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Yogyakarta, 04 – 07 April 2017

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Sonny Zulhuda (Guest Editor)

Iwan Satriawan

Yordan Gunawan

M. Endrio Susila

Design: Djoko Supriyanto

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Message from Chairman

Yordan Gunawan

Chairman, International Conference on Law and Society 6,
Universitas Muhammadiyah Yogyakarta

Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among Universitas Muhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfelt thanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only an avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

Foreword

Trisno Raharjo

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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The Inconsistency of Supreme Court Decision to Annul the Arbitral Award in Indonesia

FADIA FITRIYANTI

Faculty of Law, Universitas Muhammadiyah Yogyakarta

ABSTRACT

This study firstly examines the consideration of the Supreme Court in deciding the annulment of arbitral award both by reason under Article 70 and outside of article 70 Law No 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, secondly reviewing and analyzing theories used in consideration for the Supreme Court to annul the Arbitral Award. Thirdly formulate a concept in deciding the annulment of an Arbitral award based on the principle of justice. This type of research is normative juridical research. Some of the approaches used in the analysis of this research are case approach, statue approach, the comparative approach. In more detail, the data obtained from the reserch processed and analyzed using prescriptive analytical. The results showed firstly based on the consideration of The Supreme Court Decision No. 729 / K / Pdt.Sus / 2008 interpret Article 70 of the Arbitration Act in limiting, contrast with The Supreme Court Decision No.03 / Arb.BTU 2005 interpret Article 70 is enunciation. secondly, The Judges annul the arbitral award under Article 70 of the Arbitration Act is limitedly using analytical theory meanwhile, the Judges annul the arbitral award refers to reasons beyond Article 70 of the Arbitration Act uses Progressive legal theory. Thirdly based on Procedural and Substantive Justice reasons for annulment of an arbitral award pursuant to Article 70 of Law Arbitration is too limitedly when it is compared to Article 34 The UNICITRAL Model Law. The substantive justice should be limited to a restriction so that arbitrators use it arbitrarily.

Keywords: *Inconsistency, the Supreme Court decision, the annulment, the arbitral award*

I. INTRODUCTION

In the business world, certainly many considerations that underlie the business persons to choose arbitration as the dispute resolution efforts that they will face or face (Sudiarto Zaeni and Asyhadie, 2004:32). There are various reasons that can be used by business persons to select arbitration in an effort to resolve its trade disputes, among others, can be read in the fourth Paragraph of the General Elucidation Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, namely:

In general arbitration institutions have advantages compared to the judiciary. The advantages are among other:

1. Guaranteed confidentiality of the parties' dispute
2. The inevitable slowness caused due to procedural and administrative matters
3. The parties can choose the Parties can choose the arbitrator who he believes to have the knowledge, experience as well as sufficient background on the issues in dispute and fair
4. The parties may determine the choice of law to resolve the problem as well as the process and the venue for the arbitration and
5. The arbitral award is binding on the parties through the simple procedure or it can be immediately implemented.

One of the advantages of a settlement through arbitration compared to court is avoidable slowness due to procedural and administrative matters. This is in accordance with one of the

principles applied in arbitration law that is a Final and Binding principle. It is an arbitral award that is final and binding upon the parties directly the arbitral award cannot proceed with another remedy, such as appeals or cassation. This principle already agreed by the parties in their arbitration agreement or clause in the agreement, but in the arbitration, the act is given the remedy for the parties namely the annulment of the arbitral award if it meets the conditions regulated in article 70 of Law No 30 of 1999.

Arbitration act governs the annulment of the arbitral award in article 70 which states that the parties may apply for annulment if the arbitral award is allegedly contains elements of forgery of a letter or document, or a document found hidden by the opposing side, or decision taken from the ruse performed by one of the parties in the dispute. However, in practice, the annulment of the arbitral award based on article 70 decided inconsistency by the District Court and the Supreme Court. On the one hand, the Supreme Court annul the arbitral award can only be done on the basis of the reasons contained in article 70 that is the verdict of the Supreme Court Number 727/K/Pdt. Sus/2008. In this regard article 70 interpreted limited, on the other hand, the Supreme Court decided the annulment of the arbitration award shall be implemented on the basis of reasons outside of article 70 of the Supreme Court Verdict Number i.e. 03/Arb/the Btl/2005. Surely the Supreme Court decision raises legal uncertainty and injustice to the disputant parties

Based on the above conditions, the researcher is interested in researching inconsistencies the Supreme Court Decision decided the annulment of the arbitral award. The subject of the research is the judge at the Central Jakarta District Court and the Supreme Court with the consideration that many business disputes are resolved using arbitration and most of the respondent domiciled in Jakarta. This research is the juridical normative research. Types of data used in this research are the primary data and secondary data. Some approaches used in conducting the analysis in this study is a case approach (Peter Mahmud Marzuki, : 93-95). In this study, the data obtained were analyzed using the model of flow analysis (Matthew B Miles and Michael Huberman, 1992:19-20). In more detail the data obtained from research, both the library research or field research, processed and analyzed critically and analytically presented in a descriptively qualitative.

Based on the introduction above, then the research issues that are studied are as follows: (1) How did the Supreme Court consideration in deciding the annulment of arbitral award both according to the reason of the annulment under article 70 and outside article 70 of Law No 30 of 1999 regarding arbitration and alternative dispute resolution? (2) whether the Theory used by the Supreme Court in deciding on the annulment of the arbitration? (3) how to formulate a concept of annulment of the arbitral award based on justice?

II. DISCUSSION

2.1 The Consideration of the Supreme Court in deciding the annulment of Arbitral Award both under article 70 and outside of Article 70 Arbitration Act

Discrepancies of Supreme Court decision regarding the annulment of the arbitral award refers to Article 70 Arbitration Act raises two streams first Supreme Court is consistent with the Article 70 states that the reason for the annulment of the arbitral award must refer to the content of Article 70 is limitedly and recognized in MARI decision 729 / K / Pdt.Sus / 2008, so that the annulment of the arbitral award does not refer to Article 70 can not be justified. A second strain in which the Supreme Court stated that Article 70 is not limiting and has been recognized and become jurisprudence in MARI Decision No.03 / Arb.BTU 2005 dated May 17, 2005, stating the word "include" in the General Elucidation of the Arbitration Act allows the applicant to apply for

annulment of an arbitral award on grounds beyond those listed in Article 70 of the arbitration Act.

The judges in Award MARI No. 729 / K / Pdt.Sus / 2008 interpreted Article 70 Arbitration Act is a limitation, in contrast with MARI Decision No.03 / Arb.BTU 2005 interpreting Article 70 is enunciation, underlies the words "among others" in the General Elucidation of the Arbitration Act gave slit add to reasons other than article 70 of the Arbitration Act, but it is also the reason for annulment of an arbitral award under Article 70 do not contain matters which are fundamental. According Hikmahanto Juwana basis of the annulment of arbitral award is not limitedly under Article 70 Arbitration Act, there are several reasons for the annulment of arbitral award that the delay in deciding the case where the time specified in the Arbitration Act is 180 days, the absence of the arbitration agreement, the authority of procedure making the arbitration decision, for example process choice of the arbitrator, the implementation of the law chosen by the parties to the dispute (Rengganis, 2011: 75). In line with the opinion of Hikmahanto, according to Priyatna Abdurrasyid (former Chairman of BANI and arbitrators), there is another reason to annul the Decision BANI outside Article 70 Invitation Arbitration Act, ie when there is "procedural error" in the arbitration decision. (Priyatna Abdurrasyid, 16). Although in modern arbitration practice, restrictions on the reasons for annulment of arbitral award by law has been recognized as a universal principle of least reason for canceling arbitral award shall contain matters that are fundamental to Articles 34 The UNICITRAL Model Law

2.2 The Theory Used in Consideration of the Supreme Court to Annul the Arbitral Award

The Legal theory plays an important role in guiding the decision of the judge preparing qualified and able to accommodate the objective of the law, namely fairness, certainty and legal expediency. The Supreme Court Judge annul the arbitral award under Article 70 of the Arbitration Act is limitation using analytical theory. According to this theory the judge in applying the law only match the case heard by the sound of the text of legislation (M.Natsir, 2014: 52). The Supreme Court Judge annul the arbitral award refers to reasons outside Article 70 of the Arbitration Act uses Progressive legal theory. The founder of the theory of progressive law is Satjipto Rahardjo. The Judges can no longer simply decide within a narrow space for the text and does not capture the will and social needs as well as the existing law (M.Natsir, 2014: 69)

2.3 The Concept of the Arbitral Award Annulment Cancellation Based on the Principle of Fairness

In the discourse of the concept of justice is found various notions of justice, among others, justice is put things in place (proportional), justice is a balance between rights and obligations etc. Likewise, the classification of justice is also found, for example, Aristotle divided commutative and distributive justice. In the context of the arbitral award that is often mentioned is in the form of procedural justice and substantive justice.

So essentially, the fairness issue in its implementation in practice perceived as fair or unfair is based on an assessment of each party, which is very likely different (Bambang Sutiyoso, 2010: 9). In the ideal level to realize the judge's decision that meets the expectations of seekers of justice, which reflects the value of law and society's sense of justice, there are some elements that must be met as well. Gustav Radbruch argues, ideally in a decision must contain *idée des recht*, which includes three elements, namely justice (*gerechtigkei*), legal certainty (*rechtsicherheit*), utility (*zweckmassigkeit*). Three elements should be considered in proportion so as to produce a quality

decision to meet the expectations of the justice seekers (Sudikno Mertokusumo, 2004: 15). In connection with the annulment of the arbitral award if it refers to substantive justice and procedural fairness.

Referring to procedural justice, the annulment of the arbitral award in Indonesia should be refers to the Model Law on Arbitration International Trade adopted by the United Nations Commission on International Trade and Law on June 21, 1985 (the UNCITRAL Model Law) and these have been written in the Law of Arbitration of many countries in the world. This Universal procedure is the main reason for basing on the view that the arbitral award is acceptable, appropriate, fair to resolve domestic disputes and across the country. Thus the reason for the annulment of arbitral award based on the provisions of article 70 of the arbitration act is too limitedly when compared to Article 34 The UNCITRAL Model Law i.e. firstly the parties or one of the parties that made the arbitration agreement is a person who does not have the capacity or authority (under incapacity) to create an agreement, resulting in the arbitration agreement it becomes invalid, when the arbitration agreement becomes the basis of the case was resolved through arbitration, secondly it should be the fulfillment of the *audi alteram partem* principle which the parties are given an equal opportunity to adequately defend their interests, for example, where one party was not informed appropriately about the appointment of the arbitrator, or to defend, the arbitration decision is considered reasonable for a tribunal has to be partial or biased so the process of the case investigation is underway dishonestly, thirdly arbitration panel has ruled that exceeded its authority, fourthly the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or failing such agreement, was not in accordance with this law fifthly the subject matter of dispute is not capable of settlement by arbitration under the law of this state sixthly the arbitral award contrary to the public order of the country. The Substantive justice is something abstract. Based on interviews with Judges of the Supreme Court, Rahmadi substantive justice must be restricted with a guide, so that arbitrators use it arbitrarily except for reasons not referring to the law in deciding the case as long as the reason is contrary to public order.

According to Philippe Fouchard, in modern arbitration practice, restrictions on the reasons for the annulment of arbitral award by law has been recognized as a universal principle, and according to Sujayadi, the reason for annulment of arbitral award can only be made for the fundamental reason stipulated in the Act (Ilham Ginang Pratidina, 2014: 314) and should be a case where the court does not need to intervene in the dispute which the parties have agreed to resolve by arbitration should be a case where the court does not need to intervene in the dispute which the parties have agreed to resolve by arbitration moreover arbitration decision cancellation (less intervention of state).

III. CLOSING

Based on the formulation of the problem, the results of research can be concluded as follows (1) Observing the consideration of the decision MARI 729 / K / Pdt.Sus / 2008 and No.03 / 2005 Arb.BTU apparent inconsistency of the reasons for annulment of the arbitral award. The Supreme Court judges in MARI No. 729 / K / Pdt.Sus / 2008 interprets article 70 of Arbitration Act is a limitation. Unlike the MARI Decision No.03 / Arb.BTU 2005 interpreted enunciation (2) The Supreme Court Judges annul the arbitral award under Article 70 is limitation using analytical theory. According to this theory, the judge in applying the law only adjust the case heard by the

text of the legislation. The Supreme Court Judges annul the arbitral award refers to reasons outside Article 70 of the Arbitration Act uses Progressive legal theory. The originator of the theory of progressive law is Satjipto Rahardjo. Supposedly The Supreme Court judges should no longer merely decided in a narrow space for the text and does not capture the will and social needs as well as existing laws (3) Refers to the procedural substantive justice, the reason for annulment of arbitral award pursuant to Article 70 of Law Arbitration is too limitedly when compared to Article 34 The UNICITRAL Model Law, but the substantive Justice should be restricted for use with a guide, so that arbitrators use it arbitrarily except for reasons not referring to the law in deciding the case as long as the reason is contrary to public order. Based on the conclusion, researchers proposed recommendations as follows: Arbitration Act relating to Article 70 concerning the annulment of the arbitral award was changed to adjust to the provisions of Article 34 The UNICITRAL Model Law so that no longer occur inconsistency Supreme Court's decision in the annulment of arbitral award, because the reason for annulment of the arbitral award may be broader

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