

THE EFFECTIVENESS OF ARBITRATION AS AN EXPENSIVE ALTERNATIVE DISPUTE RESOLUTION

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Article Info

Received: 2022-08-12
Revised: 2023-02-21
Accepted: 2023-03-31

Keywords:

arbitration, dispute, effectiveness, civil law, arbitrator

Abstract

Arbitration is an alternative non-litigation dispute resolution which has great demand but it has many weaknesses including the high cost of arbitration and decisions that cannot be executed immediately if registration has not been made at the District Court. Thus, the purpose of the analysis are 1) to analyze the juridical value of arbitration when compared to dispute resolution by litigation and 2) to analyze the effectiveness of arbitration as an effort to settle disputes outside of the court system. This study employed a normative legal methodology. The following are the outcomes of this study: Arbitration is a form of alternative dispute resolution that is widely utilized by individuals, individuals and legal entities, between legal entities, etc. in the context of commercial law. Arbitration is widely chosen because dispute resolution is carried out in a closed, flexible and faster way than litigation and has binding legal force. Arbitration has more value, if the process is carried out correctly, observant in analyzing the problems and fulfilling the elements of the rules regarding the execution of the arbitral award. 2) The arbitration will be legally binding if the parties comply with the arbitration rules in the country where the matter will be executed.. Conclusion: arbitration remains an effective non-litigation dispute resolution option but must pay attention to the arbitration process and provisions so that the parties' awareness will arise to register the results of the arbitration decision and comply with the arbitration law applicable in each country.

1. INTRUDACTION

In a partnership, a dispute is very likely to occur. Disputes occur when there is a violation of the legal rights of one party. The resolution of a dispute can be reached through litigation or extrajudicially. (non-litigation). The distinction between the two lies in their respective implementation procedures. The litigation process must follow the procedural law that has been determined and takes a long time, with the final result determined by the Panel of Judges in the form of a win-lose, while the non-litigation or out-of-court process is known as Alternative Dispute Resolution (ADR) and Arbitration (Yuliani, 2022). However, dispute resolution carried out in Indonesia tends to use the court (litigation) even though the litigation route has a weakness as mentioned above, namely dispute resolution through the litigation process tends It is open to the public and has the potential to generate new issues due to its lose-lose, unresponsive, and time-intensive nature (Hendra, 2011). Then in this litigation process, legal remedies can be submitted for the decision handed down by the judge to a higher court (Sutantio, 1988). Thus, the litigation process takes a long time, while in the business world time is very valuable because it can be used to obtain greater opportunities in reading business opportunities.

Due to the weakness in dispute resolution by litigation, so problem solving can be conducted using Alternative Dispute Resolution (ADR). In Indonesia, Alternative Dispute Resolution (ADR) already regulated in Law No. 30 of 1999 concerning Arbitration and Substitute for Handling Conflicts. In Article 1 Paragraph (10) It is said that disputes that are resolved through Alternatives to Handling Conflicts or outside a court of law can be tried by means of discussion, negotiation, mediation, conciliation, or expert evaluation (See Article 1 Paragraph (10) Law No 30 Year 1999). Dispute resolution through Alternative ADR necessitates the participation of a neutral third party (Hikmaganto, 2018).

Arbitration as a substitute for handling disputes has advantages, this is also stated in Article 60 of Law No. 30 of 1999 concerning Arbitration and Substitute for Handling Conflicts, arbitration decisions are final, have permanent legal force, and are binding on the parties. Compliant with Article 59 Paragraph (1) and (4) Compliant with Law No. 30 of 1999 concerning Arbitration and Substitute for Handling Conflicts, the arbitrator's decision is binding and must be registered with the State Judicial Council prior to its implementation.

Even though the arbitral award is final and binding on the parties to the dispute, Article 70 of Law No. 30 of 1999 concerning Arbitration and Substitute for Handling Conflicts reports that the arbitral award can still be challenged if it contains the following factors::

1. The letter or document submitted in the examination is admitted to be false or declared to be false after the verdict is rendered.
2. Following the decision, the opposing party's concealment of crucial documents is discovered.
3. During the dispute examination, Decisions are based on the outcome of one party's deceit.

As stated in the explanation of Article 70 Law number 30 year1999 on Arbitration and Alternative Dispute Resolution, the provisions of Article 70 are not consistent with the explanation that the grounds for cancellation specified in Article 70 must be established by a court order. The judge may grant or deny the request to annul the arbitral award based on the court's decision. Based on the Constitutional Court's ruling, the elucidation of Article 70 Number 30 year 1999 has been annulled which states that the Elucidation of Article 70 Number 30 year 1999 is in violation of the Constitution year 1945 and has no legal force. Based on the Constitutional Court's ruling, In court, the reasons for the request to cancel the arbitration are not required to be proven. The arbitration

award is not yet final and binding because it must be registered with the court before it can be enforced. In the event that the parties are unwilling to carry out the implementation of the decision voluntarily, In response to a request from one of the disputing parties, the Head of District Court may issue an order to implement the decision.

The registration of the arbitral award with the District Court to obtain binding force and attempts to annul the arbitral award indicate a departure from the principle of finality and enforceability enshrined in Article 60 Law Number 30 year 1999 and the principle of contract freedom enshrined in 1338 of the Civil Code, namely that parties who have agreed to enter into an arbitration agreement are free to do so. And submit the dispute resolution process to arbitration, the party is obligated to immediately comply with and implement the arbitration award, without waiting for court execution. Ultimately, the ability to file a challenge with the district court in an effort to overturn a decision introduces uncertainty into the arbitration process. Consequently, despite the fact that arbitration is used to resolve the dispute, its efficacy is questionable due to the complexity of the implementation procedures..

Arbitration is a method of handling cautionary clashes outside of courts of law, originating in a registered arbitration agreement between the parties.. If in its development Arbitration aims to overcome the ice in litigation, but in reality the Arbitration itself cannot meet the expected needs, namely to obtain an effective and efficient non litigation process, there will be many cases of disputes that are delayed in settlement, causing new problems, namely the increase in arbitration costs due to the process. In addition, the quality of the decision is low because it does not have an obligation to present legal precedent or is not bound by previous Arbitration decisions. It is not uncommon for Arbitration procedures to be long and very formal and rigid (Ananda, 2017).

However, currently arbitration is a way to resolve disputes between parties entering into transnational contracts. Arbitration is also used by several countries to resolve various problems such as labor problems, disputes with consumers, and problems between investors and the state (<https://gnsso.icdfann.org/en/drafts/intl-dispute-resolutionoverview-june-2007.pdf>).

Increasing the popularity of arbitration, the costs required to resolve problems in arbitration also increase. Dispute resolution using arbitration is expensive (Alan, 1998). For the resolution of problems using arbitration can reach millions of dollars, even the costs incurred to resolve disputes using arbitration are more expensive than the amount in question (ICC August., 1994). Thus, the parties who will resolve the dispute using arbitration must prepare high fees for dispute resolution fees, and audit fees and attorneys. The existence It is expensive to resolve disputes through non-litigation arbitration channels, and there are still weaknesses in arbitration decisions that cannot be directly executed, so the use of arbitration as a way to resolve disputes can be said to be less effective.

According to the vocabulary, the word effective has the meaning of power to be effective; the quality of being able to bring about an effect (Vocabulary, 2022). So, effectiveness is the compatibility between the activities carried out with the intended targets. Effectiveness basically refers to the level of achievement of results. Effectiveness emphasizes the results achieved, namely doing something right on target or “doing the right things” (http://elib.unikom.ac.id/files/disk1/456/jbptunikompp_gdl-iiphimawan-22764-7-babii.pdf, 2022). Referring to the effective definition, if the alternative dispute resolution using paid arbitration even reaches millions of dollars with decisions that cannot be executed immediately because of the rule that the arbitration award is final and binding after being registered with the court, it is very possible for the parties to take action. defeated in the dispute will file an objection in court so that the arbitration award cannot be executed so that the issue that has been resolved through arbitration will still not be final and hanging. Thus, the effectiveness of the use of arbitration as an alternative dispute resolution will be doubted by the public. maintains neutrality, so that the ultimate goal of Arbitration dispute resolution can be achieved, namely justice

for the parties (Indah, 2019).

Based on this description, it is known that dispute resolution using arbitration requires a higher cost than litigation dispute resolution. This high cost should be followed by a final and binding decision without a complicated process so that disputes that are resolved using non-litigation do not interfere with business processes. To follow up on this, it is necessary to analyze especially in terms of the effectiveness of the use of arbitration as a means of non-litigation dispute resolution.

2. RESEARCH METHOD

This study uses a normative juridical approach. This study uses secondary data, namely data from documents related to problem solving using arbitration, arbitration costs and arbitration effectiveness. The method of analysis utilized in this study is qualitative analysis.

3. RESULTS AND DISCUSSION

Juridical Analysis for Arbitration As Alternative Dispute Resolution

In a juridical way, conflicts can be resolved through non-litigation routes in the form of arbitration. There are 2 (2) opinions regarding arbitration, namely an opinion that contains arbitration in handling substitution disputes with the benchmark of using the word "replacement" in the intent of not only legal councils. Thus, arbitration is a substitute for handling disputes outside the court system. The second opinion assumes that arbitration is not a form of substitute for handling disputes because arbitration is an independent dispute resolution body (*sui generis*). Arbitration is an independent body and renders decisions through adjudication (Adolf, 2015).

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1. The International Arbitration Award is imposed by an arbitrator or arbitral tribunal in a country which is a member of the World Trade Organization. has an agreement with Indonesia, in particular the agreement on acceptance and implementation of the International Arbitration

Award.

2. The International Arbitration Award is subject to commercial law.
3. The International Arbitration Award is compatible with public order.
4. In order for an International Arbitration Award to be enforced in Indonesia, the President of the Central Jakarta District Court must appoint an executor.
5. An International Arbitration Award cannot be enforced without first obtaining an exequatur from the Supreme Court of the Republic of Indonesia, which is then delegated to the Central Jakarta District Court.

M. Yahya Harahap in Muskibah said that foreign or international arbitration awards have different characteristics from national arbitrations (Muskibah, 2018). The characteristics are as follows.

1. Based on regional or territorial factors

The international arbitration award is rendered outside the territory of the Republic of Indonesia, even though the parties to the dispute are Indonesians, both individual disputes and between individuals and legal entities or fellow legal entities.

2. Decisions are based on international conventions

Global arbitral awards are based on the agreement of the parties to use the law in handling disputes, for example using the UNCITRAL Arbitration Rules, acknowledgment of execution is requested in the country where the decision is made, until the decision is listed as a foreign arbitration award. Next, in order to be recognized and enforceable in Indonesia, the global arbitral award must be registered with the Central Jakarta State Council, accompanied by administrative requirements as stated in Article 67 of Law No. 30 of 1999, namely the global arbitral award in the form of an original piece or a translated copy. legally into Indonesian, the contract which is under the global arbitration award in the original form or a copy of the original contract must be legally translated into Indonesian, the Statement of the diplomatic representative of the Republic of Indonesia in the country where the global arbitration award was made official if the applicant's country bound by bilateral and multilateral agreements with the Republic of Indonesia regarding the recognition and application of global arbitral awards.

Decree of the Chairperson of the Central Jakarta State Law Council which organizes global arbitration and whose validity is recognized is final and binding; cannot be appealed or matched. Even so, the Supreme Council can examine and match the antipathy of the Leaders of the Supreme Council to justify and make global arbitration decisions. The Supreme Council will consider and decide on each cassation request submitted within a maximum period of 90 days after the appeal is received by the Supreme Council. there are no objections to the decisions of the Supreme Council. Based on this explanation, legally the use of arbitration to resolve disputes is more efficient.

Effectiveness of Non-Litigation Problem Resolution Using Arbitration

Arbitration is an expensive method for resolving legal disputes, however, as disclosed in Klaus Sachs that the fees applied for dispute resolution using arbitration, between 80% to 90% of costs are used for direct expenses of the disputing parties as well as costs incurred for representation and experts and other costs (Time and Money, 2006). Thus, the costs incurred for arbitration cannot be the same from one case to another because it depends on the operational costs required by the parties and arbitrator.

If it is calculated with the costs that have been incurred to resolve arbitration disputes, then the output or results obtained from arbitration must be better than the litigation route. Arbitration as a non-litigation dispute resolution effort has been regulated both in international and national regulations in accordance with the desired arbitration institution. Indonesia also has rules regarding the execution

of the results of arbitration decisions both nationally and internationally. The problem that arises in the use of arbitration is if the disputing parties do not show good faith so that problems that require negotiations will not be resolved immediately. In relation to the costs that arise when using dispute resolution by arbitration, the ICC provides guidelines regarding costs so that there will be no cost overruns that harm the disputing parties. According to Article 85 of the ICC that To incentivize efficient behavior and discourage unreasonable cost-increasing behavior, the allocation of costs must provide beneficial benefits (Report from the ICC Comision on Arbitfration, 2007). The method used by the Arbitral Tribunal is to provide a reference for determining the cost which is deemed appropriate. The determination of fees can be made at an early stage so that the Arbitral Tribunal will consider the unreasonable behavior of either party. The existence of arbitration costs which are definitely more expensive than litigation costs, so the parties who will use arbitration must be more efficient by saving on attorney fees and other litigation costs.

In previous studies, it can be proven that paid arbitration can provide more benefits in terms of effectiveness and efficiency compared to litigation (Peter, 2015). In a survey conducted on lawyers, it was found that the cost of arbitration is slightly more expensive, but more cost effective when compared to litigation (U.S Chamber, 2005). In the study of business experience with defense costs using arbitration or litigation, it was determined that arbitration costs less than litigation when the effectiveness of faster dispute resolution compared to litigation is considered (Christopher, 2008).

Thus, non-litigation costs, although nominally more expensive, if calculated with the effectiveness of litigation, then using non-litigation will be more profitable because in the business world, conflicts that are not resolved immediately will affect the income earned. In addition to the issue of costs, the disputing parties must have good faith to carry out the Arbitration provisions are also defined in Articles 59 and 67 of Law No. 30 of 1999 concerning Arbitration and Substitutes for Handling Conflicts each governing national and global arbitration. Thus, it can be concluded that the use of arbitration requires not only binding provisions for the parties, but also the good faith of the conflicting parties.

C. CONCLUSION

The conclusions in this study are as follows Arbitration remains an effective non-litigation dispute resolution option but must pay attention to the arbitration process and provisions so that awareness will arise from the parties to register the results of the arbitration decision and comply with the arbitration law applicable in each country and then arbitration is a paid dispute resolution route, but the payments made have been regulated by the arbitration institution so that the costs incurred remain reasonable, effective and efficient when compared to the litigation route because it relates to the settlement of trade disputes that require a fast process.

REFERENCES

Kelebihan Penyelesaian Sengketa Melalui Arbitrase”,
<http://www.hukumonline.com/berita/baca/lt58a6bf5208d32/makin-ngetrend--ini-5-kelebihanpenyelesaian-sengketa-melalui-arbitrase>, accessed on September 30, 2022.

- _____. 2006. Time and Money: Pervasive Problems in International Arbitration, L. Mistelis and D M Lew, eds 2006.
- _____. 2007. International Dispute Resolution Overview”, <https://gnso.icann.org/en/drafts/intl-dispute-resolutionoverview-june-2007.pdf>, accessed on 30 September 2022.
- Adolf, Huala. 2015. Dasar-Dasar, Prinsip Dan Filosofi Arbitrase, Cetakan ke-2. Bandung: Keni Media.
- Amanuddin, Ananda Puspita. 2017. Peranan Badan Arbitrase Nasional Indonesia dalam Menyelesaikan Sengketa Penanaman Modal, *Lex Administratum*, Vol. V, No. 1, Jan-Feb 2017, Hal. 90-98.
- Blackaby, et,al, Negel. 2009. Redfern and Hunter on International Arbitration, New York: Oxford.
- Blackaby, Nigel – Partasides, Constantine – Redfern, Alan – Hunter, Martin, Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press. 2015, para. 9.99; Born, Gary B., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, p. 3085-3086.
- C Newmark, Controlling Time and Costs in International Arbitration, Chapter 6 in The Leading Arbitrators’ Guide to International Arbitration, 2nd Edition 2008, (Newman & Hill, Eds), pages 81 – 96
- Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169, 1992 US Dist. Lexis 8046 (D.C. Cir. 29 Mei 1992).
- Drahozal, Christopher R. 2008. Arbitration Costs and Forum Accessibility: Empirical Evidence, University of Michigan Journal of Law Reform, Volume 41, 2008
- Gelman, Lisa. 2002. Arbitration Pro’s and Con’s, <https://lisagelman.com/mediation/arbitration-pros-andcons/>, accessed on September 30, 2022.
- Greenberg, Simon & Kee, Christopher dan Weeramantry, J Romesh. 2010. International Commercial Arbitration an Asia Pacific Perspective. UK: Cambridge University.
- Hasanah, Yuliani Uswatun., Marpaung, Devi Siti Hamzah. 2022. Biaya Arbitrase “Mahal” Menjadi Kelebihan Dari Alternatif Penyelesaian Sengketa, *JUSTITIA : Jurnal Ilmu Hukum dan Humaniora*, Vol. 9 No. 3 Tahun 2022
- Hendra, Frans. 2011. Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional, Edisi Kedua. Jakarta: Sinar Grafika.
- Hikmahanto Juwana. 2018, Arbitrase Sebagai Forum Penyelesaian Sengketa, Modul International Excursion, Alternatif Penyelesaian Sengketa Melalui Mediasi Dan Arbitrase Internasional Batch III, Justitia Learning & Networking Center (JLNC), Jakarta-Malaysia-Singapura.
- Houthoff Buruma, International Commercial Arbitration: An Introduction. 2013. pg. 9-10.
- ICC. 2007. Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration.
- J K Goytanda. 1999. Awarding costs and attorneys’ fees in international commercial arbitrations, 21 Michigan Journal of International Law (1999) 1-50.
- M Abascal Zamora. 2007. Reducing Time and Costs in International Arbitration, Modern Law for Global Commerce, paper delivered to the Congress to celebrate the 40th annual session of UNCITRAL, July 2007.
- M P O’Reilly and E Ryan, Costs in international commercial arbitration, Ch. 9 in International Commercial Arbitration: Practical Perspectives (A. Berkeley & J. Mimms Eds), Centre of Construction Law & Management, King’s College, London, September 2001, 121 - 135.
- Muskibah. 2018. Arbitrase Sebagai Alternatif Penyelesaian Sengketa, *Jurnal Komunikasi Hukum (JKH)*, Volume 4 Nomor 2 Agustus 2018, hal. 150-171
- Okekeifere, Andrew I. 1998. Commercial Arbitration as the Most Effective Dispute Resolution Method, 15 J. INT’L ARB. 81, 86-88.
- R H Kreindler. 2006. Final Rulings on Costs: Loser Pays All? Best Practice in International Arbitration, *Erinna: Implementation of Legal Protection of Geographical Indication of*

- Proceedings of the ASA Conference, Zurich 27 January 2006.
- Redfern, Alan & Hunter, Martin. 1991. Law and Practice of International Commercial Arbitration 248 (2d ed. 1991).
- Sari, Indah. 2019. Keunggulan Arbitrase Sebagai Forum Penyelesaian Sengketa Di Luar Pengadilan, Jurnal Ilmiah Hukum Dirgantara–Fakultas Hukum Universitas Dirgantara Marsekal Suryadarma, Volume 9 No.2, Maret 2019, hal 47-73
- Sutantio, Retnowulan dan Oeripkartawinata, Iskandar. 1988. *Hukum Acara Perdata dalam Teori dan Praktek*, Bandung: Alumni, 1988), hal 68
- Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa
- U.S. Chamber Inst. for Legal Reform, Arbitration: Simpler, Cheaper, and Faster Than Litigation 21 (2005).
- Vocabulary.com accessed on September 30, 2022 861–866, p.865