



Consumer Empowerment: Safeguarding Consumer Rights Through BPSK's Arbitration Post the Constitutional Court Decision

Pemberdayaan Konsumen: Melindungi Hak Konsumen Melalui Proses Arbitrase di BPSK Pasca Putusan Mahkamah Konstitusi

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Abstract

The arbitration decision by BPSK, can be filed with objections in accordance with Law 8/1999 and annulment under Law 30/1999. These two actions raise questions related to the arbitration process to resolve consumer disputes, consumer protection, and the impact of the Constitutional Court's decision on the annulment of arbitration awards. This is because both actions are contrary to the final and binding nature of the arbitration award. Through the doctrinal research method, it was found that three years since the Constitutional Court's Decision, there has been an increase in decisions related to the annulment of arbitration awards and objections to BPSK decisions. The Constitutional Court Decision has two contrary impacts. It makes easier for the aggrieved party in the process of resolving consumer disputes through arbitration to file for annulment or objection. Meanwhile, it also makes the process of consumer protection through arbitration lose its final and binding force.

Abstrak

Terhadap putusan arbitrase oleh BPSK dapat diajukan keberatan sesuai dengan UU 8/1999 dan pembatalan sesuai dengan UU 30/1999. Kedua tindakan tersebut menimbulkan pertanyaan terkait proses arbitrase dalam upaya penyelesaian sengketa konsumen, perlindungan konsumen, serta dampak Putusan Mahkamah Konstitusi (MK) terhadap proses penyelesaian sengketa konsumen di BPSK. Hal ini mengingat bahwa kedua tindakan tersebut bertentangan dengan sifat final and binding dari putusan arbitrase. Melalui metode penelitian doktrinal, Penulis menemukan bahwa terdapat peningkatan putusan terkait pembatalan putusan arbitrase dan keberatan atas putusan BPSK, 3 (tiga) tahun sejak diucapkannya Putusan MK terkait. Di satu sisi, Putusan MK mempermudah pihak yang dirugikan dalam proses penyelesaian sengketa konsumen melalui arbitrase untuk mengajukan pembatalan ataupun keberatan. Namun di sisi lain, juga membuat proses perlindungan konsumen dalam proses penyelesaian sengketa melalui arbitrase kehilangan kekuatan final and binding-nya.



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A. INTRODUCTION

1. Background

Almost all parts of our daily life need technology, including the buying and selling process between producers and consumers. Sometimes, technology led us to some convenience in our life, but sometimes it is the other way around. Technology is a disruption to traditional business processes that will never return to its origin.¹ Technological changes lead to changes in consumer behavior, which encourages the existence of various legal instruments for consumer protection to adapt to existing technological developments. Consumer protection is part of national development, so state must accommodate it.² Economic Law is the overall legislation, which regulates various economic activities and policies from the perspective of Civil Law and Public Law, which has the aim of order and justice in the national economic system.³ That aim makes state must actively include in every detail of the national economic system through various law instruments.

National Consumer Protection Board (*Badan Perlindungan Konsumen Nasional (BPKN)*) recorded 1041 complaints as of December 2, 2022, with complaints in the financial services sector holding the most complaints at 387 complaints, followed by complaints in the e-commerce sector at 179 complaints.⁴ BPKN has resolved 111 complaints in the financial services sector, with the remaining 276 complaints still pending. In 2022, BPKN issued 27 recommendations and 15 responses, demonstrating that state has attempted to participate in consumer protection through various existing institutions or institutions.

Rechtsbetrekkingen is a relationship between two or more legal subjects or more regarding the rights and obligations of one party *vis-à-vis* the rights and obligations of the other party. The relationship between producers and consumers can be compared to a contract. A contract is a legal relationship between two parties in the field of property in which one party is entitled to a performance (the creditor) and the other party is obligated to fulfill the performance (the debtor).⁵ A contract may be written or unwritten, and can be referred to as a transaction. The rights and obligations of the parties in a legal relationship are guaranteed by law, which is in accordance with the provisions in Article 1338 paragraph 1 of the Civil Code, which states that "All agreements made in accordance with the law shall be valid as laws for those who make them. Just like the obligation, the arrangement between producers and consumers will occur continuously. The agreement cannot be withdrawn other than with the agreement of both parties, or for reasons determined by law. Consent

¹ Mery Christian Putri, *Perjanjian Di Era Digital* (Depok: PT RajaGrafindo Persada, 2020), 1.

² Erman Rajaguguk dan Etal, *Hukum Perlindungan Konsumen* (Bandung: Mandar Maju, 2000), 68.

³ Candra Irawan, *Dasar-Dasar Pemikiran Ekonomi* (Bandung: Mandar Maju, 2013), 9.

⁴ Badan Perlindungan Konsumen Nasional, "Jumlah Pengaduan Konsumen BPKN s/d 2 Desember 2022," 2022, https://bpkn.go.id/statistik_pengaduan.

⁵ I.Ketut Oka Setiawan, *Hukum Perikatan* (Jakarta Timur: Sinar Grafika, 2021), 1.

must be executed in good faith". Through the provisions in Article 1234 of the Civil Code, an obligation is intended to give something, to do something, or not to do something.

It can be said that in an agreement or obligation, it is still possible for disputes to arise due to the non-fulfilment of rights or non-performance of obligations of one of the parties. There are 2 (two) ways that can be used to resolve consumer protection disputes in Indonesia, namely the peaceful dispute resolution and the dispute resolution through authorized institutions.⁶ Amicable dispute resolution is carried out with or without the authorization of the parties and is usually carried out by deliberation to reach a consensus, to make the dispute resolution process more manageable, cheaper, and relatively faster.⁷ The authorized institutions or agencies mentioned earlier are general courts or special institutions established by law, one of them is the Consumer Dispute Resolution Board (*Badan Penyelesaian Sengketa Konsumen* (BPSK)).

Arbitration is a way of resolving disputes outside the court, which is based on an arbitration agreement, where the agreement is made by the parties, and is carried out by arbitrators chosen by the parties who has the authority to make decisions.⁸ Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (henceforth referred as Law 30/1999) provides a definition of arbitration as a way of resolving civil disputes outside the public courts based on a written arbitration agreement made by the parties to the dispute. The provision in Article 60 of Law 30/1999 states that the arbitration award is final and has permanent legal force and binding for the parties.

On February 18, 2014, the Constitutional Court registered case number 15/PUU-XII/2014, regarding the review of the Elucidation of Article 70 of Law 30/1999 which states that "A petition for annulment may only be filed against an arbitral award that has been registered in the court. The grounds for annulment mentioned in this article must be proven by a court decision. If the court states that the reasons are proven or not proven, then this court decision can be used as a basis for consideration for the judge to grant or deny the application". The petitioners in the case, Ir, Darma Ambiar, M.M., and Drs. Sujana Sulaeman, felt that their constitutional rights under Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution were violated due to the elucidation of the article. According to them, the Elucidation of Article 70 of Law 30/1999 contained a new norm that contrary to the main substance of the article, impractical and obstructed the legal right to seek justice, as well as causing confusion and legal uncertainty.. Ir, Darma Ambiar is director of PT Merina Cipta Guna, while Drs. Sujana Sulaeman is director of PT Bangun Bumi Bersatu, both of which are parties to the dispute at the National Arbitration Board. The statement of the National Arbitration Board as a Related Party in case number 15/PUU-XII/2014 at the Constitutional Court on April 30, 2014, , stated that the source

⁶ Az Nasution, *Hukum Perlindungan Konsumen: Suatu Pengantar* (Jakarta: Diadit Media, 2014), 232-233.

⁷ Nasution.

⁸ Gatot Soemartono, *Arbitrase dan Mediasi di Indonesia* (Jakarta: PT Gramedia Pustaka Utama, 2006), 2.

of the arbitration award is the agreement of the parties based on *pacta sunt servanda*, through the arbitration panel appointed by the parties, so that when the Elucidation of Article 70 of Law 30/1999 is deleted, the legal certainty of an arbitration award will be lost, and injure the constitutional rights of the party who win the arbitration case.⁹ The written statement of the DPR explains that basically the Elucidation of Article 70 of Law 30/1999 aims to provide legal certainty for the implementation of arbitral awards and for parties to disputes in arbitration institutions. The Constitutional Court in Decision No. 15/PUU-XII/2014, which was read out on November 11, 2014 stated that it granted the petitioner's request as a whole, so that the Elucidation of Article 70 of Law 30/1999 does not have binding legal force.

Arbitration, as one method of resolving consumer protection disputes, should always provide consumers with legal certainty and protection. Article 70 of Law 30/1999 provides that a judgment may be annulled if it is suspected of containing elements of falsity in letters or documents submitted in the examination; the discovery of decisive documents previously hidden by the opposing party after an award has been made; and the award made is suspected to be the result of deception on the part of one of the parties to the dispute examination. The provision which stipulates that an arbitration decision can be canceled, is contradict with the final and binding nature of the arbitration decision and can raise questions related to legal certainty to consumers protection when such decision is canceled. Constitutional Court Decision Number 15/PUU-XII/2014 which states that the Elucidation of Article 70 of Law 30/1999 does not have binding legal force provides a new path to resolve consumer protection disputes through arbitration, although it does not change the existing provisions in Article 70 regarding the annulment of arbitral judgment.

BPSK was born to strengthen consumer protection, especially in the process of resolving consumer disputes because it can speed up time and costs compared to the dispute resolution process in the court. When the disputing parties have chosen to settle their disputes at BPSK through an arbitration mechanism, this is a *pactum de compromittendo*, meaning that the parties have agreed that the settlement of their disputes will be based on arbitration. In other words, the parties have agreed to get rid of the authority of the court in resolving disputes that arise, and BPSK has full authority to resolve it.¹⁰ Law Number 8 of 1999 concerning Consumer Protection (henceforth referred as Law 8/1999) gives BPSK authorization to resolve consumer protection disputes through arbitration, where the regulation on arbitration itself is also regulated in Arbitration and Alternative Dispute Resolution Law. When BPSK carries out its role as an arbitration institution, the arbitration award issued by BPSK will be final and binding, as is the nature of arbitration

⁹ Mahkamah Konstitusi Republik Indonesia, Decision Number 15/PUU-XII/2014 (2014), 71.

¹⁰ Gusti Ayu Putu Rizky Putri Pratiwi Made Suksma Prijandhini Devi Salain, "Pengaturan Arbitrase Berdasarkan Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen," *Jurnal Kertha Wicara* 7, no. 01 (2018): 3.

awards regulated by the provisions in Arbitration and Alternative Dispute Resolution Law. However, there is a provision in Article 56 of Law 8/1999, which states that objections to BPSK decisions can be filed to the District Court, and it is even possible that cassation can be levelled up to the Supreme Court. The existence of the provisions for annulment and the filing of objections to arbitral awards undermined the final and binding nature of arbitral awards. It will also make consumer protection disrupted or, even cause legal uncertainty to resolve consumer disputes and consumer protection.

Based on the above mentioned, this research will discuss consumer protection through the arbitration dispute resolution process in BPSK and the implication of the Constitutional Court Decision Number 15/PUU-XII/2014 on the arbitration process to give protection to the consumer.

2. Research Questions

This research was conducted to analyze the consumer protection that can be provided by the process of resolving consumer disputes using the arbitration method, and also to analyze the implications of the Constitutional Court Decision Number 15/PUU-XII/2014 on the Cancellation of Arbitration Decisions on the arbitration process at BPSK.

3. Research Methods

This research will be doctrinal research that analyzes both law as "law as it is written in the books," and law as "law as it is decided by the judge through judicial process." The data used in this research is secondary data, with primary legal materials in the form of Constitutional Court Decision Number 15/PUU-XII/2014, as well as Law 30/1999 and Law 8/1999, supported by secondary legal materials in the form of books and journals related to consumer protection and arbitration. The Constitutional Court Decision will be used as a basis for analyzing and identifying the reasons used by the Constitutional Court regarding the annulment of arbitration awards and its relation to the settlement of consumer disputes through the arbitration process. Law 30/1999 and Law 8/1999 will be used as a normative reference on how dispute resolution through arbitration and how state participates in consumer protection.

B. DISCUSSION/ ANALYSIS

1. Consumers Protection Through Arbitration

The background of Law 8/1999 is the weakness of consumers in Indonesia, especially the level of public awareness of their rights as consumers which is still quite low due to their relatively low educational background.¹¹ Prior to the existence of Law 8/1999, Indonesia did not have a comprehensive legal basis to provide protection to consumers, as the existing regulations at that time were considered inadequate to provide maximum protection to

¹¹ Departemen Penerangan RI, "Kabinet Reformasi Pembangunan: Memori Masa Bahkti," 1999, 121.

consumers in Indonesia. The provisions in Article 1 of Law 8/1999, states that there are at least 3 (three) institutions that can actively give protection to consumers, namely the Non-Governmental Consumer Protection Agency, the Consumer Dispute Resolution Board, and the National Consumer Protection Agency. These institutions are a place to provide protection and resolve consumer disputes, where formally the institution is under the auspices of the Directorate of Consumer Protection, Directorate General of Domestic Trade

In 2020, the National Law Development Agency issued the Results of the Harmonization of the Academic Script of the Draft Law on Consumer Protection, where this was because the Law on Consumer Protection, which was born in 1999, was considered less effective in providing protection to consumers and solving existing problems, even after 20 (twenty) years since it was enacted. This is indicated by the existence of institutions implementing consumer protection (these institutions have not yet become a major part of determining national economic policy) and the low Consumer Empowerment Index. In 2019, the index achieved by Indonesia was 41.70, which means that Indonesia has only entered the "capable" level, which is the level when consumers are aware of their rights and obligations, and are able to choose and make their own choices about what they will consume, although they are not active yet to fight for their rights as consumers. Although the results of the harmonization of the academic paper have been published, until now there has been no renewal of the Consumer Law.

Arbitration in Indonesia has been known since the Dutch occupation era. It can be seen through such regulation, such as the *Reglement op de Burgelijke Rechtsvordering* (RV), which was then still used in accordance with the provisions in the transitional rules of the 1945 Constitution at that time. Then, the provisions in this RV ended when Arbitration and Alternative Dispute Resolution Law came into force in 1999,¹² where the RV regulates arbitration in S.1847 - 52 *juncto* S. 1849 - 63.

The provision in Article 1 point 11 of Law 8/1999 states that the Consumer Dispute Settlement Board is a body tasked with handling and resolving disputes between business actors and consumers. BPSK is often considered as a *quasi-judicial* institution, which is a semi-court institution because BPSK has the nature to adjudicate through 3 (three) dispute resolution mechanism, namely conciliation, mediation, and arbitration. Also, its decisions are final and binding. Yet, BPSK cannot be said as a full court,¹³ because dispute resolution through BPSK is said to be an out-of-court dispute resolution method, and its decisions do not have the same executorial power as court decisions in general. Moreover BPSK decisions can still be challenged in the District Court, so this is considered not to give enough protection for consumers. BPSK is different with the Small Claim Tribunal (SCT)

¹² Muskibah Muskibah, "Arbitrase Sebagai Alternatif Penyelesaian Sengketa," *Jurnal Komunikasi Hukum (JKH)* 4, no. 2 (10 Agustus 2018): 155, <https://doi.org/10.23887/jkh.v4i2.15450>.

¹³ Rahmi Rimanda, "Keberadaan Badan Penyelesaian Sengketa Konsumen (BPSK) Sebagai Lembaga Quasi Yudisial Di Indonesia," *Jurnal Bina Mulia Hukum* 4, no. 1 (2019): 20, <https://doi.org/https://doi.org/10.23920/jbmh.v4n1.2>.

model that exists in developed countries that follow the Common Law system. BPSK is designed to combine the existing systems in common law and civil law, so that what exists in SCT is adapted into Alternative Dispute Resolution (ADR).¹⁴

M. Yahya Harahap says that arbitration is a method of dispute resolution, where disputes that can be resolved by the arbitration method are disputes originating from a contract, which are considered to have the following problems:¹⁵

- a. Dispute, defined as a difference in interpretation of the performance of an agreement, which can take the form of a controversy, misunderstanding, or disagreement;
- b. Breach of contract, which includes matters relating to the validity of a contract or the validity of a contract;
- c. Termination of contract, which is defined as terminating a contract without the consent of the other party;
- d. Claims caused by damages for a default or unlawful act.

In the process of dispute resolution through arbitration, one or more arbitrators will be appointed to assist in the dispute resolution process, where these arbitrators can be appointed by the parties to the dispute or appointed by the Court. However, before the appointment of this arbitrator, it must be ensured that the parties to the dispute have made a prior arbitration agreement. Because without such agreement, the arbitration will lose its competence to resolve the dispute.¹⁶ Arbitration works in accordance with the jurisdiction under Article 3 of Law 30/1999. It states that "District Courts are not authorized to hear disputes between parties that have been bound by an arbitration agreement." To avoid bias, the provisions of Article 5 of the Law 30/1999 says that "disputes that can be resolved through arbitration are only disputes in the field of trade and regarding rights that according to laws and regulations are fully controlled by the disputing party," so that in Indonesia, not all disputes can be resolved through arbitration due to the restrictions in Article 5 of Law 30/1999 as mentioned above.

Arbitration is the choice of many parties to resolve their problems due to several advantages:¹⁷

- a) Clear and straightforward procedures to reach a decision in a relatively fast time;
- b) The costs required are not expensive;
- c) Expose decisions in public can be avoided;
- d) Legal procedures for evidence are not as rigid as the dispute resolution process in court;

¹⁴ Rimanda, 25.

¹⁵ Munir Fuady, *Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis* (Bandung: PT Citra Aditya Bakti, 2003), 11-12.

¹⁶ Candra Irawan, *Aspek Hukum dan Mekanisme Penyelesaian Sengketa di Luar Pengadilan (Alternative Dispute Resolution) di Indonesia* (Bandung: Mandar Maju, 2010), 65.

¹⁷ Fuady, *Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis*, 40-41.

- e) The law to be used in the arbitration process can be determined by the parties themselves;
- f) Arbitrators can be chosen by the disputing parties themselves;
- g) Arbitrators can be selected according to their expertise;
- h) The award issued in the arbitration process can be in accordance with the existing situation and conditions;
- i) In principle, the arbitration award is final and binding;
- j) Arbitral awards (in principle) can be directly carried out and executed by the court without having to be reviewed at all, although review is also permitted;
- k) The procedure of dispute resolution process through arbitration is more easily understood by the public;
- l) The arbitration process closes the possibility of "forum shopping."

The provisions in Article 1243 of the Civil Code explain that 'default' is a form of violation of consumer rights, where the rights and obligations of one party are not fulfilled, so that a dispute is arise. Article 49 of Law 8/1999 stipulates that to resolve disputes that occur in the field of consumer protection, the government establishes BPSK. Arbitration is one of the choices of dispute resolution methods that can be picked by the disputing parties when going through the dispute resolution process at BPSK. BPSK is present as one of the out-of-court dispute resolution institutions It comes from several criticisms out-of-court dispute resolution process, which takes a long time, relatively expensive, unresponsiveness of the litigation process, the decision does not resolve the main dispute, and the ability of judges who are still generalists.¹⁸

Dispute resolution through an arbitration mechanism is often considered the best solution in resolving disputes that occur between consumers and business actors, because the process is fast and in this process there is an opportunity for the parties to the dispute to make peace, so that the agreement reached will not harm either party.¹⁹ Dispute resolution by arbitration is considered by consumers and business actors to be a fairer solution, because this arbitration is agreed by the parties and the decision on the dispute is fully submitted to the BPSK panel consisting of elements of consumers, business actors and government elements as chairman of the panel.²⁰

Arbitration uses several special principles in the dispute resolution process, namely *absolute authority* (the court does not have the authority to resolve disputes through the arbitration process), *pacta sunt servanda* (the existence of an arbitration clause in the agreement between the parties means binding the parties not to use legal remedies in

¹⁸ Ahmadi Miru, *Prinsip-Prinsip Perlindungan Hukum Bagi Konsumen di Indonesia* (Depok: Rajagrafindo Persada, 2011), 34-45.

¹⁹ Faisal Riza Rachmad Abdur, "Penyelesaian Sengketa Secara Arbitrase Untuk Melindungi Konsumen Melalui Badan Penyelesaian Sengketa Konsumen", *Jurnal EduTech* 4, no. 1 (2018): 33, <https://doi.org/10.30596/edutech.v4i1.1886>.

²⁰ Rachmad Abdur.

court in the dispute resolution process that occurs), and *final and binding decision* (the arbitration decision is final and binding).²¹ Through these principles, arbitration is present to help consumers obtain their rights that have previously been violated by the actions of business actors.

2. The Implications of the Constitutional Court Decision Number 15/PUU-XII/2014 On the Process of Arbitration at BPSK

The issue in case 15/PUU-XII/2014 is the Elucidation of Article 70 of Law 30/1999 "stated" "A petition for annulment may only be filed against an arbitral award that has been registered in the court. The reasons for requesting annulment mentioned in this article must be proven by a court decision. If the court states that the reasons are proven or not, then this court decision can be used as a basis for consideration for the judge to grant or reject the application." When such issue claimed by the Petitioners is a provision of Law and the basis for is Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, then this has fulfilled the provisions of judicial review of the law against the 1945 Constitution which applies as the authority of the Constitutional Court.

According to the Petitioners, the Elucidation of Article 70 of Law 30/1999, especially in terms of the wording that is different from the core of the article, creates a new norm, and does not explain the core of the article as it should be. The difference in wording can lead to legal uncertainty, where the recognition, protection, and legal certainty is guaranteed by the provisions in Article 28D paragraph (1) of the 1945 Constitution. Also, it creates a new norm derived from the Elucidation of Article 70 of Law 30/1999, where such norm contradicts the provisions of Article 70 of Law 30/1999.

In its legal reasoning, the Constitutional Court held that the Court had the authority to hear the case filed by the Petitioners regarding the constitutionality of the Elucidation of Article 70 of Law 30/1999. The Constitutional Court also believes that the Petitioners have legal standing, where such loss is potential and there is *causal verband*, so there is a possibility that if the application is granted, the constitutional loss will not happen. The Court stated that if the settlement of a civil dispute, which is a legal dispute between individuals in the field of trade, is basically a matter for those involved in it, so state is obliged to provide legal protection for them, one of which is by establishing judicial power, in which there are courts as the main actors in providing dispute resolution services. When dispute resolution becomes a matter for those involved in the dispute, the parties can choose arbitration as a method of dispute resolution.

The ability to bind themselves in an arbitration agreement must be based on mutual consent, so that the factors of voluntary and mutual awareness are the basis for the validity

²¹ Alisyah Early Fajrin dan Sjaifurrachman Sjaifurrachman, "Analisis Penyelesaian Sengketa Konsumen Melalui Arbitrase," *Jurnal Analisis Hukum* 5, no. 2 (25 September 2022): 142, <https://doi.org/10.38043/jah.v5i2.3764>.

of the arbitration agreement bond, in accordance with the validity and binding of each arbitration agreement, must fulfill the provisions of Article 1320 of the Civil Code.²² In a civil agreement, when using an arbitration clause as a dispute resolution, the legal opinion of the arbitration body will bind the main agreement, so that everything that deviates from the legal opinion is a violation of the agreement. So, when it has used the arbitration clause it can no longer take any legal remedies²³ to resolve the dispute that occurred. The provisions in Article 11 paragraph (2) of Law 30/1999 explain that the dispute resolution process through arbitration is also limited court involvement²⁴ so that the court cannot participate when the parties to the dispute have chosen to use the arbitration institution for dispute resolution. For cases that have an arbitration clause, the court has no right to interfere. For cases that have been decided by arbitration, the court is only entitled to the execution of the award, not to re-process the arbitration award, except when there are unlawful efforts in the process of arbitration, so that the aggrieved party can sue the District Court with the argument that the arbitration decision is not based on good faith.²⁵

The annulment of an arbitration award can be interpreted as a legal effort that can be made by the parties concerned to request the District Court to cancel an arbitration award, either partial or a whole.²⁶ In the process of annulment of an arbitral award, the court has function and authority to examine a request for annulment of an arbitral award. This annulment is a legal step to overcome fraud that occurs during the dispute resolution process through arbitration, and one thing that must be underlined is that the function of the court in the process of annulment of an arbitral award is different from its function when examining a request for appointment of an arbitrator or in a request for execution of an arbitral award.²⁷ In Indonesian practice, the final and binding nature of an arbitral award is given a specificity, so that the award can be canceled based on the provisions in Article 70 of Law 30/1999 and its explanation. The reasons used as the basis for the annulment of an arbitral award can only be submitted against an arbitral award that has been registered in the court and must first be declared by a court decision,²⁸ so that this serves as a barrier in a way that the arbitral award does not lose its final and binding nature.

The Constitutional Court granted the petition of the Petitioners in a hearing on Tuesday, November 11, 2014, so that the provisions in the Elucidation of Article 70 of Law 30/1999 are contrary to the 1945 Constitution and have no binding legal force. The Constitutional

²² Nyoman Adi Astiti and Jefry Tarantang, "Penyelesaian Sengketa Bisnis Melalui Lembaga Arbitrase," *Jurnal Al Qaradh* 3, no. 2 (11 Februari 2019): 114, <https://doi.org/10.23971/jaq.v3i2.1179>.

²³ Karma I Putu Wisnu dan I Ketut Artadi, "Arbitrase Sebagai Upaya Penyelesaian Sengketa di Luar Pengadilan Dalam Sengketa Hak Kekayaan Intelektual," *Kertha Wicara* 7, no. 1 (2018): 114.

²⁴ I Ketut Artadi.

²⁵ I Ketut Artadi, 8.

²⁶ Fuady, *Arbitrase Nasional: Alternatif Penyelesaian Sengketa Bisnis*.

²⁷ Mosgan Situmorang, "Pembatalan Putusan Arbitrase," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (10 Desember 2020): 582, <https://doi.org/10.30641/dejure.2020.V20.573-586>.

²⁸ Pieter Radjawane, "Upaya Hukum Pembatalan Putusan Arbitrase di Pengadilan," *SASI* 22, no. 2 (13 Desember 2016): 23, <https://doi.org/10.47268/sasi.v22i2.165>.

Court stated that the Elucidation of Article 70 of Law 30/1999 may lead to multiple interpretations as follows “(i) that the Explanation may be interpreted to the reason for filing the petition must first be proven by the court as a condition for filing a petition for annulment, or (ii) that the reason for annulment is proven in the court hearing on the petition for annulment”.²⁹ The existence of multiple interpretations as explained above, will lead to legal uncertainty that leads to injustice, and when the Elucidation of Article 70 of Law 30/1999 applies in this way, there will be 2 (two) ongoing court proceedings, namely the process of annulment of the arbitral award and the process of proof in the court, which will violate the speedy nature of arbitration as stipulated in Article 71 paragraph (3) of Law 30/1999. The elucidation of Article 70 of the Law 30/1999 may also give birth to a new norm.

Arbitration is one of the dispute resolution methods used in BPSK to resolve consumer disputes. When using the arbitration method, the arbitration award issued by BPSK is also bound by the final and binding nature of the arbitration award. However, there is a provision in Article 56 of Law 8/1999, which states that against BPSK decisions, an objection can be filed to the District Court. It is even possible that cassation can be levelled up to the Supreme Court. The existence of the provisions for annulment and the filing of objections to arbitral awards makes the final and binding nature of arbitral awards is undermined.

M. Syamsudin conducted a study and concluded that there are several reasons which become the basis for the Supreme Court at the cassation level to overrule the BPSK decision, namely:³⁰

- a. The authority to adjudicate and examine the contents of the contract between the disputing parties is not vested in the BPSK Panel of Arbitrators;
- b. The types of consumer disputes whose decisions are issued by BPSK do not constitute a class of consumer disputes in accordance with the prevailing laws and regulations;
- c. The decision issued was a verdict relating to a private dispute concerning default and tort;
- d. The decision is considered not to contain severe harm due to the consumer of goods and/or services by the consumer;
- e. The decision is a judgment on a dispute relating to a bank debt, which is not a consumer dispute.

The procedure for filing objections to BPSK decisions is regulated in Supreme Court Regulation Number 1/2006 on the Procedure for Filing Objections to Decisions of Consumer Dispute Settlement Bodies. This regulation was made because the Consumer Protection Law has not regulated the procedure for filing objections to BPSK decisions. The provision in Article 1 point 2 of Supreme Court Regulation Number 1 Year 2006 states that objection is an effort that can be made by business actors and consumers who do not accept BPSK

²⁹ Mahkamah Konstitusi Republik Indonesia, Decision Number 15/PUU-XII/2014, para. 3.19

³⁰ M Syamsudin, “The Failure of The Court to Protect Consumers: A Review of Consumer Dispute Resolution in Indonesia,” *Journal of Consumer Policy* 4, no. 1 (2021): 118, <https://doi.org/https://doi.org/10.1007/s10603-020-09470-0>.

decisions. The main problem in filing of such objection is that the term 'objection' is not known in the field of Civil Law, so judges in the District Court will find it quite difficult to interpret what is meant by the filing of the objection, whether the objection is a form of appeal, or a lawsuit or petition. In response to this problem, the provisions in Article 6 paragraph (2) of Supreme Court Regulation No. 1/2006 provide an explanation that the objection examination process is conducted based on the BPSK decision and the case file, so that this tends to be more similar to an appeal. The requirements for filing an objection to an arbitration award issued by BPSK are regulated under Article 6 paragraph (3) of Supreme Court Regulation Number 1 of 2006, which explains that basically the requirements for filing an objection to an arbitration award issued by BPSK are the same as the requirements for filing an annulment of an arbitration award in general, as regulated by Law 30/1999.

In 2023, until May, as reported by the Supreme Court's decision directory, there have been 28 (twenty-eight) decisions related to the filing of objections to BPSK Decisions, and of these 17 (seventeen) rulings were to grant the request for objection, either in whole or in part.³¹ Through the same website, in the same period, 18 (eighteen) decisions were found related to requests for annulment of arbitral awards, and of these 10 (ten) were arbitral awards issued by BPSK, and all ten decisions granted requests for objections to BPSK decisions as well as annulled the arbitral awards in them.³²

Processing data from the Supreme Court Decision Directory, from 2012 to 2022 data can be obtained as shown in the following table related to the number of decisions related to arbitration and objections to BPSK decisions:

Table 1.
Number of Decisions Related to Arbitration and Objections to BPSK Decisions

Year	Decisions Related to Cancellation of Arbitration Award	Decisions Related to Objections to BPSK Decisions
2012	216	49
2013	300	118
2014	389	165
2015	514	264
2016	1062	655
2017	1406	899
2018	730	284
2019	1081	210
2020	892	194
2021	861	161
2022	182	76

³¹ Processed from existing data on Mahkamah Agung, "Direktori Putusan Mahkamah Agung," accessed 29 Mei 2023, https://putusan3.mahkamahagung.go.id/search.html?q=BPSK&t_put=2023&page=2.

³² Processed from existing data on Mahkamah Agung, "Direktori Putusan Mahkamah Agung," accessed 29 Mei 2023, https://putusan3.mahkamahagung.go.id/search.html?q=arbitrase&jenis_doc=&cat=&jd=&tp=&court=&t_put=2023&t_reg=&t_upl=&t_pr=.

According to the table 1 before the Constitutional Court Decision Number 15/PUU-XII/2014, from 2012 to 2014, decisions relating to the annulment of arbitration were only in the range of 200 - 400 decisions each year, and for decisions relating to objections to BPSK decisions were in the range of 49 - 165 decisions each year. After the Constitutional Court Decision Number 15/PUU-XII/2014, decisions relating to the annulment of arbitration decisions and objections to BPSK decisions tend to increase every year, but experienced a drastic decline from 2021 to 2022. Such increase in the number of decisions related to the annulment of arbitral awards and also objections to BPSK decisions, which may also be the result of the arbitration process, from 2015 to 2017 after the Constitutional Court Decision Number 15/PUU-XII/2014, indicates that the annulment of the Elucidation of Article 70 of Law 30/1999 provides a new door for parties who feel aggrieved by the arbitral award, and people has their own euphoria by apply for annulment or objection to BPSK's arbitration awards. This becomes a double-edged sword. On one hand, when those who file a lawsuit to cancel an arbitration award or object to an arbitration award at BPSK are consumers, then this is an opportunity to provide more protection to consumers. While on the other hand, when those who feel aggrieved file for cancellation or objection are business actors, then consumer rights are again at stake.

When state wants to protect and empower consumers, it requires state's intervention to create and establish a legal system for consumer protection.³³ The scope of consumer protection does not only protect the subject, which is the consumer himself, but also the goods and/or services he uses and the conditions that must be met by producers when selling goods and/or services to consumers. Nevertheless, consumer protection efforts do not mean freeing from disputes. Provisions in Law 8/1999, states that "If an out-of-court consumer dispute resolution effort has been chosen, a lawsuit through the court can only be pursued if the effort is declared unsuccessful by one of the parties or by the parties to the dispute." This provision indicates that the first option for resolving consumer protection disputes is through non-litigation channels, one of which is arbitration, where in Indonesia, this role is held by BPSK. According to Article 52 of Law 8/1999, one of the duties and authorities of BPSK is to handle and settle consumer disputes using mediation, arbitration, or conciliation. In resolving consumer protection disputes through arbitration, the disputing parties will fully submit the dispute resolution to BPSK.

There are several aspects that must be considered related to the annulment of arbitral awards. First, judging from the process and reasons related to the annulment of arbitral awards, its presence exists in the legislation of a country, but not regulated in international treaties. Second, the legal consequences of the annulment of the arbitral award itself are actually the nullification (as if the award was never made) of the arbitral award so that

³³ Sigit Sapto Nugroho dan Mierza Aulia Chairani, *Hukum Perlindungan Konsumen: Perspektif Pelindungan Hukum atas Iklan yang Merugikan* (Klaten: Penerbit Lakeisha), 6.

the court can request that there be a repetition of the arbitration process.³⁴ When the annulment of an arbitration award is granted, it does not immediately make the District Court have the authority to examine and decide the dispute that occurred.³⁵

The choice of dispute resolution through the arbitration mechanism can be done at BANI or BPSK, except that dispute resolution using the arbitration method at BPSK can only be used to resolve consumer disputes, not in other fields. This is a choice of forum, or an optional alternative choice related to the jurisdiction of the court. A consumer who feels that his/her rights have been harmed may file a lawsuit in the general court, but in litigating in the general court, arbitration cannot be used as a method of dispute resolution.

The term "objection," which refers to the submission of objections to BPSK decisions to the District Court, is basically unknown in civil procedural law, so this term actually makes it quite difficult for judges in the District Court to provide an interpretation of the position of the objection itself. Whether the submission of the objection is a process such as a lawsuit or a petition, whereas the term objection is intended as a process used by consumers or business actors who do not accept the decision of a consumer dispute submitted by BPSK.³⁶ However, when viewed through the provisions in Article 6 paragraph (2) of the Supreme Court Regulation Number 1 Year 2006, the examination of the objection is only based on the BPSK decision along with the case file, so this is quite similar to an appeal.³⁷

The method of dispute resolution through arbitration conducted by BPSK sometimes raises further questions about whether there is a possibility that the regulations regarding arbitration conducted by BPSK, which are regulated in Law 8/1999, deviate from the arbitration provisions in Law 30/1999. There are two opinions on this matter. First, permanent arbitration institutions such as BANI and BPSK are not subject to the Law 30/1999, because they have their own arbitrators and their own laws of procedure. Second, the Law 30/1999 is a form of *lex arbitri*, so it applies to all arbitration institutions in Indonesia.³⁸ Law 8/1999 can be considered as a *lex specialis* for arbitration provisions in BPSK, so that it can actually become the strength of arbitration conducted in BPSK if it can be optimized properly.

In general, the Constitutional Court's decision is declaratory and constitutive. A declaratory decision states what is the law, while a constitutive decision means that the

³⁴ Michael Jordi Kurniawan & Harjono, "IMPLIKASI YURIDIS PEMBATALAN PUTUSAN ARBITRASE DI INDONESIA (Studi Putusan Nomor: 305/Pdt.G/Bani/2014/Pn.Jkt.Utr)," *Jurnal Verstek* 4, no. 3 (2016): 125.

³⁵ Michael Jordi Kurniawan & Harjono.

³⁶ Yussy Adelina Mannas, "Upaya Keberatan atas Putusan Badan Penyelesaian Sengketa Konsumen Ditinjau dari Hukum Acara dan Undang-undang Perlindungan Konsumen," *jurnal Adhaper* 1, no. 1 (2015): 97, <https://jhaper.org/index.php/JHAPER/article/view/5>.

³⁷ Mannas, 98.

³⁸ Shidarta, "BPSK sebagai Badan Alternatif Penyelesaian Sengketa," 2020, <https://business-law.binus.ac.id/2020/09/08/bpsk-sebagai-badan-alternatif-penyelesaian-sengketa/>.

decision negates a certain legal situation and/or creates a new law.³⁹ When the Constitutional Court grants some decisions on a case of judicial review, it will be declaratory because such decision will become the law at that time. At the same time, the decision is also constitutive because it negates the legal situation regulated so that it creates a new legal situation.⁴⁰ The Constitutional Court Decision No. 15/PUU-XII/2014 granted the Petitioners' request, and created a new legal situation by stating that the Elucidation of Article 70 of Law 30/1999 is contrary to the 1945 Constitution and has no binding legal force. The decision will be immediately effective without any implementation of changes to the Law 30/1999, so it can be said that this decision is a self-executing decision.⁴¹

In accordance with *erga omnes* nature of the Constitutional Court's decision, the Constitutional Court Decision No. 15/PUU-XII/2014 also has implications for the arbitration process at BPSK, especially when the requirements for filing objections to arbitral awards issued by BPSK are essentially the same as the requirements for filing an annulment of an arbitral award stipulated in Law 30/1999. Basically, the Constitutional Court's decision strengthens the principle of non-intervention of the court, because it eliminates the requirement to cancel the arbitration award by first proving it in court so that it gets permanent legal force. However, on the other hand, the decision facilitates the process of filing for the annulment of arbitral awards as well as filing an objection process to arbitral awards issued by BPSK.

C. CONCLUSIONS

BPSK is an institution established with the aim of maximizing consumer protection efforts, one of which is through the arbitration dispute resolution method. The arbitration process conducted by BPSK has the benefit of accelerating the consumer dispute resolution process so that legal certainty for the disputing parties can be achieved immediately. However, such objective is undermined by the provisions regarding the annulment of arbitral awards in Law 30/1999 and objections to arbitral awards stipulated in Law 8/1999. The Constitutional Court Decision No. 15/PUU-XII/2014 annulled the provisions on the annulment of arbitral awards in the Elucidation of Article 70 of Law 30/1999, but did not make arbitral awards irrevocable, because the conditions for annulment of arbitral awards contained in the Article 70 of Law 30/1999 still apply. The Constitutional Court's decision also makes the arbitration award issued by BPSK still subject to challenge, because the requirements for filing a challenge refer to the Article 70 of Law 30/1999. When this is the case, a special regulation should be formulated regarding the provisions of cancellation and objection to arbitral awards issued by BPSK, so that it can maximize consumer protection.

³⁹ M. Ali Safa'at et al., *Hukum Acara Mahkamah Konstitusi (Edisi Revisi)*, ed. oleh Fajlruahman Jurdi (Jakarta: Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi RI, 2019).

⁴⁰ Safa'at et al.

⁴¹ Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum Ius Quia Iustum* 16, no. 3 (2009): 358, <https://doi.org/10.20885/iustum.vol16.iss3.art3>.

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