

## **Is it Possible to Appeal the Recommendations of the Indonesian National Arbitration Board in Efforts to Achieve Justice**

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### ***Abstract***

*This research aims to find out whether it is possible to appeal against BANI recommendations in an effort to achieve justice. This research is normative legal research with descriptive research type. This data was collected through literature study, regulatory study and document study. The results of this research show that the BANI decision is final, meaning that the arbitration decision cannot be taken as legal action. Meanwhile, arbitration decisions are binding, meaning they bind the parties, especially the parties to the dispute. This final nature means that it is the first and final decision, which cannot be taken as cassation, appeal or judicial review, except for cancellation by the court. This means that if the party involved in the decision is not willing to carry out the decision, in the sense of being forced to carry it out, and if they are still unwilling to carry out the decision, sanctions can be imposed. This is in accordance with the aim of the law to regulate and coerce, to regulate those who are willing to be regulated, and to coerce those who are not willing to be regulated.*

***Keyword:*** Justice, Arbitration, Indonesian National Arbitration Board

### **Abstrak**

Penelitian ini bertujuan untuk mengetahui apakah mungkin Dilakukan Banding Dalam Rekomendasi BANI dalam Upaya Mewujudkan Keadilan. Penelitian ini adalah penelitian hukum normatif dengan tipe penelitian bersifat deskriptif. Pengumpulan data ini melalui studi pustaka, studi peraturan dan studi dokumen. Hasil Penelitian ini memunjukkan bahwa Putusan BANI bersifat final artinya putusan arbitrase tidak bisa diadakan upaya hukum. Sedangkan putusan arbitrase mempunyai sifat mengikat (binding) artinya mengikat para pihak, terutama mengikat para pihak yang sengketa. Bersifat final ini mempunyai arti merupakan putusan pertama dan terakhir, yang tidak bisa diadakan upaya hukum baik kasasi, banding, dan peninjauan kembali, kecuali pembatalan ke Pengadilan. Hal ini mempunyai arti apabila pihak yang terkait dengan putusan tidak bersedia melaksanakan putusan, dalam arti dipaksa melaksanakan, dan bila tetap juga tidak bersedia tersebut melaksanakan putusan, maka dapat dikenakan sanksi. Hal ini sesuai dengan tujuan hukum untuk mengatur dan memaksa, mengatur bagi yang bersedia diatur, dan memaksa bagi yang tidak bersedia diatur.

**Kata Kunci:** Keadilan, Arbitrase, Badan Arbitrase Nasional Indonesia.

## A. Pendahuluan

This research discusses whether appeals will be carried out in BANI recommendations in efforts to achieve justice. The Indonesian National Arbitration Board (BANI) is an institution that regulates and resolves disputes through arbitration. The arbitration agreement binds the parties, and even eliminates the authority of the judiciary to examine disputes in which there is an arbitration clause. The court (judge) is obliged to refuse to examine what is submitted to him if the parties have chosen arbitration as an alternative dispute resolution<sup>10</sup>. An arbitration agreement is not only binding on the parties making the agreement, but also binding on judicial institutions. Indonesia has a National Arbitration Board which aims to participate in law enforcement efforts in Indonesia to resolve disputes or differences of opinion that occur in various sectors of trade, industry and finance, through arbitration and other alternative forms of dispute resolution, including in the fields of Corporations, Insurance, Financial Institutions, Fabrication, Intellectual Property Rights, Licensing, Franchising, Construction, Shipping/Maritime, Environment, Remote Sensing, and others within the scope of laws and international customs.

BANI provides a fast and efficient process. BANI offers higher legal certainty. Decisions resulting from BANI arbitration are binding and legally enforceable. This provides certainty for the parties involved, because they know that the decisions given will be respected and implemented. Apart from that, BANI also has a good reputation as a professional and fair dispute resolution institution. This gives the parties confidence that their dispute will be handled well.

In general, arbitration institutions have advantages compared to judicial institutions. These advantages include:

1. Guaranteed confidentiality of the parties' disputes;
2. Delays caused by procedural and administrative matters can be avoided;
3. The parties can choose an arbitrator who they believe has sufficient knowledge, experience and background regarding the disputed issue, is honest and fair;
4. The parties can determine legal options to resolve the problem as well as the process and place for holding arbitration and;
5. The arbitrator's decision is a decision that is binding on the parties and can be implemented through simple or straightforward procedures.

Thus, the author is interested in conducting a study regarding whether appeals can be made in BANI Recommendations in Efforts to Achieve Justice. The research method used in this study is a normative research method. Normative research is a method carried out by examining library materials or secondary data on legal principles and case studies, which in other words is referred to as library legal research.<sup>1</sup> The approaches used are the statutory approach, comparative approach and case approach.

## B. Discussion

### 1. Arbitration Dispute Resolution

The word arbitration comes from the words "arbitrare" (Latin), "arbitrage" (Dutch), "arbitration" (English), "schiedspuch" (German), and "arbitrage" (French), which means the power to resolve something according to one's discretion or peace by an arbitrator or referee. From these simple limitations it appears that arbitration is:

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<sup>1</sup> Rasyid, P. A. Arbitrase dan Alternatif Penyelesaian Sengketa: Suatu Pengantar. Fikahati Aneska, 2011, Hlm 21.

1. A mechanism for resolving commercial disputes;
2. Dispute resolution through arbitration must be based on the agreement of the parties.
3. The arbitration award is final and binding.

The definition of dispute in article 1 of the Financial Services Authority Regulation Number 61/POJK.07/2020 concerning Alternative Dispute Resolution Institutions is a dispute between Consumers and PUJK which has gone through a complaint resolution process by PUJK and is caused by material, reasonable and potential losses and/or losses. directly to consumers because PUJK does not fulfill the agreed agreements and/or financial transaction documents.<sup>2</sup>

An arbitration agreement is not only binding on the parties making the agreement, but also binding on judicial institutions. The judge (court) must respect the arbitration agreement by declaring that he is not authorized to adjudicate the dispute submitted to him if there is an arbitration clause (agreement).<sup>3</sup>

## **2. Concepts in Deciding on the Cancellation of Arbitration Awards Based on the Principles of Justice**

Justice is putting things in their place (proportional), justice is a balance between rights and obligations and so on. Likewise, there are also many classifications of justice, for example Aristotle divided commutative and distributive justice. In the context of judicial judges' decisions, in this case arbitration decisions that are often mentioned are procedural justice and substantive justice. Procedural justice is justice that is based on provisions formulated from formal legal regulations, such as regarding deadlines and other requirements for court proceedings. Meanwhile, substantive justice is justice that is based on values that arise from responsive legal sources. according to conscience.

Thus, the concept of justice in decisions in judicial institutions is something that is very close to fulfilling human rights and interests, but it is not easy to apply in practice. It could happen that the judge's decision handed down will be felt differently by both parties, namely one party feels it is fair if their wish is granted, but the other party feels the decision is unfair because their wish cannot be fulfilled. So essentially the issue of justice is that its implementation in practice is felt to be fair or unfair based on the assessment of each party, which is very likely to be different.<sup>4</sup>

The principle of procedural justice ensures that the arbitration process runs fairly and transparently. This includes adequate notification to the parties involved in the dispute, the opportunity to present arguments and evidence, and the selection of an independent and impartial arbitration judge. This principle involves meeting fair procedural standards to maintain integrity and trust in the arbitration process. Procedural justice is closely related to propriety and transparency in the decision-making process. The concept of procedural justice can be distinguished from the concepts of distributive justice and corrective justice. One step that is considered appropriate to achieve procedural justice is to listen to information from all

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<sup>2</sup> Peraturan Otoritas Jasa Keuangan Tentang Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan, POJK No. 61 Tahun 2020, LN Tahun 2020 No. 290, TLN No. 6599, 2020

<sup>3</sup> M. Khoidin, Hukum Arbitrase Bidang Perdata (Eksistensi, Pengaturan dan Praktik), LaksBang PRESSindo, Surabaya, Cet Ke-I.2017 Hlm. 97-98.

<sup>4</sup> Bambang Sutyoso dan Sri Hastuti Puspitasari, Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia, UII Press, Yogyakarta, 2005, Hlm 4.

parties before making a decision. Some theories of procedural justice argue that fair procedures will produce fair decisions, even if the requirements of distributive justice or corrective justice are not met.<sup>5</sup>

The justice established by arbitration institutions is substantive because it is based on the principles of arbitration, including:

1. **Party Autonomy Principle:** The intentions of the parties to an agreement have a very important role in determining the existence of an arbitration institution. The main principle of law in trade transactions is to give freedom to contracting parties to agree according to their wishes. This principle includes the freedom to determine the contents of the contract, choose the applicable law, and choose the dispute resolution forum, be it court or arbitration.
2. **Pacta Sunt Servanda Principle** The pacta sunt servanda principle refers to the principle of binding the parties to an agreement. The arbitration clause is also binding on the parties as regulated by law, and cannot be revoked unilaterally. **Substantial Justice** is a Principle that focuses on fair results or final decisions in investment arbitration. This means that arbitration decisions must be based on fair and applicable legal principles, including the principles of relevant international law, applicable investment treaties, and applicable national law. This principle ensures that arbitration awards do not conflict with generally accepted principles of substantial justice. **Protection of Parties' Rights** is a principle of justice in arbitration which also involves the protection of parties' rights. This includes the right to obtain access to the arbitration process, the right to be heard, the right to present evidence, and the right to receive an objectively decided decision. This principle aims to ensure that parties involved in arbitration have a fair and equal opportunity to present their arguments and defend their interests.

At the ideal level, to realize a judge's decision that meets the expectations of justice seekers, which reflects legal values and society's sense of justice, there are several elements that must be fulfilled properly. Gustav Radbruch said that ideally a decision should contain the idea of *recht*, which includes 3 elements, namely justice (*gerechtigkeits*), legal certainty (*rechtsicherheit*), justice (*zweckmassigkeit*). These three elements should be considered proportionally so that they can produce a quality decision that meets the expectations of the parties. seeker of justice.<sup>6</sup>

Law enforcement patterns are influenced by the level of development of society, where the law applies or is enforced. In simple societies, law enforcement patterns are implemented through simple procedures and mechanisms. However, in modern society which is rational and has a very high level of specialization and differentiation, the organization of law enforcement has become very complex and very bureaucratic. So that those who play an important role in the law enforcement process are not only humans who are law enforcement officers but also organizations that regulate and managing the operationalization of the law enforcement process. In the process of social change, the factors that influence the operation of law in society are not only internal factors in the legal system itself (law, apparatus, organizations and facilities) but also external factors outside the legal system, such as social, political, economic systems. , culture, even in the current era of globalization, the influence of international relations factors cannot be ignored.

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<sup>5</sup> Sudyana. Pemberdayaan Peran Lembaga Arbitrase dalam Penyelesaian Sengketa Bisnis di Indonesia. *PJIH*. Volume 4 Nomor 1. [ISSN 2460 1543] [e-ISSN 2442-9325].2017

<sup>6</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, Liberty, Yogyakarta,2004

In BANI arbitration, disputes can be resolved in a relatively short time, because the process is more focused and structured. This reduces uncertainty and allows the parties to quickly reach a final decision. Apart from that, resolving default disputes through BANI also offers higher legal certainty. Decisions resulting from BANI arbitration are binding and legally enforceable.<sup>7</sup>

This is in accordance with one of the principles that apply in Arbitration Law, namely the Final and Binding Principle, namely that an arbitration award is a final decision and is directly binding on the parties. An arbitration award cannot be continued with other legal remedies, such as appeal or cassation. In principle, this principle has been agreed upon by the parties in their arbitration clause or agreement. But in the Arbitration Law there is a legal remedy for the parties, namely the cancellation of the arbitration award if it fulfills the conditions stated in Article 70 of the Arbitration Law. The Arbitration Law regulates the cancellation of arbitration awards in Article 70 which states that the parties can submit a request for cancellation if the arbitration award is suspected contains elements of falsification of letters or documents, or documents are found hidden by the opposing party, or the decision is taken as a result of deception carried out by one of the parties during the investigation of the dispute. However, in practice the annulment of arbitration awards based on Article 70 by the District Court and the Supreme Court has been decided inconsistently.

Decisions resulting from BANI arbitration are binding and legally enforceable. This provides certainty for the parties involved, because they know that the decisions given will be respected and implemented. Apart from that, BANI also has a good reputation as a professional and fair dispute resolution institution. This gives the parties confidence that their dispute will be handled well. BANI has an extensive network of arbitrators, consisting of experienced legal experts and practitioners in various fields. Arbitrators are people who act as judges in the arbitration process.<sup>8</sup>

In the Regulations of the Indonesian National Arbitration Board Number: PER-02/BANI/09/2016 concerning Arbitration Rules and Procedures, theoretically describes the resolution of disputes through arbitration. BANI's decision is final, meaning that the arbitration award cannot be subject to legal action. Meanwhile, arbitration decisions are binding, meaning they bind the parties, especially the parties to the dispute. Being final means that it is the first and final decision, which cannot be taken as cassation, appeal or judicial review, except for cancellation by the court. Meanwhile, the meaning of binding in the broadest sense is a decision that must be implemented because it is considered a permanent decision (*inkrach*), and must be applied to all parties involved.<sup>9</sup> The implementation of an arbitration award which is final and binding means that all parties involved are obliged to implement it without exception. This means that if the party involved in the decision is not willing to carry out the decision, in the sense of being forced to carry it out, and if they are still unwilling to carry out the decision, they can be subject to sanctions. This is in accordance with the legal objectives of regulating and coercing, regulating those who are willing to be regulated, and coercing those who are not willing to be regulated.

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<sup>7</sup> Andriansyah, M. Pembatalan Putusan Arbitrase Nasional Oleh Pengadilan Negeri. *Jurnal Cita Hukum*, 2014, Hlm 2.

<sup>8</sup> Usmani, R. *Mediasi di Pengadilan : Dalam Teori dan Praktik*. Sinar Grafika. 2012

<sup>9</sup> Mudakir Iskandar Syah, *Op. Cit*, hlm. 71

### C. Discussion

Based on the discussion above, it can be concluded that arbitration is a form of peaceful procedure used to resolve disputes in a final and binding manner. Arbitration is included in Alternative Dispute Resolution (ADR), which includes various forms of dispute resolution outside the judicial process or litigation. Arbitration can be carried out through institutional arbitration institutions or on an ad hoc basis, and arbitration agreements give absolute authority to the arbitration panel to resolve disputes in accordance with applicable law. BANI's decision is final and has permanent legal force (*inkracht van gewijsde*) meaning that there is no legal remedy available for this decision. Being declared to have permanent legal force means that the arbitration award cannot be changed by ordinary legal measures, meaning that it cannot be appealed or cassated.

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