



The Limitation of Final and Binding Arbitral Awards: How Far in Supporting the Autonomy of Arbitration?

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ABSTRACT

The nature of a final and binding awards in arbitration bind the parties not to appeal and this meets the certainty in settling disputes. In the other hand, an error, corruption, or other undue means may happen in rendering awards which cause injustice for the parties to dispute. Hearing those mistakes before the court may breach the autonomy of arbitration as the compromise-based disputes resolution. This research aims to explain how the most countries provide that issue and the possibility to hear the issue before the arbitration. Empirical and normative legal research was conduct to redress the issue. The data are collected from the provision of arbitral awards and its effect in international frame work, even to autonomy and justice principles, to be analyzed qualitatively to answer the issues. The result found that most countries tend to limit the final and binding effect of arbitral awards, in certain grounds and routes which is contrary to certainty, and autonomy principle, but supporting justice. It is difficult to achieve together certainty as well as justice. On the grounds of voluntary, mutual solution, and finality principles in arbitration, it may be proposed to bring certainty and justice closer by (1) including the judge in composing arbitral tribunal to review the legal aspect (2) providing certain requirement to make an ultimate award (3) requiring the parties making agreement that they will not file any objection to the arbitral awards it rendered to.

Keywords: arbitral awards; final and binding; autonomy; justice.

Introduction

Generally, disputes are resolved through litigation and non litigation ways. Suitable ways in settling dispute are necessary for parties involved to ensure that justice, certainty, and benefit are obtained. As WTO mentioned in WTO Agreement Annex 2, in international business relation, the ways of settling conflict redress to provide security and predictability to the multilateral trading system.

In the business world, parties tend to choose non litigation ways in settling disputes that are considered to obtain great benefits, such as: efficient, effective, predicable, and maintain



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business relations, also as private, final, and fair resolution (Doyle & Haydock, 1991). The nature of alternative disputes resolution, including arbitration mechanism, is voluntary and compromise solution. Before or after disputes, the parties can initiate voluntarily and consensually to resolve their disputes through arbitration. In accordance to voluntary and compromise-based disputes resolution, once the arbitrator (s) rules award, the parties has to respect and bind the award. The arbitral award becomes the final and binding award then. Final means that arbitral award may not be appealed by the parties, even reviewed its validity by the court. Binding means once the arbitral award has been ruled, it binds the parties to respect and execute the award in good faith. As an idea, this final and binding principle will be preferable to the parties to dispute, as the benefit or advantage (Marcelo et al, 2015), since it obtains efficiency and certainty.

In other side, many countries have seen the need to limit the finality of arbitral award in some circumstances. Moreover, the parties are also given the right to refuse the arbitral award in several routes. First, appeal to the institution arbitration themselves. Second, initiate to judicial proceeding to vacate the arbitral awards. Third, defend the recognition of the arbitral award to the foreign jurisdiction. Fourth, invoke judicial recourse to hinder enforcement of the arbitral awards. Those rights are also recognized in UNCITRAL Arbitration Rules 2013.

As stipulated in Article 61, 70, and 71 of Law Number 30 of 1999, the court in Indonesia can intervene against arbitration on the grounds that (1) arbitral awards are based on evidence that is false, deceptive, or found novum that can reside the awards; (2) the enforceability of arbitral awards to have the same power as final court judgement only can be granted by the court. Title 5 of United States Code Sec 580(c) provides that the arbitral awards are final and binding to the parties. Of those awards, based on U. S Code Title 5 Section 581a and Title 9 U.S. Code Section 10(a), the parties to dispute may bring to review those arbitral awards to the court, and the court may vacate the arbitral awards on the ground that the arbitral awards was procured by corruption, fraud, or undue means; there was arbitrator partiality, corruption, misconduct, or misbehavior; an arbitrator has exceeded or imperfectly executed his power. The U.S. Department of Energy's regulates the Commission's Rules of Practice and Procedure and Rule 605(e) does not provide the Commission review of the arbitrator's award. Based on that Rule, a grief of exception to the final arbitral award filed by party in Twin Valley vs. PG&E case was rejected (Davis, Sr, 2014). Taiwanese Law also introduce a judicial proceeding to vacate the arbitral awards. In *Jin Chen Feng Construction Co.Ltd.vs.National Taiwan University Hospital Bei Hu-Branch (Jin Cheng Feng case)* the Taipei Taiwan District Court has reject the motion to compulsory execution of ad hoc arbitral award as filed by the party won, in the ground that the award made by an ad hoc arbitration didn't have the same executability as the final court judgement had (Chen, 2012).

Legal Issue

In a side, those intervention means to control arbitration process from undue behaviour of arbitrator, an error or unjust awards. In another side, those intervention may reduce the finality,



certainty of arbitration process, and breaches the autonomy of arbitration as compromise-based dispute resolution institution. The question are, how the most countries redress this issue and wether possible to review the error and misconduct in rendering the arbitration awards by the arbitration institution its selves autonomously.

Methods

The empirical and normative legal research was conducted to redress the legal issues. The Data are secondary data, including:

1. The final and binding principle of award.
Focussly on its meaning and effect, and its purpose aspect. This will be the basis to analyze the second data bellow.
2. The implementation of the final and binding nature and its effect in many countries.
Focussly on how final and binding are the arbitral awards in many countries which taken in a purposive sampling.
3. The autonomy and justice principles as the basis principles to strengthen final and binding nature of arbitral awards and its effect.

The data will be collected by documentary research on provision in many countries concerning with arbitral awards and its effect, together with the theory of autonomy and justice, to be analyzed qualitatively by interpretation and comparative method.

As the final report, this paper is organized into three chapters. The result chapter will (1) point out the meaning of final and binding principle and purpose which is summarized from many legal sources and opinions, (2) explain comparatively the various implementation or interpretation of final and binding arbitral awards and its effects in many coutries. This will acknowlegde how final and binding are the arbitral awards in many countries. Discussion chapter will explore the possibility to strengthen the final and binding arbitral awards and its effect based on some principles, such as autonomy and justice. Third chapter will close the report by giving conclusion and recomendation of a mandatory norm to strengthen the final and binding arbitral awards based on autonomy and justice principles.

Result

1. The meaning of final and binding principle of arbitral award

Arbitration is a model of alternative disputes resolution. Historically, this mechanism has been utilized by Ancient Egyptian between 2500 BC to 2300 BC as a dispute resolution mechanism and also in Ancient Greece around 800BC (Born, 2009). The Modern arbitration rapidly developed then around 18th to 19th Centuries until today's. As an alternative resolution, some principles are held by arbitration to make it a preferable to the parties than litigation. One of them is a final and binding nature of arbitral awards. Article 34 Paragraph 2 of UNCITRAL Arbitration Rules 2013



provides that an arbitration award is final and binding. Amina Damman (2008) found, arbitral award is generally final and binding.

Black (1991) gives the meaning of final award term as an award that conclusively determines the subject matter which leaves nothing to be done except to execute and carry out terms of award. In Cambridge Dictionary (2018), final and binding means that it has been decided for the last time and cannot be discussed or changed again. Final means that the award is the definitive resolution which cannot be appealed anymore. No grounds can be made for any appeal or judicial review of an arbitral award. Binding means that the parties to dispute have to respect and implement the award in a good faith. As having a finality core, the arbitration award must be considered: valid, irrevocable, and enforceable, except on legal or equitable grounds for the revocation of a contract (Smith, et al, 2018).

Is it right in though that the final and binding award excludes the right of appeal of the arbitration award? Of this issue, International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) Rules expressly states:

“Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” (2017 ICC Arbitration Rules, Article 35.6.)

“Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law” (2014 LCIA Arbitration Rule 26.8.).

In accordance to the meaning of final and binding awards, Article 44 Paragraph (2) of Singapore Arbitration Act 2001 promulgates that the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award. The same promulgation also set in Article 47 which does not give jurisdiction to the court to confirm, vary, set aside or remit an award on an arbitration agreement. But in practices, most of countries, including Singapore, in other part limit the final and binding effect in certain circumstances.

2. The implementation of final and binding arbitral awards and its effects in many countries

Based on Black and Cambridge, final and binding award means that the award is definitive, cannot be discussed, changed, appeal or reviewed again, except to be executed. In facts, most countries have seen the need to limit the finality of arbitral awards in some circumstances. How final and binding are the arbitral awards in facts?

Below will be described the facts of some countries' provisions concerning with the final and binding arbitral awards and its effects. The countries are chosen purposively from (i) common law system, i.e USA, (ii) from civil law system, i.e Netherlands, (iii) from international scheme, i.e UNCITRAL, and (iv) from some ASIA's countries.



2.1. USA

In accordance to U.S Code Tittle 5 Section 581a and Tittle 9 Section 10(a), of the arbitral award, the parties to dispute may bring to review those arbitral award to the court. The court may vacate the arbitral awards on the ground that: the arbitral award was procured by corruption, fraud, or undue means; there was arbitrator partiality, corruption, misconduct, or misbehavior; and the arbitrator has exceeded or imperfectly executed his power. Those reasons are about the legal issues, not the fact issues. Based on the adjustment, USA limits the final and binding arbitral awards on the basis that there is the legal issue affected in making award by the arbitrator (s) or arbitration institution. Of that issue, the reviewer is not entitled to the arbitrator (s) or arbitration institution its self, but to the court, as an external institution. The court then will hear that issue in trial process.

The U.S. Department of Energy for instant, regulates the Commission's Rules of Practice and Procedure. Rule 605(e) does not provide the Commission review of the arbitrator'award. Based on that Rule, a brief of exeption to the final arbitral award filed by party in Twin Valley vs. PG&E to the Commission was rejected (Davis, Sr, 2014). It should be filed to the court.

2.2. Netherland

A little bit different enactment shown in Netherland. Article 1061b of 2015 Netherland Code of Civil Procedures give the parties to dispute a right to submit an appeal of the final arbitral award to the second arbitral tribunal after getting agreement of thereto. Based on Article 1061f, 1061g, and 1061i, the parties may try an appeal on the ground that the arbitral tribunal declares that its has jurisdiction or has no jurisdiction; asking for lifting, suspension, or reduction of the penalty for non-compliance; the legal remedies of setting aside or revocation of an arbitral award. And, in accordance to Article 1056, The Arbitral Tribunal also has a power to compose a penalty to the party for non compliance, as well as the court has its power. As promulgated in Article 1053, the arbitral tribunal has a power to decide the validity of arbitration agreement.

Article 1061i provides that the arbitral awards may be enforced after the parties accepted or didn't lodge an appeal to the second arbitration tribunal, or after the award has been rendered on arbitral appeal. It means that the nature of an arbitration awards in Netherland is not final and binding, since the final award of arbitration tribunal may be appealed to the second arbitration tribunal. Here is the autonomy of the arbitration to review their award.

The autonomy of arbitration is diminished in respect with the enforcement of the award. As provided in Article 1062, the enforcement of arbitration award only can take place after the District Court grant leave to do so. Also, as set in Article 1065, the arbitration has no autonomy to set aside their own awards on the grounds: the absence of a valid arbitration agreement; The arbitral tribunal was composed in violation of the rules applicable rules; the arbitral tribunal has not complied with its mandate; the award is not signed or does not contain reasons in accordance with the provisions of article 1057; the award, or the manner in which it was made, violates public policy or good morals; an award rendered in excess of, or differently from, what was claimed, which shall not constitute a ground for setting aside if the party who invokes this ground has participated in the arbitral proceedings without invoking such ground. Based on Article 1066, The application for



setting aside shall not suspend the enforcement of the arbitration award, except otherwise considered to be suspended by the court. In accordance to Article 1068, the arbitration award may also be revoked by the court of appeal on the grounds: that the award based on frauds, or forgery; there is a novum; which are discovered after the awards is rendered.

2.3. Uncitral

Based on Article 34 of The UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL choose giving the right to the parties initiating judicial process to vacate arbitration award, on the grounds that the arbitration awards violate public policy, a manifest disregard of the law by the arbitrator, and rendering of an arbitrary and capricious arbitration awards. Does it mean that the court may not accept error of fact as the ground to vacate the arbitration awards? Of this issue, Amina Dammann (2008) argues that the court in a certain circumstances accepts error of fact as the ground to vacate arbitral awards. Error of fact means reviewing the underlying agreement rather than the arbitration awards its self.

Lightle (2018) in her research found that there is a deferential standard of review accorded to arbitral awards. The American Arbitration Association, in Norfolk Southern vs Sprint case, gave their opinion that a written decision resulting from the parties agreed-upon-dispute-resolution process is a final and binding. In the other hand, the appellate court had a different opinion that the decision is not final and binding .

2.4. Philippine

Marcelo, et al (2015) found, that in starting from two decades ago up till now, there is trend in Philippine to resolve the international business relation disputes into arbitration model. Of 859 cases were filed to the Construction Industry Arbitration Commission (CIAC) between 1989 and August 2015. 682 of these cases were resolved by arbitral awards, while 91 were settled through compromise agreements for which arbitral awards were rendered. This figure shows that the arbitration model is in great demand by the parties to resolve their disputes. One of the factors is the existence of a final and binding principle that supports efficient and certainty in resolving disputes.

The court tries to limit their intervention to arbitration model for disputes resolution based on the arbitration agreement. In the other hand, Rule 11.4 of Philippines Supreme Court Administrative No 07-11-08-SC as called The Special Rules of Court on Alternative Disputes Resolution provides that the arbitral awards can be vacated by a petition through the competent court on the following grounds that (1) The arbitral awards was procured through corruption, fraud, or other undue means (2) There was evident partiality (3) The arbitral tribunal was guilty, misconduct or misbehavior (4) the arbitrator (s) was disqualified (5) the arbitral tribunal exceed its power (6) the arbitration agreement did not exist or invalid (7) a party of arbitration is a minor or judicially incompetent. Even though the arbitral awards can be vacated based on many reasons, in practices, the final arbitration awards has been complained as difficult to overturn even it



erroneous with the respect of the merits (Marcelo, et al, 2015). As provided in Rule 2.4 of Special Rules of Court on Alternative Dispute Resolution, the court is also given the competence to determine the issue of the existence, validity and enforceability of the arbitration agreement. Those mandatory legislation provisions show that the court still has a competence to intervene arbitration mode, even in arbitration agreement issue or in arbitral awards.

2.5. Singapore

As promulgated in Article 44, Article 45 Paragraph (1), Article 46, and Article 49 Paragraph (1) of Singapore Arbitration Act 2001, the court may intervene the arbitration proceeding or set aside an awards, in such circumstances:

- a. on the application of a party who has given notice to the other parties, determine any question of law arising in the course of the proceedings, unless otherwise agreed by the parties. This means the parties may agree that the court may not intervene the arbitration proceeding, even the arbitration awards. In other words, the parties have the right to uphold the arbitration autonomy free from court intervention.
- b. giving leave for the law enforcement of the arbitral awards, as having the same effect as a judgment or order of the Court.
- c. on the application of the parties, or set aside by the court who find: There is arbitration incapacity, or errors of law and procedures in arbitration proceeding and in making the awards; the award was induced or affected by fraud, corruption; breaches of the rules of natural justice; or the award is contrary to public policy.

2.6. Indonesia

In Indonesia, Article 60 of Law No 30 of 1999 stipulates that the arbitration award is final, enforceable and binds the parties. It does not give the parties the right to appeal. However, in article 70 it is stipulated that an arbitration award can be submitted for cancellation by the parties if the awards allegedly contains the following elements:

- a. the letter or document submitted in the examination, after the awards was rendered, acknowledged to be false or declared false;
- b. there is a novum that was found after the awards was rendered; or
- c. the decision is taken based on the results of deception carried out by one of the parties to dispute.

The arbitral awards may still be resided by the court only when there is false evidence, novum, or deception found in the process or in rendering awards. It is clearly provided. No other basis might be used as the reason to reside the arbitral awards. But, the facts show that there are many disputes of the authority between court and arbitration institution that tend to increase (The Supreme Court of Republic of Indonesia, 2019). Those cases show the practice of extending the grounds for residing the arbitral awards.



Discussion: How far the practices support the autonomy of arbitration?

The final and binding nature of arbitral awards must be taken into consideration in settling dispute as expected to be faster than completion through litigation. The choice to arbitration also indicates that the parties more entrust with arbitration to resolve their disputes. Based on that point of view, whatever the awards, dully the parties have to respect it as an awards which is made by the institution they choose by themselves. In the ground that the parties agree and believe, it is logic that the awards is given a final and binding nature. As also mentioned by WTO in General Provision in Article 3 point 7 of Annex 2 of The WTO Agreement, before bringing a case to the arbitration, the parties should consider well to its judgement as to wether action under that procedures would be fruitfull.

Although slightly different, in certain case, the final and binding nature of the arbitral award is analogous to the final and binding nature of court's decision in the result of mediation process. In Indonesia, as provided in Article 130 of *Het Herziene Indonesisch Reglement* (Indonesian Civil Procedure Law) S.1941 No.44 and Article 27 (4) of the Supreme Court Regulation No.1 of 2016, the parties to dispute in court that reach an agreement in mediation can ask for the agreement to be strengthened into a mediation award made by the judge, which has the same power as the final and enforceable judgement. The mediation award then must not be objected anymore, except to be executed immediately in good faith. The difference between the arbitration award and the mediation awards made by the judge is, that in arbitral awards, the agreement is not upon the substance of the award, but the arbitration as authorized to make the award. Whilst, in the mediation awards made by the judge, the agreement is upon the substance of the awards.

Netherlands shows a different practice by giving greater autonomy to arbitration –in certain scope- to review the awards in appeal level to the second arbitration tribunal, not to the court. This practice strengthens the autonomy of arbitration in settling dispute. This practice is different one from what are enacted in many other countries, such as USA, UNCITRAL, Singapore, Philippine, and Indonesia. Errors may occur in rendering an arbitral award, either an error relating in assesment of facts, and an error in implementing law, or there are misconduct, unlawful, fraud, or corruption made by arbitrator. In Netherlands, the authority to examine error of fact that occurred in making arbitral awards is given to arbitration itself. Whilst, the authority to examine error of law, or unlawful, fraud, misconduct, corruption made by arbitrator is given to the court. In many countries, even the error of fact in making arbitral awards is authorized by the court to examine and decide on it. The final and binding nature in many countries does not give extensive autonomy to arbitration to correct mistakes that may be made in ruling the awards. Taking into account on the enachment of arbitration in Netherlands, an objection to the arbitration award can be submitted to the arbitration institution itself at the appeal level to examine and decide thereof. Thus arbitration autonomy as an alternative to dispute resolution will becomes strong.

The practices of limiting the final and binding arbitration award in many countries show that they recognize the possibility of mistakes made in the award and regulate how these errors should be corrected. In terms of procedural justice, this should be done. The parties must be given



the right to object when there is an error award that causes injustice to him. Relating to the arbitration award, the question then: who should be authorized to correct the error?

Similarly, to the court, which establishes an appeal examination by a higher court, arbitration as a compromise-based dispute settlement, can also be given the same authority to review their decisions by themselves, as enacted in Netherland. By granting such autonomy, analogy to judicial autonomy, the advantages of arbitration as an alternative disputes settlement will increasingly attractive. Once the arbitration has been chosen by the parties to resolve the dispute, the system must be made so that the institution itself resolves and decides if there are objections to the decision that is considered wrong. Let them solve it by themselves. If all objections are finally handed over to other institutions, namely the court, then what is the meaning of alternative dispute resolution? Or, perhaps there needs to be a redefinition of alternative dispute resolution along with the nature of the final and binding nature of the award they provide. When the judge makes a mistake, they will be reviewed by the judge at a higher level. Why won't arbitration?

For the issue of error of fact and error of law that may occur in making award, and since that issues are technical in nature, it is right when examined and decided by arbitration itself on the appeal level. However, regarding deviates behavior which may be done by arbitrator, such as misconduct, fraud, or corruption, it well considers to be examined by other institutions as external control, since these kind of behaviors constitute violations of criminal law.

If we take the definition of final and binding extremely, the decision thus cannot be changed, canceled, or ruled out. This terms shown in Indonesia practices, as set in Article 10 Pharagraph (1) of Law No.24 of 2003 of Constitution Court, which giving final and binding nature of the constitutional court, in terms, only once, as the last judicial and binding the parties to enforce, even it adjudicates constitutional cases. United States Supreme Court also adjudicates certain cases once, final and binding, even though they adjudicate important cases since involving state or public interest. Meanwhile, the scope of arbitration is only involving private interest, such as civil or business cases, and has nothing to do with public interests, human rights, or criminal. Based on that standing point, it is logic and possible to give the term of final and binding arbitral award extremely. Giving final and binding nature of arbitration award extremely may strengthen the autonomy of arbitration as a compromise-based alternative dispute resolution.

Conclusion and Recommendation

Based on the results of the research and discussion above, it can be concluded that almost all countries tend to limit the final and binding nature of arbitral awards in different grades, moreover to uphold the principle of justice in their purpose. Giving the final and binding nature extremely on the arbitration award will strengthen the autonomy of the arbitration. Conversely, the limitation will reduce the autonomy of the arbitration.

Giving an extreme meaning of final and binding awards in arbitration may also negate the efforts to get justice in case there is error of fact or law in the substance of awards. On the grounds of voluntary, mutual solution, and finality principles in arbitration, it may be proposed to bring



certainty and justice closer by (1) composing the well-qualified arbitral tribunal which is compromised by the parties to dispute, and one of them is the court judge to review the legal aspect (2) requiring the parties to make a written agreement not to file an objection in any form, before the process or (3) the limitation of the final and binding nature of arbitration award by changing, canceling , or ruling out the award should be laid down into the arbitration authority to do so at the appeal level.

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