcy Procedures in Commercial Court of Indonesia." *International Journal of Multicultural and Multireligious Understanding* 7, no. 5 (2020): 461-472.

[4] Sunarmi, *Hukum Kepailitan*, (Jakarta: PT. Sofemedia, 2010).

[5] Zeffrianto Sihotang, "Duties And Authority of PKPU Management Basen on Law No. 37 of 2004 Concerning Bankruptcy and Suspension Debt Payment Obligations," *Journal of Law Science* 3, no. 1 (2021): 15–24.

Supreme Court. It also encompasses Law Number 2 of 1986 regarding General Courts, last amended by Law Number 49 of 2009 concerning the Second Amendment to Law Number 2 of 1986 regarding General Courts, the Arbitration Law, Law No. 37 of 2004 concerning Bankruptcy and PKPU, and the laws related to Civil Procedure Law, namely HIR and/or RBg.

Bankruptcy serves as one method of conflict resolution, complementing various other mechanisms elucidated by the author earlier.[6] Bankruptcy entails the comprehensive seizure of all assets belonging to the bankrupt debtor, with the administration and resolution overseen by the appointed curator under the vigilant supervision of the presiding supervisory judge.[7] Initially, bankruptcy was regarded as a judgment for a criminal offense.[8] Article 303 of the Bankruptcy Law and PKPU states, "The court retains the authority to examine and resolve applications for bankruptcy declaration from parties bound by agreements containing arbitration clauses, provided that the debt forming the basis for the bankruptcy application complies with the provisions outlined in Article 2, paragraph (1) of this Law." Addressing the issue of limited liability debt is achieved through a well-established bankruptcy methodology in legal doctrine, referred to as commercial emergence from financial turmoil.[9]

One of the arbitration institutions in Indonesia vested with the competence to adjudicate trade disputes is the Badan Arbitrase Nasional Indonesia (BANI), also known as The Indonesian National Arbitration

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6 Rian Saputra, and Resti Dian Luthviati. "Institutionalization of the approval principle of majority creditors for bankruptcy decisions in bankruptcy act reform efforts." *Journal of Morality and Legal Culture* 1, no. 2 (2020): 104-112. *See also* Febby Mutiara Nelson, and Esther Melinia Sondang. "Striking A Balance Between Legal Certainty, Justice and Utility to End the Clash Between Bankruptcy and Criminal Proceedings in Court Decision No. 11/Pdt. Sus-Gugatan Lain-lain/2018/PN. Jkt. Pst and No. 3 K/Pdt. Sus-Pailit/2019." *Journal of Indonesian Legal Studies* 6, no. 1 (2021): 185-198.

7 Didi Sukardi, "The Legal Responsibility of Debtor to Payment Curators in Bankruptcy Situation." *Jurnal Pembaharuan Hukum* 8, no. 2 (2021): 142-156.

8 Kurnia Toha and Sonyendah Retnaningsih, "Legal policy granting status of fresh start to the individual bankrupt debtor in developing the bankruptcy law in Indonesia," *Academic Journal of Interdisciplinary Studies* 9, no. 2 (2020): 157–161.

9 Hermawan et al., "Simple Verification Principles in Bankruptcy Procedures in Commercial Court of Indonesia."

Board.[10] Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution also delineates the jurisdiction of Arbitration Institutions, such as BANI. These institutions possess the competent authority to scrutinize, adjudicate, and render decisions on cases stipulated in contracts or agreements that incorporate arbitration clauses for dispute resolution.[11] BANI consistently operates in accordance with pertinent legal statutes and internal regulations established by BANI, which includes adherence to specified time limits mandating the arbitral tribunal to render decisions.[12]

A dispute can be resolved through the following methods: Litigation, Arbitration, Consultation, Negotiation, Mediation, Conciliation, and Expert Judgment. Alternative Dispute Resolution (ADR) has been recognized as a component of the dispute resolution mechanism. In 1976, Chief Justice of the United States Supreme Court, Warren Burger, instigated the practice of out-of-court settlements. [13] The arbitration agreement serves as the cornerstone of commercial arbitration as it formalizes the parties' commitment to engage in arbitration, a mandatory accord for any dispute resolution mechanism beyond the purview of the court.[14]

In legal terminology, the term "dispute" denotes conflict, and within civil procedural law, cases are categorized into those that involve

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[10] A. Dardiri Hasyim, "Extra-Judicial Dispute Resolution and the Realization of Justice in the Indonesia Legal System." *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 55, no. 1 (2021): 1-24.

[11] Daniel Dianto Aritonang and Manlian Ronald A. Simanjuntak, "Analysis of important factors in choosing or using process alternative dispute resolution of construction project from contractor's perspective (case study in XYZ Company, Ltd's)," *IOP Conference Series: Materials Science and Engineering* 1007, no. 1 (2020). https://doi.org/10.1088/1757-899X/1007/1/012084.

[12] Vania Shafira Yuniar and Florentiana Yuwono, "The Comparison of Arbitration Dispute Resolution Process Between Indonesian National Arbitration Board (BANI) and London Court of International Arbitration (LCIA)," *Journal of Private and Commercial Law* 6, no. 1 (2022): 77–99.

[13] Rusli Subrata, "Mechanisms of Alternative Dispute Resolution in Conflict and Dispute Resolution in Indonesia," *Litigasi* 24, no. 24 (2023): 151–164.

[14] Henny Mardiani, "Arbitration Agreement according to Indonesian Law". *JISIP (Jurnal Ilmu Sosial dan Pendidikan)* 8, no. 1 (2024): 44–50.

a dispute and those that do not. [15] In accordance with Article 1, Paragraph (1) of Law Number 30 of 1999 pertaining to Arbitration and Alternative Dispute Resolution, arbitration represents a means of addressing a civil dispute outside the conventional judicial system. It hinges upon the presence of a written arbitration agreement, which is mutually agreed upon by the disputing parties. These parties may encompass both individuals and entities governed by both civil and public law. The peace award is equally conclusive and binding, mirroring the characteristics of a final award. [16] An arbitration agreement can take the form of an arbitration clause integrated into a written agreement executed by the parties prior to the dispute's inception, or it can be a distinct arbitration agreement established by the parties subsequent to the emergence of the dispute.[17] The parties' decision to resolve their dispute through BANI Arbitration signifies their agreement to abstain from pursuing the matter in the District Court. Furthermore, it implies their commitment to abide by any decisions rendered by the Arbitration Tribunal.[18]

According to Article 3 of Law 30/1999 on Arbitration, the District Court lacks jurisdiction to preside over disputes involving parties who have entered into an arbitration agreement. Nevertheless, in practice, there are numerous instances of non-compliance with the established regulations, as exemplified by the PT bankruptcy case involving Environmental Network Indonesia (Enindo) and Friends

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[15] Muhammad Iqbal Baiquni, "Arbitrators as a Legal Profession in The Alternative Role of Dispute Resolution in Indonesia," *Jurnal Humaya: Jurnal Hukum, Humaniora, Masyarakat, dan Budaya* 2, no. 1 (2022): 12–20.

[16] Hendri Jayadi, "Legal Certainty Implementation of Arbitration Decisions in Indonesia." A*rbitration and Alternative Dispute Resolution International Conference (ADRIC 2019)*. Atlantis Press, 2020.

[17] Rahayu Hartini, *Penyelesaian Sengketa Kepailitan di Indonesia (Dualisme Kewenangan Pengadilan Niaga & Lembaga Arbitrase)* (Jakarta: Kencana, 2009).

[18] Aldiva Pitaloka, Marjo Marjo, and Zil Aidi. "The Role of the Indonesian National Arbitration Board (BANI) in the Prevention and Settlement of Business Disputes in Indonesia." *Proceedings of the International Conference on Sustainability in Technological, Environmental, Law, Management, Social and Economic Matters, ICOSTELM 2022*, 4-5 November 2022, Bandar Lampung, Indonesia. 2023. *See also* Yuniar, and Yuwono. "The Comparison of Arbitration Dispute Resolution Process Between Indonesian National Arbitration Board (BANI) and London Court of International Arbitration (LCIA)."

against PT. Sons and Daughters of Fortuna Windu (PPFW) and Friends. In this particular case, an arbitration award was issued, yet dissatisfied parties subsequently resorted to re-submitting the case to the commercial court, and the court, in turn, accepted the case.

The dispute in question involves PT. Atmindo and PT. Palmechandra Abadi, with the verdict issued by the National Arbitration Board (BANI) Representative of Medan, documented as Number 01/IV/ARB/BANI-Mdn/2006 and dated January 2007. According to the BANI decision, the Medan representative ruled that PT. Palmechandra Abadi was obligated to make payment for the remaining amount of Rp. 650,979,463 within 30 days from the pronouncement of the Arbitration Decision. However, in practice, PT. Palmechandra Abadi, which also had outstanding debts to several other creditors, eventually faced bankruptcy proceedings. In bankruptcy case number 03/Pailit/2007/PN.Niaga.Mdn, PT. Atmindo, PT. Krida Pujimulyo Lestari, and PT. Bank Bukopin Medan Branch collectively became creditors of PT. Palmechandra Abadi within the bankruptcy case. This situation highlights that, despite the legally binding nature of BANI's decision for implementation, practical challenges persist when it comes to enforcing BANI's rulings concerning debt and receivable obligations.[19]

The contract between PT. Swadaya Graha and PT. Rayon Utama Makmur (RUM) includes a provision specifying the choice of a dispute resolution forum, which is the National Arbitration Board (BANI). However, on the other hand, a dispute resolution has also been proposed through the Commercial Court regarding disputes related to outstanding debts in PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg. This situation has given rise to a legal debate concerning the application of the principle of "lex specialist derogat legi generalis" between the Arbitration Law, the Bankruptcy Law, and PKPU with regard to the issue of the absolute authority of institutions empowered to examine, decide, and adjudicate disputes over debts and receivables in default within the legal relationship between the PKPU Petitioner and the Respondent. PKPU is governed by a contract that includes an

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[19] Ismail Rumaidan, *Pelaksanaan dan Hambatan Eksekusi Putusan Arbitrase Oleh Pengadilan Negeri*. (Jakarta: Puslitbang Hukum dan Peradilan Badan Litbang Diklat Kumdil Mahkamah Agung RI, 2016).

arbitration clause for dispute resolution. This research revolves around two key problem formulations: Why are there numerous business dispute resolutions in the Commercial Court related to the Arbitration Clause? How does the reformulation of the Commercial Court's jurisdiction regulations intersect with the Arbitration clause?

The research employed a normative approach, which entailed an examination of the alignment of prevailing legal frameworks. In this normative research, the author began by identifying the specific legal principles that have been established within particular legislations.[20] The research methodology employed in this study was a normative approach, specifically an evaluative research approach designed to appraise the implementation of legislation. This research method involved both library research and field research. The statutory approach encompassed a comprehensive review of all relevant laws and regulations pertaining to the specific legal issue under consideration. Simultaneously, the case approach involved an examination of business dispute cases related to Arbitration and Commercial Courts.

Resolving Business Disputes in Commercial Courts through Arbitration Clauses

Disputes or conflicts frequently arise in traditional market environments. However, depending on the inherent characteristics and mode of transaction, these issues can be effectively managed and resolved.[21] Given that conflicts inherent to business are inevitable, a precise mechanism for resolving disputes is imperative.[22] A significant number of business dispute resolutions take place within the Commercial Court, primarily due to certain legal gaps and the parties' recognition of the existing regulations governing bankruptcy law, PKPU, and the Arbitration Law. For instance, disputes concerning

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[20] Soerjono Soekanto, *Penelitian Hukum Normatif.* (Jakarta: Raja Grafindo Persada, 2003).

[21] Ayyappan Palanissamy and R. Kesavamoorthy, "Automated Dispute Resolution System (ADRS) - A Proposed Initial Framework for Digital Justice in Online Consumer Transactions in India," *Procedia Computer Science* 165 (2019): 224–231.

[22] Suwinto Johan, Amad Sudiro, and Ariawan Gunadi, "What Could ASEAN Learn about Bankruptcy Law from ASEAN Partner Countries, China and Japan?," *Hasanuddin Law Review* 8, no. 3 (2022): 194–210.

financial obligations within a business context can be addressed through the bankruptcy and/or PKPU mechanisms. The definition of debt in the context of both the Bankruptcy Law and PKPU is clearly articulated in Article 1, point 6 of the Bankruptcy Law and PKPU. These laws define debt as an obligation that is quantifiable in terms of monetary value, either in Indonesian or foreign currency and can either be immediate or contingent. Such obligations arise from agreements or legal provisions, compelling the debtor to fulfill them. Failure to meet these obligations grants the creditor the right to seek satisfaction from the debtor's assets.[23]

In such circumstances, the occurrence of events such as disputes or legal actions should always be anticipated.[24] The institutions responsible for resolving debt disputes falling under the criteria stipulated in Article 2, Paragraph 1 of the Bankruptcy and PKPU Law pertain to scenarios where a Debtor, who has multiple Creditors, fails to fully repay at least one outstanding debt that is both due and collectible. In such cases, bankruptcy is declared through a Court Decision, either at the Debtor's request or at the behest of one or more of the creditors, with resolution achieved through bankruptcy petitions and/or PKPU proceedings conducted in the Commercial Court.[25]

The acknowledgment of failure constitutes an integral aspect within the spectrum of corporate experiences. [26]Business enterprises necessitate substantial capital to fulfill the objective of maximizing profits, a means of which includes securing loans from financial institutions or other individuals and corporate entities.[27] In the

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[23] Kukuh Pramono Budi, *Implikasi Hukum Pengaturan Klausula Arbitrase Kaitannya Dengan Proses Kepailitan dan PKPU,* (Surabaya: Program Studi Manajemen Hayam Wuruk Perbanas, n.d.).

[24] Sarman Sinaga, Gomgom T.P. Siregar, and Lamminar Hutabarat, "The model of business dispute resolution on electronic transactions in Indonesia," *Journal of Advanced Research in Dynamical and Control Systems* 12, no. 6 (2020): 573–580.

[25] Budi, *Implikasi Hukum Pengaturan Klausula Arbitrase Kaitannya Dengan Proses Kepailitan dan PKPU.*

[26] Sumurung P Simaremare, Bismar Nasution, Sunarmic, and Edi Yunara, "Reviewing the Comparison of the Legal Bankruptcy System Between Indonesia and the Netherlands," *Turkish Journal of Computer and Mathematics Education (TURCOMAT)* 12, no. 6 (2021): 2290–2296.

[27] Hendra Onggowijaya, "Regulation model for filing an actio pauliana lawsuit by creditors to revoke the debtor's legal actions prior to declaration of bankruptcy by

bankruptcy case involving the PT Environmental Network Indonesia (Enindo) and its associates versus PT. Sons and Daughters of Fortuna Windu (PPFW) and associates, a formal arbitration award was issued. However, parties dissatisfied with the arbitration award opted to resubmit the case to the Commercial Court, and the court granted acceptance of the case. The declaration of bankruptcy for a debtor is contingent upon a determination rendered by the Commercial Court.[28]

An illustrative case involving arbitration, which ultimately found resolution through the Commercial Court, is the dispute between PT. Atmindo and PT. Palmechandra Abadi. This matter stems from the decision rendered by the National Arbitration Board (BANI) Representative of Medan, documented as Number 01/IV/ARB/BANI-Mdn/2006 and dated January 2007. In the BANI decision, the Medan representative imposed an obligation on PT. Palmechandra Abadi is to remit the outstanding payment for spare part replacement costs related to the procurement of palm oil mill (PKS) boiler machine equipment in Palembang, totalling Rp. 650,979,463. This payment was to be made within 30 days from the issuance of the Arbitration Decision.

However, in practice, PT. Palmechandra Abadi, which also had unresolved obligations to several other creditors, eventually faced a bankruptcy lawsuit. This legal proceeding was documented as bankruptcy case number 03/Pailit/2007/PN.Niaga.Mdn. Within this bankruptcy case, PT. Atmindo, PT. Krida Pujimulyo Lestari and PT. Bank Bukopin Medan Branch collectively emerged as creditors of PT. Palmechandra Abadi. This situation underscores that, despite the permanent legal authority of BANI's decisions for enforcement, practical challenges persist when it comes to executing BANI's judgments related to debt and receivable obligations.[29]

In the scenario involving a contract between PT. Swadaya Graha and PT. Rayon Utama Makmur (RUM), the contract stipulates a dispute resolution mechanism, specifically through the National Arbitration Board (BANI). However, concurrently, a dispute resolution

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the commercial court," *International Journal of Research in Business and Social Science* 11, no. 7 (2022): 350–356.

[28] Ria Sintha Devi et al., "The Bankruptcy Legal Politics in Indonesia based on Justice Value," *Jurnal Akta* 9, no. 1 (2022): 67-78.

[29] Rumaidan, *Pelaksanaan dan Hambatan Eksekusi Putusan Arbitrase Oleh Pengadilan Negeri.*

has also been initiated through the Commercial Court, about debt and receivable disputes in default within PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg. This situation has engendered a legal debate concerning the application of the "*lex specialist derogat legi generalis*" principle among the Arbitration Law, Bankruptcy Law, and PKPU, concerning the absolute authority of institutions empowered to scrutinize, adjudicate, and decide upon cases of debt and receivable disputes within the legal framework of the PKPU Petitioner and the Respondent. PKPU is founded upon a contract incorporating an arbitration clause as the designated dispute resolution mechanism.

The legislative objective of the Postponement of Debt Payment Obligations Law is to furnish assurance, systematic processes, enforceability, and legal safeguards, centered on the principles of justice and truth.[30] The concept of Postponement of Debt Payment Obligations (PKPU) as outlined in the Bankruptcy Law and PKPU, as per Article 222, Paragraph 1, pertains to a mechanism initiated either by Debtors with multiple creditors or by Creditors. Additionally, Article 222, Paragraph 3 of the Bankruptcy Law and PKPU states:

"Creditors who anticipate that the Debtor will be unable to continue fulfilling their outstanding, collectible debts have the option to request a postponement of the debt repayment obligation from the Debtor. This delay allows the Debtor the opportunity to present a reconciliation plan, encompassing proposals for settling part or the entirety of the debt owed to the creditor."

The PKPU mechanism, as delineated in the Bankruptcy Law and PKPU under Article 222, Paragraph 1, encompasses the definition and procedure for the Postponement of Debt Payment Obligations (PKPU). This mechanism can be initiated by Debtors with multiple creditors or by the Creditors themselves. Furthermore, Article 222, Paragraph 3 of the Bankruptcy Law and PKPU states:

"Creditors who assess that the Debtor will likely be unable to continue meeting their outstanding, collectable debts have the option to petition for the Debtor to be granted a postponement of the debt

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[30] Suwinto Johan, "Separatist Creditors Problems on Postponement of Debt Payment Obligations Based on the Supreme Court's Decree Number 30/KMA/SK/I/2020," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 3 (2021): 207–220.

repayment obligation. This allows the Debtor the opportunity to submit a reconciliation plan, which may include proposals to settle either a portion or the entirety of the debt owed to the creditor."

In PKPU case Number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg, on December 8, 2020, the panel of judges in the Commercial Court deliberated on the matter of the court's jurisdiction. They considered the PKPU Respondent's objection, taking into account the stipulations outlined in Article 303 of the Bankruptcy and PKPU Law, which state: "*The Commercial Court retains its authority to review and adjudicate applications for bankruptcy declarations stemming from parties involved in agreements that include arbitration clauses. This authority holds as long as the debt forming the basis for the bankruptcy application aligns with the criteria specified in Article 2, Paragraph 1 of the Bankruptcy and PKPU Laws*."

Referring to Article 2, Paragraph 1 of the Bankruptcy Law and PKPU, it states: "*A debtor who has multiple creditors and fails to fully satisfy at least one outstanding and collectable debt can be declared bankrupt through a court decision. This declaration can be initiated either by the debtor themselves or at the request of one or more of their creditors*."

In line with the explanation provided in Article 303 of the Bankruptcy Law and PKPU: "*This article intends to reaffirm that the Court retains its authority to consider and resolve bankruptcy declaration petitions from parties, even in cases where the agreement governing their debt and receivables contains an arbitration clause*."

Revision of the Commercial Court's jurisdictional regulations concerning the utilization of an arbitration clause

The aforementioned case has triggered a legal debate that necessitates in-depth analysis. This discussion revolves around the application of the legal principle "*Lex specialist derogate legi generalis*," which is related to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, in conjunction with Law Number 37 of 2004 on Bankruptcy and PKPU. The legal ramifications concern the exclusive jurisdiction of institutions empowered to examine, adjudicate, and make decisions on business disputes governed by contracts containing arbitration clauses as the designated dispute resolution mechanism. This

matter underscores a potential clash of norms between the Arbitration Law and the Bankruptcy Law and PKPU.

The provisions of Article 303 in the Bankruptcy Law and PKPU have, in practice, led to a situation characterized by dual uncertainties in the application of the law.

1) In cases where there exists both an arbitration clause and an ongoing arbitration proceeding, simultaneously initiated by another party through the Bankruptcy and/or PKPU petition resolution process, a legal conundrum emerges. In such circumstances, when opting for dispute resolution through arbitration, it is asserted that arbitration possesses the jurisdiction to adjudicate, scrutinize, and make decisions on cases brought forth by the disputing parties within the arbitration framework. However, on the other hand, another judicial institution, namely the commercial court, also asserts its jurisdiction, maintaining the authority to examine, decide, and adjudicate the same case utilizing the PKPU and/or Bankruptcy mechanisms.
2) Within the same case, the principal matter is determined by two distinct entities that undertake examination, decision-making, and trial proceedings. These entities are the arbitration institution and the commercial justice institution, with the latter possessing legal precedence.

The legal concerns raised above do not preclude the possibility that they might coexist with their respective legal justifications grounded in the application of distinct laws. This signifies that the Arbitration Institution's competence will continue to maintain its authority in rendering decisions, examining cases, and adjudicating them. Concurrently, the Commercial Court institution will affirm its jurisdiction in reviewing, deciding, and adjudicating cases brought by the same parties. This, in turn, gives rise to legal ramifications and consequences, including matters related to executing judgments and fulfilling legal rights based on the decisions of these two institutions.

This challenge underscores the need for legal clarity and regulatory measures in the future. Indeed, a reformulation of the regulations governing the authority of commercial courts in the examination, adjudication, and resolution of business disputes involving arbitration clauses is imperative. The pressing issues at hand, particularly concerning the concept of absolute authority, necessitate

precise limitations within the framework of institutional powers. Such precision is vital to avert normative conflicts between the Arbitration Law and the Bankruptcy Law and PKPU, as exemplified in PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg.

Consequently, a revision of the Bankruptcy Law and PKPU regulations is warranted to align with evolving norms and address the associated issues. An optimal reformulation approach entails the removal or replacement of Article 303 of the Bankruptcy Law and PKPU. A theoretical framework exists to guide the reformulation of these regulations, as follows:

1. Systems Theory

The term "*sistema*" can be defined as a compilation of interconnected parts or components organized systematically, forming a unified entity. However, as it has evolved, it has acquired diverse meanings and is now employed to reference a multitude of concepts and entities.

A system is a representation of organized ideas, encompassing a compilation of concepts, principles, doctrines, laws, and more, which collectively constitute a coherent body of thought associated with a specific philosophy, religion, or system of governance. The term "system" encompasses two distinct aspects: first, it denotes a structure or entity governed by rules or a specific arrangement of its components, and secondly, it signifies a strategy, methodology, instrument, or procedure designed for achieving a particular objective. As per various definitions, a system represents an intricate amalgamation of objects characterized by structured interactions and distinct components, all aligned towards a shared purpose and objective. Conversely, the Oxford English Dictionary defines a system as an assemblage of objects or entities that function cohesively as a singular entity.

Two distinct approaches exist for defining a system: one that underscores processes and another that highlights components or elements. The systems approach that prioritizes processes defines a system as an interconnected network of procedures brought together to execute a specific task or attain a particular objective. Conversely, the systems approach that emphasizes elements or components characterizes a system as an assembly of constituent parts that interact to achieve a specific goal. Both sets of definitions are accurate and do not contradict

each other; the distinction lies in their respective approaches. The systems approach that involves a collection of elements or components, including subsystems, constitutes a more comprehensive definition. This broader definition enjoys broader acceptance because, in reality, a system can encompass various sub-systems or constituent parts.

Subsystems are constituent elements or segments of a system, which can encompass both tangible and conceptual facets. In actuality, a system exists as a component within a broader system, indicating its presence across multiple levels. A system represents an amalgamation of multiple constituents collaborating harmoniously to achieve a specific objective, extending beyond merely physical constructs. The concept of a system can be applied to abstract and dynamic phenomena, as observed in fields like economics. Consequently, it can be asserted that a system should possess the capacity for interpretation in order to effectively represent physical, biological, and economic systems, among others.

A system's competencies are assessed through various means, including considerations of its efficiency, effectiveness, and productivity during operation. In practice, evaluating the effectiveness of a system involves three distinct approaches first, Output-Oriented Target Approach: This approach reviews the historical performance of the system in attaining predetermined output values based on its established objectives. Second, Input-Oriented Approach: This method assesses the system's success in acquiring various inputs or resources required from its external environment. Third, Process-Oriented Approach: This approach involves an examination of various internal indicators, such as efficiency and transformation management, within the system's operational processes.

This approach is not a recent methodology but has been in existence since ancient Roman times and through the 20th century. It was reintroduced, notably by Alfred North Whitehead and, in particular, by a significant number of biologists. The primary motivations behind adopting this approach include the following:

1) The systems approach can be considered a semi-metaphysical methodology. In addition to its capacity to depict the holistic attributes of an object, it also possesses the capability to conduct a detailed analysis of each component comprising the object.

2) The systems approach consistently takes into account the interconnected factors of an object, both within its internal and external contexts.
3) This approach aligns more closely with the essential characteristics of the ontology, epistemology, and axiology of science.[31]

The strength of the systems approach resides in its capacity to address the vulnerabilities inherent in modern (Cartesian) science. Within the realm of global science, legal science is inevitably shaped by the evolution of thought. One of the most prominent influences in this evolution is the prevalence of the analytical mechanical approach within the epistemology of legal science. Consequently, normative legal theories have gained ascendancy in the field of legal science.[32]

When examined through the lens of legal sociology, as articulated by Kees Schuit, the legal system is perceived as comprising three interconnected components. These elements constitute the building blocks of a legal system:

1) The ideal component encompasses all regulations, norms, institutions, and legal principles. In the context of systems theory, these terms can be encompassed by the concepts of a meaning system, symbol system, or reference system. Within the legal realm, this meaning system is referred to as the juridical meaning system. Rules, in this context, do not merely mirror a tangible reality but instead, articulate ideals concerning how individuals should ideally conduct themselves. Rules serve as symbols that impart coherence and significance to the intricate spectrum of human behaviour. Through these symbols, individuals can comprehend and interpret the diversity of human actions, thereby facilitating meaningful interactions and communication among people.
2) Operational components encompass the entirety of the organizational structure, institutions, and officials. These elements encompass executive, legislative, and judicial bodies, each equipped with their respective administrative entities, such as government

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[31] Lili Rasjidi and Wyasa Putra, *Hukum sebagai Suatu Sistem.* (Bandung: Rosdakarya, 1993).

[32] Juhaya S. Prasaja, *Teori Hukum dan Aplikasinya* (Bandung: CV. Pustaka Setia, 2014).

bureaucracies, notaries, courts, prosecutors, law enforcement agencies, and various non-governmental organizations.

3) The factual component encompasses all decisions and activities undertaken by both public officials and citizens, provided that these decisions and actions are linked to or can be situated within the framework of the juridical meaning system mentioned earlier.[33]

Consistent with the legal system concept outlined by Schuit above, Lawrence M. Friedman, in his work titled "American Law: An Introduction," posits that a legal system comprises three constituents: legal substance, legal framework, and legal culture.[34] The legal system functions as the foundational support structure of contemporary society, acting as a regulatory framework for individual conduct and the preservation of social order. [35]

2. Legal Substance

The aspect of legal substance pertains to the regulations, norms, and established patterns of human conduct within the system. This encompasses principles, ethics, and even court rulings. Consequently, the legal substance component encompasses the entirety of legal regulations, encompassing written laws (legislation) and unwritten legal conventions (common law), along with court judgments that are influenced by societal and governmental factors.[36]

As per Hans Kelsen, law is situated within a dynamic system of norms, known as nomodynamics. This perspective arises from the notion that the creation and revocation of law is perpetually governed by the institution or authority vested with the power to enact or repeal

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[33] Bernard Arief Sidharta, *Refleksi Tentang Stuktur Ilmu Hukum : Sebuah Penelitian Tentang Fondasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia.* (Bandung: Mandar Maju, 2000).

[34] Lawrence M. Friedman, *The Legal Sistem : A Sosial Science Perspective.* (New York: Russell Sage Foundation, 1975).

[35] *See* Mustafa'Afifi Ab Halim, Shabrina Zata Amni, and Mufti Maulana. "Legal System in the Perspectives of HLA Hart and Lawrence M. Friedman." *Peradaban Journal of Law and Society* 2, no. 1 (2023): 51-61.

[36] Abdul Halim Barkatullah, "Budaya Hukum Masyarakat dalam Perspektif Sistem Hukum." *Jurnal UKSW* (2013): 1-18.

it. Consequently, the focus lies not in the content of the norm itself but in its promulgation or establishment.[37]

3. Legal Structure.

Lawrence M. Friedman provides an explanation as follows:

> *"...its foundational framework, the enduring component that imparts a form and definition to the entirety... The legal system's structure comprises elements of this nature: the quantity and scope of courts, their jurisdiction (namely, the types of cases they handle and the manner and rationale for doing so), and the mechanisms for appeal from one court to another. Additionally, structure encompasses the organization of the legislature, the number of its members, the legal boundaries defining the actions a president can undertake or abstain from, the procedures adhered to by the police department, and similar facets. Structure, in a sense, serves as a cross-sectional view of the legal system- a frozen moment capturing the ongoing process.*"[38]

Put plainly, legal structure pertains to the arrangement of institutions, their functioning, and the tools they employ to execute and uphold the law. This encompasses how legal rules are applied and enforced in compliance with formal regulations, which also pertains to legal performance. Put plainly, legal structure pertains to the arrangement of institutions, their functioning, and the tools they employ to execute and uphold the law. This encompasses how legal rules are applied and enforced in compliance with formal regulations, which also pertains to legal performance.

4. Legal Culture

Lawrence M. Friedman elucidates that the concept of legal culture encompasses: *"…people's perspectives regarding the law and legal system? Their convictions, principles, concepts, and anticipations… The legal culture, in essence, constitutes the environment of societal thinking and societal influences that dictate how the law is employed, evaded, or misused.*

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[37] Barkatullah.

[38] Lawrence M. Friedman, *The Legal Sistem : A Sosial Science Perspective.*

In the absence of legal culture, the legal system remains passive-a lifeless entity resting in a container, rather than a vibrant entity thriving in its natural habitat."[39]

By Lawrence M. Friedman's exposition, legal culture assumes a pivotal role within the legal system, constituting a "*requirement*," "*entreaty*," or "*necessity*" emanating from the populace or consumers of legal services. It encompasses notions, dispositions, convictions, aspirations, and opinions concerning the law. Consequently, community legal culture can be construed as the principles, attitudes, and conduct of community members within the realm of legality. The legal culture of society is not solely manifested through the conduct of authorities (executive, legislative, and judicial), but also through the conduct of the general populace.

In addition to amending Article 303 of the Bankruptcy Law and PKPU, such revisions could be seen as contravening the *pacta sunt servanda* principle, which stipulates that agreements are legally binding.[40] This theory finds its origins and evolution in the legal traditions of continental Europe. It posits that an agreement is legally established in accordance with the applicable law and adheres to customary practices and appropriateness, rendering it an agreement made in good faith. The provisions within such a contract are binding upon the parties involved, holding the weight of legal authority. Consequently, the execution of the contract must not detrimentally affect the contracting parties or third parties beyond those directly involved in the contract. The Supreme Court explicitly articulated that the principle of *pacta sunt servanda* signifies the absolute and binding nature of the arbitration clause upon the involved parties.[41] The *pacta sunt servanda* theory signifies that an agreement obligates the parties entering into it, to hold an equivalent legal status to laws enacted by parliament and the government. *Pacta sunt servanda* represents a

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[39] Friedman.

[40] Daniel Davison-Vecchione, "Beyond the forms of faith: Pacta Sunt Servanda and loyalty." *German Law Journal* 16, no. 5 (2015): 1163-1190.

[41] Bambang Medivit Budiantoso, et al. "Final Legal Certainty and Binding of Arbitration Awards in Business Dispute Settlement at the Indonesian National Arbitration Board (BANI)." *Hermeneutika: Jurnal Ilmu Hukum* 7, no. 2 (2023): 340-360.

fundamental theory, requiring diverse interpretations and adjustments as it unfolds in practice.[42]

Religion consistently underscores the significance of honouring one's commitments, emphasizing the imperative of keeping promises. It places paramount importance on upholding human dignity and sanctity, with the elevation of human dignity being a central objective across all religions. Consequently, no religion views contractual obligations lightly; all advocate for the sanctity of promises. Hinduism imparts to its adherents that fulfilling one's commitments is not a mere responsibility, as failing to do so can constitute a transgression, carrying significant consequences in the hereafter. Brihaspati cautioned that those who fail to fulfil their promises to settle debts may be reborn within the creditor's household, assuming roles of servitude, singularity, femininity, or even as a quadruped. Narada asserted that all accountability rests with creditors. In summary, nonpayment of a debt is perceived as retaining another's property for the debtor's benefit, thereby equating the debtor with a thief.

Christianity and Islam likewise hold contracts in high regard. In Islamic tradition, reneging on a promise is deemed indicative of hypocrisy. Christianity also places significant emphasis on honoring contractual commitments, even when such agreements involve adversaries. An illustrative example is the Prophet Muhammad's pact with the Jews of Medina, commonly referred to as the Medina Agreement, which was forged despite prior hostilities. The Jewish faith similarly underscores the duty to uphold promises, with repeated references to this obligation found in various scriptures.

Divine principles encompass the duty to uphold covenants rooted in one's faith in God, extending beyond mere adherence to His commands. Consequently, it is the spiritual connection of the legal subject, who believes they are constantly under divine scrutiny, that motivates them to honour contracts.

In this context, when examining the alignment of divine principles with the *Pacta Sunt Servanda* theory, it can be deduced that divine principles not only align with but surpass the *Pacta Sunt Servanda* theory. The principle of divinity is consistent with the Pacta Sunt

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[42] Munir Fuady, *Teori Teori Besar (Grand Theory) dalam Hukum.* (Jakarta: Kencana Prenada Group, 2014).

Servanda theory because parties agreeing are legally bound to adhere to it. Nevertheless, the reason the author asserts that the Divine Principle takes precedence over the *Pacta Sunt Servanda* theory is that, according to the *Pacta Sunt Servanda* theory, individuals are obligated to continue fulfilling the agreement because the agreement is legally binding on the parties. Hence, the agreement must be executed in good faith and cannot be unilaterally rescinded. Furthermore, as expounded by Achmadi Miru, as cited above, the *Pacta Sunt Servanda* principle is closely intertwined with the principles of good faith and the legal causative prerequisites for the validity of an agreement. Building upon these legal doctrines, it becomes evident that the application of the *Pacta Sunt Servanda* principle can be circumscribed if it is discovered that bad faith or malfeasance existed on the part of one of the contracting parties at the time of agreement.

A legal contract is defined as an agreement that is explicitly designed to establish a legally binding relationship or to produce other legally recognized effects.[43] The fundamental principle of good faith is imperative in every agreement, serving as a cornerstone for fostering harmony between the involved parties.[44] The principle of good faith in the formation of an agreement is intricately linked with discussions surrounding the validity of the agreement, particularly about the prerequisites for legal validity. Thus far, the causal conditions referenced here pertain to the validity of an agreement, with one of the conditions being that the agreement must not contravene the law, public order, or morality. The principle of good faith encompasses the internal disposition of parties involved in the creation and execution of an agreement, necessitating honesty, transparency, and mutual trust.[45] This

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[43] Szyva Silviana Putri, Gunardi Lie, and Moody Rizqy Syailendra Putra, "The Urgency of Good Faith Principles in Production Sharing Cooperation Contracts with the Gross Split System," *QISTINA: Jurnal Multidisiplin Indonesia* 2, no. 1 (2023): 462–66.

[44] Putri, Lie, and Syailendra Putra.

[45] Auliah Ambarwati et al., "The Essence of the Principle of Good Faith in the Agreement For The Parties," *IOSR Journal of Humanities and Social Science* 27, no. 8 (2022): 36–43.

holds significance as entering into an agreement without good faith at its inception can result in detriment to one of the contracting parties.[46]

As indicated by the Supreme Court decision mentioned earlier, the absence of good faith during the agreement process is considered contrary to propriety or decency. Consequently, the agreement must be amended, reducing the original 5% monthly interest rate to 2% per month. If we maintain consistency, an agreement that, at the time of its formation, did not meet the criteria of a legitimate cause would render the agreement null and void. This signifies that the agreement is void and is deemed to have never existed in the first place. In the case of an invalid agreement, the *Pacta Sunt Servanda* principle cannot be applied. Concerning the principle of divinity, if we remain steadfast in our commitment to Pancasila as the foundation of our nation, and the principles of belief in the Almighty God, this divine element must also find its place in our contract law. One way to incorporate the divine element into the regulations regarding the validity of an agreement is to expand the notion of what constitutes a legitimate cause. Thus far, it has been interpreted to mean that the agreement must not conflict with the law, public order, and propriety/morality alone. However, additional provisions should stipulate that the agreement must also align with the religious teachings of the parties agreeing. This is essential because, to anchor Pancasila, its principles must be reflected in the practical lives of society, moving beyond mere slogans or rote memorization, including in contract law.

Therefore, effectively handling conflicts is a matter of significant interest and importance.[47] Many business disputes are resolved in the Commercial Court due to legal complexities arising from overlapping regulations of the Bankruptcy Law, PKPU, and the Arbitration Law. Specifically, Article 303 of Law No. 37 of 2004 on Bankruptcy and PKPU, and Article 3 of the Arbitration Law and ADR, intersect, creating uncertainties regarding the authority of institutions tasked with examining, adjudicating, and making decisions.

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[46] Frida Nurrahma Masturi, Adi Sulistiyono, and Yudho Taruno Muryanto. "The Role of the Good Faith Principle in Pre-Contractual Phase of E-Commerce." *International Journal of Multicultural and Multireligious Understanding* 7, no. 10 (2020): 520-526.

[47] Jeff Jianfeng Wang, et al. "Conflict aftermath: Dispute resolution and financial performance in franchising." *Journal of Retailing* 96, no. 4 (2020): 548-562.

Conclusion

This study concluded that effectively managing conflicts holds paramount importance in the realm of business. The Commercial Court witnesses numerous dispute resolutions, primarily due to legal intricacies within the Bankruptcy Law (Law No. 37 of 2004) and Arbitration Law. These laws, notably Article 303 of the Bankruptcy Law and PKPU and Article 3 of the Arbitration Law, intersect, raising questions about institutional competence in examining, adjudicating, and deciding disputes. A noteworthy case is PKPU case Number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg, where parties dissatisfied with arbitration sought recourse in the Commercial Court. Another instance involves PT. Atmindo and PT. Palmechandra Abadi, where unresolved arbitration led to bankruptcy proceedings. Urgent reformulation of regulations governing commercial court authority is imperative. This reformulation should delineate clear institutional boundaries to avert conflicts, exemplified by PKPU case number 45/Pdt.Sus-PKPU/2020/PN Niaga Smg, and ensure compliance with pacta sunt servanda principle. Thus, revising Article 303 of the Bankruptcy Law and PKPU is essential to align with evolving norms and resolve associated challenges.

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Acknowledgment

We express our sincere appreciation to Journal of Law and Legal Reform's editorial team and *Asosiasi Dosen Hukum Acara Perdata* (ADHAPER). Our gratitude also extends to all members of the research library committee and the students of the Doctoral Program in Law, Faculty of Law, Universitas Islam Indonesia, Batch of 2022.

Funding Information

None

Conflicting Interest Statement

There is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.