

## Legality of Online Arbitration Decisions in Indonesia Based on the Theory of Legal Certainty



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**ABSTRACT:** This thesis research was carried out due to the development of information and communication technology which has an impact on trading activities. The impact of these developments is currently the existence of trade conducted online, which results in the emergence of the use of digital contracts as a form of agreement which often causes disputes and in business prefers online dispute resolution, especially online arbitration. However, in Indonesia the legal basis for online arbitration has not specifically regulated online arbitration awards. This research was conducted with the aim of knowing and studying the legality of online arbitral awards in Indonesia based on the theory of legal certainty and also the relevance of Law Number 30 of 1999 about Arbitration and Alternative Dispute Resolution to online arbitration, especially regarding online arbitration awards in Indonesia. This research is a normative research with a conceptual approach and statutory approach. The data source is in the form of secondary data consisting of primary legal materials and secondary legal materials, which are analyzed using legal analysis methods. Drawing conclusions using a deductive thinking process. The theory of legal certainty is used as an analytical knife in reviewing research results. The results of the study show that online arbitral awards when associated with Gustav Radbruch's theory of legal certainty still occur in a dilemmatic choice and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution has not yet accommodated arrangements regarding online arbitration in Indonesia, especially regarding online arbitration awards, this causes Even though the decision has legality, if there is no law that regulates it for certain, then the aspect of legal certainty does not necessarily exist.

**KEYWORDS:** Online Arbitration, Online Arbitration Award, Legal Certainty Theory.

### A. INTRODUCTION

Trade activities are the main driving force behind national economic development, providing support in various aspects such as production, job creation, export and foreign exchange, income distribution, and strengthening the competitiveness of products for the national interest, as stated in the general explanation of Law Number 7 of 2014 concerning Trade. Trade activities are not static but dynamic. Their implementation undergoes development and changes over time. The passage of time brings about developments, one of which is technological advancements that impact human life, especially in the field of economy. The utilization of technology has brought rapid economic growth, particularly in the business sector, as various information can be presented and obtained easily and sophisticatedly, and can be done through long-distance communication without the need for face-to-face meetings, simply by using telecommunications technology connected to the internet (Suparni 2009 :1-3). The presence of internet technology enables transactions to be conducted online, such as the emergence of E-commerce or electronic commerce. Ecommerce is a modern business model that utilizes technology to make transactions non-face (without the physical presence of business operators) and non-sign (not using original signatures). Additionally, this business conducts data interchange via the internet between buyers and sellers (Suparni 2009: 28). According to APJII data in 2022, the number of internet users in Indonesia reached 210 million people (CNBC Indonesia, 2022), and the local e-commerce platform, Tokopedia, recorded 157 million visitors in the first quarter of 2022 (Iprice.co.id, 2022). The development of e-commerce has also led to changes in contract usage, specifically the emergence of digital contracts, which have the potential to give rise to conflicts/disputes that need to be resolved (Zein, 2009:82). The resolution of such disputes can be pursued through two avenues: litigation and non-litigation. Many business entities prefer resolving disputes through non-litigation channels or alternative dispute resolution methods, one of which is arbitration

The advancement of technology has also resulted in changes in the implementation of arbitration, shifting towards the online realm, commonly referred to as online arbitration. Online arbitration is conducted without direct physical meetings or through video conference media, and evidence is presented in the form of digital documents (paperless). At the national level, online arbitration is not specifically regulated by law but is still referred to under Law No. 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, some of whose provisions are not relevant when applied to online arbitration, particularly regarding online arbitration

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decisions. Referring to Gustav Radbruch's theory, which discusses legal certainty, he argues that there are four criteria for legal certainty, one of which is that the law must be positive, meaning it is declared by law itself (Rhiti H, 2023:150). This raises legal issues regarding the legality of online arbitration decisions in Indonesia, considering that legal certainty is crucial, especially for seekers of justice and parties involved in a dispute. Based on these issues, this journal article discusses the legality of online arbitration decisions in Indonesia based on the theory of legal certainty.

Based on the description above, the problem formulation in this study is as follows:

What is the legality of online arbitration decisions based on the theory of legal certainty, Law Number 30 of 1999, and the 1958 New York Convention? How relevant is Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration in the current practice of online arbitration?

### B. MATERIAL AND METHODS

The type of legal research used in this journal article is normative legal research. Normative legal research is conducted with a focus on the examined issue that has a normative legal nature (Hadikusuma, 1995: 60). Normative research uses secondary data, consisting of primary legal materials and secondary legal materials. The primary legal materials used include relevant provisions in the Civil Code, Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, the Regulations and Procedures of the Indonesian National Arbitration Board (BANI) in 2022, as well as international conventions governing arbitration ratified through Presidential Decree No. 34 of 1981, which approves the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards." The secondary legal materials include books, legal and non-legal journals, online legal and non-legal articles obtained from the internet, and expert opinions on online arbitration. The research employs a legislative approach and a conceptual approach. The data processing method in this journal article utilizes literature study, interviews with experts in the field of online arbitration.

### C. RESULT AND DISCUSSION

The judge's decision is a statement made by a judge, as a state official authorized to do so, pronounced in a court hearing and aims to resolve a case or dispute between the parties. The concept of a written decision does not have the force of a decision until it is pronounced in court by the judge, as stated in Article 13 of Law No. 48 of 2009 concerning the Judiciary. A judge's decision is not the only form of resolving a case, as there is also a judge's ruling alongside it. The resolution of a contentious case in litigation is called a decision, while the resolution of a voluntary case in voluntary jurisdiction is called a ruling (Mertokusumo, 2009: 212). Dutch literature recognizes the term "vonis," which means a decision that does not yet have definite legal force, allowing for regular legal remedies, and the term "gewijsde," which means a decision that has definite legal force, allowing for special legal remedies. A decision has three types of force: Binding Force, Probative Force, and Enforcement Force. Regarding the decision in its composition, it must at least include legal principles, including clear and detailed reasoning, the obligation to adjudicate all claims, not exceeding the demands, and pronounced in public (Wicaksana, Dio Ashar; Yusup, Deni Kamaludin; Jebabun, 2020: 10-33). In preparing a decision, the Panel of Judges/examining judges must pay attention to the content and systematic of the decision as regulated in Article 183, Article 184 of the Code of Civil Procedure (HIR), Article 2 paragraph 1 and Article 50 paragraph (1) of Law Number 48 of 2009, and include a decision format that covers: the heading of the decision, the identities of the parties, the considerations of the case and the law, the operative part of the decision, the date the decision was rendered, the presence of the parties, the panel of judges deciding the case, the court clerk, the mention of the case costs, the signatures of the panel of judges/examining judges and the assistant court clerk (Sundari, 2018:149). As time goes by, dispute resolution has shifted to using internet technology, giving rise to e-court and online dispute resolution (ODR), where decisions are made in digital format.

#### Arbitration awards

Arbitration award is a decision made by an arbiter, whether it is an arbiter from an arbitration institution or an individual arbiter. Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Article 1 number 9, defines arbitration award. In the

Indonesian legal system, an arbitration award has a clearer and stronger legal force compared to a mediation decision. Arbitration awards and court judgments have the same legal force, which is enforceability. An arbitration award is final and binding, as stated in Article 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This means that an arbitration award cannot be appealed, cassated, or subject to a review (Hizkia Raymond, 2021: 56). The binding nature implies that after an arbitration award is issued, the parties are obliged to respect and implement it in good faith. Technological advancements have introduced a new form of arbitration, namely online arbitration conducted through video conferences or other media, as regulated in the rules and procedures of the BANI Arbitration in 2022. As of now, there are no specific regulations governing the format or provisions of online arbitration awards, so they still refer to Law No. 30 of 1999, with the inclusion of digital signatures. The specific format of online awards has not been regulated yet, but if we refer to Article 59 (1) and (2) of Law No. 30 of 1999, it states that

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awards must be made in writing. Furthermore, international arbitration awards can be enforced in Indonesia, especially if they have been registered through the Central Jakarta District Court and meet the specified requirements (Siburian, 2004: 139-146).

### Online Dispute Resolution (ODR)

ODR (Online Dispute Resolution) first emerged under the name Virtual Magistrate (VM), created by the National Center for Automated Information Research in Philadelphia, United States. Virtual Magistrate (VM) had the competence to resolve disputes between internet service providers and users (Harahap, 2021: 160-161). The Virtual Magistrate (VM) at the Villanova Center for Law & Technology handled its first dispute in 1996, which involved someone filing a complaint for receiving unsolicited advertisements via email sent using an America Online (AOL) address (Dewi, 2021: 103). One type of ODR is online arbitration, which serves as a form of dispute resolution for national and global businesses seeking speed, convenience, fairness, and efficient effectiveness that ultimately lead to legal certainty (Raharjo, 2007: 24). Online arbitration is defined as a method used as a dispute resolution mechanism that includes all arbitration activities, including the submission to arbitration hearings, and all processes conducted directly over the Internet through networks, email, group chats, or online conferences (Suherman, 2019: 590). Various providers of online arbitration services exist in several countries and have their own regulations. For example, in the United States, there is Virtual Magistrate and the American Arbitration Association (AAA), while in China, there is CIETAC and the Guangzhou Arbitration Commission online arbitration platform. The process of resolving disputes through online arbitration consists of several stages, including the preliminary stage, statement and written document stage, hearing stage, online deliberation stage, and delivery of the award. The digital format of online arbitration awards differs from conventional awards, and in the BANI rules, digital awards can be made in hardcopy. Indonesia itself does not yet have specific legislation governing online arbitration. Therefore, to accommodate online arbitration, the country still relies on Law No. 30 of 1999 and the Arbitration Rules and Procedures issued by BANI in 2022.

### The Legality of Online Arbitration Awards

Gustav Radbruch stated that law has three fundamental values: justice, utility, and legal certainty. According to Gustav Radbruch, legal certainty serves as a form of protection for those seeking justice. In this regard, Radbruch argues that one of the characteristics of legal certainty is the presence of positive law, particularly in the form of legislation. In the context of Indonesia as a civil law country, the application and enforcement of the law prioritize statutory regulations. Based on interviews with relevant sources regarding the legality of online arbitration awards, Indonesia still relies on Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration as its guiding framework. Additionally, the BANI (Indonesian National Arbitration Board) as an arbitration institution in Indonesia has the authority to regulate the arbitration process through Decree Number 22.001/I/SL/-BANI/AWR, which issued the rules and procedures for electronic arbitration in 2022, but has yet to specifically address online awards. When it comes to online arbitration awards in relation to Gustav Radbruch's theory of legal certainty, according to the sources, there is still a dilemma between legal certainty (juridical validity) and utility (sociological validity), along with justice (philosophical validity). In this case, the provisions regarding arbitration procedures and processes are formal/procedural laws that are imperative and serve as the "rule of the game" for all parties involved. Therefore, the sources argue that primary importance should be given to legal certainty over other considerations. The primary concept of legal certainty implies the need to establish regulations specifically addressing online arbitration, particularly online arbitration awards, and their governance. Something that is good can create uncertainty when it is not regulated by law.

There are two types of online arbitration: arbitration as a tool and substitution arbiter. According to the source, the process of conducting arbitration online (as a tool) is a current and future necessity. Based on the interviews with the source, the emergence of online dispute resolution raises the question of how technology can be used in online arbitration while still maintaining the principle of "private and confidential." The principle of "private and confidential" means that all dispute proceedings, whether conducted by an arbitrator or an arbitral panel, must be conducted in a closed manner, and confidentiality must be ensured regarding the subject matter, objects, substance, processes, and arbitral awards. Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration adheres to the principle of "private and confidential" in the examination of cases (Syarif, Eka. Rusdiana, Shelvi. 2016: 87-100). According to the source, the regulation of online arbitration for business disputes is not yet addressed in the law. Currently, the regulation of online arbitration still relies on Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, which does not specifically accommodate the use of technology in the process or the form of online arbitration awards. As a result, some articles are relevant while others are not. The enforcement of online arbitration awards still follows the rules of the Code of Civil Procedure (HIR) and the Code of Criminal Procedure (RBG), which still require physical copies of the awards.

The 1958 New York Convention has been ratified by Indonesia through Presidential Decree No. 34 of 1981. The existence of the 1958 New York Convention serves as a legal framework for the implementation of arbitration in the international realm. Article IV(1) of the 1958 New York Convention states that a party seeking recognition and enforcement of an arbitral award must submit a duly authenticated original award or a duly certified copy thereof. According to interviews with sources regarding the

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ratified 1958 New York Convention in Indonesia, Indonesia is open to applications for recognition and enforcement of foreign awards in Indonesia. In practice, any foreign arbitral award to be executed in Indonesia still refers to Article 65 and Article 66 of Law No. 30 of 1999, which states that the award must be registered with the Central Jakarta District Court. Essentially, the 1958 New York Convention remains applicable, but its implementation and recognition still follow the provisions of Law No. 30 of 1999 concerning Alternative Dispute Resolution and Arbitration.

### The Relevance of Law Number 30 of 1999 in the Practice of Online Arbitration

Dispute resolution outside the court, as known, includes arbitration as one of its forms. Based on interviews, there are currently no explicit regulations specifically governing online arbitration. Online arbitration is still regulated under Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Some provisions in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution are relevant for the implementation of online arbitration, while others are not. Relevant provisions include Article 4(3), Article 8(1), and Article 14(2), which mention the use of electronic means in conducting online arbitration. Irrelevant provisions include Article 36(1), Article 54(1) letter j, Article 59(2), (3), and (4), Article 63, Article 66, Article 67(2), and Article 71. The wording and meaning of these provisions are unclear when applied to online arbitration. In this case, the specific form and format of online arbitration awards are not mentioned in the law. In response to this, in 2022, BANI (Indonesian National Arbitration Board) issued rules and procedures for conducting electronic arbitration through Decree Number 22.001/I/SK/-BANI/AWR. However, these rules do not delve into the specifics of online arbitration awards.

### D. CONCLUSION

Based on the issues presented and after processing and analyzing the data obtained from the research, it can be concluded that arbitration awards have a final and binding nature. However, due to inadequate legal regulations, these awards do not yet provide legal certainty.

Online arbitration awards have legal validity as long as they comply with the provisions of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Until now, Law Number 30 of 1999 has not specifically accommodated online arbitration, particularly regarding online arbitration awards. Although BANI has issued rules and procedures for electronic arbitration, it has not yet addressed online arbitration awards in detail.

Regarding online arbitration awards resolved outside of Indonesia, they still hold legal validity and can be enforced as long as they adhere to the regulations set out in Article 60. Registration through the Central Jakarta District Court is required, and the execution procedure still follows the rules of the Code of Civil Procedure (HIR) or the Code of Criminal Procedure (RBG). Essentially, the 1958 New York Convention remains in effect. Parties in online arbitration seeking recognition and enforcement of awards must submit a duly authenticated original award or a duly certified copy to ensure the award is recognized as valid and enforceable. Indonesia has ratified the 1958 New York Convention through Presidential Decree No. 34 of 1981, indicating its openness to applications for recognition and enforcement of foreign arbitration awards.

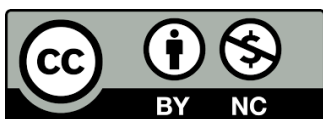
Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution contains both relevant and irrelevant provisions regarding online arbitration. Since the law does not specifically regulate the use of technology, it does not specifically accommodate online arbitration awards, define the execution process, or provide specific rules for international online arbitration awards.

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