SEPARABILITY DOCTRINE IN ARBITRATION AGREEMENT (A COMPARATIVE STUDY)

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ABSTRACT

This paper discusses the status of the separability doctrine in arbitration based on Indonesian arbitration law and the provisions of arbitration law internationally. The legal issues discussed are what constitutes the justification so that the arbitration agreement does not become canceled even though the main agreement is canceled; whether the arbitration agreement is an integral part of the main agreement; and whether the arbitration agreement is not canceled even though the main agreement is canceled based on the separability principle, this applies to all principal agreements. This paper is based on normative legal research. To analyze and answer the legal issues above, the author uses a statutory approach, a case approach, and a conceptual approach. This study concludes that the application of the separability doctrine has a fairly strong justification, namely the parties' intention to resolve disputes arising from the main agreement through arbitration, including disputes regarding the validity of the main agreement. The separability doctrine applies only if the main agreement in question is nullified or canceled, and does not apply if it concerns the invalidity of the arbitration agreement itself, which is the court's authority to determine. Recognition of the application of the separability doctrine in legal practice in Indonesia still requires more recognition through court decisions, especially at the Judex Factie level.

Keywords: Separability, Arbitration Agreement, Cancellation

INTRODUCTION

The globalization of the world market has led to increased business with foreign companies. In this era, transnational trade and investment are increasing, where multinational companies develop with the interest to promote business and profit regardless of national borders.[1]When business between domestic companies and foreign companies increases, disputes are inevitable.[2]

Arbitration as a method of resolving commercial or business disputes has been recognized and accepted both nationally and internationally. It can even be said that arbitration is the preferred method of dispute resolution for resolving disputes between parties in international business transactions.[3] In an international context, commercial arbitrations have shown remarkable developments, especially concerning ICC (International Chamber of Commerce) arbitrations.[4] It is indisputable that arbitration is the dominant international commercial dispute settlement method.[5]

The main requirement for a dispute to be resolved through arbitration is the existence of an arbitration agreement.[6] Without an arbitration agreement, it is impossible to carry out arbitration. This is evident in the definition of arbitration as stipulated in Article 1 Raise 1 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (hereinafter referred to as the Arbitration Law and Alternative Dispute Resolution), that arbitration is a way of resolving civil disputes outside the court. General based on an arbitration agreement made in writing by the disputing parties. (Huala, (n.d.). Thus, the existence of an arbitration agreement is very important for the resolution of a civil dispute through arbitration. Even the existence of an arbitration agreement made by these parties can prevent court interference to resolve disputes. The District Court is not authorized to adjudicate disputes between parties

that have been bound by an arbitration agreement (Article 3 of the Arbitration Law and Alternative Dispute Resolution). The existence of an arbitration agreement in writing negates the rights of the parties to submit dispute resolution to the District Court and the District Court is obliged to refuse and will not interfere in the settlement of disputes that have been determined through arbitration (Article 11 of the Arbitration Law and Alternative Dispute Resolution) (Gary, (2001).

An arbitration agreement not only creates absolute competence for the arbitral tribunal to resolve a dispute, but even its binding power remains when the principal agreement expires or is canceled. In other words, the arbitration agreement does not become null and void because of the termination or cancellation of the principal agreement. The non-cancellation of the arbitration agreement with the termination or cancellation of the main agreement is known as the separability doctrine or severability doctrine. (Laurence, 1995). The recognition of this doctrine in international arbitrations is still relatively new.[7] The application of this doctrine certainly raises problems in the contract law, among others: what is the justification so that the arbitration agreement does not become canceled even though the main agreement is canceled; whether the arbitration agreement is an integral part of the main agreement. If it is one entity with the main agreement, why does the arbitration agreement not become void? If the arbitration agreement is accepted as an agreement separate from the main agreement, what is the logical argument that can be put forward in the case of the arbitration agreement is the arbitration clause contained in the main agreement. Whether the arbitration agreement is not canceled even though the main agreement is canceled based on the separability principle, this applies to all main agreements. The questions above need an assessment based on the provisions of arbitration law, both in the national and international scope, and contract law (Munir, (n.d.).

RESEARCH METHOD

This research is normative legal research. To analyze and answer the legal issues above, the author uses a statutory approach, a case approach, and a conceptual approach. The statutory approach is carried out by analyzing the separability doctrine provisions in the Arbitration Law and Alternative Dispute Resolution, UNCITRAL Model Law, UNCITRAL Arbitration Rules, UNCITRAL model laws, and ICC Arbitration Rules. The case approach is used to analyze the application of the separability doctrine in cases that have been decided, both in Indonesian courts and abroad. The conceptual approach is used to analyze the legal argument supporting the existence of the doctrine (Sudargo, 1999).

DISCUSSION

Development of the Doctrine of Separability or Severability

The doctrine of separability or autonomy of the arbitration clause states that the arbitration clause contained in an agreement is considered separate from the main agreement. The arbitration clause and the main agreement are two separate contractual relationships, if there is a dispute regarding the validity of the main agreement, the arbitration clause is independent and remains binding on the parties even though the main agreement is void. [8] As previously stated, the separability doctrine is still relatively new in international arbitration (Fahri, (n.d.).

In the United States, for example, this doctrine was first recognized in 1967 in the case of Prima Paint Corp. v. Flood & Conklin Mfg. Co. In this case, the court thinks that the arbitration clauses are "separable" from the principal agreement in which the clauses are contained, and there is no claim that fraud has occurred regarding the arbitration clause itself,

a broad arbitration clause would be seen as covering arbitration against claims that the principal agreement itself was made for fraud.[9] However, in the context of national arbitration, the recognition of the separability doctrine has been quite long.

In Switzerland, for example, this doctrine has been recognized since 1931 by a Federal Court decision ruling that the cancellation of the principal agreement had no impact on an arbitration clause under Swiss law.[10]

In England, this doctrine was first recognized in 1942 in the Heyman v Darwins Ltd. case. In that case, the House of Lord decided that the dispute over whether a contract had been canceled was within the scope of the arbitration clause.[11] Further developments in the case of Harbor Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd., this separability principle has been expanded to include canceled agreements.[12] In the UK the separability doctrine has received full recognition with the enactment of the Arbitration Act 1996. Article 7 states that (Yahya, 1991):

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement (Hussain et al., 2020)."

That article shows the binding force of the arbitration agreement or the arbitration clause. Likewise, further developments in the United States show that the doctrine of separability applies to agreements that are null and void. This is as decided in the case of Buckeye Check Cashing Inc. v John Cardegna,[13] in this case it was decided that "regarding the alleged invalidity of the principal agreement, except for the claim against the arbitration clause, the issue of the validity of the agreement is determined by the arbitrator. From several cases that have been decided, it shows that the validity of the arbitration clause does not depend on the void or cancellation of the main agreement, in the sense that if the main agreement is void or canceled, the arbitration clause does not apply, but the arbitration clause still exists and is separate from the main agreement. That is why this doctrine is called the separability doctrine or the separation of the arbitration clause from the main agreement (Hussain et al., 2021).

Justification of Separability Doctrine

The separability doctrine has generally been accepted in the practice of dispute resolution through arbitration. Characteristics that the arbitration agreement is independent and separate from the main agreement (not accessory or additional), therefore, even though the main agreement does not apply, the arbitration agreement remains in effect is an important concern. This is because there are still quite many people who argue, including experts and practitioners in Indonesia, that the arbitration clause is an additional agreement. Consequently, the termination or cancellation of a contract or principal agreement immediately terminates or cancels the arbitration clause (contained in the contract). The opinion that the arbitration agreement is an additional or adjunct agreement (accessory) is shared by M. Yahya Harahap and Munir Fuady. M. Yahya Harahap stated that (Alan et al., 1986):

"The existence of an arbitration agreement is only an addition to the main agreement, and in no way affects the fulfillment of the agreement. Without an arbitration clause, the fulfillment of the principal agreement is not hindered. Cancellation or invalidity of the arbitration agreement will not result in the null and void of the principal agreement. It is different if the principal agreement is void or canceled. This immediately resulted in the arbitration agreement being null and void. The paralysis of the validity of the principal agreement automatically paralyzes the arbitration clause. "[14]

For different reasons, Munir Fuady stated that in principle the arbitration agreement is additional (accessory), but several unique characteristics cause the accessory to not be fully followed. For example, if the principal agreement is canceled, the arbitration agreement is not automatically canceled.[15] Although he still recognizes the enforceability of the arbitration agreement, basically Munir Fuady thinks that the arbitration agreement is additional (accessory). Therefore, it is necessary to state the justification that the arbitration agreement is independent (Rosen, 1993).

According to Schwebel, an arbitration agreement is an agreement that is separate from the main agreement for four reasons.[16] First, when parties enter into a broadly formulated arbitration agreement, they usually intend to require that all disputes, including disputes over the validity of contracts, be resolved by arbitration. Perhaps this is an implied agreement condition. If the parties making the agreement get questions, what do you mean by determining that "every dispute arising out of or relating to this agreement" will be submitted to arbitration, excluding disputes over the validity of this agreement? ", Of course, they will answer that they do not intend to exclude these disputes. Thus applying the separability doctrine means doing the will of the parties (Stephen, 1987).

Second, if only by denying the legality of the principal agreement one party can revoke the arbitrator's authority to decide on the allegation, this provides an opportunity for the parties to refuse their obligation to arbitrate. This undermines one of the main advantages of choosing arbitration over the court as a method of dispute resolution: fast and simple without requiring a long time and large costs in court. Even worse the problem is in the context of international arbitration agreements because there is no international court with absolute competence to determine and enforce the validity of contracts.

Third, it has been accepted the legal fiction that when the parties agree to a contract or an agreement containing an arbitration clause, they actually enter into two separate agreements: a principal agreement containing substantive obligations and an arbitration agreement that provides a resolution of disputes arising from the principal agreement.[17] This legal fiction is fully justified if we consider what happens if the parties enter into two physically separate agreements. In this situation, if the principal agreement is considered null and void, there is no problem regarding the validity of the arbitration agreement because the arbitration agreement is independent. Hence it is logical to treat an arbitration clause in an agreement differently.[18]

Fourth, it is customary in practice that courts usually only examine the award and not the subject of the dispute to be resolved by arbitration.[19] However, if we do not accept the separability doctrine, the courts are forced to do this (Tibor, 2003).

Separability Doctrine Regulation

Although it is still relatively new, the separability doctrine has been recognized in various legal instruments, both national and international law, as well as court decisions. In Indonesian national law, the separability doctrine is stipulated in Article 10 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This article provides that:

"An arbitration agreement is not null and void because of
the circumstances are below:
a. ...
h. expiration or cancellation of the principal agreement. "

The aforementioned provision expressly determines that the arbitration agreement is not null and void due to the termination or cancellation of the principal agreement. Thus, Indonesian law has recognized the separability doctrine.[20]

Apart from Indonesia, the ASEAN country that has recognized the separability doctrine is Malaysia. In the case of Forest Development Sdn Bhd v Syarikat Permodalan and Pahang Bhd Company, the Malaysian court has indirectly recognized this doctrine.[21]

We can find the recognition of the separation doctrine through international legal instruments, for example in the UNCITRAL Arbitration Rules, UNCITRAL Model Law, and ICC Arbitration Rules (Jane et al., 1996).

In the UNCITRAL Arbitration Rules the doctrine of separability is stipulated in Article 21 Paragraph (2) which determines:

"... an arbitration clause which forms part of a contract and which provides for arbitration under the Rules shall be treated as an agreement independent of the other terms of the contract."

A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

The first sentence of this provision indicates that the arbitration clause is an agreement that is separate or independent from the other terms of the agreement. This shows the characteristics of the separability doctrine. Furthermore, the second sentence further clarifies the binding power of the arbitration clause, namely if the main agreement is declared null and void by the arbitral tribunal, it does not cause the arbitration clause to be canceled. This further reinforces the recognition of the separability doctrine to prevent the implementation of international commercial arbitrations only by questioning the validity of the main agreement.

Apart from the UNCITRAL Arbitration Rules, the doctrine of separability is also recognized in the UNCITRAL Model Law on International Commercial Arbitration (Model Law). If the UNCITRAL Rules were designed for use in international commercial arbitration proceedings, the UNCITRAL Model Law was developed to overcome the lack of harmony in arbitration laws of different countries and to expand a harmonious national arbitration legal system. In Article 16 Paragraph (1) the Model Law explicitly recognizes the separability doctrine. The article stipulates:

"The arbitral tribunal may rule on its jurisdiction, including any objections concerning the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. "

The second sentence of the article, which recognizes the separability doctrine, is basically the same as the provisions of Article 21 Paragraph (2) of the UNCITRAL Arbitration Rules.

Apart from the UNCITRAL Arbitration Rules, another international legal instrument that recognizes the separability doctrine is the ICC Arbitration Rules. The ICC is an arbitration institution that first recognized the separability doctrine of an arbitration agreement, namely in 1955. In Article 6 Paragraph (9) of the ICC Arbitration Rules, the principle of separability is expressly recognized. The article provides that:

"Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void. "

From the second sentence of this article, it is clear about the recognition of the separability doctrine, namely that the arbitration agreement which designates the ICC institution remains valid even though the main agreement itself may not be valid or null and void.

Limitation of the Separability Doctrine

The separability doctrine which states that an arbitration agreement is an agreement that is separate from the main agreement so that the arbitration agreement is not null and void even though the main agreement is null and void does not apply in every situation. The separability doctrine can be applied as long as the arbitration agreement itself is not null and void or canceled. In other words, the arbitration agreement which is part of the main agreement must fulfill the validity conditions of the agreement. If the question is the validity of the arbitration agreement, the separability doctrine cannot be applied. To determine whether the arbitration agreement is valid or invalid is not the authority of the arbitral tribunal, but is the authority of the court. This is as can be concluded from the decisions that recognize the separability doctrine that as long as the issue is not the validity of the arbitration agreement itself, the validity of the main agreement falls within the scope of settlement based on the arbitration agreement.

The Application of Separability Doctrine in Indonesia

The separability doctrine has received recognition and regulation in Indonesia, namely in Article 10 letter (h) of the Law on Arbitration and Alternative Dispute Resolution. In legal practice before the enactment of this Law, it was decided that the arbitration agreement was null and void if the main agreement was null and void. This happened in the case of Yani Haryanto against F.A.E. Mann Sugar Limited London. In this case, the London Sugar Arbitration decision could not be implemented and was rejected by the court, even though it had received "fiat execution" from the Supreme Court of the Republic of Indonesia because the main agreement violated the regulations in force in Indonesia, namely the prohibition of importing sugar other than by Agency for Logistic Affairs (Bulog). In this case, the import of sugar was carried out by the private sector, namely Yani Haryanto. By violating the laws in force in Indonesia, it means violating public order in Indonesia. Thus, the sugar import agreement has been deemed null and void from the beginning (void ab initio), as stipulated in Article 1342 of the Civil Code. This decision shows the tendency of the legal practitioner at that time that the arbitration agreement is null and void with the invalidity of its principal agreement.[22]

The question that arises at this time is whether Indonesian legal practice has recognized the separability doctrine after the enactment of the Arbitration and Alternative Dispute Resolution Laws. At least one case is directly related to the separability doctrine. In the case between Lekom Maras Pengabuan Inc. against the Indonesian National Arbitration Board (BANI), the South Jakarta District Court ruled that the arbitration clause that appointed BANI as a dispute resolution institution in the event of a dispute in the Enhanced Oil Recovery Contract (EOR Contract) is valid and remains valid even though the main agreement or EOR contract has ended.[23]

The application of the separability doctrine still requires more recognition from the general court, because, in several disputes relating to agreements in which an arbitration agreement contains an arbitration agreement, the court states that it is authorized to examine and try the case. One of them is as seen in the case of PT. Golden Spike Energy Indonesia (GSEI) against Pertamina Hulu Raja Tempirai (PHE RT). In the case related to the implementation of the Production Sharing Contract, where the plaintiff was PT. GSEI has sued PHE RT for reasons of default, the Central Jakarta District Court stated that it has the authority to examine and adjudicate the case even though in its contract the parties agree to resolve disputes arising through arbitration, namely through the arbitration body at the International Chamber of commerce (ICC). This decision was upheld by the Court of Appeal, with the consideration that the arbitration agreement does not transfer if the main agreement is transferred to another party. Therefore the arbitration clause in the Production Sharing

Contract does not apply. Fortunately, the Judex Factie's (First Instance Court) decision was later overturned by the Supreme Court, which stated that the arbitration agreement was still valid even though the main agreement was transferred to another party and stated that the Central Jakarta District Court was not authorized to examine and try the case.

CONCLUSION

Based on the above discussion, it can be concluded that basically, the separability doctrine has received recognition in national and international legal instruments, as well as in court decisions. The application of the separability doctrine has strong justification reasons, namely the parties' intention to resolve disputes arising from the main agreement through arbitration, including disputes regarding the validity of the main agreement; eliminates the effectiveness of arbitration if only because of the alleged invalidity of the principal agreement, one party can avoid its contractual obligations; there is a legal fiction that in the main agreement containing the arbitration clause, the parties actually agree on two separate agreements, namely the main agreement containing substantive obligations and the arbitration agreement that provides settlement of disputes arising from the main agreement; If the separability doctrine is not recognized, the court will be forced to examine the subject matter of the dispute to be resolved through arbitration instead of only examining the award. The separability doctrine applies only if the main agreement in question is null and void or canceled, and does not apply if it concerns the invalidity of the arbitration agreement itself, which is the court's authority to determine. Recognition of the application of the separability doctrine in legal practice in Indonesia still requires more recognition through court decisions, especially at the Judex Factie level.

ENDNOTES

1) W. Laurence Craig, *Some Trends and Development in The Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L.J.1 (Winter 1995) , p. 2
2) Jane L. Volz and Roger S. Haydock, *Foreign Arbitral Awards: Enforcing The Award Against The Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867 (Spring 1996), p. 868. There has been a parallel increase in the number of civil and commercial lawsuits involving defendants from abroad with an increase in economic relations between countries around the world.
3) *Ibid*.
4) Gary B. Born, 2001, *International Commercial Arbitration*, 2d.ed, Transnational Publishers and Kluwer Law International, p.7
5) Tibor Varady, *et.al*., 2003, *International Commercial Arbitration A Transnational Perspective*, 2d. ed, Thomson West, p. 41
6) An arbitration agreement is an agreement in the form of an arbitration clause stated in a written agreement made by the parties before a dispute arises, or a separate arbitration agreement made by the parties after the dispute arises. See Article 1 Number 3 of the Arbitration Law and Alternative Dispute Resolution.
7) Huala Adolf, "Syarat Tertulis dan Independensi Klausula Arbitrase," INDONESIA ARBITRATION - Quarterly Newsletter No. 6/2009, hlm. 29
8) J. A. Rosen, "Arbitration Under Private International Law: *The Doctrines of Separability and Competence dela Competence. Fordham International Law Journal 17 (3) 6* , 1993, p. 11
9) 388 U.S 395 (1967)
10) Altan Fahri *GÜLERCİ*, "Seperability of the Arbitration Agreement in International Arbitration," ankarabarrevew *2008*/1, p.109
11) *Heyman v Darwins Ltd* [1942] App Cas 356.
12) *Harbour Assurance Co (Uk) Ltd -v- Kansa General International Insurance Co Ltd CA* (Gazette 07-Apr-93, [1993] 1 QB 701,
13) 546 U.S 440 (2006)
14) M. Yahya Harahap, 1991, *Arbitrase Ditinjau dari: Reglemen Acara Perdata, Peraturan Prosedur BANI, ICSID, Uncitral Arbitration Rules, Convention on the Recognition and Enforcement of Foreign Arbitral Award, Perma No. 1 tahun 1990*, Pustaka Kartini, Jakarta, hlm.96

15) Munir Fuady, *Arbitrase Nasional Alternatif Penyelesaian Sengketa Bisnis*, Citra Aditya Bakti, Bandung, hlm. 118-119
16) Stephen M Schwebel, 1987, *International Arbitration: Three Salient Problems,* Grotius Publications Ltd, Cambridge, pp. 1-13
17) This is in line with the views expressed by Alan Redfern and Martin Hunter that in the agreement that contains an arbitration clause, there are actually 2 (two) separate agreements. First, an agreement that contains the rights and obligations of the parties in the commercial sector. Second, an agreement containing the parties' obligation to settle the dispute arising from the exercise of the parties' rights and obligations from the agreement. See Alan Redfern and Martin Hunter, 1986, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London, p. 132
18) Hussain, S., Nguyen, Q. M., Nguyen, H. T., & Nguyen, T. T. (2021). Macroeconomic factors, working capital management, and firm performance—A static and dynamic panel analysis. Humanities and Social Sciences Communications, 8(1), 1-14.
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21) Jack Tsen-Ta Lee, "Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore. (1995). *Singapore Academy of Law Journal*. 7, 421. Research Collection School Of Law, p.433
22) Sudargo Gautama, 1999, *Undang-Undang Arbitrase Baru 1999*, Citra Aditya Bakti, Bandung, hlm. 16-17
23) Hussain, S., & Hassan, A. A. G. (2020). The reflection of exchange rate exposure and working capital management on manufacturing firms of pakistan. Journal of Talent Development and Excellence, 12(2s), 684-698.

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