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Legal Reconstruction of the Implementation of Arbitration on Consumer Disputes Based on Justice Value

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Abstract

The purpose of this study is to examine and analyze the weaknesses of the regulations for the execution of arbitration in adjudicating consumer disputes, and reconstructing regulations for the execution of arbitration in adjudicating consumer disputes based on justice value the research are done using a normative-juridical research method which relies on literature review and finding obtained in the field. Based on the findings of this research, several facts and inputs were found in the execution of consumer dispute resolution arbitration where there are still several weaknesses, namely Weaknesses in Legal Substance, which lies in the principles, processes and decisions of consumer dispute resolution through arbitration that is not in tune with Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, weaknesses in the Legal Structure, namely problems in BPSK and Weaknesses in the Community/Consumers, namely the level of consumer awareness of their rights is still low. Based on the results of the research, it is recommended to reconstruct the provisions contained in Perma No.1 of 2006 concerning Procedures for Filing Objections to the Decision of the Consumer Dispute Settlement Agency, the amended provisions are Article 6 paragraph (2) and paragraph (5) as well as in Article 54 paragraph (3) Law no. 8 of 1999 concerning Consumer Protection.

Keywords: Legal Reconstruction, Arbitration, Consumer Disputes, Justice Value.

INTRODUCTION

Dispute resolution through litigation ideally provides more legal certainty for the parties, especially those who won because the judge's decision which has legal force remains binding as long as there are no other legal remedies and must be carried out by the parties. However, in reality, the opposite is true as namely, the consumer/plaintiff (the party who wins) does not get certainty about their rights as regulated in Article 4 of the UUPK.

The right to receive compensation cannot be realized if the decision is not implemented voluntarily and then a request for execution must be submitted. The execution process must be preceded by a request for execution accompanied by data or information about the object of execution by the winning party (the consumer) to the Chief Justice. So that if the winning party (consumer) is unable to find the property of the losing party, the consumer only gets a decision without any implementation of the decision (Diakonova, 2021).

This problem injures the sense of justice for consumers, where the essence of the law is made to create justice and provide legal certainty for the community (Widodo, 2018). This is also what causes the community to then prefer non-court dispute resolution such as arbitration.

With respect to arbitration, a request for execution can be made against a BPSK decision or an objection decision, but the UUPK does not accommodate its implementation, the implementation of the BPSK decision still depends on the District Court which as one of the institutions in judicial power and has legitimacy in forcing the implementation of the decision. The procedure for carrying out the decision is regulated in Article 195 HIR, the UUPK in this case explains in Article 57 that the execution can be requested for an execution determination to the District Court where the consumer is. This provision is also supported by Kepmenridag No.350/MPP/12/2001 that the party submitting execution is BPSK.

The obstacle in the application for execution of the BPSK decision is because in the BPSK decision there is no inclusion of the opening statement or commonly known as "*irah-irah*", in contrast to the BPSK decision which includes *irah-irah*, in Article 54 paragraph (1) point (a) of the Arbitration Law, it is stated that an arbitration award must contain *irah-irah*. "For the sake of Justice Based on God Almighty" so that if there is no inclusion of these *irah-irah* then the decision will be null and void by law.

One example that the absence of *irah-irah* can hinder the execution of a BPSK decision is the Bandung City BPSK which submitted a fiat execution to the BPSK decision numbered 66/Pts-BPSK/VII/2005 to the Central Jakarta District Court. The Central Jakarta District Court stated that the BPSK decision could not be executed because it did not include *irah-irah*, which in the BPSK decision was not known *irah-irah*. Central Jakarta District Court through letter number W7.Db.Ht.04.10.3453.2005, the point of which is to state that BPSK's decision cannot be processed because it does not meet the requirements, namely BPSK's decision must contain references "*Demi Keadilan Berdasarkan Tuhan yang Maha Kuasa (For the sake of Justice Based on God Almighty)*" in accordance with Arbitration Law Article 54 paragraph (1).

The UUPK and Kepmenridag No. 350/MPP/12/2001 do not regulate the inclusion of *irah-irah* in BPSK decisions. This is because structurally BPSK is under the Ministry of Trade while HiR or RBg and the Law on Judicial Power are for the judiciary. However, this should not be a problem because BPSK is one of the quasi-judicial institutions to resolve consumer disputes through arbitration so the decision must include "For Justice Based on the One Godhead" because it refers to the Arbitration Law.

Regarding the execution of BPSK decisions, based on Article 57 UUPK jo. SK Kepmenridag No.350/MPP/12/2001, the execution can be carried out because it is a special execution and is in line with the principle of *lex specialis derogat legi genenalis* (A more specialized law excludes the more general law), although the execution must be determined by the district court. The question is the contradiction between Article 57 UUPK jo. Article 42 Decree of the Minister of Industry and Trade No. 350/MPP/Kep/12/2001 with the provisions in civil procedural law, namely the obligation of BPSK in submitting an application for execution to the court against the resulting decision, in civil procedural law, the submission of an application for execution is carried out by the winning party while BPSK, in this case, is an institution resolving consumer disputes. In this case, BPSK as a neutral and impartial institution is doubtful.

Based on the above background, the authors are interested in conducting research titled "*Legal Reconstruction Of The Implementation Of Arbitration On Consumer Disputes Based On Justice Value*" where the authors raise 2 (two) main issues as follows:

1. What are the weaknesses of The Implementation Of Arbitration On Consumer Disputes currently?
2. How to reconstruct The Implementation Of Arbitration On Consumer Disputes Based On Justice Value?

METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach).* The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010):

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses of the Implementation of Arbitration on Consumer Disputes Currently

Arbitration, according to Article 1 number (1) of Law Number 30 of 1999 concerning arbitration and alternative dispute resolution stated that arbitration is a

way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute.

According to Article 1 point (11) Kepmenperindag Number 350 of 2001 concerning the Implementation of Duties and Authorities of the Consumer Dispute Settlement Agency, it is stated that arbitration is a process of resolving consumer disputes outside the court in which the parties to the dispute submit fully the dispute resolution to BPSK.

Based on the formulation of Article 1 point (1) of Law Number 30 of 1999 and Article 1 number (11) of the Minister of Industry and Trade Decree Number 350 of 2001, arbitration dispute resolution is carried out on the basis of the choice and approval of the disputing parties.

In general, arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute in accordance with Article 1 number (1) of Law Number 30 of 1999. However, some business actors do not want to agree to settle their disputes with consumers by means of arbitration conducted by BPSK of Bandung City.

Business actors certainly do not want their disputes to be resolved by the BPSK assembly, because business actors want to resolve the dispute in the internal institutions of business actors and even allow consumers to settle in a general court. So that business actors declare that they do not choose and do not agree with arbitration dispute resolution. This is an obstacle in resolving consumer disputes and tends to harm consumers. Obtaining the approval of the parties will not materialize, because on the one hand the business actor is unwilling and on the other hand the consumer wants the dispute to be resolved by BPSK by arbitration (Susanto, 2011).

If this happens, then legal certainty as the principle of consumer protection will not be achieved and consumers will continue to suffer losses in demanding their rights and not receiving any clear legal protection. Therefore, the BPSK assembly must interpret Article 1 number (11) Kepmenperindag Number 350 of 2001 concerning "*the parties fully submit dispute resolution to BPSK*", and the principle of legal certainty in consumer protection.

Then, in the implementation of the arbitration itself, the obstacles faced are as follows (Maryanto, 2021):

a) The assembly that resolves the dispute, where consumer disputes are resolved by the BPSK assembly which has been determined by the chairman of the BPSK. Members of the assembly determined from the elements of consumers, business actors and elements of the government do not all have knowledge in the field of law. So in the examination process, there is a weakness in the legal basis for the dispute.
b) The disputing parties, where the presence of the disputing parties is very necessary to obtain information from both parties. Sometimes business actors are not present to fulfill BPSK's summons. The absence of business actors will complicate the settlement process. Although the tribunal may take action if one of the parties is absent after being summoned twice, the presence of both parties is still expected.
c) Settlement time for Settlement, where the arbitration disputes have been determined, the settlement time must be no later than 21 working days after the claim is received. However, in practice, it is difficult to implement. Some of the factors that contributed to this were the parties who agreed to postpone the trial or the assembly that was unable to attend the trial. Regarding the legal consequences, if the dispute resolution exceeds 21 days, no sanctions will be given. This means that the provisions are open.
d) Proof, As the means of an important part of consumer dispute resolution is proof. To avoid the burden of proof, then in applying the burden of proof in consumer disputes is borne by the business actor. The burden and responsibility of the business actor are to prove that there is no element of error, not to prove no there is an element of loss to consumers. Even though the proof is borne by the business actor, the consumer is also asked to prove that he has suffered a loss. The burden of proof to consumers is difficult to obtain because in general consumers do not know and/or do not have complete evidence of utilizing goods and/or services purchased from business actors.

The results of the settlement of consumer disputes by means of arbitration are made in the form of an assembly decision signed by the Chairman and members of the Assembly. BPSK's decision can be in the form of reconciliation where the lawsuit is either rejected or granted. If the lawsuit is granted, then in the decision is stipulated the obligations that must be carried out by the business actor in the form of fulfilling compensation and/or administrative sanctions in the form of determining compensation for a maximum of Rp. 200,000,000, - (two hundred million rupiah).

Barriers that hinder the BPSK decision are related to the execution of the decision. The Law on Consumer Protection and Kepmenperindag No. 350/2001 does not explicitly and in detail explain the request for execution of the BPSK decision. The implementation of the decision is submitted and becomes the full authority of the district court.

If the business actor does not object to the BPSK decision, then the decision has permanent legal force, and the decision still needs to request fiat execution to the district court at the consumer's residence. BPSK does not have the authority to carry out its decisions as is the authority of a judicial body.

This means that a request for execution can be made either against a BPSK decision or an objection decision, but the UUPK does not provide more detailed regulations regarding this matter. The implementation of the arbitral award is submitted to and becomes the full authority of the District Court which carries out the functions of judicial power, and has legitimacy as a coercive institution. The procedure for implementing the judge's decision is regulated in Article 195 to Article 208 of the HIR. Provisions regarding the procedure for the application for execution are not regulated in detail and in clarity in the UUPK. Article 57 of the UUPK explains that the decision of the panel of judges is requested for its execution to the District Court in the place where the consumer is harmed. Then the provisions of Article 57 of the UUPK are clarified by Article 42 of the Decree of the Minister of Industry and Trade No. 350/MPP/12/2001 that the party proposing the execution is BPSK.

In the BPSK arbitration award, there are obstacles in the implementation of the request for execution due to the absence of inclusion of *irah-irah* in the BPSK arbitration award. This is different from the content of an arbitral award which in its decision contains *irah-irah*. Article 54 Paragraph (1) point a of Law no. 30 of 1999 concerning Arbitration and APS, states that an arbitration award must contain the head of the award or *irah-irah* "For Justice Based on the Almighty God". The provisions of Article 57 of the UUPK are contrary to Article 4 Paragraph (1) of Law no. 14 of 1970 which has been amended by Law no. 4 of 2004 concerning Judicial Power, that a decision must contain instructions "For Justice Based on the One Almighty God". The inclusion of these *irah-irah* gives executive power to the decision so that the abolition of the *irah-irah*'s resulted in the decision being null and void.

As an example of a case, the Bandung City BPSK once filed a fiat execution of the BPSK decision Number 66/Pts-BPSK/VII/2005 to the Central Jakarta District Court, but the Central Jakarta District Court stated that the BPSK decision could not be executed because it did not have a certificate, whereas, in the BPSK decision, there is no known *irah-irah*. The Central Jakarta District Court through Letter Number W7.Db.Ht.04.10.3453.2005 gave a response to the request for the determination of the execution of the BPSK decision in the City of Bandung which essentially stated that the application for the execution of the BPSK decision could not be processed because it did not meet several requirements, namely: No. 30 of 1999 concerning Arbitration and APS in Article 54 paragraph (1) that the Dispute Settlement Arbitration Award must contain the head of the decision which reads "For Justice Based On The Almighty God", and refers to the provision, as regulated in Chapter V on the implementation of the national arbitral award section First, Article 59, namely: (1) Within a maximum period of 30 (thirty) days from the date the decision is pronounced, the original sheet or an authentic copy of the Arbitration Award is submitted and registered by the arbitrator or his proxy to the District Court; (2) The submission and registration as referred to in paragraph (1) is carried out by recording and signing at the end or at the edge of the decision by the clerk of the district court and the arbitrator or his proxies who submit, and the record is a registration deed; (3) The arbitrator or his proxies must submit the decision and the original sheet of the appointment of the arbitrator or an authentic copy thereof to the Registrar of the District Court.

The UUPK law and the Decree of the Minister of Industry and Trade Number 350/MPP/Kep/12/2001 which regulates the implementation of the duties and authorities of BPSK institutions, do not regulate the obligation to include *irah-irah* in BPSK decisions. This is due to the position of BPSK which is structurally under the Ministry of Trade, while HIR/RBg and the Law on Judicial Power are regulations that apply to judicial bodies. The author argues, that the problem is not with BPSK under the Ministry of Trade or which Ministry, but that BPSK carries out the handling and settlement of consumer disputes by arbitration so that it contains the consequence that the arbitration award must also include the reference or head of the decision "*For the sake of Justice Based on the Almighty God*" as stipulated in Law no. 30 of 1999 concerning Arbitration and APS as special provisions governing Arbitration in Indonesia (Harjono, 2021). Article 48 of the UUPK law states that "*settlement of consumer disputes through the courts refers to the provisions concerning general courts that apply with due regard to the provisions in Article 45 of the PK Law*." While Article 45 of the UUPK in general states that the settlement of consumer disputes can be reached through the courts or out of court. This out-of-court settlement is carried out by conciliation, mediation, and arbitration. Based on this approach, the application for the execution of the BPSK decision is based on the provisions of Article 57 UUPK jo. Article 42 SK Menperindag Number 350/ MPP/ Kep/ 12/2001 can be implemented because it is a specificity of the execution in general according to the provisions of civil procedural law in accordance with the legal principle of *lex specialis derogat legi generalis* which means that special provisions override general provisions.

It becomes a question related to the conflict between Article 57 UUPK jo. Article 42 Decree of the Minister of Industry and Trade No. 350/MPP/Kep/12/2001 with the provisions of civil

procedural law in general regarding the BPSK institution which must submit an application for execution to the court for the decision it produces, not the party who wins. BPSK is an institution that resolves consumer disputes, where it has an obligation to decide disputes between consumers and business actors in determining their losses, therefore, BPSK's position must be neutral and impartial so as to provide a balance between the interests of consumers and business actors/producers. Although the main purpose of establishing BPSK is to provide legal protection to consumers, this does not mean that in an effort to implement compensation, BPSK must submit a request for execution to the court. Because compensation is given for the benefit of consumers, those who can apply for the execution of BPSK decisions are only consumers themselves, not BPSK institutions.

If BPSK is subject to the obligation to file for execution as stipulated in Article 57 UUPK jo. Article 42 Decree of the Minister of Industry and Trade No. 350/MPP/Kep/12/2001, then the position of BPSK as a neutral and impartial body is in doubt. In addition, if BPSK submits a request for execution, it will increase the workload of BPSK itself. For this reason, with the provisions of Article 7 Paragraph (1) PERMA No. 1 of 2006 which affirms that "*the court issues an execution decision at the request of the litigants (consumers) on the BPSK decision that is not objected to*", can encourage better BPSK performance. According to the author, if it is related to legal principles, then the provisions of Article 7 paragraph (1) PERMA No. 1 of 2006 actually cannot be used as a legal basis or guide in explaining which party has the right to file for execution, this is because the provisions of Article 7 paragraph (1) PERMA No. 1 of 2006 contradicts Article 57 jo. Article 42 of the Decree of the Minister of Industry and Trade No. 350/MPP/Kep/12/2001. According to the applicable legal principle, namely lex superior legi imperior or higher provisions overpower lower provisions, then PERMA No. 1 of 2006 cannot be used as a benchmark or basis because it is defeated by a higher regulation, namely Article 57 of the UUPK. The execution of BPSK arbitration decisions should take into account the provisions of Law no. 30 of 1999 and the applicable Civil Procedure Code. The selection of arbitration in dispute resolution through BPSK, makes BPSK an arbitration institution and for that, it must pay attention to the provisions of national arbitration. The execution procedure carried out after the determination of execution is given concerns the provisions in HIR/RBg as the parent regulation in the Civil Procedure Law because disputes between consumers and business actors which are resolved through arbitration are also the realm of civil law (Widodo, 2019).

2. Reconstruction the Implementation of Arbitration on Consumer Disputes Based On Justice Value

Efforts to resolve consumer disputes through arbitration by BPSK provided by the UUPK have not accommodated the fulfillment of consumer rights because BPSK is a relatively new institution so the impact on the regulation in the procedural law is still chaotic or ambivalent, both UUPK, Arbitration Law, Decree of the Minister of Industry and Trade No. 350/MPP/Kep/12/2001, this means that it cannot be used as a reference in resolving consumer disputes comprehensively, because it causes multiple interpretations. then BPSK has not reflected the dispute resolution that is simple, fast, easy, and low cost because there is a contradiction between the court's attitude and the BPSK decision which is a final and binding decision. (Purwoko, 2020)

Regarding the power of BPSK's decision, apart from not having executive power due to the absence of transfers, it also requires a determination to execute its decision, related to objections and cancellations that can be made to arbitration decisions by BPSK giving the impression that BPSK's decision is not final and binding, so it appears that the BPSK decision is not considered a decision that has legal force, it can be used for business actors to ignore the decisions issued by BPSK (Jarnawansyah, 2022).

Therefore, the author will carry out an idea in the form of a reconstruction of Regulation No.1 of 2006 concerning Procedures for Filing Objections to the Decision of the Consumer Dispute Settlement Body, namely Article 6 paragraph (2) of Regulation No.1 of 2006 which reads: "*An examination of objections is carried out only on the basis of BPSK decisions and case files*".

The article is the same as the rule of appeal in ordinary civil cases which in fact only requires a case file, but in reality, the article is difficult to apply because Article 6 Paragraph (3) of Perma No.1 of 2006 explains that: "*Objection to the BPSK arbitration decision can be submitted if it fulfills the requirements for the cancellation of the arbitral award as regulated in Article 70 of Law Number 30 of 1999 concerning arbitration and alternative dispute resolution, namely:*

a) The letter or document submitted in the examination, after the decision is rendered, is admitted to be false or declared false
b) After the BPSK arbitration award is taken, it is found that decisive documents are hidden by the opposing party; or
c) *The decision is taken from the results of deception by one of the parties in the examination of the dispute".*

Article 6 paragraph (2) of Perma No.1 of 2006 should be changed to: "*The judge conducts an objection examination with a material and formal test only on the basis of the BPSK decision and the case file after it has been carried out*".

In terms of proving whether or not the elements in Article 6 paragraph (3) of Perma No.1 of 2006, it must first go through the proof stage, this, of course, requires a material review stage of the case, which should be the judge at the appeal/objection stage the judge also conducted a formal test.

Then, the next legal reconstruction is Article 6 paragraph (5) of Perma No.1 of 2006 which states that: "*In the event that an objection is filed on the basis of other reasons other than the provisions as referred to in paragraph (3), the panel of judges can adjudicate the consumer dispute themselves.* "

The article sounds as if annulling paragraph (3) which contains elements of canceling the BPSK decision. The existence of this paragraph (5) can provide an interpretation that the BPSK decision that is submitted to the District Court has other reasons outside of paragraph (3), so that the panel of judges can try their own consumer dispute cases related to using civil procedural law, and the objection is registered using a number which is different from the BPSK decision number with the consequence that BPSK can be involved as a defendant or a co-defendant.

Then, in Article 6 paragraph (5) of Perma No.1 of 2006 must be changed to: "*In the event that an objection is submitted on the basis of other reasons other than the provisions as referred to in paragraph (3), then the objection is rejected/cancelled by law*."

In addition, there is also a need for a reconstruction of the regulations in Law no. 8 of 1999 concerning Consumer Protection in conjunction with the Decree of the Minister of Industry and Trade of the Republic of Indonesia Number: 350/MPP/Kep/12/2001 concerning the Implementation of Duties and Authorities of the Consumer Dispute Settlement Agency, Article 57 of Law no. 8 of 1999 which reads: "*The decision of the assembly as referred to in Article 54 paragraph (3) is requested for a determination of its execution to the District Court at the place of the consumer who is harmed*."

Applications for execution can be made against BPSK decisions or objection decisions, but the UUPK does not accommodate its implementation, the implementation of BPSK decisions still depends on the District Court which is one of the institutions in judicial power and has legitimacy in forcing the implementation of a decision. The procedure for carrying out the decision is regulated in Article 195 HIR, the UUPK in this case are explained in Article 57 that the execution can be requested for an execution determination to the District Court where the consumer is. This provision is also supported by Kepmenridag No.350/MPP/12/2001 that the party submitting execution is BPSK. Constraints in the application for execution of the BPSK decision are caused because in the BPSK decision there is no inclusion of *irah-irah*, therefore Article 57 of Law no. 8 of 1999 must contain *irah-irah*: "For Justice Based on the Almighty God" so that if there is no inclusion of this *irah-irah*, the decision will be null and void by law.

It should be in Article 57 of Law no. 8 of 1999 was changed to: "*The decision of the assembly as referred to in Article 54 paragraph (3) contains the head of the decision which reads "For Justice Based On The Almighty God, and the decision on execution can be requested to the District Court at the place of the consumer who is harmed*."

CONCLUSION

Based on the results of the research, the following conclusions can be drawn:

1. The Weaknesses in the regulation of the Execution of Arbitration in adjudicating consumer disputes can be seen in Legal Substance, which lies in the principles, processes, and decisions of consumer dispute resolution through Arbitration which are not in tune with Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, weaknesses in the Legal Structure, namely Problems in BPSK and Weaknesses in Society/Consumers, namely the level of consumer awareness of their rights which is still low, besides that the position between business actors and consumers is not balanced where consumers are in a weak position.
2. It is necessary to reconstruct the regulation on the execution of the implementation of arbitration in Perma No.1 of 2006 concerning Procedures for Filing Objections to the Decisions of the Consumer Dispute Settlement Body, the amended provision is Article 6 paragraph (2) so that the provisions become Article 6 paragraph (2) "*Judges conduct objection examinations with a material and formal test only on the basis of the BPSK decision and the case file after it has been carried out*", paragraph (5) "*In the event that an objection is filed on the basis of other reasons other than the provisions as referred to in paragraph (3), the objection is rejected/null by law*". Then the provisions that need to be amended further are Article 57 of Law no. 8 of 1999 so that it becomes "*The decision of the assembly as referred to in Article 54 paragraph (3) contains the head of the decision which reads "For Justice Based On The Almighty God, and an order for its execution may be requested to the District Court at the location of the aggrieved consumer.*"

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