



The Dilemma of International Arbitration Awards in Indonesia

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Abstract

The final and binding nature of international arbitral awards results in the nullification of the rights of the parties to file legal remedies against the arbitral award, as is the case with decisions of national courts that can be appealed, appealed, or reviewed. However, Article 68 paragraph (2) of Law Number 30 of 1999 concerning arbitration and Alternative Dispute Resolution provides an opportunity for parties who refuse to recognize and implement an international arbitral award that can be appealed to, as well as Article 70 must also be explained that Article this applies only to national arbitrations. This of course creates legal uncertainty, disuse, and injustice for the parties. Therefore, what is highlighted in this research is what is the position of the final and binding international arbitration award in Indonesia. The research method used in this article is legal research using primary and secondary legal materials. The results of the research show that the position of international arbitral awards in Indonesia is not the same as the decisions of national courts because they cannot be appealed, cassated, and reviewed. Therefore, it is necessary to completely amend international arbitration arrangements by removing Article 68 paragraph (2) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in order to provide legal certainty, benefit, and justice for the parties.

Keywords: *Award; International Arbitration; Final and Binding*

Introduction

The modern justice system as a means of distributing justice has proven to have many obstacles. This is caused by factors of formality, procedures, bureaucracy, and strict methodology (Suparman, 2012). Dispute resolution through the courts gives dissatisfaction to the disputing parties and the wider community. The community's dissatisfaction is characterized by many cynical views, blaspheming the

performance of the court, and distancing the disputing parties from justice, the place where the judge's decision trades (Suparman, 2012). Business people who need legal certainty and security in their investments and trades are very worried about these conditions. This fact further strengthens the reasons and the tendency of the disputing parties to choose dispute resolution outside the court, especially arbitration. Dispute resolution outside the court is considered to provide more legal certainty and justice (Suparman, 2012).

Arbitration is one way of resolving civil disputes outside the court, which is based on an arbitration agreement made by the parties and carried out by the parties, and carried out by arbitrators who are selected and given the authority to make decisions (Pujiyono, 2018). The settlement of disputes through arbitration is based on the mutual agreement contained in the arbitration agreement. Based on this, the validity and binding of any arbitration agreement must comply with the provisions of Article 1320 of the Civil Code. The existence of an agreement negates the rights of the parties to submit a dispute resolution to the district court (Pujiyono, 2018). One of the characteristics of an arbitral award is that it is final and binding, meaning that legal remedies that can be taken against the arbitral award are closed.

In the judicial system in Indonesia, the position of arbitration is extra-judicial or quasi-judicial, while the district court acts as the executor of judicial power. Therefore, although the law authorizes arbitrations to resolve disputes, it does not change the extra-judicial status attached to arbitration (Suparman, 2012). The executorial authority is the authority possessed by the district court to execute the judge's decision. Therefore, the judge's decision has executorial power, namely the power to carry out what is stipulated in the decision by force by state instruments (Mertokusumo, 1993).

The essence of the execution of the judge's decision is the realization of the obligations of the party concerned to fulfill the achievements contained in the decision. In addition, execution can also be interpreted as the implementation of the contents of a decision that is carried out by force through court assistance, if the loser does not want to carry out a decision voluntarily. The issue of recognition and implementation of arbitral awards, especially international arbitral awards in Indonesia, has never had legal certainty, although currently there is Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This means that to be recognized and enforced an international arbitral award in Indonesia, it must meet the requirements contained in Article 66 of Law Number 30 of 1999. These conditions include, among others, that the international arbitration award does not conflict with public order and can only be enforced after obtaining an exequatur from the Central Jakarta District Court.

The still strong competence of district courts in the process of recognizing and implementing arbitral awards, both national and international arbitral awards, proves that state courts still demonstrate their power in selecting and implementing claims for rights obtained through arbitral awards. If this condition persists, does the arbitration award still have a final and binding nature? In addition, Article 68 of Law Number 30 of 1999 also raises doubts about the final and binding nature of international arbitral awards, which still provides an opportunity for legal appeals against parties who refuse to implement international arbitral awards.

Based on Article 68 paragraph (2) of Law Number 30 of 1999, such an arrangement will be one indicator that places the arbitral award as subordinate to the competence of the district court. Therefore, without specific reasons, in principle, an international arbitration award cannot be filed as a legal remedy like a decision of a national court. However, in practice, there are still disputes over international arbitral awards that are filed for cassation up to the filing of an application for the cancellation of the international arbitral award. This happens because Article 70 of Law Number 30 of 1999 still provides an opportunity for the parties to apply for the cancellation of the arbitral award. Have national courts overturned international arbitral awards?

An example of an international arbitration award dispute that has been submitted for annulment in the Indonesian national court is the international arbitration award dispute between Kahara Bodas and Pertamina. The request for the cancellation of the international arbitration award submitted by Pertamina has been decided by the panel of judges at the Central Jakarta District Court No. 86/Pdt.G/PN.Jkt.Pst with the verdict stipulating that the arbitration award has been denied (considered never existed) and Pertamina does not need to carry out the decision. Kahara Bodas then filed an appeal to the Supreme Court and in its decision, the Supreme Court No. 01/banding/Wasit-Int/2002 canceled the decision of the Central Jakarta District Court, because the cancellation of the decision made by the Central Jakarta District Court was contrary to the 1958 New York Convention, so that the executorial power of the international arbitral award is restored.

The arbitration award, which is final and binding, closes the legal remedies that can be taken against the arbitral award. This means that the agreement that has been stated in the arbitration award must be implemented in good faith by the parties. There is no reason to delay the execution of the decision by the parties by making appeals like the decision of the national court. However, there are still many arbitration decisions that are appealed. In addition, there are still international arbitral awards that have been canceled by the courts. Does the court have the authority to overturn international arbitral awards? Bearing this in mind, the decision was made outside the territory of the Republic of Indonesia. This, of course, creates legal uncertainty regarding the international arbitration award which leads to the non-realization of benefits and justice for the parties.

Based on the above background, what is highlighted in this article is how is the position of final and binding international arbitration awards in Indonesia in realizing international arbitral awards that are legal and fair.

Methods of Research

This research is legal research (Marzuki, 2016). Legal research is to find the truth of coherence, namely whether there are legal rules in accordance with legal norms and whether norms in the form of orders or prohibitions are in accordance with legal principles, and whether someone's actions are in accordance with legal norms (not only in accordance with the rule of law) or legal principles (Marzuki, 2016). The type of approach used in this research is a statutory approach, a conceptual approach, and a case approach. The types of legal materials in this study are primary legal materials consisting of national legislation and international conventions, while secondary legal materials consist of textbooks, research reports, scientific articles, and dictionaries.

Results and Discussion

In the Indonesian legal system, the power of an arbitral award is clearer and stronger than the legal force of a mediation agreement. Arbitration decisions have the same legal force as court decisions, namely, they have executive power (Ariprabowo & Nazriyah, 2017). Article 54 of Law Number 30 of 1999 expressly states that the format of the arbitral award must include the head of the decision "FOR JUSTICE BASED ON THE ALMIGHTY GOD". This means that here, the head of the arbitral award is the same as the decision of the district court. Compared to conventional courts, arbitration has advantages, including The procedure is faster and simpler, the parties can choose which law applies, can choose the arbitrators, the nature of the legality of decisions, and decisions are final and binding (Fuadi, 1999).

Courts and arbitration are both institutions used to resolve disputes. In contrast to a court which is an institution organized by the state, arbitration is a dispute system held outside the court based on an arbitration agreement made by the parties. Therefore, arbitration is limited by several shortcomings

including limited authority which always and always involves the courts (Abdurrasyid, 2002). International arbitration decisions are analogous to decisions of foreign judges so it can be concluded that arbitral awards handed down outside the territory of Indonesia cannot be enforced in Indonesia. This is because the RV only regulates the implementation of domestic arbitral awards. For an international arbitration award to be executed in Indonesia, it must first obtain an *exequatur* (Permatasari & Pranoto, 2017).

Ambivalent treatment of arbitral awards should not occur if we look at Article 54 paragraph (1) Law Number 30 of 1999, where the conditions for a judge's decision are also owned by the arbitral award. In addition, the arbitral award is also final and binding, meaning that the arbitral award cannot be filed for appeal, cassation, or review. The problem of recognizing and implementing arbitral awards made abroad, until now still leaves problems even though Law Number 30 of 1999 has been issued. The existence of the role of the formal judiciary which is still very dominant, where the execution of decisions of foreign arbitration institutions must go through a district court, is one of the problems that will not be resolved. The execution of decisions by international arbitration institutions that must go through a district court becomes a frightening problem for the winning party.

In practice, the possibility often arises for the inclusion of various parties, both parties who have to carry out the execution and third parties who have an interest and refute everything that has been based on the execution decision. For example, goods that have been confiscated and are about to be auctioned off are not the goods of the executed party or the confiscations that have been carried out in the context of wrongful execution, or the confiscations are placed on goods that have nothing to do with the owner. In addition, there is concern that national courts are still not competent to enforce international arbitral awards, causing difficulties in their execution.

The difficulty of implementing an arbitration award, Rene David gives the reason that the contract is made by both parties so that carrying out the contents of the contract does not pose much of a problem, while the arbitration decision is made by a third party and the objections to it are mainly by the losing party, there are always and usually objections. against arbitration decisions made after the decision was issued (David, 1985). This problem is a major feature of the weakness of international arbitration. The emergence of this problem is a reflection of international regulations or conventions in general, including the 1958 New York Convention, namely that international conventions like this do not regulate detailed regulations, but only regulate the main things. Only mentions the binding power of a decision and how it is implemented or executed. The 1958 New York Convention also does not stipulate which institution has the authority to execute international arbitral awards.

The 1958 New York Convention does not provide for legal remedies against arbitral awards, nor does it contain provisions concerning the issue of recognition and enforcement. In addition, this convention also does not regulate arbitration procedures (Nugroho, 2015). Although not stated in the convention, the principle of the convention emphasizes that participating countries must recognize foreign arbitral awards as binding decisions. While the implementation in each country is adjusted to the respective procedural law. The New York Convention 1958 also does not regulate legal remedies that can be taken by the parties against foreign arbitral awards such as legal remedies concerning the requirements regarding the interpretation, amendment, or cancellation of a foreign arbitral award (Nugroho, 2015).

The arbitral award cannot be appealed or cassated and cannot be made extraordinary legal action, namely Judicial review. The parties must comply with the contents of the arbitral award. The arbitration award for the parties is binding, final, and binding. Article 32 paragraph (2) of the UNCITRAL Arbitration Rules states that "The Award... Shall be final and binding on the parties". That is, the decision is final, namely, the arbitral award is a decision of the first and last instance. Against the closed arbitration decision appeals and cassation and Judicial review. The final nature of arbitration is in accordance with

one of the principles of arbitration, namely quick and simple dispute resolution. While binding means that since the decision was handed down it has bound the parties and has had executive power. This is in accordance with Article 32 paragraph (2) of the UNCITRAL Arbitration Rules in the last sentence which states that "the parties undertake to carry out the award without delay" which means that the decision must be carried out by the parties without delay. If the implementation is delayed, it can be asked for execution by the court. The parties must remember that the arbitration process is based on the good faith of the parties in implementing the arbitral award. One example of a dispute over an international arbitral award that has reached the Judicial review level is the dispute between PT. Sumi Asih (as Judicial review Petitioner, formerly Cassation Petitioner/Plaintiff) against Vinmar Overseas (as Judicial review Respondent formerly Cassation Respondent/Defendant) and The American Arbitration Association (AAA) as Co-Respondent for PK/Co-Defendant with Supreme Court Decision No. 88 PK/Pdt. Sus-Arb/2014.

In addition to the appeals contained in Article 68 paragraph (2) of Law Number 30 of 1999, there is still Article 70 which regulates the cancellation of the arbitral award. In the process of canceling the arbitral award, the court is not authorized to examine the subject matter of the disputed case by the parties. The court's authority is only limited to the authority to check the validity of the procedure for making the arbitral award. An application for annulment of the arbitral award must be submitted to the Head of the District Court. Article 70 of this Law Number 30 of 1999 does not distinguish between the cancellation of national or international arbitral awards. Of course, Article 70 of Law Number 30 of 1999 cannot be applied to the annulment of a national arbitral award, considering that this award was handed down outside the territory of the Republic of Indonesia, the only country authorized to cancel it is the country where the arbitral award was rendered.

Table 1. List of Cancellations of International Arbitration Awards

No.	Judgment Date	The Parties	Supreme Court or Central Jakarta District Court	Contents of the verdict dictum
1.	2010	PT. Bungo Raya Nusantara versus PT. Jambi Resources Limited (d/h PT. Basmal Utama International)	Supreme Court decision No. 64K/PDT.Sus/2010	Rejecting the Application for Cancellation of the International Arbitration Award submitted by PT. Bungo Raya Nusantara
2.	24-05-2012	PT. Lirik Petroleum versus PT. Pertamina	Supreme Court decision No. 144K/Pdt/2012	Refuse the request for annulment of the international arbitral award
3.	27-12-2012	Harvey Nichols and Company Limited versus PT. Hamparan Nusantara and PT. Mitra Adi Perkasa	Supreme Court decision No. 631K/Pdt.Sus/2012	Granted Harvey Nichols and Company's appeal and canceled the decision of the Central Jakarta District Court No.126/Pdt.G/2011/PN.JKT.PS T, October 13, 2011
4.	27-08-2014	PT. Sumber Subur Mas Dkk versus Transpac Capital Pte.Ltd,Dkk	Supreme Court decision No. 288B/Pdt-Sus-Arb/2014	Reject
5.	11-08-2014	PT. Arpeni Pratama Ocean	Central Jakarta District Court decision No.	1) Granting the defendant's exception as long

		Line versus Handytankers K/S of Copenhagen	19/PDT/ARB/2014/PN.JKT.PST	as it concerns the authority to try 2) Stating that the Central Jakarta District Court is not authorized to examine and hear cases No 19/Pdt/G-Arb/PN.Jkt.Pst
6.	23-12-2014	PT. Daya Mandiri Resources Indonesia (d/h PT. Risna Karya Wardhana Mandiri) versus SUEK AG	Supreme Court decision No. 6754B/Pdt.Sus-Arb/2014	Reject the application PT. Daya Mandiri Resources and PT. Dayando Resources Int, Tbk
7.	25-05-2015	PT. Sumi Asih versus Vinmar Overseas Ltd	<ul style="list-style-type: none"> – Central Jakarta District Court decision No. 271/Pdt.G/2010/PN.Jkt.Pst. – Supreme Court decision No. 268_K/Pdt.Sus/2012. – Supreme Court decision No. 88/Pdt.Sus-Arb/2014. 	Rejecting Application for Cancellation of International Arbitration Award PT. Sumi Asih
8.	02-09-2015	PT. Global Mediacom, Tbk versus KT Corporation	<ul style="list-style-type: none"> – Central Jakarta District Court decision No. 188/Pdt.G/ARB/2012/PN.JKT.PST – Supreme Court decision No. 212K/Pdt.Sus-Arb/2013. – Supreme Court decision No. 64PK/Pdt.Sus-Arb/2015 	Reject Application PT. Global Mediacom
9.	12-05-2016	PT. Global Mediacom, Tbk versus Qulacomm Incorporated	Supreme Court decision No. 49B/Pdt.Sus-Arb/2016	Reject Cancellation Request
10.	18-07-2016	PT. Indiratexpindo versus Everseason Enterprises,Ltd	Supreme Court decision No. 219B/Pdt.Sus-Arb/2016	Reject Cancellation Request
11.	22-02-2017	Danny Sihanouk Demita versus Svitzer Salvage, BV	Supreme Court decision No. 169K/Pdt.Sus-Arb/2017	Reject Cancellation Request
12.	06-12-2018	PT. Batam Textile Industry versus Cangil Cotton, A Business Unit of Cangil Incorporated	Supreme Court decision No. 922K/Pdt.Sus-Arb/2018	Reject Cancellation Request

Source: Directory of Supreme Court Decisions

From the description above, it can be concluded that the position of international arbitral awards is not the same as that of national court decisions. We can see this in the legal remedies that can be taken against decisions, where international arbitral awards do not recognize appeals, cassation, or judicial

review like national court decisions. Efforts that can be made on international arbitral awards are the correction of decisions, either adding or subtracting the contents of the award before the award is registered for execution. Therefore, it is necessary to make changes to the international arbitration arrangements, either as a comprehensive change or in the form of amendments, especially Article 68 number (2) where Law Number 30 of 1999 still provides legal remedies for appeals against parties who refuse to recognize and implement international arbitral awards. Likewise, Article 70 of Law Number 30 of 1999 must also explain that these rules do not apply to international arbitral awards. If this Article still exists, then the polemic in the implementation of international arbitral awards will always exist. This of course will create legal uncertainty regarding international arbitral awards, and the non-usefulness of international arbitral awards which are final and binding, and leads to the creation of injustice for the parties. Justice is the main thing of the three things but that does not mean the other two elements can be ignored. A good law is a law that can synergize these three elements for the welfare and prosperity of the community. According to Radbruch, the justice in question is justice in a narrow sense, namely equal rights for all before the court. Benefit describes the content of the law because the content of the law is indeed in accordance with the objectives to be achieved by the law, while legal certainty is interpreted as a condition in which the law can function as a regulation that must be obeyed (Huijbers, 1982). Legal certainty is defined as the clarity of norms so that they can be used as guidelines for people who are subject to this regulation. The definition of legal certainty can be interpreted that there is clarity and firmness towards the enactment of the law in society. This is so as not to cause multiple interpretations.

Conclusion

The position of international arbitral awards is different from that of national court decisions because the nature of the arbitral award itself is final and binding so it closes legal remedies that can be taken against the decision. However, Article 68 (2) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution provides an opportunity for cassation for parties who refuse to implement the arbitration award. Likewise, with Article 70 of Law Number 30 of 1999, an explanation must be given that the cancellation in this article only applies to national arbitration. This is because this will certainly cause a polemic so that it must be deleted and an explanation given in order to create legal certainty, benefit, and justice for the parties.

Recommendation

Changes to international arbitration arrangements in Indonesia, either as a whole or in the form of amendments, especially Article 68 paragraph (2) and Article 70 of Law Number 30 of 1999 must be explained that the rules for annulment of arbitral awards in Article 70 only apply to national arbitrations, while international arbitrations can be submitted in the country in which the arbitral award was rendered. So that a final and binding international arbitration award will be created.

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