

CHAPTER FOUR

FINDING AND ANALYSIS

1. The Mechanism of Annulment of An Arbitration Award Based on Law No. 30 of 1999 on Alternative Dispute Resolution and Arbitration

The clause of arbitration states arbitration award is final and bind the parties. Because the arbitration decision can not be applied for any legal action, if in the arbitration award founded an error, the parties may be appealed to the arbitrator to correct/recheck the arbitration award. Correction of the arbitration award has been set up in Article 58 of Law No. 30/1999 which gives an opportunity to the parties, up to 14 days after the arbitration award pronounce, to submit a correction to an administrative error or adding decision.¹ After the enactment of Law No. 30 of 1999 the arbitration award is final and binding but it does not mean to prohibit and limit the parties to request the annulment of arbitration award.

An application to annul an arbitration award may be made if any of following condition are alleged to exist:²

- a. Letters or documents submitted in the hearing are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;
- b. After the award has been rendered then the documents are founded decisive in nature and which are deliberately concealed by opposing party; or

¹ Sujayadi, 2015, Patologi dalam Arbitrase Indonesia: Ketentuan Pembatalan Putusan Arbitrase dalam Pasal 70 No.30/1999, "Jurnal Hukum Acara Perdata, ADHAPER", Vol. 1, No.2, p. 193.

² Article 70 of Law No. 30 of 1999

- c. The award was rendered as a result of fraud committed by one of the parties to the dispute.

Elucidation of article 70 causes the norm regulating formal requirements of annulment of arbitration award that have to be met by the applicant.³ First, the arbitration award has to be registered to the court.⁴ Second, the reasons of application of annulment have to be approved by the Chief Judge of court decision.⁵ But in practice, the application of annulment of arbitration award never attaches court decisions that proves the reasons are used as the basis for annulment of the arbitration award.⁶

An application for annulment of an arbitration award must be submitted in writing within not more than thirty (30) days from the date such arbitration award was submitted for registration to the Clerk to the District Court.⁷ Therefore, the court only has a maximum of 60 days to take a decision on the reason of application of annulment of arbitration award. That provision is considered to be difficult to implement and contrary to the adage *lex non cogit impossibilia* or the law requires not to impossibilities.⁸ The annulment of arbitration award has to be filed in the form of “request”, but practically the application of annulment of arbitration award filed in the form of claim/lawsuit.⁹ Arbitrator has obligation to register the arbitration award to the court within 30 days since the

³ Sujayadi, 2015, *Op. Cit.*, p. 196.

⁴ Muhammad Andriansyah, 2014, “Pembatalan Putusan Arbitrase Nasional oleh Pengadilan Negeri”, *Jurnal Cita Hukum*, Vol.I No.2, p. 5.

⁵ Penjelasan UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa pasal 70.

⁶ Mieke Komar Kantaatmadja, 2012, “National Court and the Interactions with Tribunals, the Indonesian Experience”, *Proceeding Sixth RAIIF Conference on International Arbitration*, p. 7.

⁷ Article 71 of Law No.30 of 1999.

⁸ Sujayadi, *Op. Cit.*, p. 205.

⁹ Gatot P. Soemartono, 2006, *Arbitrase dan Mediasi di Indonesia*, Jakarta: Gramedia Pustaka Utama, p.94.

arbitration award pronounce. So, it can be concluded that the right and obligation to the register an arbitration award to the court are not burden of the parties.¹⁰

In the hearing, the court is not allowed to reexamine the dispute but only reexamine the validity of taking decision procedure such as the appointment of arbiter and the enactment of law in the dispute.¹¹ During registration arbitration award has not been made, then the execution can't be requested by an interested party to the Chief Judge of the Court. After registered the arbitration award may execute to the party who don't obey the arbitration award. The important thing that we have to know is which District Court has authority to cover the issue of annulment of arbitration award?

“District Court shall mean the District Court having jurisdiction over the Respondent.”¹²

“Respondent shall mean the party opposing the Claimant in the resolution of the dispute by arbitration.”¹³

Based on those articles, it can be concluded the application for annulment of arbitration award was send to the head of District Court having jurisdiction over the Respondent. Therefore, if the respondent is the injured party of arbitration award, they may request the annulment of arbitration award to District Court which has jurisdiction over their resident.

Then, if the application is granted the Chief Judge of the District Court shall determine further the consequences of the annulment of the whole, or a part, of the

¹⁰ M. Yahya Harahap, *Op. Cit.*, p. 301.

¹¹ Frans Hendra Winarta, 2013, *Hukum Penyelesaian Sengketa*, Jakarta: Sinar Grafika, p. 85.

¹² Article 1 point (4) of Law No. 30 of 1999.

¹³ Article 1 point (6) of Law No. 30 of 1999.

arbitration award.¹⁴ Chief Judge of the Court may decide that after annulment pronounced, the same arbitrator or another arbitrator will check the relevant dispute or determine that a dispute may not anymore be resolved through arbitration.¹⁵ From that provision, it can be concluded that the Court is not authorized to investigate and prosecute dispute. Functions and authority of the court of the examination just check the facts about correct or not their reason found by applicant. Therefore the function and authority of the courts in the examination of the request of annulment of arbitration award is only declarative.¹⁶

The decision on the application for annulment shall be made by the Chief Judge of the District Court within no more than thirty (30) days from receipt of the aforesaid application¹⁷ and the application for an appeal against the decision of the District Court may be made to the Supreme Court, which latter shall decide the matter as the court of final instance¹⁸. Then, the Supreme Court shall consider and decide upon any such application to appeal, as contemplated in paragraph (4) above, within no more than thirty (30) days after such application to appeal is received by the Supreme Court.¹⁹ In principle, decision which has permanent legal force may be appealed to the Supreme Court²⁰, so the appeal can only be done against the decision of District Court which annul an arbitration award.²¹ Actually, the law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution has regulated clearly on the mechanism of annulment of an arbitration

¹⁴ Article 72 (2) of Law No. 30 of 1999.

¹⁵ Penjelasan UU No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa pasal 72 (2).

¹⁶ M. Yahya Harahap, *Op. Cit.*, p.286.

¹⁷ Article 72 (3) of Law No. 30 of 1999.

¹⁸ Article 72 (4) of Law No. 30 of 1999.

¹⁹ Article 72 (5) of Law No. 30 of 1999.

²⁰ Article 28 (1) of Law No. 14 of 1985 on the Supreme Court.

²¹ Rengganis, 2011, *Op. Cit.*, p. 88.

award, starting from the registration of arbitration award until the application for an appeal against the decision of the District Court to the Supreme Court.

In 2014, the Constitutional Court was held of hearing of judicial review on the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution which lead by Justice of Supreme Court (Hamdan Zoelva).²² The Constitutional Court granted the application for Judicial review on the elucidation of Article 70 of Law No. 30 of 1999.²³

Arbitration Award in principle is final and binding²⁴, so it is a decision on the final level and binds the parties "*Pacta Sunt Servanda*". Annulment of arbitration decision can only be made if there are "things that are extraordinary".²⁵ Without very specific reasons, basically an annulment of an arbitration award may not be accepted.²⁶ Law No. 30 of 1999 has been regulated the issue of annulment of arbitration award in article 70 which stated:

"An application to annul an arbitration award may be made if any of the following conditions are alleged to exist:

- a. letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;*
- b. after the award has been rendered documents are founded which are decisive in nature and which were deliberately concealed by the opposing party; or*
- c. the award was rendered as a result of fraud committed by one of the parties to the dispute."*

While, the elucidation of article 70 of Arbitration law stated:

²² Constitutional Court/ the reason of annulment of an arbitration award cause the new norm, The Constitutional Court deleted the Norm on elucidation of article 70 of Arbitration Law <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=10366#.WdW1vtR97De> published on November 11st, 2014, accessed on Oct 5th, 2017, at 09.17 AM.

²³ Constitutional Court decision No. 15/PUU-XII/2014 on Judicial Review of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution

²⁴ Article 60 of Law No. 30 of 1999

²⁵ Bambang Sutiyoso, 2006, *Penyelesaian Sengketa Bisnis*, Yogyakarta, Citra Media, p. 141.

²⁶ Munir Fuady, 2000, *Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis*, Bandung, PT. Citra Aditya Bakti, p. 112.

“The application for annulment can only be filed against an arbitration award which already registered in court. The reasons for the annulment petition referred to this article shall be proven by a court decision. If the court is declared those reason are proved or not proven, the court decision may be used as a basis for judges' consideration to grant or reject the application.”

The Constitutional Court argued that the word of “alleged” (*diduga*) in article 70 means the allegation of applicant toward the requirement of application for annulment of an arbitration award is subjective, and apriori.²⁷ Apriori can be interpreted as presupposing before knowing (seeing, investigating, etc.) the real situation.²⁸ The Constitutional Court also argued that the phrase of “shall be proven by a court decision” that mention in the elucidation of article 70 means the Court decision is posteriori.²⁹ In other word, the elucidation of article 70 of Arbitration law change and cause the new norm. The article 70 is only required the allegation which is apriori, while the elucidation of article 70 changes the meaning of the allegation to the something definite based on the Court decision which is aposteriori. Aposteriori means knowed (seeing, investigating, etc.) the real situation.³⁰

The Constitutional Court argued that article 70 of Arbitration law is already clear then don't need to interpreted that article, while the existence of elucidation of article 70 cause the multi interpretation on the application for the annulment of arbitration award.³¹ The interpretation implied the legal uncertainty and cause the injustice. Then the implication will take a long time which is not in line with the princlipe of fast arbitration which is maximum 30 days as mention in article 71 of Arbitration law.

²⁷ Constitutional Court decision No. 15/PUU-XII/2014, *Op. Cit.*

²⁸ Anonym, “Apriori” available at <http://kbbi.web.id/inkonsisten> accessed on October 5th, 2017, at 11.24 AM.

²⁹ Constitutional Court, *Op. Cit.*

³⁰ Anonim, “Aposteriori”, <http://kbbi.web.id/inkonsisten> accessed on October 5th, 2017, at 11.27 AM.

³¹ *Ibid.*

2. The Inconsistency of Annulment of National Arbitration Award According to Supreme Court Decision No. 26 B/Pdt.Sus-Arbt/2014

The inconsistency of Supreme Court decision regarding the annulment of arbitration award refers to Article 70 of Arbitration Law raises to groups first Supreme Court is consistent with the Article 70 states the reason for annulment of arbitration award have to refer to content of Article 70 is limitedly and recognized in Supreme Court decision No.293 K/Pdt.Sus/2012, so the annulment of arbitration award does not refer to Article 70 cannot be justified. The second group is Supreme Court which is not consistent with the Article 70, the reason for annulment of arbitration award can be outside of content of Article 70 and it is not limitedly and recognized in Supreme Court decision Supreme Court decision No.26 B/Pdt.Sus-Arbt/2014.

The judges in Supreme Court decision No. 293 K/Pdt.Sus/2012 considered annulment of arbitration award was based on article 70 of Law No. 30 of 1999, in contrast with Supreme Court decision No. 26 B/Pdt.Sus-Arbt/2014 considering the general explanation of the Law No. 30 of 1999 and the jurisprudence of Supreme Court Decision No. 03/Arb.Btl/2015.³² According to Hikmahanto Juwana basis of annulment of arbitration award is not limitedly under Article 70 of Arbitration Law, the delaying in deciding the case where the time specified in the Arbitration Law is 180 days can be the reason for the annulment of arbitration award.³³ In line with the opinion of Hikmahanto,

³² Supreme Court decision No.03/Arb.Btl/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.

³³ Fadia Fitriyanti, *Op. Cit.* p. 243.

Priyatna Abdurraid (former Chairman of BANI and arbitrators) stated when there is the “procedural error” in the arbitration award, there can be reason for the annulment of arbitration award.³⁴

In connection with the inconsistency, the author is presented the Supreme Court decision No 26 B/Pdt.Sus-Arbt/2014 on the annulment of the arbitration award.

2.1 Supreme Court Decision No 26 B/Pdt.Sus-Arbt/2014

PT. Hutama Karya & PT. Krakatau Bandar Samudra enter into an agreement as stated in the Contract No. D/26/DU-KBS/ KONTRAK/ VIII/2009 (Citayur pier construction work agreement) dated 12 August 2009. During the agreement was running, one of the party commit “wanprestasi”. Then, PT. Krakatau Bandar Samudra as victim applies for arbitration against PT. Hutama Karya as the defendant arbitration through BANI. Then, BANI passed an arbitration award No. 442/I/ARB-BANI/2012.

Then, PT. Hutama Karya applied for annulment of the arbitration award No. 442/I/ARB-BANI/2012 on 16 August 2013 through the Serang District Court for the reasons BANI is wrong in giving legal opinions in the Arbitration Award No. 442, because the fact that the BANI did not consider the legal facts revealed during the hearing. PT. Hutama Karya does not agree and strongly objected to consideration of the law and the arbitration award No. 422, because in fact the defendant in the examining and hearing the case *a quo* has violated the provisions of applicable law,

³⁴ *Ibid.*

not based on justice and propriety in decisions of this and based on consideration of the law is not enough/incomplete;

On June 17, 2013, Serang District Court enacted decision No. 18/Pdt.G/2013/PN.Srg. that accepting the “eksepsi” of the co-Respondent and the Respondent and declared application of annulment against Arbitration award of BANI No. 442/I/ARB-BANI/2012 dated January 16, 2013 filed by the Applicant (PT. Hutama Karya (Persero) is unacceptable. The Serang District Court also Refuse application of annulment against Arbitration award of BANI No. 442/I/ARB-BANI/2012 dated January 16, 2013 and punish the Applicant to pay court costs of Rp514.000,00 (five hundred fourteen thousand rupiah).

Then, PT. Hutama Karya filed an appeal against the Serang District Court Decision dated June, 17th, 2013, to the Supreme Court for the reasons Judge of Serang District Court in examining and hearing *a quo* case, lacking enough and incomplete provide legal considerations and are not careful in assessing/interpreting facts revealed in the hearing *a quo* case, so that the impression has acted sided/siding to the Respondent of appeal and Co-Respondent of appeal to ignore the fairness;

Against the reasons filed by the Applicant of Appeal (PT. Hutama Karya), the Supreme Court found that the Serang District Court did correct legal considerations. Supreme Court also consider the jurisprudence of Supreme Court Decision No. 03/Arb.Btl/2005 which stated that the provision of article 70 of law No.30/1999 on Arbitration and ADR is not limitedly and imperatively, but it can be added and improved with the reasons out of content of article 70 as long as it is relevant

reason.³⁵ Based on legal considerations, the Supreme Court enact decisions No. 26 B/Pdt.Sus-Arbt/2014 on 28 November 2013, that accepting the appeal of PT. Hutama Karya and strengthen the Serang District Court No. 18/Pdt.G/2013/PN.Srg., dated June 17, 2013 which annul the Arbitration award of BANI No.442/I/ARB-BANI/2012 dated January 16, 2013.

2.2 Analysis of the Inconsistency of Supreme Court Decision No. 26 B/Pdt.Sus-Arbt/2014

Based on the decision of Serang District Court dated June 17th, 2014, the application for annulment of arbitration award of BANI was rejected because the application of annulment didn't meet the provisions of Article 70 of Law No. 30 of 1999. The reasons presented by the Applicant to apply for annulment of the arbitration award is because in the examining and hearing of the arbitration BANI has violated the provision of applicable law, and there is no fairness and propriety in the hearing. On November 28th, 2014, Supreme Court decided to strengthen the Serang District Court that annul the arbitration award of BANI No. 422/I/ARB-BANI/2012. The consideration of the Supreme Court is the jurisprudence of Supreme Court Decision No. 03/Arb.Btl/2005 which stated that the provision of article 70 of law No.30/1999 on Arbitration and ADR is not limitedly and imperatively, but it can be added and improved with the reasons out of content of article 70 as long as it is relevant reason. Therefore, the judges of Supreme Court argued the reasons of annulment of arbitration award are not limited as well as mention in article 70 of Law

³⁵ Supreme Court, Supreme Court decision No. 26 B/Pdt.Sus-Arbt/2014, Jakarta, 2014, P. 36

No. 30 of 1999 on Arbitration and ADR. The Supreme Court Judges annul the arbitration award refers to reason outside Article 70 of Arbitration Law uses Progressive legal theory. Satjipto Raharjo stated in his book, Progressive Law is a part of the process of finding the truth that never stops; it emerges because of dissatisfaction and concern over the performance and quality of the law enforcement in Indonesia at the end 20th century.³⁶

The rigidity of law enforcement led to public disappointment against law enforcer who just focuses on the text in the legislation without wanting to found the justice for society. The law enforcement who adopts positivism is often argued 'require' the judge as a funnel the law (*la bouche de la loi*).³⁷ Satjipto Raharjo encourage the judges must dare to free themselves from the using of rigid pattern, and this way is called the rule breaking.³⁸

Therefore, the author agreed with the Supreme Court decision No. 26 B/Pdt.Sus-Arbt/2014 which annuls the arbitration award with the consideration of Jurisprudence of Supreme Court decision No. 03/Arb.Btl/2005 because one of the sources of law is Jurisprudence.³⁹ This issue becomes the important thing since the arbitration award is final and binding, if there is possibility to annul an arbitration award with the reason out of content of article 70 so there should be rules and limitation of annulment of an arbitration award.

³⁶ Satjipto Raharjo, 2005, "Hukum Progresif: Hukum yang Membebaskan, *Jurnal Hukum Progresif*, Vol.1, Program Doktor Ilmu Hukum UNDIP, p. 3.

³⁷ Suketi, 2015, *Masa Depan Hukum Progresif*, Yogyakarta, Thafa Media, p. 8.

³⁸ *Ibid*, 10.

³⁹ Sudikno Mertokusumo, 2003, *Mengenal Hukum*, Yogyakarta, Liberty, p. 111.

If the Supreme Court decision No. 26 B/Pdt.Sus-Arbt/2014 compared to the Supreme Court decision No. 293 K/Pdt.Sus/2012, it is very noticeable inconsistencies of the Supreme Court in taking a decision. In the one side, the Supreme Court affirmed that an annulment of the arbitration award is only based on the reasons mentioned in Article 70⁴⁰, but in other side the Supreme Court affirmed that there is possibility to annul the arbitration award with reasons beyond Article 70.⁴¹ The legal basis used in the each Supreme Court decision is little different, but both still refer to the Law No. 30 of 1999. In the Supreme Court decision No. 293 K/Pdt.Sus/2012 the consideration of Supreme Court decision was based on article 70 of Law No. 30 of 1999 while the Supreme Court decision No. 26 B/Pdt.Sus-Arbt/2014, the consideration of Supreme Court is based on a general elucidation of the Law No. 30 of 1999 and the jurisprudence of Supreme Court Decision No. 03/Arb.Btl/2015.

Refer to the facts described above, according to the authors there should be additional point of article which provides guidance what extent of using the reason out of content of article 70 of Law No. 30 of 1999 in the annulment of the arbitration award, because based on the facts there is a Supreme Court Decision which Annul an Arbitration award over reasons out of content of article 70 of Law No. 30 of 1999. The regulations are also expected to prevent misinterpretation about the purpose of the content of article 70 of Law No. 30 of 1999.

⁴⁰ Supreme Court Decision No. 293 K/Pdt.Sus-Arbt/2012 (the case between Indonesia Arbitration Agency (BANI) against PT. SMG CONSULTANS & PT. Butir Mutiara Indah) which stated that has been true that an arbitration award may only be annulled if fulfilled the elements referred to in Article 70 of Law No. 30 of 1999 on Arbitration and ADR.

⁴¹ Supreme Court Decision No. 03/Arb.Btl/2005 (the case between Yemen Airways against PT. Comarindo Expres Tama Tour & Travel) which stated that the provision of article 70 of law No.30/1999 on Arbitration and ADR is not limitatively and imperatively, but it can be added and improved with the reasons out of content of article 70 as long as it is relevant reason.

