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Application of the Ex Aequo Et Bono Principle to the Reconsidered Arbitration Award (Case Study of the Decision of the Indonesian National Arbitration Board (BANI) NUMBER 43032/VI/ARB-BANI/2020)

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Abstract: In business cooperation agreements, it is important to establish measures to prevent future conflicts. This involves adding a "Dispute Resolution" clause in the agreement, which specifies how to handle conflicts using the application of the ex aequo et bono principle, either through the courts or arbitration. The purpose of the Research is to find out the arbitrators apply the principle of ex aequo et bono in arbitration awards, and the court's authority in handling arbitration award cases that are challenged in court. This research uses an empirical juridical method, which is research that seeks to see the law work in society, By using a case approach and statutory approach which aims to study the implementation of a law or legal rule carried out in legal practice and examine references related to the issue being studied, namely the Decision of the Indonesian National Arbitration Board (Bani) NUMBER 43032/VI/ARB-BANI/2020 jo Medan District Court Decision Number 831/Pdt/G/2021/PN Mdn jo Supreme Court Decision 1371 B/Pdt.sus-Arbt/2022. The results showed that the application of the concept of ex aequo et bono can be done if the parties agree to use this principle but it is carried out carefully by the arbitrator, The authority of the court in examining arbitral awards is limited to the annulment of arbitral awards at the first and appellate levels (Supreme Court), registration of arbitral awards and requests for execution of arbitral awards, However, arbitral awards that have reached the final stage of Appeal (Supreme Court) cannot be sued to the court because it is not the authority of the court to examine the case, this is in accordance with court decision number 326/Pdt.G/2023/PN Mdn.

Keywords: Award; Arbitration; Ex Aequo et Bono.

INTRODUCTION

In business cooperation agreements, both on a national and international scale, it is generally recognized that the parties involved need to establish measures to address potential

conflicts in the future, even though such conflicts are not certain to occur.[1] Preventive measures to deal with the possibility of such conflicts include the addition of dispute resolution clauses in the agreement. Such clauses are often known as "Dispute Settlement", which outlines an agreement on the responsible party in dealing with the conflict, whether through courts or arbitration.

At 1 paragraph 1 of Law Number 30 Year 1999 "arbitration is a method of resolving civil conflicts outside the realm of conventional justice (courts) depending on a written agreement (agreement) between the parties involved in the dispute".[2]

Dispute resolution methods in court are increasingly unpopular due to dissatisfaction with their procedural aspects. People seeking justice in the courts have to follow complex procedural rules.[3] As a result, it takes a long time to resolve disputes, and the time-consuming nature of the proceedings is a major disadvantage of courts compared to arbitration. [4]

Another advantage of arbitration is that the parties can choose an arbitrator of their choice, who will consider the evidence presented to make a decision. This provides an opportunity to appoint an expert who understands the context of the dispute, thus not requiring the parties to bring experts as witnesses to avoid additional costs. The arbitrator acts as a private judge appointed by mutual agreement to resolve the conflict between the parties.[5]

This provision is derived from the principle of freedom of contract, which is internationally recognized as a universal principle. If the chosen conflict resolution is arbitration, the regulations can be found in Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution.[6] According to Article 3 of the law, the court has no authority to decide the dispute between the parties if they have agreed to an arbitration agreement. The presence of the agreement signifies the consent and freedom of the parties in entering into a contract, and becomes the main basis for resolving disputes, through the arbitration process that has been regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (AAPS Law).[7] There are several significant meanings in the arbitration clause, such as: In a conflict situation, the parties have agreed to use arbitration in accordance with the agreement to resolve the dispute. Thus, the resolution of the matter falls entirely under the jurisdiction of the arbitration, not under the jurisdiction of the district (general) court. Through the arbitration clause, the parties follow the agreed arbitration rules. For example, if they appoint the Indonesian National Arbitration Board (BANI) as a forum for settlement in disputes, then they are obliged to comply with the rules (law of procedure) applicable in BANI. Based on the principle of pacta sunt servanda which indicates that

[1] Donald Hamonangan Siregar, *–Eksistensi Arbitrase Internasional Terhadap Sengketa Investasi Asing Di Indonesia," Cessie : Jurnal Ilmiah Hukum* 2, no. 1 (2023), https://jurnal.arkainstitute.co.id/index.php/cessie/article/view/734. P. 2.

[2] Nita Triana, *Alternative Dispute Resolution (Penyelesaian Sengketa Alternatif Dengan Model Mediasi, Arbitrase, Negosiasi Dan Konsiliasi)*, ed. Apik Anitasari Intan Saputro (Yogyakarta: Kaizen Sarana Edukasi, 2019), https://repository.uinsaizu.ac.id/6834/1/alternatif dispute resoluti.pdf. P.74.

[3] Ahmad Mafaid et al., *Peradilan Dan Alternatif Penyelesaian Sengketa*, ed. Budi Sastra Panjaitan, *CV Amerta Media* (Purwokerto: CV. Amerta Media, 2022), http://repository.uinsu.ac.id/18974/1/EDITOR BUKU PERADILAN %26 ALTERNATIF PENYELESAIAN SENGKETA.pdf. P. 2.

[4] Michael Herdi Hadylaya, *"Harmonizing Arbitration : Clarity , Consistency , and Consent in the Application of Ex Aequo Et Bono"* 6, no. 01 (2024): 90.

[5] Arivani Caniago Vero, *–Arbitrase Sebagai Alternatif Solusi Penyelesaian Sengketa Bisnis Di Luar Pengadilan"* Vero Arivani Caniago Mahasiswa Fakultas Hukum Universitas Singaperbangsa Karawang, *Jurnal Ilmiah Wahana Pendidikan* 8, no. 20 (2022): P. 310.

[6] IEAS Pelu and J Tarantang, *Arbitrase (Paradigma Teoritik Arbitrase Syariah Dan Perkembangannya Di Indonesia)*, ed. Ahmad Dakhoir, *K-Media* (Yogyakarta: K-Media, 2019), http://digilib.iain-palangkaraya.ac.id/2646/1/Arbitrase_.pdf. P. 23.

[7] Khotibul Umam And Muhammad Guntur Hamonangan Nasution, *"Pemaknaan Dan Implementasi Prinsip Ex Aequo Et Bono Dalam Penyelesaian Sengketa Ekonomi Syariah Melalui Basyarnas" 9, no. 2 (2023): P. 457.*

agreements are binding as law, the arbitration clause is present to ensure that all parties are obliged to resolve disputes through the arbitration institution that has been mutually agreed upon.[8] Dispute resolution through arbitration is generally faster, and simpler.

In accordance with Article 56 paragraph (1) of Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution (Law No. 30 Year 1999), it is explained that the arbitrator or arbitral tribunal has the authority to make decisions based on the law or the principles of justice and propriety. In further explanation, it is stated that the parties have the freedom to make an agreement that determines the arbitrator who will handle the case, either based on the law or the principles of justice and propriety (ex aequo et bono). [9]

In the Decision of the Indonesian National Arbitration Board (BANI) NUMBER 43032/VI/ARB-BANI/2020 issued on August 25, 2021. The Indonesian National Arbitration Board (BANI) examines and resolves conflicts between the party who filed the application and the party who is the Respondent, by approving part of the lawsuit filed by PT Waskita Karya against PT ITC Polonia, the verdict of which states that PT ITC Polonia is in default for not making further payments for the progress of building development. And one of the legal considerations is that the arbitrator uses the application of the principle of ex aequo et bono, namely: Considering on the basis of ex aequo et bono, the cut off date for collection of late payment fines stopped on October 31, 2016, the amount of late payment fines granted was Rp.7,926,777,033. Considering that scaffolding is the fault of both parties, then based on ex aequo et bono partially granted the scaffolding demands of PT Waskita Karya in the amount of Rp. 5,570,000,000.

The freedom for both parties in determining whether the arbitrator should decide a case based on statutory regulations or by considering using the ex aequo et bono principle, is also related to the situation where one of the parties certainly has a dominant legal position. This can be used to manipulate the substance of the agreement with the aim of obtaining a favorable position in law (legal vantage point) compared to the opposing party. Conditions like this can undermine justice.[10] The fact that the applicant (ITC Polonia) does not have a sense of satisfaction regarding the arbitration award decided by the arbitrator, it cannot be denied that sometimes, arbitration awards are not voluntarily implemented by the parties involved, because there are doubts about the validity of the award or other reasons and of course one of the parties will challenge the arbitration award again to the district court.

Based on the explanation above, the main focus of this research is First, how should the application of the ex aequo et bono principle in arbitration awards so that it will create a decision that benefits both parties (win-win solution)? Second, how is the court's authority in handling arbitration award cases that are challenged again?

METHOD

This research uses an empirical juridical method, which is research that seeks to see the law work in society, By using a case approach and statutory approach which aims to study the implementation of a law or legal rules carried out in legal practice.[11] The data sources used are secondary data and primary data, secondary data obtained through a scientific work

[8] CCut Memi, *"Penyelesaian Sengketa Kompetensi Absolut Antara Arbitrase Dan Pengadilan,"* Jurnal Yudisial 10, no. 2 (2017): P. 115.

[9] Tan David, *"Analisa Yuridis Pengesampingan Prinsip-Prinsip Keadilan Dan Kepatutan Dalam Proses Pengambilan Keputusan Oleh Arbiter*,‖ *Humani* 11, no. 1 (2021): P. 38–56.

[10] *Ibid.,* David, *–Analisa Yuridis Pengesampingan Prinsip-Prinsip Keadilan Dan Kepatutan Dalam Proses Pengambilan Keputusan Oleh Arbiter."*: P. 40.

[11] Jonaedi Efendi & Prasetijo Rijadi. (2016). *Metode Penelitian Hukum Normatif dan Empiris*. Jakarta: Kencana. P. 150.

in the form of writings from legal experts such as journals, books and regulations Law (UU) Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and Decision of the Indonesian National Arbitration Board (Bani) Number 43032/VI/ARB-BANI/2022 jo District Court Decision Number 831/Pdt/G/2021/PN Mdn Jo Supreme Court Decision Number 1371 B/Pdt.sus-Arbt/2022 and, primary data obtained through interviews with Arbitrators from the Indonesian National Arbitration Board (BANI) Medan Branch. The analysis technique that will be used in this research is descriptive analytical.[12]

RESULTS AND DISCUSSION

Application of the ex aequo et bono principle to arbitration awards so that it will create an award that benefits both parties (win-win solution).

The arbitral tribunal is authorized to apply the principle of ex aequo et bono (The decision taken is not derived from statutory regulations but objective norms), so that arbitrators are expected to be able to seek justice not only based on legal regulations, but also based on objective norms that are not listed in writing, religious beliefs, common sense, and conscience. However, the use of common sense and conscience must be objective so as not to result in unfair and incorrect decisions. It is important to note that the application of this principle should not be done arbitrarily. Instead, arbitrators must adhere to the guidelines that have been set out in its use. However, in its application, the principle of ex aequo et bono in an arbitral award must be subject to the consent of both parties to the dispute.[13] This statement is supported based on Article 56 paragraph (1) of Law No. 30 of 1999 which states that the arbitrator or arbitrators in making a decision must be based on the law or the principles of justice and propriety. This means that in making a decision, the arbitrator can take into account two alternatives or choices, namely referring to the provisions of the law or paying attention to aspects of justice. The article uses the keyword "or", which indicates the existence of alternatives in the choice of decision. Furthermore, the explanation in the article states that the parties involved can determine through an agreement whether the arbitrator should decide based on the applicable law or use the Ex Aequo et Bono principle. The arbitral tribunal has the authority to make a decision based on the Ex Aequo et Bono principle or often referred to as an award based on compositeur, which is a decision based on justice or in accordance with the applicable jurisdiction. In the context of Dutch law, it is known as deciding disputes based on naar billijkheid.[14] History records the use of the Ex Aequo et Bono principle in arbitration, found in the second phrase of Article 631 Rv which explains an exception to the authority called "as good men based on justice" unless by compromise, they are authorized to decide as good men based on justice, (ten ware het compromis hun de bevoegdheid mogt toegekend hebben om als goede mannen naar billijkheid te oordelen.), left to the Arbitrator or Arbitral Tribunal of the parties by consensus. The term of the word propriety (billijkheid) in Marjanne Termorshuizen's definition is the validation of the actions and views of legal subjects who are wise and trusted by the parties, to decide a business dispute.[15] In international regulations, namely UNCITRAL on International Commercial Arbitration, it is said that parties have the option to authorize arbitration judges to resolve conflicts based on the principle of ex aequo et bono or as amiable compositeur.[16] The Rules

[12] Soerjono Soekanto, S. M. (2009). *Penelitian hukum normatif:suatu tinjauan singkat*. Jakarta: Rajawali Pers.

[13] Fadia Fitriyanti, *"Penggunaan Asas Ex Aequo Et Bono Dalam Sengketa Bisnis Pada Arbitrase Nasional Dan Arbitrase Syariah,"* no. April (2017): 324503, http://etd.repository.ugm.ac.id/home/detail_pencarian_downloadfiles/842768. P.98.

[14] Ariful Hakim Waruwu et al., *–Kewenangan Arbiter Dalam Memutus Sengketa Bisnis Arbitrase Secara Ex Aequo Et Bono"* 2, no. 12 (2023): P. 991.

[15] Ricco Akbar, *–Ex Aequo Et Bono Di Dalam Penerapan Lembaga Arbitrase Nasional Indonesia.," BANI Arbitration Center* (Jakarta, March 1, 2019): 9 https://baniarbitration.org/newsletter#.

[16] Milan Lazić, Giulio Palermo, and Srđan Dragićević, –Ex Aequo et Bono in International Arbitration,‖ *Revija*

& Procedures of the Indonesian National Arbitration Board also contain provisions on the use of the principle of ex aequo et bono, namely in article 16 paragraph 3 which states that arbitrators can apply the principle of ex aequo et bono if the parties have agreed on it, even in the statute of the international court in article 38 paragraph 2 the international court has the authority to decide a case based on ex aequo et bono.[17]The above regulation explains that the use of the principle of ex aequo et bono must be accompanied by a mutual agreement between the parties at the beginning of the agreement, before the examination of the case by the arbitrator.[18] If this principle is set aside in dispute resolution, in this case the arbitrator uses material law which is more rigid than the use of the principles of justice and propriety (ex aequo et bono) in giving a decision. The principle of ex aequo et bono comes from the philosophy of natural law, which lies in the moral field (Rational), so it has a higher position than positive law, if ex aequo et bono has the meaning of propriety (billijkheid) and has a relationship with a sense of justice.[19] Then Kuh-Civil Law can be used as the basis for resolving legal disputes at the Indonesian National Arbitration Board (BANI).

If in the event that the application of the principle of ex aequo et bono causes dualism (conflict), the arbitrator must be guided by BANI regulation article 5 which states that: The attitude of the Arbitrator in the BANI Rules and Procedures which states: "Towards fellow colleagues it is important to maintain harmonious cooperation between each other, mutual respect, and have an awareness of responsibility and maintain the good image of the Corps of Arbitrators, both within the scope of the profession and outside arbitration".[20]

Mohammad Koesnoe said that if Indonesians use the principle of harmony and the principle of harmony apart from the principle of propriety. So that way, the decisions issued by the arbitrators are also influenced by the diverse atmosphere and atmosphere, therefore: In terms of deciding disputes, arbitrators are obliged to use the principle of ex aequo et bono if the parties to the dispute clearly state in the agreement that the consideration and ruling state that the arbitrator must apply the principles of propriety and justice (ex aequo et bono). The petitum of the applicant and respondent must be in line with the agreement that has been agreed upon in the dispute settlement, the following is the petitum of the parties: "Based on the posita (arguments of the lawsuit) and evidence as well as everything revealed in the trial, the Applicant / Respondent requests the (panel of) arbitrators in dispute resolution No. to decide based on propriety and justice (ex aequo et bono)." The request made by the applicant is a reasonable request from the examination process based on the principle of ex aequo et bono, and the arbitrator has a full understanding of the content and consideration of the decision to be made. Thus, the arbitrator has a deep understanding of all the information revealed in the hearing, based on the arguments and evidence submitted by the parties. The legal explanation of article 56 of Law Number 30 Year 1999, is that any decision (panel) of arbitrators agreed upon based on the principle of ex aequo et bono cannot be denied as a decision that exceeds the demands (ultra petita) by the parties involved in the dispute. [21]

Kopaonicke skole prirodnog prava 2, no. 1 (2020): P.52.

[17] Rudi Natamiharja, *"Sengketa Internasional" International Organization,* 2nd ed. (Bandar Lampung: PUSAKA MEDIA, 2022), http://repository.lppm.unila.ac.id/48038/1/HPSI.pdf. P. 91

[18] Anangga W. Roosdiono and Chaidir Anwar Makarim, *Kompilasi Tulisan Para Arbiter, Akademisi Dan Praktisi Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa*, ed. Anangga W. Roosdiono and Chaidir Anwar Makarim (Jakarta: PT FIKAHATI ANESKA, 2021), https://books.google.co.id/books/about/Kompilasi_tulisan_para_arbiter_akademisi.html?id=HeYZ0AEACAAJ&redir_esc=y. P. 43

[19] *Ibid.*,Waruwu et al., *"Kewenangan Arbiter Dalam Memutus Sengketa Bisnis Arbitrase Secara Ex Aequo Et Bono.*‖ P. 990.

[20] *Ibid.*, P. 990

[21] *Ibid,* Akbar, *"Ex Aequo Et Bono in the Application of the Indonesian National Arbitration Institution."* P.13

The application of the ex aequo et bono principle by the arbitrator should be limited to an arbitration agreement made in writing by the parties, if the disputing parties in the agreement agree to authorize the arbitrator to decide the arbitration case based on the principles of propriety and justice (ex aequo et bono).[22] So in this case the arbitration court has a narrow space to apply the principle of ex aequo et bono, because its application is not only based on the petitum that has been requested by the applicant, but must be emphasized in an agreement that has been made by the disputing parties. If there is no confirmation of the use of ex aequo et bono in the agreement, the arbitrator cannot apply the principle. However, on the contrary, if the petition (relief or remedy sought) does not request the use of the principle of ex aequo et bono, but the agreement requests the use of the principle, the arbitrator has the right to apply it.[23]

The application of the ex aequo et bono principle in arbitration needs to be considered with caution, because it can cause conflict if one of the parties does not agree with the arbitration award so that it can challenge the validity of the arbitration award. Article 643 of the Reglement op de Rechtsvordering (RV) stipulates that an arbitral award may be annulled if the award grants more than what was requested (petitum) by the parties to the dispute or includes elements that were not requested by the parties at all. Therefore, if one of the parties objects to the arbitral award and it is believed that the application of ex aequo et bono is incorrect, then that party can apply for the annulment of the arbitral award.[24]

According to Mr. Dr. Azwir Agus, SH, M.Hum as Secretary of the Indonesian National Arbitration Board (BANI) in an interview said that an arbitrator in deciding a case relies on article 56 of Law 30/1999 concerning arbitration which paragraph 1 states "the arbitrator or arbitration panel makes a decision based on legal provisions or based on justice and propriety". Here the first is based on legal provisions, because the scope of arbitration is a violation of an agreement or agreement of the parties arguably in the context of default, the legal provisions referred to in article 56 in my opinion are the laws of the parties to the agreement. So that the Arbitrator is authorized based on the agreement or agreement of the parties to use the principle of ex aequo et bono and may not use the law of the parties if an agreement contains elements of justice and propriety, the arbitrator when using the principle of ex aequo et bono must really explore or pay attention to the legal events submitted to him for trial based on the legal principles of justice and propriety.

So that the implementation of the principle of ex aequo et bono in an arbitration award can be implemented if there is an agreement in the parties' agreement before the arbitrator examines the case of the parties to the dispute, but the arbitrator or panel of arbitrators must not seem arbitrary in using this principle because it can create injustice for the parties, the arbitrator must decide objectively so that the decision expected by the parties to the dispute occurs.

The Authority of the Court in Handling Arbitration Award Cases that are Recalled

The role of the District Court in implementing Arbitration awards is very important in maintaining justice in society. Through its duties, the court is responsible for upholding justice for individuals involved in conflicts or disagreements. The state authorizes the courts to hear cases and enforce the decisions that have been made, thus ensuring that all parties receive fair treatment. The ability to enforce arbitral awards, both at the national and

[22] Michael Herdi Hadylaya, "*Arbitrator's Authority to Decide Ex Aequo et Bono: A Juridical Review," Law Review* 23, no. 1 (2023): P. 59.

[23] *Ibid.*, Waruwu et al., *"Kewenangan Arbiter Dalam Memutus Sengketa Bisnis Arbitrase Secara Ex Aequo Et Bono.*‖ P. 992.

[24]*Ibid*, Hadylaya, *"Harmonizing Arbitration: Clarity, Consistency, and Consent in the Application of Ex Aequo Et Bono."*P. 94.

international level, has been regulated in Law No. 30/1999 on Arbitration and Alternative Dispute Resolution. However, before a court can enforce an arbitral award, it must ensure that all the conditions set out by the legal regulations in the arbitration law have been met. [25]

According to Schmitthoff, an arbitration award is considered valid if it follows the agreement agreed by the parties and does not decide on matters not agreed by the parties, if it violates this right then the arbitration award is null and void, then the arbitration award must be in the form of a definite thing so that it can be implemented and has a final nature and has clear legal reasons.[26]

Arbitral awards are final and binding and cannot be appealed, cassated or reviewed in accordance with article 60 of Law No. 30/1999 on Arbitration. This nature confirms that parties have the responsibility to immediately implement arbitral awards.[27] However, in reality, this depends on the characteristics, nature and attitude of the individuals involved in the dispute. Law No. 30/1999 provides for steps that can be taken if voluntary enforcement of an arbitral award does not go well. In this situation, the step taken is to request the President of the District Court to execute the arbitral award. However, the authority of the court chairman only reaches the examination stage. The examination includes that the arbitration award is not contrary to public order, and is not authorized to examine the reasons or legal considerations of the arbitrator.

In December 2016, the Supreme Court issued Circular Letter No. 4/2016 (SE No. 4/2016) containing guidelines for the implementation of duties for the Court, based on the results of the 2016 plenary meeting. The letter states that if a district court decision rejects a request for annulment of an arbitration award, no appeal or judicial review can be filed. However, legal certainty for the parties still involved in the dispute, especially those caused by the non-compliance of certain parties in implementing the arbitration award, remains a problem. The Arbitration Law also still provides the possibility for parties who are not satisfied with the award to file for annulment to the district court.[28]

In case number 326/Pdt.G/2023/PN Mdn PT ITC Polonia tried to cancel the Supreme Court's decision Number 1371 B/Pdt.sus-Arbt/2022 or the Indonesian National Arbitration Board (BANI) Decision NUMBER 43032/VI/ARB-BANI/2020 in the medan district court with case number 326/Pdt.G/2023/PN Mdn on October 5, 2023, in its claim PT ITC Polonia considers that the decision (BANI) NUMBER 43032/VI/ARB-BANI/2020 was taken from deceitful actions in accordance with Article 70 Letter C of UUAAPS and asks the Medan District Court, the essence of which is:

1. Stating that the Decision of the Supreme Court of the Republic of Indonesia as Arbitration Award Number: 1371 B/Pdt.Sus-Arbt/2022 or Number 43032/VI/ARB-BANI/2020 dated September 20, 2022 has violated the provisions of Article 70 letter c of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
2. Declare valid and legally enforceable the Decision of the Medan District Court Number 831/Pdt/G/2021/PN Mdn dated January 17, 2022 which annuls the Decision of the

[25] Madha Ratu Nisa and Abdul Muiz Nuroni, *"Pelaksanaan Putusan Arbitrase Di Indonesia," Cahaya Mandalika* 3, no. 2 (2023): 2121–2133, https://ojs.cahayamandalika.com/index.php/jcm/article/view/2542. P. 2126

[26] Nurnaningsih Amriani, *Prinsip Transparansi Putusan Arbitrase Studi Penyelesaian Sengketa Investasi Melalui ICSID Dan Pengalaman Di Beberapa Negara*, ed. Ridwan M.Said (Yogyakarta: Genta Publishing, 2019), https://mylibrary.umy.ac.id/koleksi/view/101344/Prinsip-Transparansi-Putusan-Arbitrase. P. 73.

[27] Hendri Jayadi, *Hukum Alternatif Penyelesaian Sengketa Dan Teknik Negosiasi*, 1st ed. (Yogyakarta: Publika Global Media, 2023), http://repository.uki.ac.id/13176/3/BukuAjarHukumAlternatifPenyelesaianSengketadanTeknikNegosiasi.pdf . P. 97.

[28] Ina Heliany, *–Analisis Final and Binding Putusan Arbitrase Serta Dampaknya Terhadap Kepastian Hukum Dan Keadilan," Jurnal Yure Humano* 5, no. 2 (2021): P.88.

Indonesian National Arbitration Board (BANI) Number: 43032/VI/ARB-BANI/2020 dated August 25, 2021.

The judge's consideration in this case was supported by the exceptions filed by the 1st respondent and the 2nd respondent, namely as follows; the 1st respondent stated that the applicant had filed an application in the same case with the same reasoning in the BANI decision which had been examined and decided in several previous decisions, including BANI Decision No. 43032/VI/Arb-BANI/2020 jo Medan District Court Decision No. 831/Pdt.G /2021 which had been canceled by jo Supreme Court Decision No. 1371 B/Pdt.sus-Arbt/2022. Therefore, the applicant's arguments in this case are considered to be a repetition of what has been decided previously, and the Medan District Court is considered to have no authority to examine and hear the case again. The Respondent considers that the district court is not authorized to handle this case, which violates the provisions of Article 11 paragraph 2 and Article 62 paragraph 4 of Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution. Article 11 paragraph 2 states that "The District Court shall refuse and not intervene in a dispute settlement that has been determined through Arbitration, except in certain cases stipulated in the Law" and Article 62 paragraph 4 states that "The President of the District Court shall not examine the reasons or considerations of the Arbitration Award" from these articles the 1st respondent states that there is no rule of law governing the annulment of Supreme Court decisions through the District Court.

Whereas previously the BANI decision 43032/VI/ARB-BANI/2020 had been filed by the Petitioner applying for the annulment of the BANI decision registered at the Medan District Court Number 831/Pdt.G /2021, dated January 17, 2022 which basically the Medan District Court granted the Petitioner's application and annulled the BANI decision Number 43032/VI/Arb-BANI/2020; Then respondent I and respondent II appealed to the Supreme Court for the annulment of the BANI decision at the Medan District Court with Number 831/Pdt.g /2021, dated January 17, 2022, which was registered in the Supreme Court Number 1371 B/Pdt.sus-Arbt/2022 dated September 20, 2022, which basically tried itself with the ruling canceling the Medan District Court Decision Number 831/Pdt.g /2021, on January 17, 2022. So that the Decision of the Indonesian National Arbitration Board Number 43032/VI/ARB-BANI/2020 Jo the Medan District Court Decision Number 831/Pdt.G Jo the Supreme Court Decision Number 1371 B/Pdt.sus-Arbt/2022 has become an inseparable unity.

The 1st Respondent states that the rules of civil procedure law and the Arbitration Law do not cover legal action against the rejection of a Supreme Court decision that has become legally binding. Therefore, the steps taken by the Claimant to apply for the annulment of the Supreme Court decision at the Medan District Court are not in accordance with the law. This is because the Arbitration decision in the case is final and binding, and cannot be reviewed in accordance with Article 72 paragraph 4 of the Arbitration Law, the Article states that review of the Arbitration decision is not possible against the decision of the District Court and the Jurisprudence 56 PK/Pdt.sus/2011 states that; "against the decision of the District Court, an appeal can be filed to the Supreme Court which decides at the first and final level, thus in the case of annulment of an arbitration decision there is no legal remedy for judicial review."

Respondent II also gave an exception to the petition, namely: That (BANI) in this case is the BANI Arbitration Council is a body whose function is related to judicial power, namely a dispute resolution body outside the court (Non-litigation). The decision of the BANI arbitration institution is final or has permanent legal force and is binding and cannot be appealed, cassation or judicial review (vide: Article 38 jo Article 59 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power jo Article 60 of the Arbitration Law). In this case, Bani also believes that in the argument of the petition, the applicant requests that the court examine the events and re-examine the legal facts of the work contracting agreement which is the absolute authority of BANI arbitration.

That the absolute power in the arbitration process by BANI is also in line with the provisions of Article 3 of the Arbitration Law, which clearly states: "The District Court is not authorized to hear disputes between parties who have been bound by an arbitration agreement.

Then, Article 11 of the Arbitration Law states that the existence of a written agreement to arbitrate deprives the parties of the right to bring the dispute or difference of opinion contained in the arbitration agreement to the District Court. The District Court shall refuse and not interfere in the settlement of disputes that have been determined through arbitration, except in certain circumstances provided for in this Law. Therefore, the Medan District Court has no absolute authority to re-examine this case.

The considerations of the judge in case No. 326/Pdt.G/2023/PN, are as follows; That the panel of judges in this case stated that the petition for annulment of Arbitration Award No. 43032/VI/ARB-BANI/2020 dated August 25, 2021 (Exhibit T.I-3) has actually been filed by the Petitioner to the Medan District Court as referred to in case register No. 831/Pdt.G/2021/PN Mdn, dated January 17, 2022 with the decision to annul Arbitration Award No. 43032/VI/ARB-BANI/2020 dated August 25, 2021. For the decision of the Medan District Court, a legal action has been filed with the Supreme Court as referred to in case register Number 1371 B/Pdt.Sus-Arbt/2022 dated September 20, 2022. Based on the decision of the Supreme Court of the Republic of Indonesia, it has canceled the decision of the Medan District Court dated January 17, 2022.

The panel of judges in this case stated that based on the facts and arguments of the petition submitted by the Applicant, in fact what was argued by the Applicant in his petition had been submitted by the Applicant previously as referred to in Medan District Court Decision Number 831/Pdt.G/2021/PN Mdn, dated January 17, 2022 (Exhibit T.I-4) Jo. Decision of the Supreme Court of the Republic of Indonesia Number 1371 B/Pdt.Sus-Arbt/2022 dated September 20, 2022 (Exhibit T.I-2), so that what is requested by the Applicant in the aquo case is not as intended in the provisions of Articles 70, 71 and 72 of the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution;

That, based on the provisions of Article 30 of Law Number 14 of 1985 as amended by Law of the Republic of Indonesia Number 3 of 2009 Concerning the Second Amendment to Law Number 14 of 1985 Concerning the Supreme Court in the cassation level, the decision or determination of the Courts of all Judicial Environments shall be annulled because:

a. Not authorized or overstepping authority;
b. Misapplying or violating applicable law; and/or
c. Failure to comply with statutory requirements
d. Which threatens the negligence with the nullity of the decision in question

That the Panel of Judges considered, that based on the description of the legal considerations above, the Panel of Judges stated that the Medan District Court did not have the authority to hear the aquo case to annul the decision of the Supreme Court of the Republic of Indonesia 1371 B/Pdt.Sus-Arbt/2022 dated September 20, 2022 because it had exceeded the authority granted by the Law; and the Panel of Judges stated that the exceptions filed by the Respondents were reasonable and therefore were granted.

However, PT ITC Polonia (Applicant) again appealed to the Medan High Court with Number 624/PDT/2023/PT MDN on November 9, 2023 to overturn the decision of the Medan District Court Number 326/Pdt.G/2023/PN Mdn, which then issued a decision stating that the appellant's application was rejected and upheld the decision of the Medan District Court Number 326/Pdt.G/2023/PN Mdn.

The above decision cannot be separated from the principle of pacta sunt servanda, because this principle is the foundation of the authority or jurisdiction of arbitration in

resolving a case, which is born from the agreement of the parties. The impact of this principle is that the parties who are bound by the arbitration award are obliged to respect the decision in accordance with the principle of pacta sunt servanda, regardless of the arbitration decision issued by the arbitral tribunal, the parties are obliged to obey and implement it whether they win or lose.[29]

According to Mr. Dr. Azwir Agus, SH, M.Hum as the Secretary of the Indonesian National Arbitration Board (BANI) in an interview said that there is no arbitration award that is challenged again, because it violates the principle of ne bis in idem, namely a case cannot be tried twice or a person / legal entity cannot be punished twice for the same case or the same legal act, can only submit a request to examine the cancellation of Article 70 of Law No. 30 concerning Arbitration. So that in this case the judge may no longer try or examine the same subject matter. However, the judge may not reject a case submitted to him because he must first examine and try the case, if it has been tried and examined, only then will he decide whether it is accepted or rejected, this is in accordance with the principle of ius curia novit.

The authority of the court in terms of enforcement of arbitral awards must begin with the deponir process, deponir means registering. In the case of registration submitted to the Registrar of the District Court. The process of registration and data collection of arbitration awards at the District Court is a step that must be taken for the parties involved in terms of executing the arbitration award,[30] because the implementation of the arbitration award is carried out voluntarily so that it takes something that forces to execute the arbitration award, namely through the court after 30 days the arbitration award is decided by BANI (Indonesian National Arbitration Board). [31]

The registration becomes the basis for the court to execute the arbitral award at the request of the parties involved. Thus, if after the registration process (deponir) no party files for annulment, and the losing party does not attempt to fulfill its obligations voluntarily, then the winning party has the right to apply for execution of the arbitral award itself, through the court as executor.[32] The usual forms of execution are: Granting exequatur, Determination of execution order, conducting enforcement or Aanmaning, Execution can take the form of confiscation, auction or vacating. This shows that there is still a dependence of the arbitration institution on the court in carrying out the arbitration award forcibly because it does not have an executorial title.[33]

So in this case the court's authority to examine the case of an arbitration award is only limited to the registration submitted by the applicant to execute the arbitration award because it is not carried out voluntarily by the losing party, execution can take place if there is a request from one of the parties and the court is also authorized to cancel the first level arbitration award and appeal (Supreme Court) and regarding arbitration awards that are final and binding can be submitted to the court but only as a request for cancellation, but if the arbitration award has reached the Appeal stage to the Supreme Court (Final Stage) then the decision cannot be challenged again to the court.

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[29] Huala Adolf, *Dasar-Dasar, Prinsip & Filosofi Arbitrase, ed. Darlin Darmansyah*, 3rd ed. (Bandung: Keni Media, 2023), https://www.kenimedia.id/product/dasar-dasar-prinsip-filosofi-arbitrase-cetakan-ke-3/. P.74.

[30] Andi Sitti Melantik Rompegading, *"Legal Analysis of Cancellation Bani Reg. No. 13/Arb/Bani-Sby/I/2015 through A Court Decision," Himalayan Journal of Humanities and Cultural Studies* 4, no. 1 (2023): P. 81.

[31] Nanda Bagus Trihatmojo and Adi Sulistiyono, *"Prosedur Pasal 70 Undang-Undang Nomor 30 Tahun 1999 Dalam Pembatalan Putusan Arbitrase Di Indonesia," Jurnal Privat Law* 7, no. 2 (2019): P. 243.

[32] Paula Karlina Watti, Royke A Tarorereh, and Rudy M.K Mamangkey, *"Peranan Pengadilan Indonesia Dalam Penyelesaian Sengketa Melalui Proses Arbitrase"* XI, no. 3 (2023): 342–346, https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/47404/42165. P. 4

[33] H Yuhelson, *Hukum Arbitrase*, ed. Ramlani S Lina, Pertama. (Yogyakarta: CV. Arti Bumi Intaran, 2018): P. 96.

CONCLUSION

That the arbitral tribunal has the authority to apply the ex aequo et bono principle to the arbitral award, this allows them to seek justice based on objective norms that are not in writing. However, the use of this principle must be objective and not arbitrary, and must be based on the consensus of the parties to the dispute. In the context of Dutch law, this principle is known as naar billijkheid. The implementation of the ex aequo et bono principle must be carried out carefully so as not to result in an unfair decision, and the arbitrator must decide objectively in order to achieve the justice expected by the parties to the dispute. The authority of the court to examine the case of an arbitration award is only limited to the registration submitted by the applicant to execute the arbitration award because it is not carried out voluntarily by the losing party, execution can run if there is a request from one of the parties and the court also has the authority to cancel the arbitration award if the award contains elements of error at the first and appellate levels (Supreme Court) and regarding arbitration awards that are final and binding can be submitted to the court but only as a request for cancellation, but if the arbitration award has reached the Appeal stage to the Supreme Court (Final Stage) then the decision cannot be challenged again to the court.

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