Jurisprudentie

Jurnal Jurisprudentie, Volume 11 Issue 1, 2024
P-ISSN: 2355-9640, E-ISSN: 2580-5738

The Application of Party Autonomy Principle in Arbitration

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Abstract: *The application of both substantive and procedural law should be imperative, however, in arbitration, there is a concept that substantive and procedural laws that are imperative in the place (country) where the arbitration is held or where the arbitration award is enforced can be waived by the agreement of the parties which is known as the principle of party autonomy. The principle of party autonomy is interpreted as the freedom of the parties to determine the substantive and procedural law to be used in the arbitration process that arises between them based on the arbitration agreement. However, the act to waive the imperative law can cause problems in the future when the award will be enforced. Hence, this research aims to analyze the party autonomy principle based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), UNCITRAL Model Law on International Commercial Arbitration (With amendement as adopted in 2006), Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Civil Code (KUH.Perdata), Rules of Civil Procedure, Staatsblad (Rv), Het Herziene Indonesisch Reglement (HIR), Rechtsreglement Buitengewesten (Rbg), as well as the Principle on Choice of Law in International Commercial Contracts, by using normative research method and comparative law approach. The research finds a concept that the principle of party autonomy is limited by restrictions established based on laws of the country where the arbitration is held or where the arbitration award is enforced (limited party autonomy).*

Keywords: ***Arbitration; Party Autonomy Principle; Limited Party Autonomy; Substantive Law; Procedural Law***

1. Introduction

One of the fundamental principles in arbitration is the principle of party autonomy. Black's Law Dictionary gives an definition about principle of party autonomy by referring to the definition of freedom of contract,[1] as follow : *"the doctrine that people have the right to bind themselves legally; a judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by external control such as governmental interference."*[2] Based on definition that given by Black's Law Dictionary, the principle of party autonomy is closely related to freedom of contract principle. In the development of arbitration law and practice, the principle of party autonomy becomes one of the main principle.

Redfern & Hunter give more explanation about party autonomy as, "the guiding principle in determining the procedure to be followed in an international commercial arbitration, it is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopts without opposition."[3] Beside that, Diego P Fernandez gives an statement that fundamental feature of arbitration is the freedom of the parties to set forth all aspect of the procedure in arbitration.[4]

[1] Black's Law Dictionary, Eight Edition, page. 145
[2] Black's Law Dictionary, Eight Edition, page. 689
[3] Redfern & Hunter, *Law & Practice International Commercial Arbitration,* Ed. 4, 2004, page. 315.
[4] Diego P. Fernandez Arroyo, "Arbitrator's Procedural Powers : The Last Frontier of Party Autonomy*?", Limits to Party Autonomy in International Commercial Arbitration,* New York: Center for Transnational Litigation, Arbitration, and Commercial Law, 2016, page. 201

However, in arbitration, the application of the principle of party autonomy doesn't mean that the parties have absolute freedom to determine subjects or matters related to the arbitration that they choose as their alternative dispute resolution. There is limitation to party autonomy that's imposed by public powers based on policy reason and public mandatory rules.[5]Furthermore, one of the clearest limitations stipulated in the arbitration provisions is regarding the subject of disputes that can be resolved through arbitration or that are prohibited from being resolved through arbitration.

The party autonomy principle is also known as the doctrine of party autonomy, and, in the substantive law of arbitration, it can be interpreted as the freedom of the parties to apply the law to determine their rights and obligations in guaranteeing what arises in an agreement.[6]Based on the perspective of arbitration procedural law, the party autonomy principle can be interpreted as the freedom that given to the parties to determine the proceedings or legal procedures to be applied in arbitration process.[7]Gao explains that the party autonomy principle can be defined as the principle that gives parties the right to freely determine the law for themselves regarding agreement between them based on arbitration agreement.[8]The party freedom to determine substantive law or procedural law in arbitration apply in domestic and international scale.[9]

This research is conducted by observing the previous researches about party autonomy in arbitration, among others, are as follow: : 1) A Brief Analysis of Party Autonomy in International Commercial Arbitration by Yifang Gao[10], 2) The Self-Styled "Autonomy" of International Arbitration oleh George A Bermann[11], and 3) The Applicable Law to Arbitration Proceedings : Party Autonomy and Lex Loci Arbitri (Extent and Limitation) oleh Wafa Yaqoob Janahi and Muneera Khalifa.[12]Based on previous research by Yifang Gao and George A Bermann, they explained that the principle of party autonomy is very important, especially in international commercial arbitration which fully applies this principle. Yifang Gao explained that the principle of autonomy for the parties is like a double-edged sword which can give rise to its own advantages and disadvantages which can be detrimental to parties who

[5]Diego P. Fernandez Arroyo, "Arbitrator's Procedural Powers : The Last Frontier of Party Autonomy*?", Limits to Party Autonomy in International Commercial Arbitration,* New York: Center for Transnational Litigation, Arbitration, and Commercial Law, 2016, page. 200 & 229.

[6] Saloni Khanderia & Sagi Peari, "Party Autonomy in the Choice of Law Under Indian and Australian Private International Law : Some Reciprocal Lessons", *Coomonwealth Bulletin,* 46: 4, 2020, page. 711-712, https://doi.org/10.1080/03050718.2020.1804420

[7] Desri Novian, *Hukum Acara Arbitrase di Indonesia,* (Yogyakarta: CV. Arti Bumi Intaran), 2023, page. 58

[8] Yifang Gao, A Brief Analysis of Party Autonomy in International Commercial Arbitration. Proceeding of the 2021 International Conference on Social Sciences : Public Administration, Law, and International Relations (SPPALIR 2021), page. 123-127.

[9] Hossein Fazilatfar, "Public Policy Norms and Choice of Law Methodology Adjustment in International ArbitrationI, *South Carolina Journal of International Law and Business,* Vio. 18. Article 2, 2022, hlm. 88.

[10] Yifang Gao, A Brief Analysis of Party Autonomy in International Commercial Arbitration. Proceeding of the 2021 International Conference on Social Sciences : Public Administration, Law, and International Relations (SPPALIR 2021), page. 123-127

[11] George A. Berman, The Self Styled "Autonomy" of International Arbitration, Vol. 36, Arbitration International, 2020, page. 221-232, available at: https://scholarship.law.columbia.edu/faculty_scholarship/2879

[12] Wafa Yaqoob Janahi and Muneera Khalifa Al Khalifa, "the Applicable Law to Arbitration Proceeding: Party Autonomy and Lex Loci Arbitri (Extention and Limitation), *Kilaw Journal,* Vol. 10, Ed 1, December, 2021, page. 43-44

choose arbitration as dispute resolution. However, this research does not confirm that the principle of autonomy of the parties is limited in arbitration subantive law and procedural law, and does not provide an explanation or in-depth analysis of how international arbitration instruments such as the UNCITRAL Model Law or the 1958 New York Convention regulate the principle of autonomy of the parties.[13] Yifang Gao and George A. Berman's research does not examine the impact of the application of the party autonomy principle from lex arbitri perspective. Unlike Yifang Gao and George A. Berman's researches, Wafa Yaqoob Janahi and Muneera Khalifa's research in The Applicable Law to Arbitration Proceedings: Party Autonomy and Lex Loci Arbitri (Extent and Limitation) examines restrictions on party autonomy from the perspective of Lex Loci Arbitri, but Wafa Yaqoob Janahi and Muneera Khalifa do not analyze how parties autonomy is applied in the use of arbitration substantive law. Therefore, this research is conducted by analyzing the principle of party autonomy in arbitration which is limited based on the provisions in the 1958 New York Convention, UNCITRAL Model Law on International Commercial Arbitration in terms of international arbitration, meanwhile, in Indonesia, arbitration also has regulations that limit the party autonomy principle as regulated by Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, civil procedural law in Indonesia, and decisions of the Supreme Court of the Republic of Indonesia.

In Indonesia's arbitration law, the regulation of party autonomy is explicitly regulated in Article 5 paragraph (1) of Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which regulates that the only disputes which can be settled by arbitration are disputes in the commercial sector concerning rights which, according to the law and regulations, have the force of law and are fully controlled by the parties in dispute. Meanwhile, Article 5 paragraph (2) of Law no. 30 of 1999 regulates that disputes which cannot be resolved by arbitration are disputes that cannot be settled amicably under the regulations and the force of law. Therefore, Article 5 paragraph (1) and Article 5 paragraph (2) of Law no. 30 of 1999 is the implementation of the policy on the party autonomy principle as determined by National Law. Article 31 paragraph (1) Law no. 30 of 1999, regulates that the parties are free to determine in an explicit written agreement the arbitration procedure to be used in examining the dispute, as long as it does not conflict with the provisions of Law no. 30 of 1999.[14] In connection with the provisions of Article 31 paragraph (1) of Law no. 30 of 1999 which regulates the freedom of the parties to determine the arbitration procedural law to be used in examining disputes, has also given academic discourse regarding the parameters of the parties' freedom in determining the arbitration procedural law, including but not limited to procedures for examining evidence.

Based on the foregoing, this research aims to determine the regulation regarding the freedom of the parties in determining the substantive law of arbitration and the procedural law of arbitration in examining arbitration disputes and also to determine the restrictions on the party's freedom to determine the substantive law of arbitration and procedural law of arbitration, regarding and compare it with the provisions in the 1958 New York Convention, UNCITRAL Model Law on International Commercial Arbitration, Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution with reference to civil procedural law in Indonesia.

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[13] Yifang Gao, A Brief Analysis of Party Autonomy in International Commercial Arbitration. Proceeding of the 2021 International Conference on Social Sciences : Public Administration, Law, and International Relations (SPPALIR 2021), page. 123-127

[14] Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

2. Method

This type of research is normative research with a statutory and conceptual approach. Meanwhile, the research specification is analytical descriptive which explains the problem according to the research title. The data used is secondary data which is primary legal material in the form of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), UNCITRAL Model Law on International Commercial Arbitration, Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Civil Code (KUH.Perdata), Reglement op de Rechtsvordering, Staatsblad (Rv), Het Herziene Indonesisch Reglement (HIR), Rechtsreglement Buitengewesten (Rbg), and Principle on Choice of Law in International Commercial Contract published by The Hagues Conference on Private International Law (The Hague Principles 2015). Meanwhile, secondary legal materials include books, journals and other related scientific writings. This research was also carried out by comparing the provisions mentioned above.

3. Results and Discussion

3.1 Principle Party Autonomy in Arbitration Based on the New York Convention 1958, UNCITRAL Model Law, and Law No. 30 of 1999

In the development of arbitration practice, both in Indonesia and in international arbitration, one of the reasons for the parties to resolve their disputes through arbitration is because they are considering the flexibility of the arbitration process which is based on the party autonomy principle.[15]This is also in line with the opinion that the character of arbitration is flexibility in its proceeding, where the parties on arbitration has freedom in determining how the arbitration is carried out.[16] However, in reality this is not as flexible as imagined, because there is a restriction norm on the principle of autonomy of the parties which should be noted.

Party autonomy principle is also known in commercial contract law, and it is considered as another name of the principle of freedom of contract (*freedom of contract*). In commercial contract law, freedom of contract is defined as the freedom of the parties to agree on the terms of the contract without any elements of coercion, influence or fraud.[17] Gary B. Born stated that party autonomy principle is a basic principle in arbitration, which is defined as the freedom of the parties to agree to every arbitration condition and procedure that occurs in the dispute resolution process between them, which allows the parties to choose applicable law regarding the number of arbitrators, arbitration procedures, and other important aspects

[15] Ar. Gor. Seyda Dursun, "A Critical Examination of the Role of Party Autonomy in Internation Commercial Arbitation and An Assesement of Its Role and Extent", *Yalova Universitesi hukuk Fakultesi Dergisi,* 1.1., 2012, page. 163

[16]Abdul Wahid, "Pengangkatan Arbiter dalam Internasional (Suatu Studi Perbandingan Berdasarkan UNCITRAL, ICC, AAA, dan LCIA Rules", *Jurnal Hukum dan Pembangunan,* No. 3, Juli – September 1999, page. 224.

[17] Ida Bagus Rahmadi Supancana, *Perkembangan Hukum Dagang Internasional: Penulisan Karya Ilmiah,* (Jakarta: Badan Pembinaan Hukum Nasional), 2012, page. 44

in resolving arbitration disputes.[18]However, although the party autonomy principle is fundamental, it does not apply absolutely in all matter, because there are certain limits to the autonomy of the parties, especially with regard to mandatory public policies and laws. In some literature, restrictions on the party autonomy principle are based on "Mandatory Rules", which are defined as legal regulations that cannot be overridden by the agreement between the parties.[19]

Article V paragraph 1 letters (a), (b), (c), and (d), the New York Convention 1958 regulates that the recognition and enforcement of an award can be rejected, at the request of the party against whom it is applied, if it is proven that the arbitration agreement is invalid according to the law to which the parties have submitted themselves, or according to the law of the country where the arbitral award was made, or the party was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present their case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, or the composition of the arbitral tribunal or arbitration procedure was not in accordance with the agreement by the parties or, in the absence of an agreement, does not comply with the law of the country where the arbitration took place. In addition, Article 2 letter (b) of the New York Convention 1958 stipulates that the recognition and enforcement of an award can be rejected if the subject matter of the dispute cannot be resolved through arbitration according to the law of that country, or the recognition or enforcement of the arbitration award would be contrary to the public policy of the country.

The provisions of Article V paragraph 1 letters (a) and (c) show freedom in determining substantive law or matters agreed upon in the arbitration agreement, is limited by the law of the country where the arbitration is held, and the provisions of Article V paragraph 1 (d) of the New York Convention as mentioned above, regulates that if the parties do not determine the arbitration procedural law, then the procedural law of the country where the arbitration takes place shall apply. Thus, arbitration procedures must comply with -the procedural law where the arbitration is held.

According to Albert Jan van den Berg, Article V paragraph (1) letter a contains two conflict rules in determining the law governing the arbitration agreement, the first rule is the main rule of party autonomy which gives the parties the freedom to comply with the law of their choice in the arbitration agreement, while the second rule is a subsidiary rule which states that the arbitration agreement, if there is no choice of law by the parties, will be governed by the law of the country where the arbitration award is made. No court has questioned that these conflict rules should be interpreted as internationally uniform rules that supersede the domestic conflict rules of the country where the award is relied upon in connection with the award governed by the Convention.[20]

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[18] Gary B. Born, *International Arbitration: Law & Practice,* Wolter Kluwer Law & Business, 2012, page. 96, 121.

[19] George A. Bermann, "Introduction: Mandatory Rules of Law in International Arbitration", *The American Review of International Arbitration,* vo. 18, 2007, page. 1-2

[20] Albert Jan van den Berg, "The New York Convention of 1958: An Overvie", *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, London: Cameron May,*2008, page. 14

Article 19 paragraph (1) of the UNCITRAL Model Law regulates that the parties are given the freedom to agree on procedural law or procedures in examining arbitration disputes which will be applied or followed by the arbitrator or arbitration tribunal. Furthermore, Article 19 paragraph (2) of the UNCITRAL Model Law states that if there is no agreement between the parties regarding the procedural law or dispute examination procedures that will be applied, the arbitration tribunal will conduct the arbitration in such manner as it considers appropriate. The authority of the arbitration tribunal in determining procedures for examining disputes includes the authority to accept evidence, relevance, material and burden of proof for each piece of evidence. In connection with the provisions of Article 19 paragraph (1) of the UNCITRAL Model Law, Redfern and Hunter stated that this Article has similarities with the provisions in Article 34 paragraph (1) of the 1996 Arbitration Act which applies in England which regulates The arbitral tribunal has the authority to decide all procedural and evidentiary matters, taking into account the rights of the parties to agree on each matter.[21]

In connection with the application of substantive law and procedural law in the examination of arbitration disputes, the UNCITRAL Model Law also has provisions that implicitly limiting the application of the party autonomy, as contained in Article 34 of the UNCITRAL Model Law concerning the setting aside or annulment of arbitration awards, especially in paragraph (1) letter a number (i) and (iv), which determine that the award can be annulled if it is proven that the agreement is invalid, or if the composition of the arbitral tribunal or the arbitration procedure is not by the agreement between the parties, unless the agreement conflicts with this law which cannot be reduced by the parties, or, if the agreement fails, does not comply with this law. Furthermore, Article 34 of the UNCITRAL Model Law paragraph (1) letter b confirms that an arbitration award is set aside or annulled because the subject of the dispute cannot be resolved through arbitration based on the law of this country, or the award is contrary to the public policy of this country.

In Law No. 30 of 1999, the articles that regulate the party autonomy are contained in Article 5 paragraphs (1) and (2) regarding limitations on the subject matter that can be examined through arbitration, Article 19 paragraph (1) and Article 24 paragraph (6) regarding withdrawal the arbitrator himself based on the agreement of the parties, Article 30 concerning the inclusion of third parties in the process of examining arbitration disputes, Article 31 paragraph (1) concerning procedural law for examining arbitration disputes determined in the examination of arbitration disputes, Article 34 paragraph (1) concerning the choice of dispute resolution through national arbitration or international arbitration institutions, Article 34 paragraph (2) regarding the procedural law chosen by the parties in resolving disputes through arbitration institutions, Article 36 paragraph (2) regarding oral examination in arbitration dispute examinations, Article 37 paragraph (1) regarding venue of arbitration, and Article 48 paragraph (2) regarding the extension of the arbitration examination period. Furthermore, based on Law No. 30 of 1999, the party autonomy principle is not only related to the substantive law and procedural law that applies to the parties at the time the arbitration examination is carried out, but, it is also related to the right of third parties who are not bound by an arbitration agreement to become parties to the arbitration dispute examination process.[22] Based on this, it can be interpreted that the party autonomy principle does not only impact to the parties, but also other parties who have an interest in the object of the dispute in arbitration.[23]

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[21] Michael Pryles, "Limits To Party Autonomy in Arbitral Procedure." *Journal of International Arbitration,* vol. 24, Issue 3, June, 2007, page. 327

[22] Desri Novian, "Problematika Hukum Masuknya Pihak Ketiga dalam Proses Pemeriksaan Sengketa Arbitrase di Indonesia." *UNES Law Review*, *6*(1), 2023, 1265 https://doi.org/10.31933/unesrev.v6i1.868

[23] Desri Novian, Perlindungan Hukum Kepada Pihak Ketiga Terhadap Proses dan Putusan Arbitrase di Indonesia. Disertation. *Jakarta: Fakultas Hukum Universitas Jayabaya*. 2018, page. 20-21

3.2 Limitation of Party Autonomy Principle in Arbitration

The freedom of the parties to make an arbitration agreement either concerning the main agreement of the case or regarding the procedure for examining the dispute is subject to several restrictions.[24] The arbitration agreement must meet the legal requirements of the agreement determined by the law governing the agreement (civil law).[25] In addition, regarding the agreement between the parties in determining the arbitration procedural law, they must also comply with the provisions of procedural law in the country where the arbitration is held, known as lex arbitri.[26]

The choice of law by the parties is valid as long as it does not conflict with mandatory norms that address the public policy of the domestic forum.[27] Most jurisdictions have special rules that aim to protect parties who are in a weaker situation such as consumers, employees, and insurance policy holders from the dangers of party autonomy, namely situations where one party is in a vulnerable position compared to the other party, in such circumstances, the rights of parties to choose the applicable law are generally limited. For example, the provisions that give limitations to the matters that are regulated by the parties on the agreement are contained in the Principles on Choice of Law in International Commercial Contracts published by *The Hagues Conference on Private International Law (The Hague Principles 2015).* The Hague Principles 2015 is a set of principles adopted by the International Council For Commercial Arbitration (ICCA) in 2015 which aims to provide parties with freedom in determining the law that applies in international commercial contracts between them.[28]In the part *preamble,* The Hague Principle states that the provisions in the instrument establish general principles regarding the choice of law in international commercial contracts by recognizing the principle of party autonomy with limited exceptions. These exceptions are regulated in Article 11 of The Hague Principles 2015 which regulates*: 1)* These principles will not prevent courts from applying mandatory provisions that overcome the applicable forum law without regard to the law chosen by the parties; *2)* Forum law determines when courts can or should apply or consider mandatory provisions that override other laws; *3)* The court may exclude the application of a statutory provision chosen by the parties only if and to the extent that the result of such application is clearly inconsistent with the fundamental ideas of the forum's public policy; *4)* Forum law determines when a court can or must apply or consider the public policy of a state whose law would apply in the absence of a choice of law; *5)* These principles shall not prevent the arbitral tribunal from applying or considering public policy, or applying or considering overriding the mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is entitled to do so.

In the Explanation to Article 11 *The Hague Principles 2015* explained that *party autonomy* is not absolute, it states that the party autonomy principle applies within certain limits. The Hague Principles refuse to give full force to laws chosen by the parties. As further explained in the explanation, regardless of the law chosen by the parties, the forum can apply or consider "mandatory provisions that override" that choice. If the result is "clearly inconsistent with

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[24] Michael Pryles, "Limits To Party Autonomy in Arbitral Procedure." *Journal of International Arbitration,* vol. 24, Issue 3, June, 2007, page. 329

[25] Michael Pryles, "Limits To Party Autonomy in Arbitral Procedure." *Journal of International Arbitration,* vol. 24, Issue 3, June, 2007, page. 329

[26] Desri Novian, *Hukum Acara Arbitrase di Indonesia,* (Yogyakarta: CV. Arti Bumi Intaran), 2023, page. 32

[27] Saloni Khanderia & Sagi Peari, "Party Autonomy in the Choice of Law Under Indian and Australian Private International Law : Some Reciprocal Lessons", *Coomonwealth Bulletin,* 46: 4, 2020, page. 711-712, https://doi.org/10.1080/03050718.2020.1804420, page. 716-717

[28] Prisikila Prastita Penasthika, "Pilihan Hukum dalam The Hague Principles 2015", *Law Review,* Vol. XX. No. 3, 2021, page. 362-363

fundamental ideas of public policy", the forum can reject the chosen law. Restrictions on party autonomy only pertain to rules and policies that are of fundamental importance in the legal system where they apply. Based on this explanation, it can be concluded that the freedom of parties to determine the substantive and procedural law applicable in arbitration disputes is not absolute. If the substantive and procedural law agreed upon by the parties conflicts with the national law at the place of arbitration or the law of the country where the arbitration award is enforced, then the agreed-upon law will be set aside.

Article 5 paragraph (1) and paragraph (2) of Law no. 30 of 1999 basically regulates the subject matter that can be resolved through arbitration and is limited to the subject matter of trade disputes and disputes that cannot be reconciled. Therefore, based on this article, the parties cannot make an agreement with points other than the points stipulated in Article 5 paragraph (1) and paragraph (2) of Law no. 30 of 1999. In a civil case between the "Cikini" Higher Education Foundation and PT. Paper Nusantara in the Indonesian Supreme Court Decision No. 17 B/Pdt.Sus-Arbt/2014 dated 29 October 2014 with the main legal rule: that the main case agreed by the parties to be resolved through arbitration is an industrial relations dispute, so that the existence of the arbitration clause cannot be applied to the arbitration examination because it is not constitutes the scope of trade or commerce as regulated in Article 5 of Law no. 30 of 1999. Thus, even though the parties have agreed to choose arbitration as an alternative dispute resolution, because the subject matter of the dispute is not in accordance with the provisions of Article 5 paragraphs (2) and (2) of Law no. 30 of 1999, arbitration cannot examine and decide the dispute, therefore it is proven that the principle of autonomy of the parties is limited. Not only regarding the subject matter of the agreement which is not included in the arbitration authority which limits the application of the principle of autonomy of the parties, agreements which contain unlawful causes as intended in Article 1320 of the Civil Code also limit the application of the principle of autonomy of the parties in arbitration. In the Republic of Indonesia Supreme Court Decision No. 877 K/Pdt.Sus/2012 dated March 26 2013 in the case between Astro Nusantara International B.V et al against PT. Ayunda Prima Mitra, et al, there is a basic legal rule that the parties' agreement contains a clause prohibiting the parties from filing a trial (lawsuit) in any court, including Indonesian courts, even though this is based on an agreement between the parties, but the agreement has violated the principle of freedom of contract and violates the principle of justa causa as adopted in contract law in Indonesia, so that foreign arbitration award proved contrary to public order.

Likewise, what is used in examining arbitration disputes in selecting procedural law is also limited as per the Decision of the Supreme Court of the Republic of Indonesia No. 03/Arb.Btl/2005 dated 17 May 2006, with the main legal rule that because in the Agreement between the Parties there is a clause for resolving disputes arising under the agreement which must be resolved according to the law of the Republic of Yemen, therefore BANI Representative Surabaya is not authorized to resolve disputes between the Petitioners and Respondent. With regard to procedural law or procedures for examining arbitration disputes, based on Article 19 paragraph (1) of the UNCITRAL Model Law, it is determined that in the event that the parties have not agreed on the arbitration procedural law to be applied, then the parties are free to determine the arbitration procedural law or procedures for examining arbitration disputes between the parties. parties, but this depends on the arbitration procedural law at the place where the arbitration is held and the rules of the arbitration institution chosen by the parties.[29]

[29] Michael Pryles, "Limits To Party Autonomy in Arbitral Procedure." *Journal of International Arbitration,* vol. 24, Issue 3, June, 2007, page. 342

Article 31 paragraph (1) Law no. 30 of 1999 regulates that parties, in an express and written agreement, are free to determine the arbitration procedures used in examining disputes as long as they do not conflict with the provisions of this Law. This provision seems to give the parties the right to freely choose and determine the arbitration procedural law used in examining arbitration disputes. However, in Article 37 paragraph (3) Law no. 30 of 1999 regulates that the examination of witnesses and expert witnesses (Experts) before an arbitrator or arbitration tribunal is held according to the provisions of civil procedural law. Thus, the agreements between the parties regarding the procedures for examining witnesses and experts must comply with the examination procedures in civil procedural law, including regarding the obligation for witnesses or experts to take an oath before giving testimony or the requirements for witnesses or experts whose statements can be heard in arbitration dispute examination hearing. In implementing the party autonomy principle, public policies and imperative (compelling) regulations which have been regulated by the laws and regulations where the arbitration is held cannot be violated by the parties.[30] In addition to the statutory regulations in the place where the arbitration is held, it is also appropriate to pay attention to transnational procedural public policy laws which can also limit the autonomy of the parties, as regulated in the New York Convention 1958 which includes substantial and procedural principles regarding the law of other countries from the place arbitration is held, where the other country in question may be the country where the arbitration award is implemented.[31] Examples of the transnational policies in question that limit the principle of autonomy of the parties are the rights of the parties to be treated equally, the rights of the parties to be able to present their cases, proper notification to the respondent regarding the existence of arbitration, and submission of evidence.[32]

When examining an arbitration dispute, the arbitrator or arbitration tribunal may first examine the material law and formal law agreed upon by the parties, if there are several provisions in the agreement, either formal or substantial, that conflict with the provisions of the law of the country where the arbitration is held or the law of the country where arbitration is enforced, then the arbitrator or arbitration tribunal should notify the parties regarding the existence of this situation before the examination of the arbitration dispute begins or continues, and then advise or ask the parties to make an agreement by changing the provisions so that they are in line with the legal provisions of the country where the arbitration is held or the law of the country where the arbitration award is enforced. Therefore, even though the parties can choose arbitration procedural law that is different from the civil procedural law of the country where the arbitration is held, the parties must still comply with the provisions of civil procedural law which are imperative in nature, resulting in freedom or discretion in using or applying procedural law in arbitration is freedom/discretion that is limited or restricted (limited party outonomy). Thus, in the settlement of arbitration disputes, the parties should choose or fully submit to the provisions of the civil procedure law applicable in the country where the arbitration is held.[33]

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[30] Diego P. Fernandez Arroyo, "Arbitrator's Procedural Powers : The Last Frontier of Party Autonomy*?", Limits to Party Autonomy in International Commercial Arbitration,* New York: Center for Transnational Litigation, Arbitration, and Commercial Law, 2016, page. 203

[31] Diego P. Fernandez Arroyo, "Arbitrator's Procedural Powers : The Last Frontier of Party Autonomy*?", Limits to Party Autonomy in International Commercial Arbitration,* New York: Center for Transnational Litigation, Arbitration, and Commercial Law, 2016, page. 203

[32] Diego P. Fernandez Arroyo, "Arbitrator's Procedural Powers : The Last Frontier of Party Autonomy*?", Limits to Party Autonomy in International Commercial Arbitration,* New York: Center for Transnational Litigation, Arbitration, and Commercial Law, 2016, page. 203

[33] Desri Novian, *Hukum Acara Arbitrase di Indonesia,* (Yogyakarta: CV. Arti Bumi Intaran), 2023, page. 32

4. Conclusion

Arbitration is based on the party autonomy principle, however, autonomy in selecting and determining substantive law and procedural law is not absolute but it is limited and subject to the laws and regulations in the country where the arbitration is held and in the country where the arbitration award will be implemented. Therefore, the arbitation agreements between the parties, whether regarding the subject matter of the agreement such as certain matters or objects agreed upon cannot about the subject matter of the agreement which is prohibited by the laws and regulations in the country where the arbitration is held or where the award is made. If the arbitration agreement does not fulfill the legal requirements of the agreement, both the subjective requirements and the objective requirements as regulated in Article 1320 of the Civil Code, this could result in the arbitration award being annulled by the competent court. Another thing is if the clause of the agreement that conflicts with the law in the place where the arbitration is being held is about the arbitration procedure, then in that case when the arbitration examination process begins, the parties on their initiative can request that to change the agreements so that arbitration procedure is in line with legal provisions, or if the parties do not understand about this before the arbitration examination begins or continues, the arbitrator or arbitration tribunal should advise the parties to change the arbitration procedure with considering the applicable procedural law provisions in its country.

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