

The Role of the Indonesian National Arbitration Board (BANI) in the Prevention and Settlement of Business Disputes in Indonesia

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Abstract. The rapid development of business activities in Indonesia can risk business disputes. The Indonesian National Arbitration Board (BANI/ *Badan Arbitrase Nasional Indonesia*), an arbitration institution based on Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, offers business dispute resolution services by Arbitration and Binding Opinion. This study aims to determine the differences between Arbitration and BANI Binding Opinions in preventing and resolving business disputes in Indonesia and the procedures for implementing Arbitration and providing BANI Binding Opinions. The research method used is empirical juridical, which links the legal provisions applicable in society with the reality on the ground, which is focused on analyzing problems to achieve research objectives. The results show that BANI Arbitration aims to resolve the business disputes of the parties that are not in accordance with the agreement, while the Binding Opinion aims to prevent disputes by providing legally binding opinions on the differences of opinion between the parties in the agreement. The implementation procedure is set forth in the BANI Arbitration Rules and Procedures, effective as of July 1, 2021.

Keywords: Arbitration, Binding Opinion, Binding Opinion, BANI.

1 Introduction

Nowadays, more and more types and more complex forms of business cooperation are established; there are undeniable that there are many possibilities for business disputes that can arise from business activities and transactions. Often a business dispute arises from a contract or agreement that is not carried out as agreed. Nevertheless, the agreement is binding on the parties who have agreed, and an agreement has been formed to do the things that have been agreed upon [1][2]. Disputes in the business that have not been resolved can affect the efficiency of development and decrease the company's productivity which can lead to the barrenness of the company's productivity, causing an increase in production costs [3][5].

Generally, a dispute is resolved through a court (litigation), in which case settlement is carried out by adhering to formal procedures as regulated in the Civil Procedure Code. It, of course, makes dispute resolution through the courts formalistic, technical, and expensive. Therefore, as an alternative form of dispute resolution through litigation, the government issued Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (hereinafter referred to as the Arbitration and Alternative Dispute Resolution Law).

Arbitration in Article 1 point 1 of the Arbitration and Alternative Dispute Resolution Law is a way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties, while Alternative Dispute Resolution is regulated in Article 1 No. 10 of Arbitration and Alternative Dispute Resolution Law, are institutions for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgment.

Arbitration is a way of resolving a dispute outside the court which has the most formal procedure with a decision that is final and legally binding [6]. One of the arbitration institutions in Indonesia is the National Arbitration Board/*Badan Arbitrase Nasional Indonesia* (hereinafter abbreviated as BANI).

Dispute resolution through BANI has increased significantly, especially since the promulgation of the Arbitration and Alternative Dispute Resolution Law, as evidenced by the increasing number of cases that BANI has successfully resolved. This increase was seen in the fourth decade since it was first established in 1977, from 215 cases to 728 cases in 2007-2016. These cases cover the construction, leasing, IT & telecommunications, energy or mining sectors, investment, transportation, insurance, agency, banking, and finance [6][7].

As an institution that is the center of arbitration in Indonesia, BANI also provides service facilities to resolve disputes by providing a binding opinion on a legal relationship even though there has not been a dispute [8, 9]. This binding opinion is based on Article 52 of the Arbitration Act and the Alternative Dispute Resolution, which reads: "The parties to an agreement have the right to request a binding opinion from the arbitration institution on certain legal relationships of an agreement". The provision of a binding opinion is the method of dispute resolution that BANI quite widely chooses, wherein the period 2015 to 2017, there were 12 (twelve) applications submitted to BANI [10].

Based on this background, the author raises the title, "The Role of the Indonesian National Arbitration Board (BANI) in the Prevention and Resolution of Business Disputes in Indonesia." The formulation of the problem to be raised is:

1. What is the difference between arbitration and binding opinion at the Indonesian National Arbitration Board (BANI) in the context of preventing and resolving business disputes in Indonesia?
2. What is the procedure for resolving business disputes by arbitration and binding opinion through the Indonesian National Arbitration Board (BANI)?

2 Research Methods

The approach method used is an empirical juridical approach. The juridical approach can be interpreted as a research approach that uses applicable laws and regulations as a reference, while the empirical approach can be seen as an approach that connects law as *das sollen* (law in books) with the law in the real world or as a *das sein* (law in action) [11] [12]. This method focuses on analyzing problems regarding arbitration and binding opinions as well as procedures implemented at BANI to prevent and resolve business disputes.

The research was conducted using a descriptive-analytical type of research, where descriptive-analytical research is research that provides an overview of a prevailing statutory regulation which is then linked to the theory and practice of implementing the existing law in the field.

The data analysis method uses qualitative analysis, where the analysis process is emphasized on analyzing for deductive-inductive conclusions and analysis related to the relationship between the phenomena studied using scientific logic, with interviews obtained from the Indonesian National Arbitration Board along with secondary data analyzed qualitatively to obtain the relationships between the phenomena studied, which were then written descriptively, completely, and systematically.

3 Results and Discussion

3.1 The Difference Between Arbitration and Binding Opinion BANI

BANI is an independent institution established in 1977, as a service provider for arbitration, mediation, and other types of non-litigation/out-of-court dispute resolution. From 2017 to 2020, at least 364 cases have been registered and resolved through arbitration held at BANI. In carrying out the dispute resolution process, BANI adjusts the dispute resolution process according to the needs of business actors who submit their disputes to BANI for resolution (Interview with Eko Dwi Prasetyo as the Executive Board of BANI, Jakarta, 2021).

Based on the 2021 BANI Arbitration Rules, the main condition has been determined whether or not a dispute can be resolved by BANI Arbitration, namely that a written arbitration agreement is required by the disputing parties to take their dispute to BANI Arbitration. Therefore, dispute settlement can be carried out by adhering to the existing BANI Arbitration Rules, taking into account the special provisions that have been stipulated in writing by the parties, as long as these provisions do not conflict with the applicable laws and regulations, do not conflict with the policies of BANI itself, and prioritize a peaceful process with the good faith of the parties to act cooperatively and not confrontationally [13].

BANI has the competence to declare the validity of an arbitration clause in the agreement and state whether or not BANI has the authority to examine the application for arbitration. The agreement of the parties to settle their dispute with BANI Arbitration also means that the parties agree not to take their dispute in the District Court, and agree to implement any decisions that the Arbitration Tribunal has taken.

The parties in the 2021 BANI Arbitration Rules are mentioned as the Petitioner and the Respondent. The 2021 BANI Arbitration Rules provide provisions for the parties to be represented in the trial process. If the parties choose to be represented, then in the application for arbitration submitted by the Petitioner or the respondent's response to the application for arbitration made by the respondent, the name, address, information, and the position of the person/person who represents it, along with the original special power of attorney with stamp duty.

Based on Article 10 of the BANI Arbitration Rules 2021, those who are entitled to be elected as arbitrators are the only people who have been registered in the BANI arbitration list, by fulfilling the requirements to live in Indonesia and in various jurisdictions around the world, and are legal experts/practitioners/non-legal experts (e.g. engineers, architects, and other qualified persons).

If only a single arbitrator is required, the Petitioner, in his application for arbitration may propose an arbitrator to the Chairman of BANI. If the respondent agrees, then with the approval of the Chairman of BANI the person proposed by the Petitioner may become the sole arbitrator. However, if the respondent does not agree, then the Chairman of BANI is obliged to appoint a sole arbitrator immediately.

Then in Article 11 of the 2021 BANI Arbitration Rules, it is also explained that the BANI Chair may determine that a dispute is resolved by the Arbitration Tribunal consisting of three arbitrators, with the following considerations:

1. The parties disagree with the appointment of a sole arbitrator
2. The chairman of BANI considers that the dispute between the parties is complex
3. The scale of the dispute/the value of the disputed claim is large

All processes that occur during the examination of the case are closed. It is regulated by Article 14 paragraph (2) of the 2021 BANI Arbitration Rules. All trials are held closed to the public. With that, all processes that occur in it, such as: the appointment of arbitrators, witness statements, giving decisions, documents used during the trial, reports, or court records, must be kept confidential by the parties involved in the process (Interview with Eko Dwi Prasetyo, 2021).

In accordance with Article 48 of the Arbitration and Alternative Dispute Resolution Law, the BANI Arbitration procedure also determines the time limit for disputes to be resolved in Article 4 paragraph (6) of the 2021 BANI Arbitration Rules, which is 180 days. The length of time required is calculated from establishing the Arbitral Tribunal. Although the time limit for examining the BANI Arbitration case has been set, it is also possible for the Arbitration Tribunal to extend it, if there are special circumstances.

The decision taken by the BANI Arbitration is final and binding on the parties. After the arbitration award is issued, within 30 days of the decision being pronounced, the arbitration award is registered with the District Court by one of the disputing parties so that the decision can be implemented/executed based on the order of the Head of the District Court (Interview with Eko Dwi Prasetyo, 2021). The result of not registering the arbitration award to the District Court is that the arbitration award cannot be implemented under the order of the Head of the District Court.

In contrast to arbitration, a request for a Binding Opinion which is also held at BANI (hereinafter referred to as a Binding Opinion BANI) can be submitted even though there is no dispute between the parties. The alternative offered by BANI has 17 cases from 2017 to 2020. The implementation of BANI's Binding Opinion is based on submitting a request for a binding opinion/opinion from the parties bound in an agreement. The role of BANI here is to provide a binding opinion on issues related to the agreement of the parties (Interview with Eko Dwi Prasetyo, 2021).

Based on the 2021 BANI Arbitration Rules, which also review BANI's Binding opinion, it is stated that BANI may be asked to provide a binding opinion concerning the following matters:

1. The interpretation of the provisions in the agreement according to the parties is unclear.
2. Additions or changes to provisions in the agreement as a form of adjustment in the event of development, new circumstances, and so on.

By giving a binding opinion by BANI, the parties will be bound by the amended agreement as in the original agreement.

BANI's binding opinion has certain characteristics, including (Interview with Eko Dwi Prasetyo, 2021):

1. Creating legal certainty and interpretation
2. Preventing disputes
3. Preventing default

4. Saving on dispute fees
5. Controllable circumstances of the dispute and outcome
6. Maintaining good relations between the parties

Apart from the Parties listed in the relevant agreement, the parties involved in the binding opinion process at BANI are also the Formulating Team. The number of people who are members of the Formulating Team is adjusted to the complexity of the existing problems, but generally, the number of the Formulating Team is 3 people. The appointment of the Formulating Team is entirely the prerogative of the BANI Governing Council itself by taking into account the expertise of each member, and as much as possible in the team, there is at least a legal expert and a technical expert on issues.

The process of examining requests for binding opinions is confidential and takes place in a closed manner. Accordingly, all those involved in the process must maintain confidentiality when the examination process has not been or is or is in progress, including any issues raised during the examination process.

Examining a request for a binding opinion will occur no later than 30 days after the Examining Team is formed. A binding opinion can be issued within 21 working days after the parties have paid the specified fee (Interview with Eko Dwi Prasetyo, 2021).

With respect to binding opinions that have been issued, what is decided in them is binding only on the parties submitting the request for binding opinions. Due to its final and binding nature, the parties should carry out what has been decided in good faith, and no objections or attempts can be made against it. Binding Opinion itself has been widely used as an effort to prevent disputes [14].

3.2 Procedure for Arbitration and Binding Opinion BANI

BANI, which acts autonomously and independently, has determined its own rules and procedures for implementing dispute resolution at BANI. Likewise, in this discussion, the provisions regarding the rules/regulations and procedures for arbitration at BANI, which will be discussed at this point, are the 2021 BANI Arbitration Rules.

At the beginning of the rules/rules and procedures, it is emphasized that the provisions contained in these rules can only apply to arbitration conducted by BANI, with the appointment in the agreement or written business transaction agreement stating that the dispute will be resolved through BANI arbitration. The agreement is also the basis for conducting arbitration at BANI and an agreement not to process existing disputes to the District Court.

As for sorting the stages of the process of arbitration at BANI, it can be categorized into [15]:

1. Pre-trial stage
This stage is technical in nature. However, prior to the commencement of the trial, there are administrative matters that must be fulfilled. This stage begins with the submission of a letter of application for arbitration for case registration to the BANI Secretariat by the Petitioning Party which in Article 6 paragraph (2) of the 2021 BANI Arbitration Rules must contain:
 - a. Names and addresses of the Parties
 - b. Information on the facts and legal basis for the application for arbitration
 - c. Problem details
 - d. Claims and/or value of claims requested

In the event that there are two or more applications for arbitration, at the request of a party, based on the rules and procedures BANI can make the applications for arbitration into one if there is an agreement between the parties and the dispute arises from the same legal relationship, or the application for arbitration is filed based on several agreements with the same parties who also choose to settle their dispute at BANI, or the application is submitted based on several agreements in which one of the parties is the same and chooses to use BANI dispute resolution.

2. Trial stage

This stage is in the form of holding a trial by the Arbitration Council (whose process is carried out based on the BANI Rules and Procedures and the provisions in the Arbitration and Alternative Dispute Resolution Law) until the decision is read out.

The trial process in the BANI Arbitration is also sought for reconciliation between the parties by the Arbitration Tribunal. This reconciliation effort was carried out before and during the trial period and did not affect the predetermined trial time limit of 180 days. Such efforts can be made by the parties themselves, with the assistance of a mediator/conciliator, an independent third party, or with the assistance of the Arbitration Tribunal according to the agreement of the parties. If peace is reached, the Arbitration Tribunal will issue an arbitral award which contains a written peace agreement that is legally binding and binding on both parties and shall apply the same as the decision of the Arbitral Tribunal at the end of the arbitration proceedings. However, if peace fails to be reached, the examination process will continue as usual. The trial will still be conducted in a closed, fair place determined by BANI and agreed by the parties as long as the presence of the parties in the process is fulfilled.

The proceedings must take into account the provisions of the agreement, as well as the business practices of the parties. Likewise, the choice of law regulates the disputed material in the agreement that causes the dispute. If the governing law has not been stipulated in the agreement, then the parties can agree freely to choose the applicable law. In this case, the Arbitration Tribunal also has the right to applicable legal provisions deemed necessary according to the circumstances and problems encountered. In addition, in the 2021 BANI Arbitration Rules, it is also stated that with the agreement of the parties, the Arbitration Tribunal may apply the authority of an amiable compositeur, namely the authority to give decisions based on proper justice and/or *decide ex aequo et bono*, as regulated in Article 56 paragraph (1) Arbitration and Alternative Dispute Resolution Law which reads [16], "The arbitrator or the arbitral tribunal makes decisions based on legal provisions, or based on justice and propriety."

Referring to the existing BANI Arbitration Rules, the Arbitral Tribunal has full rights to determine procedures and make binding decisions on the parties. The Arbitration Tribunal may also make Terms of Reference with the parties' consent. All procedures, stipulations, and minutes in the trial are signed by the Arbitral Tribunal and become examination documents.

The absence of the Petitioner in the first session without a valid reason will result in the cancellation of the arbitration application. It will be determined in the determination of the tribunal. It is different with the respondent; the Arbitration Tribunal will summon the respondent with a proper summons for the second time.

However, if the respondent is not present again, the arbitration tribunal may make a decision based on the documents and evidence submitted by the Petitioner.

The Petitioner and the Respondent are obligated to explain their respective positions regarding agreements and disputes, submit evidence to strengthen their position, and prove the facts that form the basis of the claim/response. If deemed necessary, the Arbitral Tribunal may also ask the parties to explain, submit other documents, and/or provide a summary of all documents/evidence that has been submitted to help support the claim/response to the claim. Then the Arbitral Tribunal will determine whether the evidence is admissible, relevant to the issue, and has the strength of evidence.

Examination of disputes through arbitration must be completed within a maximum of 180 (one hundred and eighty) days from the arbitrator's election or the arbitral tribunal's formation. However, the period can be extended if the dispute is complex. Within 30 days from the trial's closing, the Arbitral Tribunal is obliged to read out the final decision unless the Arbitration Tribunal needs to extend the period. Any decision taken by the Arbitral Tribunal shall be determined by a majority of the decisions of the Arbitrators. If in making a decision, there is a difference of opinion from the arbitrator in certain parts, then the difference of opinion must also be included in the decision.

3. Post-trial stage

This stage is an administrative stage after the trial. Decisions must be made in writing and contain the considerations that underlie the formation of the decision and adhere to legal provisions or are based on justice and propriety. The arbitrators then sign the award along with the date and place of issuance of the award.

The decision that the Arbitrators have signed shall be submitted to the parties within 14 days, with 2 copies for BANI. In addition, within 14 days from the date of receipt of the award, the Parties may submit a request to correct administrative errors related to typing and/or arithmetic errors.

One of the copies of the decision will then be registered by BANI with the relevant District Court. Although the nature of the BANI Arbitration examination is confidential, this secrecy does not prevent the registration of the decision to the District Court for its execution. The decision is also final and binding on the parties. In this case, the parties must immediately implement the decision.

In the initial procedure for submitting a binding opinion to BANI, it is only required to submit an application from the parties to the BANI Management Board in which it requests that BANI issue a binding opinion regarding the proposed difference of opinion. In addition, the application submitted must at least contain (Interview with Eko Dwi Prasetyo, 2021):

- a. Identity of the parties
- b. Chronology of problems
- c. The opinion of each party
- d. What was asked

The application is accompanied by the signatures of the parties wishing to submit and the attached agreement, whose interpretation is to be requested, along with the relevant supporting documents.

Similar to the BANI Arbitration, the request for a binding opinion must also be examined. In this case, the BANI Management Board will state whether the issue for

which the application is requested is still within the scope of BANI's Binding opinion or not. If it is still included, then BANI will notify the parties submitting the application that BANI can issue a binding opinion and collect fees to be paid before the Formulating Team is formed.

After the BANI Management Board has formed the Formulating Team, drafting a binding opinion can begin. The process is only based on the documents submitted by the parties, and it is possible to hold a direct meeting between the parties and the Formulating Team.

The preparation of a binding opinion has a maximum period of 30 days. Regarding the binding opinion that the Formulating Team has issued, no specific reading is carried out as in the case of arbitration. Instead, the binding opinion that has been formed is sent directly to the parties. Then the parties are allowed to make administrative corrections that do not change the contents of the BANI Binding opinion.

4 Conclusion

Arbitration is a method of resolving business disputes, which can be kept confidential, with a maximum length of examination process of 180 days with a decision that is final and binding and can be requested for execution to the District Court, while a binding opinion is a way to prevent disputes from arising, by asking an opinion that is binding, to an institution such as BANI, on the existence of a difference of opinion between the parties in an agreement, without having to have a dispute first. The examination process is closed so that confidentiality is guaranteed and has a period of 30 days. Any violation of a binding opinion that is not implemented is considered a form of default or breach of contract.

According to the 2021 BANI Arbitration Rules, the BANI Arbitration Rules can be divided into three stages: the pre-trial stage, the trial stage, and the post-trial stage. The pre-trial stage includes the administrative stages in the form of applying, processing supporting documents, paying arbitration fees, appointing an arbitrator, to the respondent's answers to the application submitted by the applicant. The trial stage is the stage of starting the trial, which begins with the pursuit of peace, summoning the parties, to proof by the parties. The last stage is the post-trial stage, which is the administrative stage after the trial, the formation of the decision, and the registration of the decision to the District Court. Meanwhile, the BANI Binding opinion procedure is simpler than the BANI Arbitration and is adjusted as needed through the provisions of the BANI Management Board. The procedure begins with the submission of an application from the parties to the BANI Management Board, which requires the issuance of a binding opinion, the formation of a Formulating Team, the preparation of a binding opinion by the Formulating Team, sending a binding opinion to the parties for correction, and deposit of binding opinions to the District Court.

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