

Legal Certainty in the Resolution Process of Business Disputes due to Default on Payment with Bank Guarantee through Arbitration

Didit Wijayanto Wijaya

Doctoral Program in Law, Faculty of Law Universitas 17 Agustus 1945 Jakarta, DKI Jakarta 14350, Indonesia

Email: [diditww\[at\]yahoo.com](mailto:diditww[at]yahoo.com)

Abstract: Corporations have been established and recognized in Indonesia as entities engaged in business activities since 1602. In these business activities, disputes can occur regarding the non-disbursement of Bank Guarantees through the Indonesian National Arbitration Board (BANI). Therefore, this research uses the Normative Juridical method through a literature review. The research questions considered are (1) What is the guarantee of legal certainty in the process of resolving business disputes regarding Bank Guarantee payments through the Arbitration Board? (2) What can the Supreme Court Decision provide legal certainty for resolving business disputes through arbitration in Indonesia? The process of resolving business disputes in default on Bank Guarantee payments through the Arbitration Court has fulfilled the legal certainty principle. The results showed that the rules were available through different Arbitration and Alternative Dispute Resolution Laws, as well as other laws applied consistently in the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021. The Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023 tried the appeal case and rejected the application for annulment of the arbitration decision from the Applicant. In addition, legal certainty is created for corporate legal efforts to take the arbitration route.

Keywords: Arbitration, Legal Certainty, Business Disputes, Default

1. Introduction

The Dutch East Indies have existed since 1602 with the entry of the *Vereenigde Oostindische Compagnie* (VOC) to trade spices (Sirait, T.M. 2021, p. 1). In this context, business activities have a longstanding presence, and corporations tend to dominate the activities due to perceived flexibility compared to individual business actors. The impact of corporate dominance in the economic field has positive and negative impacts (Sirait, T.M. 2017). From a positive perspective, the dominance of corporations improves the economy and creates jobs. Meanwhile, from a negative perspective, many business relationships based on agreements have conflicts regarding payment methods with a Bank Guarantee leading to disputes. A Bank Guarantee is a form of financial instrument often used as a payment method by business corporations. The parties use this method for various interests as a form of written guarantee from banking institutions to the recipient. These include the need to "guarantee the implementation of work according to agreement, increase trust, and enhance mutual trust."

There are several legal options due to the occurrence of these business disputes. Conventional resolution of business disputes between corporations is carried out through litigation at the District Court. An alternative dispute resolution outside the court has been developed in subsequent developments due to various dissatisfaction with the length of the process and stages of dispute resolution through litigation in court. The resolution process can be carried out through consultation, negotiation, mediation, conciliation, or expert assessment as regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (UUAAPS). However, only disputes in the fields of trade or business can be resolved under the law.

Disputes unrelated to business and cannot be reconciled are not the resolution object of the law (Sudjana, 2017, p. 51).

Bank Guarantee is often used by business actors to finance private and government projects and is issued by Financial Institutions at the request of certain companies. This instrument has become a form of *bona fide* supporting material in business activities. In making a letter of agreement or cooperation contract for certain work, the business parties can include the form of payment method with a Bank Guarantee.

In business practice, the use of Bank Guarantee instruments also has problems when disbursed, resulting in disputes. An example is the legal relationship between corporations that began with the Cooperation Agreement between PT. Berkah Tiga Usaha ("PT. BTU") as the party guaranteed by a Bank (Applicant) with PT. Berkah Kawasan Manyar Sejahtera ("PT. BKMS"). The issuing bank rejected the disbursement when PT. BKMS as the Bank Guarantee Holder made the disbursement.

The clause of the agreement between PT. BTU as the guaranteed party (Applicant) and PT. BKMS states that the dispute is resolved through arbitration. Therefore, this case is submitted to the Indonesian National Arbitration Board (BANI) in Surabaya. BANI is an independent institution providing arbitration, mediation, and dispute resolution services outside the court. The advantages include fast decisions, low costs, and a win-win solution, as well as a closed trial and dispute resolution process to ensure the confidentiality of the disputing parties and minimize the impact on business. However, dispute resolution through arbitration is also considered to have several weaknesses. The arbitration decision is not guaranteed to be binding and final because the concept can be annulled by the District

Court and appealed to the Supreme Court, leading to legal uncertainty.

The research questions are (1) What is the guarantee of legal certainty in resolving business disputes regarding Bank Guarantee payments through the Arbitration Board? (2) How can the Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023 provide legal certainty for the resolution of business disputes through arbitration in Indonesia?

2. Research Method

This research uses a normative juridical method through a literature review by analyzing business agreement cases ending in disputes resolved through arbitration and reviewing related legislation. Case research is carried out to determine the fulfillment of the legal certainty principle in each stage of the business dispute between PT. BKMS and PT. BTU in various litigation and non-litigation resolution options. This occurred in the arbitration decision at the Indonesian National Arbitration Board (BANI) Surabaya Number 59/ARB/BANI-SBY/XI/2021 and the annulment decision to the Tangerang District Court Number 1188/Pdt.P/2022/PN Tng., as well as appeals through the Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023.

3. Discussion

3.1. Legal Certainty in Resolution of Business Disputes over Default in Bank Guarantee Payments through an Arbitration Board

Business agreements whose implementation is guaranteed by payment often become disputes resolved inside or outside the Court through arbitration. The law defines arbitration as "a method of resolving a civil dispute outside of a general court based on an agreement made in writing by the disputing parties (Article 1 number 1).

In modern times, Bank Guarantee is an important instrument to participate in and obtain projects including business payments. The confidence of the party requesting the guarantee can be increased besides improving mutual trust between the guarantor, the guaranteed, and the recipient, considering that the bank has credibility and *bona fide* financial integrity.

The term "Bank Guarantee" comes from the English word "guarantee" or "guaranty," which means to ensure or provide assurance. "Guarantee" or "assurance" is intended as an action to ensure fulfillment when an individual does not fulfill obligations as promised. For example, when someone does not pay debts, the guarantor will carry out or take over the obligation (Toni Butar-Butar, 2020 p. 313). This Bank Guarantee concept has been applied globally to gain the trust of business actors.

Issuing a Bank Guarantee is a service offered by banks to help smooth the business sector. These services are balanced with the mandate of the Banking Law that "Commercial Banks carry out business activities conventionally based on Sharia Principles whose activities provide services in payment transactions" (Article 1 number 1).

Besides the provisions, the agreement is regulated in Article 1824 of the Civil Code which "is an agreement to provide a Bank Guarantee". Article 1824 of the Civil Code stipulates that the guarantee should be determined expressly but not necessarily in writing.

According to Sarah Staszak, arbitration has been a highly successful strategy of the conservative judicial project, supposedly promoted to combat inefficient and wasteful litigation (Harvard Law Review, 2023, p. 1654). However, business disputes occur over the payment model because Bank Guarantee cannot be disbursed. In this context, the disputes should be resolved according to the agreement clause through the Arbitration Board.

Resolution of Bank Guarantee payment disputes through arbitration requires the parties to first agree in the agreement to bring disputes to arbitration. This should be fulfilled before arbitration can exercise the jurisdiction. In the resolution, the parties are free to select a judge considered neutral and an expert or specialist regarding the subject of the dispute. Arbitration decisions are also relatively more enforceable in other countries than disputes resolved through the courts (Sefriani, 2011, p.339).

a) Chronology of the Failure to Disburse Bank Guarantee according to the Agreement

Financing is an important element in business activities and performance is affected without this concept. Business actors who make agreements secure liquidity with a Bank Guarantee to avoid payment problems. This method was adopted by PT. BTU in conducting the sand dredging project given by PT. BKMS. In implementing the cooperation agreement, PT. BKMS made a disbursement to Bank Syariah Bukopin. However, the Bank rejected the disbursement because PT. BTU had not fulfilled some agreements.

b) The Bank Guarantee Should Be Disbursed Because It Has Passed the Prudence Principle in Its Issuance

According to the agreement, the bank should not be allowed to hinder the disbursement of the Bank Guarantee made by PT. BKMS. The Article of the Banking Law stipulates that "Indonesian Banking in conducting business is based on economic democracy by using the prudence principle." The issuance of the Bank Guarantee had been carried out by following the prudence principle in the law and was given to PT. BKMS.

The prudence principle is normatively regulated in Article 8 of Law Number 7 of 1992 concerning Banking as amended by Law Number 10 of 1998. The provisions of "Risk Management" in the Financial Services Authority Regulation (POJK) Number: 18/2016 are manifestations of the prudence principle. The disbursement of the Bank Guarantee should comply with the principle without harming the interests of the guaranteed customers (Rihantoro Bayuaji, 2024, p. 29). Therefore, since the issuance has been subjected to the prudence principle in Article 1 paragraph (3) of POJK Number 18/2016 and Article 14 Number 19 of Law No. 4 of 2023, the bank is expected to disburse the Bank Guarantee when all the requirements have been fulfilled. The issuing bank should provide legal certainty and protect the recipient and the guaranteed customers. The Bank Guarantee could

not be cashed as agreed, hence PT. BKMS brought the dispute resolution through the BANI Surabaya under the choice of dispute resolution law in the agreement.

c) The Surabaya Arbitration Board Decision

The arbitration case between PT. BKMS and PT. BTU regarding the Bank Guarantee was examined by the Arbitrator at the BANI Surabaya. Subsequently, BANI Surabaya has issued Decision Number 59/ARB/BANI-SBY/XI/2021, dated June 30, 2022, with the following ruling.

- 1) Accepting and granting the Applicant application in part,
- 2) Declaring that the Respondent has broken promise (default) and caused losses to the Applicant,
- 3) Declaring that the work agreement between the Applicant and the Respondent is valid and has binding legal force with all legal consequences until terminated by the Applicant,
- 4) Declaring that the termination of the employment agreement entered into by the Applicant against the Respondent is valid and has binding legal force with all legal consequences,
- 5) Ordering the Respondent to pay compensation of IDR 37,500,000,000.00 (thirty-seven billion five hundred million rupiah), which shall be disbursed and received by the Applicant no later than 30 (thirty) days from the date this decision is pronounced. This compensation includes
 - a) Performance Guarantee from Bank Syariah Bukopin Number 1039-2/SPPY-BG/KP-JKT/XII/2015, dated 7 December 2015 in the amount of IDR 7,500,000,000.00 (seven billion five hundred million rupiah)
 - b) Down Payment Guarantee from Bank Syariah Bukopin Number 1057/SPPY-BG/KP-JKT/XII/2015, dated 14 December 2015 in the amount of IDR 30 billion.
- 6) Sentencing the Respondent to compensate the Applicant for the payment of Income Tax and VAT amounting to IDR 2,100,000,000.00 (two billion one hundred million rupiah),
- 7) Rejecting the application of the Applicant,
- 8) Charging the Applicant and Respondent with half of the arbitration costs. This is because the Applicant has paid the Applicant and Respondent obligation costs of IDR 594 million and IDR 549 million. The Respondent is sentenced to return the arbitration costs to the Applicant of IDR 594 million,
- 9) Sentencing the Respondent to implement the contents of this decision no later than 30 days after the arbitration decision is pronounced,
- 10) Declaring that the arbitration is a decision at the first and final level as well as binding on both parties,
- 11) Ordering the Secretary of the BANI Trial Panel to register an official copy of the arbitration decision at the office of the Tangerang District Court Clerk within 30 days as stipulated by applicable laws and regulations.

d) Legal Remedy for Annulment of an Arbitration Decision Through the District Court

Article 70 of the Arbitration and Alternative Dispute Resolution Law stipulates that the parties may apply for annulment when the decision is suspected of containing the

following elements. (1). Letters or documents submitted in the examination are recognized as false or declared false after the decision is rendered (2). Documents of a decisive nature are found, which are hidden by the opposing party, and (3). The decision is made due to a ruse carried out by the parties in the examination of the dispute.

PT. BTU was dissatisfied with the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021 and applied for annulment to the Tangerang District Court due to the existence of a legal loophole. An appeal was sent to the Tangerang District Court to accept the application in the entirety and annul the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021.

Regarding the annulment application of PT. BTU, the Respondent I PT. BKMS filed an exception primarily stating, "The application submission has expired (*exceptio temporis*)" and is unclear (*exceptio obscurae libel*). The Applicant is not justified in suing Respondent I because the Applicant has committed a breach of contract/default (*exceptio non adimpleti contractus*). The *a quo* application was made in a voluntary form (*voluntair*) and the main case has been examined and decided by Respondent II (*exceptio nebis in idem*). Meanwhile, Respondent II BANI Surabaya filed an error in persona and *temporis* exception.

After examining the formal requirements of the PT. BTU annulment application and the exceptions from Respondent I PT. BKMS and II BANI Surabaya, the Tangerang District Court issued Decision Number 1188/Pdt.P/2022/PN Tng., dated February 20, 2023. In this context, the application and the lawsuit were inadmissible (*niet onvankelijke verklaard*) due to a formal defect. Therefore, the main cause of the lawsuit is not followed up by the judge to be examined and tried.

The process of resolving business disputes for default on Bank Guarantee payments has fulfilled the legal certainty principle. This is because the rules governing such matters have been made available through Arbitration and Alternative Dispute Resolution Laws, reinforced by the Judicial Power and Supreme Court Law. The laws can be accessed and recognized due to the power of the state. The judiciary also applies the legal rules as well as is subject to and obedient to independent Judges who do not think of applying legal rules when resolving legal disputes and Judicial decisions are implemented as in the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021. The legal certainty principle is needed in creating laws and regulations because the concept is the main principle of various law supremacy. According to M. Kordela, "The legal certainty as a higher principle justifies the validity of a certain group of values" (Indratanto, S. P., et al., 2020).

3.2. Legal Certainty in the Supreme Court Decision on Legal Remedy for Resolution of Business Disputes Through Arbitration in Indonesia

a) Scope of Appeal in Arbitration Decision

According to Jan Michiel Otto, legal certainty is the possibility that in certain situations (a). There are clear (transparent), consistent, and easily obtained rules, issued by

and recognized due to the power of the state. (b). The governing bodies (government) apply these legal rules consistently. (c). Citizens in principle adjust behavior to the rules. (d). Independent and unbiased judges apply the legal rules consistently to resolve disputes. (e). Judicial decisions are concretely implemented (Soeroso, 2011).

Article 72 paragraph (4) of the Arbitration and Alternative Dispute Resolution Law states that an appeal may be filed against a District Court decision to the Supreme Court which decides at the first and final instance. The authority of the Supreme Court is also strengthened by the Judicial Power and the Supreme Court Law.

Based on the provisions, the reading of the Tangerang District Court Decision was attended by the attorney of PT. BTU, Respondent I PT. BKMS and Respondent II BANI Surabaya. PT. BTU filed an appeal to the Supreme Court to examine the case at the final instance against the Tangerang District Court Decision Number 1188/Pdt.P/2022/PN Tng.

A memorandum is submitted through the office of the District Court Clerk within the time limit and in the manner specified in the law. In this context, the opposing party was notified to fulfill the formal requirements for the application. Based on the memorandum received by the Applicant, PT. BTU asked the Supreme Court Judges to accept and grant the Appeal application and memorandum from the Applicant. Furthermore, the Supreme Court was asked to annul the Tangerang District Court Decision Number 1188/Pdt.P/2022/PN Tng. PT. BTU also asked the Appeal legal remedy to be decided by rejecting the exceptions of Respondent I and Respondent II. In the main case, Supreme Court Judges "accept the Applicant Cassation application and annul the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021.

Respondent I (PT. BKMS) and II (BANI Surabaya) filed a counter memorandum where the Supreme Court rejected the appeal of the Applicant (PT. BTU). However, Article 72 paragraph (4) of the Arbitration and Alternative Dispute Resolution Law states that the meaning of "appeal" is against the annulment of the arbitration decision as referred to in Article 70. The existence of elements such as the letter or document submitted is declared false, or a document of a decisive nature is found, which is hidden by the opposing party.

b) Appellate Judge's Considerations and Decisions

After the appeal and counter-appeal memorandum received from the Applicant and Respondents were examined in connection with the Tangerang District Court, the reasons could be justified because the District Court Judge made a mistake in applying the law with consideration. Under the provisions of Article 70 connected with Article 71 of the Arbitration and Alternative Dispute Resolution Law, the annulment of the arbitration decision can be submitted to the District Court in the form of the application to annul the decision of Respondent II.

The reasons Respondent II (BANI Surabaya) is obliged to submit a copy of the claim of Respondent I (PT. BKSM) to the Applicant (PT. BTU) as stipulated in Article 39 of the

Arbitration Law cannot be justified. Therefore, the failure of Respondent I to inform the Applicant regarding the existence of the application for dispute resolution does not constitute a trick as reported in the provisions of Article 70 letter c of the Arbitration Law. According to Article 39 of the Arbitration Law, after receiving a letter of claim from the applicant, the arbitrator or chairman of the panel shall submit a copy of the claim to the respondent accompanied by an order that the respondent should respond and provide a written answer within a maximum of 14 (fourteen) days.

Respondent II (BANI Surabaya) has submitted a copy of the claim to the Applicant (PT. BTU) under applicable provisions. However, the Applicant did not provide an answer or attend the hearing before the Arbitration Panel/Respondent II without a valid reason. The reasons of the Applicant PT. BTU containing case materials in Decision Number 59/ARB/BANI-SBY/XI/2021 show that the Court is not authorized to re-evaluate the decision of Respondent II according to the provisions of Articles 3 and 11 paragraph (2) of the Arbitration Law.

The District Court should not have rejected the application for annulment of the arbitration decision by declaring the application inadmissible (*niet onvankelijke verklaard*) due to a formal defect. Therefore, the main case of the lawsuit was not followed up to be examined and tried by the Tangerang District Court Judge. Based on the considerations, the Supreme Court is reasonable in granting the application from the Applicant PT. BTU to annul the Tangerang District Court Decision Number 1188/Pdt.P/2022/PN.Tng in connection with the BANI Surabaya Decision Number 59/ARB/BANISBY/XI/2021. Furthermore, the Supreme Court is adjudicated under the arguments of the disputing parties since the application was inadmissible (*niet onvankelijke verklaard*). Based on the consideration of the Supreme Court, the Panel of Judges at the Appellate level, having examined and deliberated on the case, issued Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023 with the following ruling.

- 1) Accepting the Appeal from the Applicant PT. BERKAH TIGA USAHA,
- 2) Annulling the Tangerang District Court Decision Number 1188/Pdt.P/ 2022/PN Tng., dated February 20, 2023 with the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021, dated June 30, 2022.

The Main Case,

- 1) Rejects the application for annulment of the arbitration decision from the Applicant,
- 2) Strengths the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021, dated June 30, 2022;
- 3) Sentences the Respondents to pay court costs at all levels of the trial set at IDR 500,000.00 (five hundred thousand rupiah);
- 4) Respondents pay court costs at all levels of the trial after granting the application of the Applicant.

The Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023 rejected the application to annul the arbitration decision and upheld the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021. In this context, legal certainty was created regarding the case of non-payment of the Bank

Guarantee as stated in the Arbitration Board Decision. The Supreme Court ordered PT. BKSM and BANI Surabaya to bear the court costs determined to be IDR 500,000.

Sebagai Penerima Bank Garansi dengan PT Berkah Tiga Usaha Sebagai Terjamin)", *Lex Jurnalica* Volume XVII (3), pp. 312-323, 2020.

4. Conclusion

In conclusion, the process of resolving business disputes for default on the payment of Bank Guarantee through the Arbitration Court fulfilled the legal certainty principle. The rules governing the matters were made available through Arbitration and Alternative Dispute Resolution Laws, reinforced by the Judicial Power and the Supreme Court Law. The laws could be accessed consistently and recognized due to the power of the state. Independent and unbiased judges (courts) also applied the legal rules when resolving legal disputes. Judicial decisions were concretely implemented as in the BANI Surabaya Decision Number 59/ARB/BANI-SBY/XI/2021. The Supreme Court Decision Number 918 B/Pdt.Sus-Arbt/2023 created legal certainty for corporate legal efforts to take the arbitration route in litigation such as in the case of non-payment of the Bank Guarantee issued. Subsequently, the Decision sentencing PT. BKSM and BANI Surabaya as the Respondents to pay the court costs at all levels of the trial was fair to the parties. The imposition of court costs at all levels of the trial reported the commitment to uphold independence in establishing legal certainty through arbitration proceedings.

Author Profile



Didit Wijayanto Wijaya, Bachelor of Economics, Faculty of Economics, University of Indonesia (1983-1990), Bachelor of Law, University of Jakarta (2005-2008), Master of Law, Islamic University of Jakarta (2010-2012), Master of Law in Finance, Jakarta Institute of Management (1997-1998), Doctoral Program Student of Law at the University of August 17, 1945 Jakarta, profession as State Register Accountant, Lawyer, Expert, Power Generation Company Group In Aceh Tamiang, Sapalewa, Ruteng, Bali (Planning), Bengkulu (Planning)

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