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THE INTERCONNECTION BETWEEN ARBITRATION AND COMMERCIAL COURTS: SCENARIOS, ISSUES, AND A PROPOSAL

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Abstract

The intersection between arbitration forums and Commercial Court (Pengadilan Niaga) in the context of business disputes reveals a normative regulatory gap, particularly when bankruptcy or suspension of debt payment (PKPU) proceedings are filed despite the presence of arbitration clause. The urgency of this research lies in the increasing frequency of cross-forum disputes, which generate legal uncertainty and raise the risk of violating fundamental principles of arbitration. This study analyses the research question of how should an appropriate regulatory framework be formulated to address the interrelation between arbitration and Commercial Court proceedings across different scenarios. The research adopts a normative-conceptual method by evaluating laws and regulations, legal doctrines, and case studies, complemented by practical observations. The findings indicate that in scenarios where parties bound by an arbitration clause submit a bankruptcy petition, a clash arises between the principles of confidentiality and trust inherent in arbitration with the openness and distrust characteristic of Commercial Court proceedings. Meanwhile, in scenarios where a third party files the petition, a stronger emphasis on inter-forum coordination becomes necessary, as decisions in one forum may directly affect proceedings in the other. This study concludes that the regulatory response to this intersection must not

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be generalized but rather be classified based on scenario typologies, emphasizing limits on jurisdiction and enhanced coordination mechanisms between forums.

KEYWORDS: *The interrelationship between arbitration and Commercial Court; Arbitration; Commercial Courts; Bankruptcy; Arbitration clauses*

Introduction

Arbitration and the Commercial Court are forums for resolving business disputes that may intersect with one another. Arbitration concerns the resolution of a breach of contract in which there is an arbitration clause, as well as torts arising from such a contract. Meanwhile, the Commercial Court deals with petitions for bankruptcy and suspension of debt payment obligations (PKPU). Their interconnection may arise from two (2) scenarios: (1) a bankruptcy or PKPU petition is filed by one of the parties bound by the arbitration clause; or (2) a third party, outside of the arbitration clause, files the petition.[1]

This interconnection can be illustrated by the following example: if the Respondent in a bankruptcy petition is declared bankrupt by the Commercial Court, can an arbitration proceeding in which the Bankrupt Respondent is either the Claimant or the Respondent continue to proceed?

In the context of Scenario 1, where one of the parties files for bankruptcy with the Commercial Court, the central issue is that these two forums have different paradigms toward one another. On one hand, confidentiality and trust are two principal features of arbitration.[2] On the

[1] Based on an interview conducted on 28 May 2024 with Eko Dwi Prasetyo, Senior Clerk and Secretary of the BANI Arbitration Centre, the situation that generally occurs is Scenario 2. Nevertheless, according to findings by Rahayu Hartini, various cases have arisen corresponding to Scenario 1, and such a possibility remains foreseeable. See Rahayu Hartini, "Kedudukan Klausul Arbitrase dan Kompetensi Absolut dalam Kepailitan," *Indonesia Arbitration Quarterly Newsletter* 17(4), December 2023: 14-17.

[2] Anangga W. Roosdiono, Muhamad Dzadit Taqwa, Mayta Ciara Salsabila, "The Non-Applications of Good Faith, Trust, and Confidentiality in Arbitration: A Study of the Annulment Cases in Indonesia," *Indonesia Law Review* 12, no. 2 (2022): 4-9, https://doi.org/10.15742/ilrev.v12n2.1.

other hand, when a matter is brought before the Commercial Court, it becomes open to the public.[3] Furthermore, in a bankruptcy process before the Commercial Court involving two parties, there is an inherent element of distrust, as one party seeks to strip the other of its civil capacity to take legal action.[4]

In the context of Scenario 2, where a third party files a bankruptcy petition, the issue of breaching the principles of arbitration is no longer the main concern, since the petition is not filed by the parties bound by the arbitration clause. The issue instead shifts to the reality that the proceedings in one forum may be disregarded by the other, or that one party, and even the arbitral tribunal itself, may be unaware that the other party is simultaneously litigating before the Commercial Court. This occurs because the two forums operate independently of each other and are not bound within a single hierarchical structure.

For example, while proceedings are ongoing in the Commercial Court, instead of suspending the arbitration process due to its implications for arbitration, the arbitration may continue as though there are no implications whatsoever. In reality, however, the outcome of the Commercial Court's decision will inevitably affect the subject matter and the process of the arbitration, assuming the Respondent in the bankruptcy petition is declared bankrupt. If the Bankrupt Respondent is the Respondent in arbitration, the arbitration cannot be continued,[5] meaning

[3] See Article 8(7) Bankruptcy and PKPU Law.

[4] Luthvi Febryka Nola, "Dampak Kemudahan Pengajuan Pailit Di Masa Pandemik Covid-19," *Info Singkat: Kajian Singkat Terhadap Isu Aktual dan Strategis* 12, no. 18 (2020): 2-4, https://berkas.dpr.go.id/pusaka/files/info_singkat/Info%20Singkat-XII-18-II-P3DI-September-2020-209.pdf.

[5] See Article 29 Bankruptcy and PKPU Law. The article provides that, "Any legal claim before the Court filed against the Debtor, insofar as it aims to obtain the fulfillment of obligations from the bankruptcy estate and is still pending, shall be null and void by operation of law upon the pronouncement of a bankruptcy declaration against the Debtor" (emphasis and underlining by the Author). Although the term used in the provision is "Court," such provision may—through an extensive interpretation—also encompass proceedings in arbitration as an alternative dispute resolution mechanism chosen by the parties. In arbitration where the Bankrupt Respondent serves as the Respondent in

that any further proceedings would be futile; if the Bankrupt Respondent is the Claimant in arbitration, the process could be subject to reconstruction by the court-appointed receiver.[6] Furthermore, there is no clearly regulated coordination mechanism between the Commercial Court and arbitration, making it highly possible that various parties, including the arbitral tribunal, remain unaware of an ongoing or completed bankruptcy process.

With respect to these two scenarios, the research problem to be addressed is: What is the appropriate regulatory model to address the issues arising from the intersection between arbitration and the Commercial Court? This paper argues that addressing the interconnection between the absolute jurisdiction of arbitration and that of the Commercial Court must take into account these two scenarios. A regulatory model cannot be generalized for both scenarios.

The objective of this study is to formulate a precise and classified regulatory approach in responding to the interconnection between arbitration and the Commercial Court, based on analysis of the two primary scenarios that may occur. By considering the substantive differences between the scenarios, the study aims to provide a normative prescription that not only clarifies the jurisdictional boundaries of each forum, but also establishes a coordination mechanism between the two forums, which is currently absent from existing legislation.

The novelty of this paper lies in its attention to the existence of the two scenarios, distinguished by the identity of the petitioning party. Generally, existing research only considers Scenario 1, seeking to answer whether the Commercial Court may legitimately hear a bankruptcy case between parties whose contract contains an arbitration clause.[7] Rahayu Hartini, in her

arbitration proceedings, the Claimant in arbitration essentially seeks to obtain the fulfillment of obligations from the Respondent's bankruptcy estate, in the form of a claim for damages arising from a breach of contract.

[6] See Article 26 jo. Article 24 Bankruptcy and PKPU Law.

[7] See Didin R. Dinovan, "Kewenangan Pengadilan Niaga Mengadili Perkara Kepailitan Terhadap Adanya Klausula Arbitrase Dalam Perjanjian Yang Disepakati," *Supremasi Jurnal Hukum* 1, no. 2 (2019): 95, https://doi.org/10.36441/supremasi.v2i1.106; Huzaimah

article titled *"Kedudukan Klausul Arbitrase dan Kompetensi Absolut dalam Kepailitan"*, focuses primarily on the proposition that a bankruptcy ruling disregarding an arbitration clause between the parties constitutes a deviation from the principle of *pacta sunt servanda* (agreements must be honored).[8] Previously, Mulyani Zulaeha made a similar attempt in 2010 through her article titled *"Penyelesaian Sengketa Kepailitan yang Memuat Klausul Arbitrase"* drawing several different conclusions without addressing the possibility of Scenario 2.[9]

Method

This descriptive and analytical legal paper adopts a conceptual approach in addressing the research question outlined in the Introduction. The search for an appropriate regulatory framework to resolve issues arising from the intersection between arbitration and the Commercial Court focuses on the research object in the form of laws and regulations relating to arbitration and the Commercial Court. Technically, the research is conducted by analyzing both substantive and procedural concepts in arbitration and the Commercial Court, and by elaborating on the legal problems that emerge when the two processes intersect. The data analysis technique employed is library research, involving the examination and processing of legislation, books, journals, and other scholarly works, including reports and information obtained from resource persons. In

Al-Anshori, Emi Puasa Handayani, Naufal Ghoni Bayhaqi, "Penyelesaian Sengketa Bisnis Kaitannya Dengan Klausula Arbitrase di Pengadilan Niaga," *Jurnal Transparansi Hukum* 6, no. 1 (2023): 14-15; Marihot Janpieter Hutajulu, "Kajian Yuridis Klausula Arbitrase Dalam Perkara Kepailitan," *Refleksi Hukum* 3, no. 2 (2019): 185-187; Bangun Victor Halomoan Pasaribu, "Karakter *Ordinary Court* Pengadilan Niaga Dalam Mengadili Sengketa Pailit Yang Berasal Dari Perjanjian Yang Berklausa Arbitrase," Tesis Magister, Universitas Islam Riau, 2022: 127-128.

[8] Rahayu Hartini, *Kedudukan Klausul Arbitrase dan Kompetensi Absolut dalam Kepailitan*, ed. 1. (Malang: UMM Press, 2023): 149-157.

[9] See Mulyani Zulaeha, "Penyelesaian Sengketa Kepailitan yang Memuat Klausul Arbitrase," *Jurnal Cita Hukum* 2, no. 1, (2010): 17-18, https://repo-dosen.ulm.ac.id//handle/123456789/12894.

addition, the results of observations of actual practice are utilized to capture the factual (as opposed to purely normative) status quo of the issue. Both sources are then analyzed evaluatively and critically, grounded in references from relevant books and journals concerning the fundamental principles of arbitration, as well as through independent analytical reasoning, to produce a more refined normative prescription.

Discussion

Conceptual and Legal Framework

The Absolute Jurisdiction of Arbitration, the Commercial Court, and Its Relationship with the District Court

There is no conflict or overlap in the subject matter of disputes within the absolute jurisdiction of arbitration and that of the Commercial Court. Each forum examines, adjudicates, and renders decisions on two distinct civil matters, with different types of rulings.

The absolute jurisdiction of the Commercial Court, as referred to in Article 1 point 7 of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations ("Bankruptcy and PKPU Law"), is further stipulated in Article 300 of the Bankruptcy and PKPU Law, namely: (i) to examine and decide petitions for a declaration of bankruptcy (the first absolute jurisdiction), and (ii) to examine and decide petitions for PKPU (the second absolute jurisdiction).

In the context of the first absolute jurisdiction, a creditor seeks a ruling declaring the debtor bankrupt or insolvent. All assets of the bankrupt debtor are liquidated by a court-appointed receiver under the supervision of a Supervisory Judge, for the purpose of debt repayment to creditors. [10] The

[10] The House of Representatives (*Dewan Perwakilan Rakyat*) and the President enacted the Law on Bankruptcy and Suspension of Debt Payment Obligations (*Undang-Undang tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang*). There are two primary requirements for a bankruptcy petition to be processed. Pursuant to Article 2 paragraph (1) of the Bankruptcy and PKPU Law, the requirements for filing a bankruptcy petition are:

legal status of "bankrupt" is sought by the petitioner as a means of debt recovery. With such status, the debtor is deemed legally incapacitated—often referred to as a "civil death", and possesses only very limited legal authority, namely, to take legal actions beneficial to the estate, such as the collection of assets for repayment of debts forming part of the bankruptcy estate (*boedel pailit*).[11]

Nevertheless, the debtor may also submit a settlement proposal to resolve its indebtedness. In practice, such a settlement plan is contained in a legal document containing proposals from the debtor, such as an extension of maturity dates, reduction of interest, principal write-down, conversion of debt into equity, and other arrangements.

An extension of maturity dates may also be sought separately through a PKPU petition by the debtor so that debt payments may be suspended—although such an extension may also be included as part of a settlement proposal in bankruptcy proceedings. This process falls within the Commercial Court's second absolute jurisdiction. PKPU is intended to enable the parties to reach a settlement plan so that bankruptcy can be avoided.[12] The legal consequence of PKPU is that the debtor cannot be compelled to pay its debts, and any attachments placed over the debtor's assets, as well as any detention of the debtor, must be lifted.

These jurisdictions are distinct from the absolute jurisdiction of arbitration. Pursuant to Article 5 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("Arbitration and ADR Law"), arbitration focuses on the resolution of disputes in the field of commerce and other disputes permitted by law to be determined by the disputing parties themselves.[13] In general, such disputes concern breaches of contract where

(1) the debtor has two or more debts to creditors; and (2) at least one of such debts is due and payable, and the debtor has failed to pay it.

[11] Sutan Remy Sjahdeini, *Hukum Kepailitan,* (Jakarta: Pustaka Utama Grafiti, 2002): 257.

[12] See Article 222 jo. Article 228(5) Bankruptcy and PKPU Law.

[13] Jonathan Agustinus Alva, "Kompetensi Absolut dalam Badan Arbitrase Nasional Indonesia dalam Penyelesaian Sengketa Berdasarkan Perjanjian Penyaluran Tenaga Listrik

the contract contains an arbitration agreement; however, tort claims (*perbuatan melawan hukum* or "PMH") are not excluded as subject matters of arbitration under the Arbitration and ADR Law.[14]

The outcome of arbitration proceedings is the granting or denial of a claim for damages arising from an alleged breach of contract or tort. Thus, an arbitral award has no implications whatsoever on the authority of the directors of a legal entity that is a debtor. The revocation of such authority, to be replaced by a receiver, lies solely within the power of the Commercial Court.

Accordingly, the proposition of applying the principles of lex specialis or lex posteriori from the outset is inappropriate in the context of the interaction between arbitration and the Commercial Court, because the relevant provisions regulate two distinct civil matters with different anticipated outcomes.[15] The Commercial Court focuses on the settlement of debts and receivables, whereas arbitration focuses on resolving disputes

(Studi Putusan Nomor: 681/Pdt.G/2019/Pn.Jkt.Sel)," *Unes Law Review* 6, no. 2 (2023): 6723-6724, https://doi.org/10.31933/unesrev.v6i2.1530.

[14] This can be implicitly inferred from the wording of Article 2 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which states: "This Law governs the settlement of disputes or differences of opinion between the parties … or differences of opinion that arise or may arise from such legal relationship shall be resolved by arbitration …" The potential for differences of opinion arising from such legal relationship indicates the possibility for tort claims (perbuatan melawan hukum) to become the subject of disputes in arbitration. Furthermore, Article 30 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution also opens the possibility for the involvement of third parties—provided it is agreed upon by the parties—who may be affected by the legal relationship between the parties bound by the arbitration agreement.

[15] Ni Made Asri Alvionita dan I Nyoman Bagiastra, "Kewenangan Penyelesaian Sengketa Kepailitan Yang Dalam Perjanjiannya Tercantum Klausul Arbitrase," *Kertha Semaya: Journal Ilmu Hukum* 2, no. 4 (2014), 6; Diana Ayu Mardiani, Muhammad Eko Prasetiyo, Nyulistiowati Suryanti, Deviana Yuanitasari, "Pilihan Domisili Yurisdiksi Dalam Permohonan PKPU Berdasarkan Asas Lex Specialis Derogat Legi Generalis," *Doktrin: Jurnal Dunia Ilmu Hukum dan Politik* 2, no. 1 (2014), 108; Novi Kusuma Wardhani, "Tinjauan Yuridis Kewenangan Pengadilan Niaga Dalam Menyelesaikan Perkara Kepailitan dengan Adanya Akta Arbitrase (Studi Putusan Kasus PT. Environmental Network Indonesia melawan PT. Putra Putri Fortuna Windu dan PPF International Corporation," Skripsi, Universitas Sebelas Maret Surakarta, 2009: 83.

concerning breaches of contract and PMH.[16] The assumption underlying the use of these maxims is that they apply where two provisions regulate the same legal object but differ in their substantive regulation, a situation that does not arise in this case.

Fundamental Principles of Arbitration and the Characteristics of the Commercial Court

The absolute jurisdiction, or subject matter jurisdiction, of arbitration is, in fact, the same as that of the District Court in civil matters, and differs from that of the Commercial Court, which is a special court within the District Court. The District Court has authority to examine, adjudicate, and render decisions on civil disputes generally experienced by members of the public. Concretely, two types of civil cases resolved by the District Court are breach of contract (*wanprestasi*) and tort (*perbuatan melawan hukum*, or "PMH") as the legal grounds of the claim.[17] These subject matters are identical to those adjudicated in arbitration.

The distinction between these two forums lies primarily in aspects other than the subject matter of the dispute. One example is that the absolute jurisdiction of the District Court may arise even if the parties have

[16] Another point to note is the opinion— which, in our view, is less than precise—expressed by Mulyani Zulaeha in Zulaeha, "Penyelesaian Sengketa Kepailitan yang Memuat Klausul Arbitrase," *Jurnal Cita Hukum*: 210. In her conclusion, Zulaeha opines that arbitration may adjudicate bankruptcy matters insofar as the bankruptcy dispute does not meet the elements of Article 2 of the Bankruptcy and PKPU Law. However, the term "bankruptcy" (kepailitan) can only arise when the requirements under Article 2 of the a quo Law are satisfied. Furthermore, arbitration has no authority to terminate the legal capacity of a legal entity in the form of a declaration of "bankruptcy," as such power rests exclusively with the Commercial Court.

[17] A breach of contract (*wanprestasi*) claim, in brief, is a claim brought due to the non-fulfilment of a contractual obligation. There are three forms of such non-fulfilment: (1) complete failure to perform; (2) performance rendered but delayed; and (3) performance rendered but not in accordance with the agreement. Meanwhile, a tort (*perbuatan melawan hukum* or PMH) claim arises when an act is contrary to a legal obligation, infringes the subjective rights of another person, violates morality, or breaches the principles of propriety and due care. A tort claim does not arise from a contractual relationship, but rather from a deviation of the kind described above. See Rosa Agustina, *Perbuatan Melawan Hukum*, (Depok: Penerbit Pasca Sarjana FH Universitas Indonesia, 2003): 117.

not agreed upon a dispute resolution clause, whereas the absolute jurisdiction of arbitration is based on the existence of an arbitration agreement.[18] Other differences include confidentiality, the final and binding nature of awards, and time limits on proceedings, as reflected in the table below.

Table 1: Comparison Between Arbitration and the District Court

Compared Aspect	Arbitration	District Court
Decision	Final and binding	Subject to appeal or cassation
Absolute Jurisdiction	Requires the existence of an arbitration agreement	Does not require a dispute resolution agreement such as an arbitration clause
Confidentiality	Entire process is confidential	Open to the public
Maximum Duration of Proceedings	180 days (6 months)	5-6 months for one instance, but excluding appeal and cassation; in practice, there is no fixed statutory time limit
Decision-Makers	Arbitrator(s) (not referred to as "judges" or "arbitral judges")	Judge(s)
Appointment of the Tribunal	Choice of the parties; foreign arbitrators may be selected if registered with the chosen arbitral institution	Appointed and allocated by the Chief Judge of the Court
Dispute Resolution Paradigm	Aims to resolve the root cause of the dispute	Win-lose outcome, although mediation is included in the process
Rules	May be chosen by the	Parties cannot choose

[18] Joni Emirzon, *Alternatif Penyelesaian Sengketa di Luar Pengadilan*, (Jakarta: PT Gramedia Pustaka Utama, 2001), 100.

	parties	the procedural rules

Meanwhile, in the context of comparing the jurisdiction of the District Court and the Commercial Court, prior to the establishment of the Commercial Court, under the Bankruptcy Law (*Faillissements-Verordening Staatsblad* 1905 No. 217 in conjunction with *Staatsblad* 1906 No. 348), bankruptcy and PKPU cases initially fell within the absolute jurisdiction of the District Court, with relative jurisdiction determined based on the debtor's domicile. However, over time, there was no prescribed time limit for the resolution of bankruptcy cases, and there was only one receiver, namely *Weestcomer* (*Balai Harta Peninggalan*), whose performance was widely considered highly ineffective and slow.[19] According to a report by the National Development Planning Agency (*Badan Perencanaan Pembangunan Nasional*), since 1996, the public had already regarded the courts and judges as institutions lacking competence in handling commercial matters, further aggravated by widespread corruption cases within the District Court system.[20]

This became highly counterproductive during the economic crisis, when the number of bankruptcy cases filed was very small, thereby impeding the stability of the national economy. The International Monetary Fund eventually urged Indonesia to establish a Commercial Court dedicated to bankruptcy cases so as to facilitate economic recovery.[21] Consequently, the government established the Commercial Court as a special court through Government Regulation in Lieu of Law No. 1 of 1998 (*Perppu No. 1 Tahun 1998*) as an effort to restore public confidence during the economic

[19] Yuhelson, *Hukum Kepailitan di Indonesia*, (Gorontalo: Ideas Publishing, 2019), 8.
[20] Simon Johnson, Peter Boone, Alasdair Breach, Eric Friedman, "Corporate Governance in The Asian Financial Crisis," *Journal of Financial Economic* 58, No. 171 (2008): 145, https://doi.org/10.1016/S0304-405X(00)00069-6.
[21] Giancarlo Corsetti, Paolo Pesenti, dan Nauriel Roubini, "What Caused The Asian Currency and Financial Crisis," *Japan and the World Economy* 11, (1999): 356-362, https://EconPapers.repec.org/RePEc:eee:japwor:v:11:y:1999:i:3:p:305-373.

crisis at that time, thereby removing the District Court's jurisdiction over bankruptcy and PKPU matters.

Analysis of Scenario 1: Bankruptcy Petition Filed by One of the Parties

Differences in the Characteristics of the Forums

Scenario 1 concerns a situation in which a bankruptcy petition is filed by one party against the other, where both parties are bound by an arbitration agreement. The first variable that must be examined in this scenario is the characteristics of the Commercial Court. Such examination requires first looking at the characteristics of the District Court, given that the Commercial Court functions as a special court within the general court system.[22] This is in accordance with the definition of the Commercial Court set out in Article 1 point 7 of the Bankruptcy and PKPU Law.

The first characteristic of the Commercial Court, by virtue of this status, is that hearings are open to the public. As part of the general judiciary, and pursuant to Article 13(1) of Law No. 48 of 2009 on Judicial Power, such openness is mandatory in all hearings, unless otherwise provided by laws relating specifically to the Commercial Court. Moreover, under paragraph (2) of the same article, a hearing not conducted in public may render the resulting judgment legally invalid and without binding force.[23] In addition, the Bankruptcy and PKPU Law contains no provisions allowing the Commercial Court to conduct closed hearings.[24] In fact, the phrase "open to the public" appears seven times in connection with the trial

[22] Dewan Perwakilan Rakyat and the President, "Undang-Undang tentang Kekuasaan Kehakiman," Pub. L. No. No. 48 Tahun 2009 (2009), Elucidation of Article 27(1).

[23] Dewan Perwakilan Rakyat and the President, Elucidation of Article 13(2).

[24] Dewan Perwakilan Rakyat and the President, "Undang-Undang tentang Sistem Peradilan Anak," Pub. L. No. 11 Tahun 2012 (2012), Article 3.

process across various provisions, while the phrase “closed to the public” does not appear in any provision of the Bankruptcy and PKPU Law.[25]

This openness takes several forms. In a public hearing, members of the public, regardless of whether they have any connection to the parties or the dispute, may attend, listen, take notes, and, where permitted, record events in court.[26] There is no prohibition against disseminating such observations to a broader audience.

Openness is also manifested in the absence of anonymisation of the parties’ names.[27] Party information is accessible on the Supreme Court’s official website, allowing the public to view details of the parties, the substance of the dispute, and related information. In this way, the court plays an active role in the dissemination of information in accordance with its statutory mandate.

This, of course, can affect the parties’ reputations.[28] Publicity of the dispute means publicity of the problems faced by a company or an individual. Such openness can be detrimental, as it directly influences public perception. A party may be perceived as problematic, thereby diminishing its reputation and credibility.[29] In business, the credibility and reputation of the individuals behind a company are critical factors in attracting external stakeholders, including investors.[30] Reputation is

[25] Dewan Perwakilan Rakyat and the President, Undang-Undang Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, Article 8(7), Article 13(4), Article 18(2), Article 194(1), Article 194(5), Article 221, and Article 298.

[26] Dewan Perwakilan Rakyat and the President, Undang-Undang tentang Kekuasaan Kehakiman, Article 13.

[27] Pengadilan Negeri Surabaya, Putusan Nomor 1249/Pdt.G/2022/PN.Scby (2022). In this decision annulling the arbitral award, the case was recorded by directly disclosing the full identities of the Parties, which had previously been kept confidential during the arbitral proceedings.

[28] Rajarishi Nahata, “Venture capital reputation and investment performance,” *Journal of Financial Economics* 90, no. 2 (2008): 127–51, https://doi.org/10.1016/j.jfineco.2007.11.008.

[29] Nahata.

[30] Nahata.

therefore essential to maintain, as it is directly linked to the trust placed in the parties to the dispute.

The next characteristic is that of feud or hostility.[31] This arises from the general orientation of proceedings in the District Court, namely, a win–lose approach. Each party will seek to prove its case in a manner that benefits itself, given that the orientation is a zero-sum game where the winner takes all.[32] From the outset, the petitioner's intention in filing for bankruptcy is to secure repayment of the respondent's debt. This is achieved by causing the respondent's "civil death," whereby the respondent is replaced by a court-appointed receiver. All assets and business activities of the respondent will be managed solely by the receiver for the purpose of repaying creditors.

A bankrupt debtor may, indeed, submit a settlement plan pursuant to Article 144 of the Bankruptcy and PKPU Law. However, there exists a significant legal paradox in the implementation of such settlements in the Commercial Court. The Bankruptcy and PKPU Law is often used as a weapon by creditors to bankrupt a debtor without consideration of the settlement plan. This occurs because the law allows creditors to reject a settlement plan without any legal consequences.[33] As a result, settlements are difficult to achieve, as creditors can easily reject them in order to bankrupt the debtor and obtain repayment more quickly.

In contrast, settlements in arbitration, unlike those in the Commercial Court, which are often pursued by only one party, are grounded in the win–win solution principle, oriented toward finding a resolution to the dispute

[31] Linguistically, the term "adversarial" can also be interpreted as "hostility." However, to avoid confusion with the adversarial system in criminal procedure, the term "feud" is used in this article. See Merrriam-Webster, "Feud," diakses 26 November 2024, https://www.merriam-webster.com/dictionary/feud.

[32] James Marshall, "Lawyers, Truth and the Zero-Sum Game," *Notre Dame Law Review* 47, no. 4 (1972): 919–26, http://scholarship.law.nd.edu/ndlr/vol47/iss4/6.

[33] Munir Fuady, Hukum Pailit Dalam Teori dan Praktek (Bandung: Citra Aditya Bakti, 2005), 407.

and ensuring business continuity.[34] ursuant to Article 45 of the Arbitration and ADR Law, the arbitrator or arbitral tribunal must first attempt to reconcile the parties; if a settlement is reached, a deed of settlement will be issued, which is final and binding.[35] Thus, settlements in this context, both procedurally and in substance, aim to produce outcomes that maximise the benefits for both parties and promote the sustainability of the business.

Conflict of Principles Between Forums and Its Impact on Forum Validity

Confidentiality and trust, in the context of arbitration, constitute two fundamental principles that must always be upheld by all parties. Arbitration focuses on resolving disputes in a manner that enables the parties to prioritise the continuation of their business relationship.[36] Accordingly, what the parties should value most is the competence and professionalism of the arbitral tribunal. Equally, each party must participate in the process on the basis of mutual trust and good faith. Publicity of the dispute is unnecessary and, in fact, may harm the parties' reputations.

The concept of confidentiality is of particular importance to commercial parties engaged in dispute resolution.[37] Its significance lies in the fact that business matters forming the subject of the dispute, such as competition issues, intellectual property rights, and matters potentially

[34] Sjaifurrachman dan Habib Adjie, Aspek Pertanggungjawaban Notaris Dalam Pembuatan Akta (Bandung: Mandar Maju, 2011): 22; as an additional reference Anangga W. Roosdiono dan Muhamad Dzadit Taqwa, "Paradigma dalam Arbitrase di Indonesia: Win-Lose atau Win-Win/Lose-Lose?," Hukumonline.com, 3 Maret 2023.

[35] Indonesia, "Kitab Undang-Undang Hukum Perdata" (t.t.). Pursuant to the provisions of Article 1851 of the Indonesian Civil Code, a deed of settlement (*akta van dading*) constitutes an agreement in which the parties undertake to promise something or to terminate a dispute in writing.

[36] Andika Dwi Yuliardi dan Imam Budi Santoso, "Upaya Arbitrase dalam Penyelesaian Perselisihan Hubungan Industrial Didasarkan Adanya Kesepakatan Para Pihak," *Perspektif Hukum* 22, no. 1 (2022): 139–65, https://perspektif-hukum.hangtuah.ac.id/index.php/jurnal/article/view/92/97.

[37] Paul Friedland dan Loukas Mistelis, "2010 International Arbitration Survey: Choices in International Arbitration," 2010, http://www.arbitrationonline.org/research/2010/ index.htm.

amounting to trade secrets, may arise in the proceedings. Furthermore, critical information, including financial data and information relating to other companies disclosed during the resolution process, could create presumptions detrimental to the parties' reputations.[38]

Third parties outside the arbitral process are not permitted to access case information, as publicity does not contribute to resolving the substance of the dispute. For example, before the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia* or BANI), the general public cannot access ongoing cases. This restriction means that individuals with no connection to the dispute are not allowed to attend hearings, and there is no publicly accessible electronic file of the proceedings, unlike the online system maintained by the Supreme Court. Even BANI administrators are only aware of the identities of the parties, without any knowledge of the dispute's substantive details, and are bound by strict confidentiality obligations.[39]

The principle of trust is likewise absent in Scenario 1. Broadly speaking, trust can be understood as the willingness and confidence to rely on another person's capability and integrity to discharge a responsibility.[40] The application of this principle is critical to achieving arbitration's primary orientation: resolving disputes by identifying the best possible solution for all parties. One tangible manifestation of this is the parties' mutual trust that their dispute will be resolved under such an orientation, by appointing an arbitral tribunal of competence and integrity. This principle is reflected in Article 1(7) of the Indonesian Arbitration and Alternative Dispute

[38] François Dessemontet, "Arbitration and Confidentiality," The American Review of International Arbitration 7, no. 3–4 (1996), https://arbitrationlaw.com/pdf/arbitration-and-confidentiality-vol-7-no-3-4-aria-1996.

[39] Badan Arbitrase Nasional Indonesia, "Peraturan dan Prosedur Arbitrase Badan Arbitrase Nasional Indonesia" (2022), www.baniarbitration.org.

[40] Sri Rahayu Endang, "Pengaruh Budaya Kerja, Integritas dan Kepercayaan terhadap Organizational Citizenship Behavior pada Dosen Universitas Negeri Jakarta," *Jurnal Ilmiah Econosains* 15, no. 1 (2017), https://doi.org/10.21009/econosains.015.1.3.

Resolution Law, which provides that arbitrators are appointed by the parties on the basis of mutual agreement or their own free will.

Where one party bound by an arbitration clause files a bankruptcy petition with the Commercial Court, there is an indication that such party no longer has confidence in the other party to resolve the dispute solely through arbitration, which possesses characteristics markedly different from those of the Commercial Court. Although bankruptcy proceedings may also allow for settlement, the decision to resort to court proceedings signals distrust. This indication is particularly strong where the petitioner effectively seeks the "civil death" of the other party, thereby showing no interest in resolving the dispute directly with the party they wish to bankrupt. In parallel, the bankruptcy respondent can no longer reasonably be expected to trust the petitioner to resolve the dispute amicably through arbitration, given the petitioner's chosen orientation. This raises the evaluative question: must the resolution of their commercial dispute necessarily proceed through a process that may result in the "civil death" of one of the parties?

Analysis of Scenario 2: Petition by a Third Party Outside of the Arbitration Clause

Urgency of Cross-Forum Coordination

In the context of Scenario 2, the party filing for bankruptcy is a third party or a party outside the arbitration agreement. Accordingly, the issue is no longer a matter of conflicting principles between arbitration and the Commercial Court, but rather one of connectivity and coordination between different fora. This connectivity gives rise to the importance of coordination, as the decision of one forum will have implications for the proceedings in the other. Therefore, it is first necessary to properly understand the overlap in the timelines of arbitration proceedings and bankruptcy/suspension of debt payment obligation (PKPU) proceedings.

Overlap Between Arbitration and Commercial Court Timelines

Maximum Duration of Arbitration Proceedings: 6 months

An arbitration proceeding commences when the arbitral tribunal is constituted or when a sole arbitrator is appointed by the disputing parties. Once the statement of claim is received, the arbitrator or presiding arbitrator must deliver a copy of the claim to the respondent. Within fourteen (14) days of receipt, the respondent must submit its written response. The arbitrator or presiding arbitrator then issues a summons to the parties to appear before the arbitration hearing no later than fourteen (14) days from the issuance of the summons. If the claimant fails to appear within the prescribed time, the claim is deemed withdrawn. However, if the respondent fails to appear, a second summons will be issued, and the examination will proceed in absentia within a maximum of ten (10) days after the second summons.

Article 48 of the Indonesian Arbitration and Alternative Dispute Resolution Law expressly provides that the examination of a dispute must be concluded within no later than 180 (one hundred and eighty) days from the constitution of the arbitral tribunal.[41] urthermore, Article 57 stipulates that an arbitral award must be rendered no later than thirty (30) days after the close of the examination.[42] Thus, in principle, arbitration already provides a certainty of time for resolution which is approximately 180 days, subject to other applicable provisions.

Under the 2022 BANI Rules and Procedures, within fourteen (14) days after the award is signed by the arbitrator or tribunal, the award must be delivered to the parties. Within fourteen (14) days of receipt, the parties may request the correction of administrative errors in the award. It should be noted, however, that arbitral awards are final and binding in nature.

[41] Badan Arbitrase Nasional Indonesia, Peraturan dan Prosedur Arbitrase Badan Arbitrase Nasional Indonesia, Ps. 48.

[42] Badan Arbitrase Nasional Indonesia, Ps. 57.

Maximum Duration of Bankruptcy Proceedings: 2 months

Pursuant to Article 6 of the Bankruptcy and PKPU Law, the hearing to examine a bankruptcy petition must be held no later than twenty (20) days from the date of filing. Ideally, the bankruptcy process is regulated to conclude no later than sixty (60) days from the date of registration of the petition, as provided in Article 8(5) of the Bankruptcy and PKPU Law. After the decision is rendered, the parties may file an appeal to the Supreme Court within eight (8) days from the date the decision is pronounced, in accordance with Article 11. The Supreme Court must issue its ruling within sixty (60) days of receiving the cassation petition, pursuant to Article 13(3). The Law also allows for a petition for judicial review (peninjauan kembali), which must be decided within thirty (30) days of receipt by the Supreme Court.

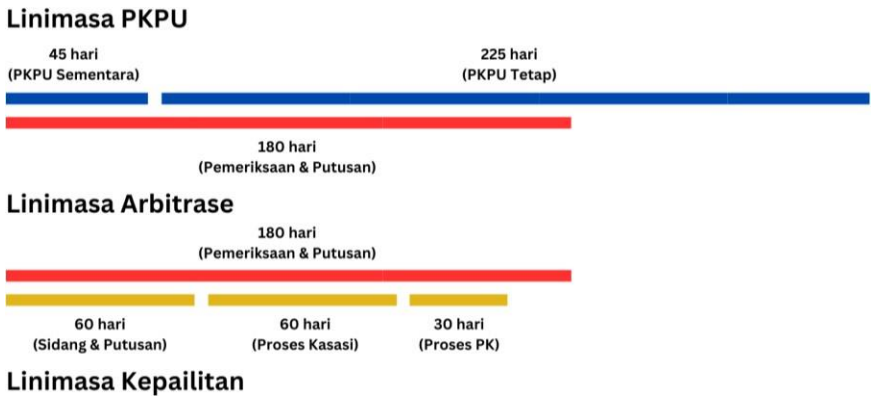
Maximum Duration of PKPU Proceedings: 9 months

The Bankruptcy and PKPU Law recognizes two types of PKPU proceedings: temporary PKPU and permanent PKPU. Temporary PKPU proceedings last a maximum of forty-five (45) days, whereas permanent PKPU proceedings last a maximum of 270 (two hundred and seventy) days from the creditors' approval. During PKPU proceedings, the debtor cannot be declared bankrupt. If PKPU and bankruptcy petitions against the same debtor are filed concurrently, the PKPU petition must take precedence.

The distinction between temporary and permanent PKPU is set out in Article 225(4) of the Law, which provides that a hearing must be held no later than forty-five (45) days after the temporary PKPU decision is pronounced, after which the temporary PKPU lapses. If the debtor fails to appear, bankruptcy is declared in the same hearing. If the debtor is present, it may submit composition plans (rencana perdamaian) for creditor approval. Creditors then decide whether to reject or accept permanent PKPU. If permanent PKPU is not granted, the debtor must be declared

bankrupt within forty-five (45) days. If granted, the PKPU period must not exceed 270 days from the date of the temporary PKPU decision.

The timelines above can be visualized as follows:



Based on such visualization, both bankruptcy and PKPU proceedings may run in parallel with arbitration proceedings and may conclude either before or after the arbitration process.

Implications of Each Decision on Other Proceedings

Interrelation between Arbitration Disputes and Bankruptcy

A relevant question arising from the potential overlap between arbitration and bankruptcy is: should the arbitration proceedings continue after a bankruptcy declaration has been pronounced? Some parties take an extreme position, maintaining that even in the event of bankruptcy, arbitration proceedings should continue, relying on Article 10 of the Arbitration and Alternative Dispute Resolution Law ("Arbitration Law"). Bankruptcy or insolvency of one party does not nullify the arbitration agreement. The opposite extreme holds that if bankruptcy occurs, the arbitration proceedings must inevitably be terminated.

In practice, once a bankruptcy ruling has been issued, there are two possible scenarios in ongoing arbitration proceedings. If the bankrupt debtor is the claimant in the arbitration, the proceedings shall continue with

the involvement of the bankruptcy receiver (kurator). The legal basis is Article 28(1) of the Bankruptcy and Suspension of Debt Payment Obligations Law ("Bankruptcy Law"). A legal claim brought by the debtor (in its capacity as arbitration claimant) and pending during bankruptcy proceedings must, upon request of the respondent, be suspended to allow the respondent to summon the receiver to take over the proceedings (the receiver replacing the claimant) within a time period determined by the court.

Such proceedings are generally initiated by a bankrupt debtor to seek or increase the bankruptcy estate (boedel pailit). More precisely, the debtor is attempting to add assets for the purpose of debt repayment.

However, if the bankrupt debtor is the respondent in the arbitration, the proceedings must be terminated. The legal basis is Article 29 of the Bankruptcy Law, which states:

> "A legal action before the Court brought against the Debtor (in its capacity as arbitration respondent) insofar as it is aimed at obtaining fulfilment of obligations from the bankruptcy estate, and which is pending at the time the bankruptcy declaration is pronounced, shall lapse by operation of law upon such declaration being issued.
> *[suatu tuntutan hukum di Pengadilan yang diajukan terhadap Debitur (kapasitas debitur sebagai Termohon arbitrase) sejauh bertujuan untuk memperoleh pemenuhan kewajiban dari harta pailit dan perkaranya sedang berjalan, gugur demi hukum dengan diucapkan putusan pernyataan pailit terhadap Debitur]*".

This is because settlement measures are already underway to satisfy the rights of creditors.

Another issue in this interrelation is the absence of coordination between the arbitration forum and the Commercial Court. How can the

arbitral tribunal ascertain that one of the parties is involved in proceedings before the Commercial Court? The Bankruptcy Law does not provide an answer. This lack of regulation creates a significant risk that bankruptcy proceedings may have concluded — with one party being declared bankrupt — without the arbitral tribunal's knowledge, due to the absence of notification from either the bankrupt party or the Commercial Court.

Interrelation between Arbitration Disputes and Suspension of Debt Payment Obligations (PKPU)

When PKPU proceedings are ongoing, an arbitral award may affect the PKPU process. The Commercial Court cannot simply disregard such an award, except where the arbitral award determines that the debtor owes no debt.

Deni Purba explained during the BANI Arbitrator's Discussion that several scenarios may arise: (1) where the arbitral award favours the creditor against the debtor ("C>D"); (2) where the arbitral award favours the debtor against the creditor ("D>C"); and (3) Where the arbitral award favours a third party against either the creditor or debtor, or vice versa ("TP>D" or "TP>C").[43]

If the first scenario occurs, and there is a discrepancy in amounts, the creditor may request an amendment to the list of receivables so that the claim is adjusted accordingly. The list of receivables in bankruptcy and PKPU proceedings is public and may be inspected by anyone free of charge, as stipulated in Article 119 of the Bankruptcy Law. If an error occurs, or if circumstances require adjustment to the list, Article 270(1) of the Bankruptcy Law provides that the administrator (pengurus) may perform reconciliation to discuss the amount and nature of the creditor's claim

[43] Deni Purba, "Masalah-Masalah yang Timbul terkait Arbitrase dan Kepailitan/PKPU: Practical Issues," 15 Maret 2023.

against the debtor's debt records. If no resolution is reached, Article 272 grants the administrator the authority to determine the final list of receivables. Thus, transparency and independence of the administrator are crucial to avoid conflicts of interest between debtor and creditor.[44]

In the second scenario, the debtor may seek an adjustment to the receivables list. However, if the arbitral award determines that the debtor owes no debt to the creditor, contradicting the ongoing PKPU process (since the existence of a debt is a prerequisite for PKPU), in practice, the Commercial Court will not recognise the arbitral award.

Where a third party not involved in the PKPU process is concerned, if the arbitral award favours the PKPU debtor against the third party, the PKPU administrator may seek enforcement against the third party's assets to add to the PKPU debtor's estate. Conversely, if the third party prevails, it may register its claim to be paid in accordance with the terms of the court-approved settlement (*homologasi*).

If the dispute is between a third party and a creditor, and the arbitral award favours the creditor, the benefit accrues solely to that creditor. Conversely, if the third party prevails, performance and enforcement are directed solely at the creditor, without any relation to the bankruptcy estate or debtor's assets.

What if a creditor initiates arbitration after the Commercial Court grants the debtor's PKPU petition, thereby extending the maturity date for debts already due? The creditor's rationale is disagreement with the payment extension, believing that an arbitral award in its favour would result in payment within 30 days of the award.

Nevertheless, the Commercial Court's PKPU ruling must prevail. PKPU is a petition to extend the maturity date of debts already due, while

[44] Erna Widjajati dan Yessy Kusumadewi Wijayanto, "Upaya Hukum Bagi Kreditur Apabila Debitur Pailit Tidak Mengakui atau Menolak Tagihan Utangnya (Studi Putusan Nomor 05/Pdt.Sus-Pailit/2016/PN.Niaga.Jkt.Pst)," *Jurnal Krisna Law* 2, no. 2 (2020).

under the arbitral award, the debt would only become due once the time period stipulated therein expires. For example, if the arbitral award stipulates a 30-day compliance period, the debt matures only upon the expiry of that period. Since PKPU serves to extend the due date of payment, the relevant period is that determined by the arbitral award.

Proposed Provisions to Address the Interconnection Between Arbitration and the Commercial Court

Based on the discussion and findings in the preceding section, the policy proposal in this paper is premised on the understanding that it is not feasible to formulate a single, generic approach (one size fits all) to govern the relationship between arbitration and the Commercial Court. Each scenario carries distinct normative characteristics and procedural implications, necessitating a contextual legal response.

First, in Scenario 1 (where one party files for bankruptcy or a suspension of debt payment obligations [PKPU] against the other party who is currently engaged in, or bound by, an arbitration agreement), the primary issue lies in the collision of legal principles: the principle of confidentiality in arbitration versus the principle of openness and public interest in bankruptcy proceedings. This tension also reinforces distrust between the parties and creates room for forum abuse (forum shopping). Accordingly, we propose a limitation on the absolute competence of the Commercial Court to unilaterally process PKPU petitions in such circumstances. Article 303 of the Bankruptcy and PKPU Law, which currently grants full legitimacy to the jurisdiction of the Commercial Court, should be revisited to account for the existence and status of any ongoing arbitration proceedings. This revision could take the form of an exception clause or a cross-forum coordination requirement before a PKPU application is processed.

Second, in Scenario 2 (where arbitration proceedings run concurrently or overlap with a legitimate bankruptcy petition), the debate shifts from the

realm of principle to the need for coordination and synchronization between two parallel legal processes. For this, we propose several concrete measures:

1. The Commercial Court and the arbitral tribunal should recognize and take into account the outcome of proceedings in the other forum as limited res judicata, particularly to avoid conflicting decisions and duplicative fact-finding;
2. A legal norm should be established to regulate the formal notification mechanism between arbitration and the Commercial Court. This obligation may be imposed on the parties, the arbitral tribunal, or the bankruptcy judges, depending on the procedural trigger;
3. In cases where a PKPU petition is filed during ongoing arbitration, arbitrators should be granted explicit authority to issue interim measures to protect the legal rights of the parties and to preserve the effectiveness of dispute resolution;
4. Parties are encouraged to incorporate a specific clause in their arbitration agreement regulating scenarios involving bankruptcy or debt restructuring proceedings, including provisions on forum priority; and
5. Institutions such as BANI may develop internal protocols or soft law guidance for handling potential cross-forum disputes, including policies to suspend arbitral hearings while PKPU proceedings are underway.

Through this differentiated approach, this paper not only offers a normative framework but also presents practical recommendations that can be directly implemented by businesses, legal counsel, arbitral institutions, and Commercial Court judges to achieve jurisdictional clarity and legal certainty.

Conclusion

The interconnection between arbitration and the Commercial Court in resolving business disputes presents significant normative challenges, as both have distinct absolute competences but may operate in parallel in practice. This study demonstrates that the core issue lies not only in overlapping jurisdictions but also in the clash of principles (in Scenario 1) and the absence of cross-forum coordination (in Scenario 2). Accordingly, a one size fits all regulatory approach is inadequate to address the complexity of this inter-forum relationship.

The key findings of this research distinguish between two typologies: (1) when parties bound by an arbitration clause initiate bankruptcy proceedings, raising concerns over breaches of confidentiality and trust; and (2) when the petition is filed by a third party, necessitating stronger coordination mechanisms between arbitration and the Commercial Court. In this context, this paper recommends two normative responses: limiting the absolute competence of the Commercial Court in the first scenario, and mandating notification or coordination in the second scenario.

Going forward, further research could expand this discussion by examining how arbitral awards from international forums are considered by the Commercial Court in Indonesia, as well as exploring the possibility of harmonizing cross-jurisdictional practices in cases of cross-border insolvency. An interdisciplinary study combining legal and economic perspectives could also enrich the discourse on the effectiveness of dispute resolution systems within the modern business ecosystem.

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