

Education And Regulation Factors Affecting Difficulties For Indonesian Arbitral Awards To Become Final And Binding

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Abstract: Parties chose arbitration in dispute for its final and binding award. However, in Indonesia, Article 70 in Law No. 30 Year 1999 regarding Arbitration and Alternative Dispute Resolutions provides the possibility for the "losing party" in the arbitration to seek annulment of the award difficult to become final and binding. This research aims to discuss several factors affecting the intention of the "losing party" to seek annulment that made Indonesian arbitral awards difficult to become final and binding. This research was normative legal research. Data consisted of ten final supreme courts' verdicts, which totaled twenty-four courts' verdicts and ten arbitral awards. The data obtained were then analyzed using a normative qualitative approach. The research found and concluded that two significant factors made the "losing party" went for annulment. The first factor was the regulation itself, and the second factor was things beyond the law. There was a low cost for submitting annulment to the court and the "bad" culture that no one would like to lose on a case. The researcher urges the amendment of Law No.30 Year 1999 to exclude the possibility of the annulment. Intensive education shall be given to businesspeople and law-enforcer, including attorneys and judges, to remind them that arbitration awards must be respected and implemented.

Keywords: Annulment, final and binding, arbitration award, Indonesia

1. Introduction

Arbitration is one way among other alternative dispute resolutions that are currently used to settle commercial disputes. There were so many reasons that the parties in disputes might speak up about why they choose arbitration. Scholars have also identified many advantages and disadvantages of arbitration compared to a court of law. One of the benefits is that arbitration provides a final and binding decision. Decisions made by arbitration tribunals cannot be challenged. There is no room for parties in disputes to appeal for any decision made by the arbitration tribunal. Not even to the court of law (Abdurasyid, 2002) (Adolf, 2002).

The existence of arbitration in Indonesia can be drawn back to the year 1847, whereby during Dutch colonialism, the Dutch Indie Governor-General had promulgated *Reglement op de Rechtsvordering* (Rv) (*Staatsblad* 1847:52). Article 615 to article 651 of Rv explained an institution similar to arbitration (Gautama, 1986). The institution was then used as the guidance for arbitration until the issuance of Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution (the AADR Law) (State Gazette 1999 No.138, Sup. No.3872) (Widjaja and Yani, 2018) (Widjaja and Kartasasmita, 2018). For a final and binding decision of arbitration, before the enforcement of the AADR Law, parties in disputes used to waive article 641 of Rv. so that no appeal can be made at all. Article 641 Rv limited the rights to appeal. For those decisions that cannot be appealed, article 643 Rv allows the disputed parties to seek annulment of the decision using one or more reasons from ten reasons stipulated in the article. Based on article 642 Rv nor cassation, neither civil request can be submitted (Gautama, 1979).

Upon the inauguration and effectiveness of AADR Law, article 615 to article 651 Rv was revoked. In article 60 of AADR Law, it is clear that arbitral decision (award) is final and binding. Based on the elucidation, no appeal, cassation, and civil request can be taken. The same content on "final and binding decision" can be found in article 59 paragraph (2) Law No.48 Year 2009 regarding Judicial Power (Judicial Power Law) (State Gazette 2009 No.157, Sup.5076). However, article 70 on AADR Law provides the possibility for the "losing party" in the arbitration to seek the award's annulment (Widjaja and Adrian, 2008). The rights to annul have made the award difficult to become final and binding.

This research aims to elaborate and find out several factors that affect the intention of the "losing party" to seek annulment of an arbitration award issued in Indonesia, making arbitral awards difficult to become final and binding.

2. Materials and method

This research was normative legal research. Data used in this research were secondary data. Data were obtained by searching through the website of the Indonesian Supreme Court (<https://putusan.mahkamahagung.co.id>). Data were randomly selected to get the first ten decisions of the first instance court that examine the annulment of the arbitral awards from 2004 to 2014. The researcher did not consider the first instance Court Verdict made after 2014 is because on 11 November 2014, there was a Constitutional Court Verdict No. 15/PUU-XII/2014 that revoke the elucidation of Article 70 of AADR Law.

To have a full understanding, the researchers also search for the court of appeal decision and supreme court civil-request decision following the first instance Court Verdict. It will provide the researchers with the opportunity to review the full set of decisions. Data obtained were analyzed using the deductive method with a qualitative approach to determine why the losing party applied for the arbitration awards' annulment instead of executing the final and binding decision. Data that were collected for analysis were:

1. The verdict of Serang District Court No.18/Pdt.G/2013/PN Srg, jo. Supreme Court Verdict in Appeal No. 26 B/Pdt.Sus-Arbt/2014 jo. Supreme Court Verdict in Civil Review No. 33 PK/Pdt.Sus-Arbt/2016
2. The verdict of South Jakarta District Court No. 564/Pdt.G/2011/PN.Jkt.Sel jo. Supreme Court Verdict in Appeal No. 293 K/Pdt.Sus/2012
3. The verdict of Tegal District Court No. 08/Pdt.G/2014/PN.Tegal jo. Supreme Court Verdict in Appeal No. 530 B/Pdt.Sus-Arbt/2014,
4. The verdict of South Jakarta District Court No. 109/Pdt.G/2011/ PN.Jkt.Sel jo. Supreme Court Verdict in Appeal No. 641 K/Pdt.Sus/2011
5. The verdict of South Jakarta District Court No. 424/Pdt.G/2012/ PN.Jkt.Sel jo. Supreme Court Verdict in Appeal No. 893 K/Pdt.Sus/2012
6. Verdict District Court Jakarta Selatan No. 601/Pdt.G/2012/ PN.Jak.Sel jo. Supreme Court Verdict in Appeal No. 511 K/Pdt.Sus-Arbt/2013
7. The verdict of Semarang District Court No. 01/Arbitrase/2012/PN.Smg jo. Supreme Court Verdict in Appeal No.182 K/Pdt.Sus-SArbt/2013
8. The verdict of South Jakarta District Court No. 173/Pdt.P/2004/ PN.Jak.Sel jo. Supreme Court Verdict in Appeal No. 02/Arb/Btl/2005
9. The verdict of Central Jakarta District Court No.169/Pdt.G/2011/PN.Jkt.Pst jo. Supreme Court Verdict in Appeal No.292 K/Pdt.Sus/2012
10. The verdict of South Jakarta District Court No.267/Pdt.P/ 2008/PN.JKT.Sel jo. Supreme Court Verdict in Appeal No. 250K/PDT. SUS/2009 jo. Supreme Court Verdict in Civil Review No. 16PK/Pdt.Sus/2010 jo. the verdict of South Jakarta District Court No. 194/Pdt.G/2012/PN.Jkt.Sel jo. Supreme Court Verdict in Appeal No.586 K/Pdt.Sus/2012 jo. Supreme Court Verdict in Civil Review No. 143 PK/ Pdt.Sus-Arbt/2013.

3. Results and Discussion

Article 70 of AADR provides three reasons to annul an arbitration award. They consisted of:

- (a) "letters or documents submitted in the hearings were acknowledged to be false or forged or were declared to be forged;
- (b) after the award has been rendered, documents were founded to be decisive and deliberately concealed by the opposing party; or
- (c) the award was rendered as a result of fraud committed by one of the parties to the dispute."

The analysis showed that from the ten sets of First Instance (District) Court Verdict, there were eventually five reasons for annulment that were not using article 70 of AADR as a basis. From the other five annulments request, the most common excuse used was point c of article 70 AADR, which, according to the elucidation, must be supported by final and binding (penal) Court Verdict. From all first instance Court Verdict that examined the requests, only one First Instance Court Verdict mentioned that for article-70 point c AADR to be applicable, a final and binding (penal) Court Verdict must exist. In one first instance court provided the verdict in contradiction with the consideration. In another first instance court verdict, the court judges decided by examining the disputes' content and ruled the annulment of arbitral awards. In the court of appeal, eight verdicts follow the first instance of court verdicts. Two supreme court verdicts corrected the first instance of court verdicts that annul the arbitral awards. Civil-request verdicts did not change decisions made by the court of appeal (Widjaja and Kartasmita, 2019).

From the above-given facts, it is clear that the principles that courts shall never refuse to examine any case brought before them have made the final and binding decision concept of arbitration meaningless in practice. In one of the ten cases, there were two sequential requests for the annulment of the same arbitration decision. Another

request for annulment was taken after the losing party failed in the first attempt to annul the award, from the first instance court to civil request. The examinations by courts were still conducted even that annulment reasons do not fall into the criteria and reasons as stipulated in article 70 AADR Law. The condition worsens when the court tries to examine the reason for annulment only, but the court should not consider the subject matter (Widjaja, 2008). It meant that there existed regulatory barriers that made the arbitration decision difficult to become final and binding. In one of the Supreme Court verdicts, the Supreme Court even penalized the arbitration institution and the arbitration panel for the award, that according to the Supreme Court, was "wrong." There was also a case whereby the chairman of the arbitration institution declared that the institution has the competency to trial the case. In the choice of the forum of the underlying arbitration agreement, the institution's name was different. Those facts proved that the understanding of arbitration and the choice of the forum concerning the arbitration institution competency and the procedure for settling commercial disputes were still terrible even for a Chairman of an arbitration institution and Supreme Court's judges.

Researchers also found that the low cost for requesting annulment becomes another barrier besides the regulatory matter. It made the losing party in the arbitration case quickly ask for cancellation, even for no reason. With a little money, the losing party can drag the time for execution as long as possible, even beyond the civil-request verdict, making the arbitration decision difficult to become final and binding. The low and lengthy process in court has become a culture for justice seekers in Indonesia. The losing party always tried to find ways to avoid the execution. The habits were taken along even when the disputants have chosen to settle their matters through arbitration. Besides the regulatory barriers, non-regulatory barriers contributed to making the arbitration decision difficult to become final and binding.

The regulatory barriers and the non-regulatory barriers hand by hand created a system that makes arbitration decisions possible not to become final and binding. Therefore, an effort must be made to break these relations, either by amending the regulations and/ or creating new value concerning the increase in monetary amount when a person tried to submit to the court and/ or facilitate court proceeding to become faster but reliable. Besides increasing awareness to respect arbitral awards as final and binding court decisions, continuous training shall be given to all law enforcers. The businessman must be morally educated, that they shall respect their own decision to choose arbitration as the way to resolve their disputes. Therefore, they shall acknowledge and voluntarily accept to enforce the arbitral awards whenever they lose in the case. It will finally create a new culture on how the court works concerning Arbitration. The new habit will sequentially affect, making the arbitration awards be accepted as final and binding.

4. Conclusion

The research concluded that two significant obstacles made the arbitration decision difficult to become final and binding. The first is the regulatory barriers that can be found in the legal system. It can be changed by amending the required laws and legislations. The second is the non-regulatory barriers (low costs) that have become a culture for the "losing party" in dispute settlement. Creating a new habit in resolving disputes through arbitration must be a strong will to increase litigation costs and speed up the proceeding without losing the reliability. It will need an everlasting education to business actors and the legal community to respect and enforce the arbitral awards instead of challenging for annulment.

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