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LEGAL REVIEW RELATING TO CANCELLATION OF ARBITRATION AWARDS THAT ARE ALREADY POWERFUL AND FINAL RELATED TO ARBITRATION LAW NO. 30 OF 1999 CONCERNING ARBITRATION CASE STUDY PT. KRAKATAU POSCO AGAINST INDONESIAN NATIONAL ARBITRATION BOARD, DKK AT SERANG STATE COURT

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Abstract

The author discusses the determination of several deviations related to the cancellation of the Arbitration Award as regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. In this case, the parties and the judges tend to ignore the existence of the Arbitration Institution; the agreement on the absence of an Arbitration Clause is considered a fake document and a deception by the Arbitration Applicant. Krakatau Posco (Arbitration Applicant) against the National Arbitration Board (Arbitration Respondent I) and PT. Krakatau Engineering (Respondent of Arbitration II) in Decision Number 105/Pdt.Arbt/2018/PN.Srg in Serang District Court Class IA. Arbitration clauses are carried out when the contract agreement is about to start between the two parties to avoid disputes before or after. Both parties must file the debate at the Indonesian National Arbitration Board (BANI) in a dispute. The problems discussed in this thesis are regarding the Determination of Number 105/Pdt.Arbt/2018/PN.Srg. On September 21, 2018, the judge considered the absence of the Arbitration Clause a false document and a ruse. The research method used in this thesis is normative juridical through a law approach. The sources used are in the form of secondary legal materials with library techniques that are analyzed qualitatively. The result of this study is the cancellation of the Arbitration decision that the Panel of Judges granted at the Serang District Court Class IA based on the fact that there was no Arbitration Clause agreement between the two parties when

Keywords: *Arbitration Cancellation, Arbitration Clause.*

INTRODUCTION

Regarding disputes that occur, the laws and regulations in Indonesia have provided a means to resolve disputes between the parties (Zulfikar & Jumiati, 2017). Things that the parties can take include the General Court process (litigation) and processes outside the Court (non-litigation) (Herniati, 2019). For resolving disputes outside the Court or non-litigation with a simpler and faster mechanism, dispute resolution through Alternative Dispute Resolution is commonly abbreviated as "ADR." (Wibowo & Wijaya, 2021)

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Forms of dispute resolution outside the Court, such as mediation, consolidation, and Arbitration. Arbitration is a term used to describe a form of appropriate peaceful procedure or as a provision of how to resolve disputes that arise to achieve a specific result that is legally final and binding (Emirzon & Sengketa, 2000). Arbitration is one of entrepreneurs' most preferred ways of resolving disputes out of Court because it is considered the most suitable method for the needs of the business world. Arbitration is considered an independent business court to resolve disputes according to their wishes and needs (Winarta, 2022).

The settlement process through Arbitration only sometimes satisfies the parties to the dispute; there is no guarantee for the perfection of the legal process in Arbitration (Muskibah & Hidayah, 2021). Arbitration also has weaknesses, for example, absolute dependence on the arbitrator, meaning that arbitral awards always depend on the technical ability of the arbitrator to provide the right Decision and on the sense of justice of the parties (Yuliardi & Santoso, 2022). Even though arbitrators have high technical expertise, it takes work for the arbitral tribunal to satisfy and fulfill the wishes of the disputing parties. The losing party will say that the arbitral award is unfair, and vice versa (the winning party will say the award is fair) (Triana, 2019).

Absolute dependence on arbitrators can be a weakness because the substance of a case in Arbitration cannot be reexamined (through an appeals process) (Dodi, 2022). In addition, there is an opinion from many businessmen or investors from abroad that gives a stigma that Indonesia is seen as an "unfriendly country" for Arbitration. The term here refers to their understanding that Indonesia is not friendly (unfriendly) to Arbitration. The real reason is that the final and binding arbitration award was annulled. The annulment of an arbitral award hurts the feelings of a party with good faith in resolving its dispute in Arbitration (Situmorang, 2020).

The enactment of Law No. 30 of 1999 is a new spirit and hope for the community through the role of the Indonesian Government, which can find a faster and more attractive way for business people to resolve disputes (Mayangsari et al., 2020). However, in fact, in daily practice, it still creates obstacles in the form of the slowness of justice seekers getting justice for arbitral awards; this allows the parties to avoid implementing the Decision, even though according to the nature of the final and binding Decision there is no other choice for the parties must obey and implement it voluntarily by the applicable provisions (Muskibah & Hidayah, 2021).

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Some of the rules of the article involve the role of the District Court in disputes that have an arbitration clause in the Arbitration Law, among others; for requests that are not satisfied, the District Court is given the authority to examine requests for annulment of arbitral awards that previously made agreements have chosen. (Uzma, 2016) Likewise, the freedom of the parties to choose an Arbitrator based on an agreement often turns out to be deadlocked, so they have to submit a request to the Chief Justice of the District Court to appoint a sole Arbitrator or a third Arbitrator(Nugroho, 2017).

Arbitration has the principle of legal certainty because the Court is not authorized to examine cases with an Arbitration agreement (Putra, 2023). The Court is obliged to reject the case and may not interfere if there is an Arbitration clause (Article 3 of Law 30 of 1999 concerning Arbitration) (Dinovan, 2019). The Arbitration Agreement must be followed by the arbitrator in resolving the dispute submitted to him (Article 4 Law 30 of 1999) (Siswanto, 2018). The Arbitration Agreement is not canceled even though the parties have died, so the heirs are still bound by the Arbitration agreement made by the heir (Article 10 of Law 30 of 1999 concerning Arbitration (Simanjuntak, 2015). The parties have no right to submit a dispute to the Court because the Arbitration Agreement is binding on the parties who made it (Article 11 paragraph 1 of Law 30 of 1999) (Pamolango, 2015).

Based on this problem, there was a dispute between PT. Krakatau Posco against PT. Krakatau Engineering to the Integrated Steel Mill Construction agreement called the ISM project made between the two parties. However, in carrying out the project, PT. Krakatau Engineering often makes mistakes, defects in work, or delays in work due to PT. Krakatau Engineering is inexperienced and needs to be able to handle large-scale types of construction. As a result, they have to bear the work of PT. Krakatau Engineering was bad and forced PT. Krakatau Posco suffered enormous losses due to the work of PT—Krakatau Engineering, which should have complied on time according to the agreement stated.

In that case, PT. Krakatau Engineering carries out this dispute settlement through the Non-Litigation channel, namely the Arbitration mechanism at the Office of the Indonesian National Arbitration Board (BANI). In this case, it is known that PT. Krakatau Engineering has filed a lawsuit against PT. Krakatau Posco has been 3 (three) times, namely with the Case Number: (1) 631/XI/ARB-BANI/2014 (Case 631), (2) 669/III/ARB-BANI/2015 (Case 669), (3) 008/BANI/ARB-008/VII/2017 against the final Decision submitted by PT. Krakatau Engineering made PT with Case Number 008/BANI/ARB-

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008/VII/2017. Krakatau Posco feels it has never consented to resolving the PT dispute. Krakatau Engineering through the Indonesian National Arbitration Board (BANI).

Article 72 of Law no. 30 of 1999 expressly states that in order to apply for an annulment of an arbitral award, only the Head of the District Court has the right to give a stipulation whether the arbitral award can be annulled or not without the signature of the stipulation by the Panel of Judges examining the arbitration case. By way of the Arbitration, the applicant submits a letter requesting the annulment of the arbitral award to the District Court, after which the Head of the District Court examines the letter attached with evidence of whether the Decision can later be rescinded or not, with the result being a stipulation signed by the Chairperson of the District Court.

It can be reviewed based on the law that there is a discrepancy between Article 3 and Article 72; on the one hand, the applicant, namely PT. Krakatau Posco argued to the Panel of Judges of the Serang District Court by using Article 72 as the basis for canceling the Arbitration decision, and on the other hand, the respondent PT. Krakatau Engineering argued that the Panel of Judges at the Serang District Court used Article 3 as a basis for defending the Arbitration award.

In connection with the cases described above, the annulment of the arbitral award at the Serang District Court needs to be reviewed because the implementation in the field between dass sein and dass sollen did not work as expected both in terms of law and the judge's Decision at the Court which was very contradictory which resulted in losses for the party defending the arbitral award.

RESEARCH METHODS

The approach method used by the author in writing this thesis is a normative juridical approach. So, to support this method, the author's research stage to find secondary data needed in research is the method of study or library research, namely by taking inventory of secondary data (library research) and then carrying out a qualitative analysis of these data.(Benuf & Azhar, 2020)

RESULTS, DISCUSSION AND ANALYSIS

Analysis of Legal Considerations in Handling Requests for Cancellation of Arbitration No. 105/Pdt. Arbt/2018/PN. Srg

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In this analysis, the author will examine the legal considerations in handling the case for the cancellation of this Arbitration. At the time of registration of the Petition for Cancellation of Arbitration on September 21, 2018, the Deputy Chairperson of the Serang District Court as an official at that time because the Chairperson of the Serang District Court had not been appointed by the Chairperson of the Banten High Court who delegated to Judges: Chairperson Efiyanto D, SH., MH. Judge Member I: Dr. Erwantoni, SH., MH. and Member Judge II: Santosa, SH., MH. who handled the case by the stipulation of the appointment of the Panel of Judges determined by the Deputy Chairperson of the Serang District Court in the case.

Whereas in Decree No. 105/Pdt.Arbt/2018/PN.Srg, on page 7, point 11, it is stated that:

"That the applicant expressly filed an Objection through the exception of the Jurisprudential Competence of the Respondent I, dated November 27, 2017, not to adjudicate the arbitration dispute Number 006/BANI/ARB-008/VIII/2017 because the Petitioner Never Gived Its Agreement to resolve the dispute to the Respondent-I".

In legal considerations, on page 149 of the Panel of Judges of the Serang District Court stated that:

"Considering that the BANI Sovereign Decision Number: 008/BANI/ARB-008/VIII/2017, dated August 3, 2018, is legally flawed because it is not based on Article 1 paragraph 1, paragraph 8 and Article 4 paragraph 2 of Law No. 30/1999 which essentially states that the implementation of arbitration must be based on the agreement of the parties, both before the dispute occurs through the arbitration clause and after the dispute occurs through the arbitration agreement "

The results of the author's interview with Mr. Uli Purnama, SH., MH. as a Judge at the Serang District Court explained that the Arbitration Petitioner argued to the Panel of Judges that the Arbitration Petitioner did not agree to a settlement between the Arbitration Petitioner (PT. et al.) and Respondent-I (PT. Krakatau Engineering) to be tried at the Indonesian National Arbitration Board.

Furthermore, in the information provided, it can be analyzed that the Panel of Judges did not pay close attention to Article 70 of Law 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution, which states that concerning an arbitral award, the parties can apply for annulment if the Decision is suspected of containing elements of a letter or documents submitted during the examination

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after the verdict has been handed down it is recognized as fake or declared fake. After the Decision is taken, a decisive document is found hidden by the opposing party, or the last element is that the Decision is taken as a result of a ruse committed by one of the parties in the examination of the dispute.

The panel of judges in this case refers to Article 70 of Law 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution that in respect of disputes between the two parties, It can be concluded that even if the agreement between the parties ends, the arbitration agreement is not deemed to have ended anyway, this is of course by the principle upheld by the Arbitration itself, namely the principle of separability, the principle of separation between the main agreement and additional agreements are two different things and have different legal impacts, even if the main agreement ends, the parties have their obligations when problems occur in the future.

An arbitration agreement will not exist if there is no principal agreement. If the judge considered that there was no arbitration clause agreement at the time of the arbitration trial, then the Panel of Judges of the Serang District Court considered that the agreement became one unit, and this was a mistake in the interpretation of the arbitration law, even though in fact when the arbitration agreement was not included in the agreement, then by itself the agreement also becomes one complete part. However, the application and terms of termination are different.

Article 70 of this author makes two things a point that must be considered:

a. Whereas the article uses the word "false," meaning that there is no evidence that is considered "false" between the two parties at the time of the said agreement and which cannot be waived unless
b. This law provides otherwise; it will be explained in the following sentence if this arbitration law provides

other provisions, but in reality, this was not found except in the ratification of the arbitral award so that the arbitral award could be executed.

The results of the author's observation that against this arbitration cancellation award, the Arbitration Petitioner provided evidence to the Panel of Judges at the Serang District Court of the absence of this arbitration clause agreement as being "solid evidence" to convince the Panel of Judges to cancel the arbitral award and finally the Panel of Judges won the Petitioner for Arbitration with evidence that there is no such arbitration agreement.

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However, if the author examines it in Article 70 of Law 30 of 1999 in several paragraphs, it states that:

1) In the results of the author's review in paragraphs (a) and (b) during the examination of the arbitration trial, the documents that should have been in the form of (evidence) to declare the existence of a breach of contract at the time the agreement existed were not attached during the examination of the trial before the Panel of Judges. However, the Arbitration Petitioner continued to argue for the Objection to the Arbitration Session and pointed out the absence of an arbitration clause as a basis for proving this to the Panel of Judges as a solid basis for canceling the arbitral award;
2) In paragraph (c), from the results of the author's review, there was no deception when carrying out the arbitral examination. However, the Arbitration Petitioner was allowed not to sign the Arbitration and objected to the arbitration trial. However, not the Arbitration Tribunal rejected the Objection of the Arbitration Petitioner and continued until the final Decision without giving any objection by the Arbitration Petitioner at that time.

The author compares with the Serang District Court Decision No. 72/Pdt.G/2015/PN.Srg between PT. Krakatau Engineering (PTKE) against the Indonesian National Arbitration Board (BANI) as the Arbitration Respondent regarding the Cancellation of Arbitration with the Panel of Judges Ni Putu Sri Indayani, SH., MH. as Chief Judge, Muhammad Sainal, SH., M.Hum as Member Judge I, and Rina Zain, SH, as Member Judge II. On page 81 of the Decision, it was explained:

"Considering that after the Panel of Judges paid attention to and scrutinized and studied the documentary evidence submitted in this case, particularly the documentary evidence submitted in this case, particularly the documentary evidence submitted by the Petitioner, the Panel of Judges did not find that a Court Decision had permanent legal force as a basis The Petitioner to file a Request for Cancellation of this Arbitration Award, therefore, the Panel of Judges considers as follows:

Considering that in the provisions of Article 70 of Law Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution and its explanation, it is imperative to have an absolute decision because, in the end, the Decision will be used as evidence besides being connected with other valid evidence."

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In Serang District Court Decision No. 72/Pdt.G/2015/PN.Srg page 82 it is also stated that:

"Considering that subsequently the Panel of Judges considers that because this lawsuit is a request for annulment of the Arbitration Award (BANI), then based on this matter and linked to the main argument of the petition for Cancellation of the Arbitration Award by the Arbitration Petitioner, the Panel of Judges will then will consider whether it is true that Respondent II (PT. et al.) has committed deception related to the funding of the Integrated Stell Mill Project (ISM Project) because Respondent II refused all adjustments to the increase in costs proposed by the Arbitration Petitioner but Respondent II on August 15 2013 submitted letter No. FN 01.02.0063/DIR-KP/VIII/2013 to its shareholders to request additional funds for the Integrated Steel Mill Project (ISM Project)?"

From the comparison results according to the author between Case Number: 105/Pdt.Arbt/2018/PN.Srg and 72/Pdt.G/2015/PN.Srg, it is clear that there is a difference, including that from the results of the judge's consideration, which is explained in Number 105/Pdt. Arbt/2018/PN.Srg stated that no Arbitration Clause agreement caused it to be used as evidence before the Panel of Judges for the cancellation of the Arbitration using Article 70 of Law Number 30 of 1999 while in case 72/Pdt.G/2015/PN.Srg it was explained that in its legal considerations, it rejected the Cancellation of Arbitration by using Article 70 of Law Number 30 of 1999 and did not mention that there was no "trickery" in the ISM project between the two parties Arbitration Petitioner and Arbitration Respondent II.

The form of an arbitration clause from various legal sources, both contained in the RV and Law No. 30 of 1999, consists of the following:

Pactum de Compromise

In the Pactum de Compromittende form, the parties have stated in their contract that if a dispute occurs between them in the future, they have determined an arbitration institution to resolve the dispute. This is by the words of Article 4, paragraph (2), the agreement to resolve disputes through Arbitration.

Compromise Deed

The compromise deed was made "after" a dispute arose between the two parties. So besides the parties having determined at the time the contract was made, based on Article 7 of this Law, the parties can agree on a dispute that has occurred or will occur between them to be resolved through Arbitration. While the permissibility of an arbitration agreement using a Pactum de Compromittende

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or Compromise Deed is contained in Article 1 paragraph (3), namely, an arbitration agreement is an agreement in the form of an arbitration clause contained in a written agreement made by the parties before a dispute arises, or a separate arbitration agreement made the parties after a dispute arises.

The meaning is clear: the Petitioner for Arbitration made (loopholes) not to sign the Arbitration Clause Agreement at the beginning of the agreement in the Integrated Steel Mill (ISM) Project Construction agreement between the Arbitration Petitioner (PT. et al.) and Arbitration Respondent II (PT Krakatau Engineering) in the event of a dispute in the future for the basis for the cancellation of Article 70. Finally, if it causes a loss for the Arbitration Petitioner if defeated by the Arbitration award, the basis for the Arbitration Petitioner filing the Cancellation of Arbitration is evidenced by the attachment of the absence of the arbitration clause agreement to convince the Panel of Judges at the Serang District Court to cancel the Arbitration award. This causes a loss for the Respondent for Arbitration II (PT. Krakatau Engineering) that it has attempted a trial through Arbitration that takes a long time, costs money, and the trial continues without delay in the absence of an arbitration clause agreement that both parties should have known that the Arbitration Clause This is very important in the contract if there is a dispute in the future so as not to cause harm to both parties.

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