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Legal Implications of Corruption Crime Legal Process on The Arbitration Dispute Resolution Proceedings

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Abstract: The research aims to analyze allegations of criminal acts of corruption that may affect the validity of arbitration agreements, as well as the implications of investigating or prosecuting these criminal acts simultaneously with arbitration proceedings. The research method relies on arbitration legal instruments and relevant literature, including the New York Convention 1958, the UNCITRAL Model Law, and Law No. 30 of 1999. The research identifies differences in regulations concerning the conduct that arbitrators or arbitral tribunals may adopt when examining arbitration disputes where the subject matter is also under investigation for criminal acts of corruption. The uniqueness of the research lies in its comprehensive analysis of the legal gaps and uncertainties that arise when these two legal processes run in parallel, which, if not governed by clear and firm regulations, could lead to conflicting decisions between the two legal processes. The findings show that in some jurisdictions, arbitration disputes related to criminal acts of corruption are refused or rejected, while others continue the arbitration process by considering the principles of party autonomy and separateness in arbitration law. The research recommends several approaches that arbitrators or arbitral tribunals may take and emphasizes the need for regulations from relevant authorities to ensure legal certainty in the parallel examination of arbitration disputes and criminal acts of corruption involving the same subject matter.

Keywords: ***Corruption*, *Arbitration*, *Parallel Examination.***

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1. Introduction

From a theoretical perspective, arbitration law and criminal law are two very different legal domains, because arbitration is based on the autonomy of the parties which aims to examine, adjudicate and provide decisions on private disputes, especially in the trade or commercial sector. Meanwhile, criminal law is law in the public domain which is intended to limit personal freedom based on law in the public interest. However, in practice, criminal cases that are in the process of being resolved can have an impact on the arbitration dispute resolution process and these two legal disciplines have more points of contact than originally thought.[1]

Alexis Mourre in the book Arbitrability: International and Comparative Perspectives - "Part II Substantive Rules on Arbitrability, Chapter 11 - Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal" describes the first problem that an arbitrator may face in an arbitration hearing process is when the arbitrator is faced

[1] Alexis Mourre, 'Part II Substantive Rules on Arbitrability, Chapter 11 - Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal', on Loukas A. Mistelis and Stavros Brekoulakis(eds), Arbitrability: International and Comparative Perspectives, International Arbitration Law Library, Volume 19 (© Kluwer Law International; Kluwer Law International 2009) hlm. 207 - 240

with an allegation of fraud or illegality in the arbitration agreement. The arbitrator is required to analyze whether the fraud invalidates the agreement as a whole, including the arbitration agreement, regardless of the principle of severability of the arbitration agreement (*principle of separability/severability)*. In the arbitration case at the International Commercial Chamber (ICC) Number 1110 of 1963, Arbitrator Lagergren discussed this issue and emphasized that criminal acts of corruption in an agreement could invalidate the entire agreement, including the arbitration clause. Arbitrator Legergren's ruling emphasizes the legal position of the French State, which prohibits arbitrators from handling cases intended for public courts and prohibits examining arbitration disputes originating from agreements containing serious moral violations[2]. In legal considerations of ICC Decision No. 1110 of 1963 which was decided by Arbitrator Lagergen, the principle used is that if an agreement is contaminated by criminal acts, especially corruption, then the agreement is legally deemed to have never existed, meaning that the agreement cannot be submitted, examined or decided in an arbitration mechanism.

The English court in the Westrace case provided legal considerations regarding whether an arbitration agreement is still valid if the main agreement is contaminated by criminal acts such as bribery. The English court ruled that the level of illegality of the main agreement must be examined first by an arbitrator or arbitral tribunal. If the illegality is serious, such as drug trafficking, then the arbitration agreement is invalid, but, if the level of illegality is low, the arbitration agreement still has a chance to come into force and the dispute examined by an arbitrator or arbitral tribunals.[3]

Dragor Hiber and Vladimir Pavic in "Arbitration and Crime" conducted research discussing how criminal issues can arise before an arbitration tribunal and analyzing how arbitrators or arbitration tribunals handle criminal issues that arise during the examination of arbitration disputes. In particular, the discussion relates to the relationship between the principle of confidentiality and the obligation to report crimes (both those being prepared and those that have been committed). Dragor Hiber and Vladimir Pavic's research also discusses the impact of false testimony before an arbitrator or arbitral tribunal, if during the examination of an arbitration dispute there is sufficient evidence that the disputed arbitration agreement is invalid, then the arbitrator or arbitration tribunal often refuses jurisdiction for certain reasons, known as criminal acts of fraud can destroy everything (*fraus omnia corrumpit)*, so, the agreement is invalid and automatically the arbitration clause is also becoming invalid. Another way to stop the process of examining an arbitration dispute: if there is a suspicion of a criminal act of money *laundering*, generally the arbitrator or arbitral tribunal will declare that there is no dispute and then stop the process of examining the arbitration dispute. Another way is to declare that the dispute brought before the arbitrator or arbitral tribunal is contrary to moral norms (*against mores bonds*) so that it cannot be submitted to arbitration as Alexis Mourre opinion.[4]

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[2] *Ibid,* hlm. 2103 Arb. Int'l (1994) 282, dan artikel J.G Wetter, "The Authentic Text and True Meaning of Judge Gunner Lagergren's1963 Award in ICC case No. 1110", Arb. Int'l (1994) 227

[3] Lloyd's Rep. 111. See also: A. Sheppard, "Case Comment: Westacre InvestmentsInc. v. Jugoimport-Spdr Holding Co. Ltd [1998] 3 W.L.R.", Int'l ALR (1998) 54; S. Wade, "Westacre v. Soleimany: What policy? Which public?" Int'l ALR (1999) 97.

[4] Dragor Hiber and Vladimir Pavic. "Arbitration and crime." *Journal of International Arbitration* 25.4 (2008). p. 463

The descriptions above give rise to a discourse regarding the act that should be taken by the arbitrator or arbitral tribunal if there are allegations of criminal acts of corruption related to the arbitration agreement. Then, what kind of action of the arbitrator or arbitral tribunal if in the process of an arbitration dispute proceeding it turns out that there is also a process of criminal act of corruption that is ongoing, either in inquiry stage or prosecution or examination in the realm of general court? Apart from that, also the attitude of the arbitrator or arbitral tribunal if the arbitration dispute and the corruption investigation process have the same object. Therefore, this research carries out a careful and comprehensive analysis of the solutions to the discourse mentioned above.

This research will carry out an analysis of the appropriate attitude that must be taken by the arbitrator or arbitral tribunal if the inquiry into an alleged criminal act of corruption begins before or simultaneously with the process of examining an arbitration dispute or the object of the arbitration dispute has similarities with the object of the alleged criminal act of corruption. The research aims to obtain legal certainty regarding the status of the arbitration dispute examination process in the event that there are allegations of criminal acts of corruption which are currently in the process of investigation/investigation/prosecution or examination in court. This research is also expected to explain the relationship between arbitral authority and criminal legal proceeding, as well as to provide normative guidance for the parties invloved. Research references refer to arbitration legal instruments such as the New York Convention 1958, UNCITRAL Model Law, and Law No. 30 of 1999 as well as statutory regulations related to Corruption Crimes, therefore the research has the title "The Implications Of Corruption Crime Legal Process On The Arbitration Dispute Resolution Proceedings".

2. Method

The research type is normative legal research with a statutory and conceptual approach, with analytical descriptive research specifications that analyze problems according to the research title. The secondary data used comes from primary legal materials, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958), UNCITRAL Model Law on International Commercial Arbitration, Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the Criminal Procedure Code (KUHAP), Law No. 31 of 1999 concerning the Eradication of Corruption Crimes, Supreme Court Regulation (Perma) No. 1 of 1956. Meanwhile, secondary legal materials include books, journals and related and relevant scientific writings.

3. Results and Discussion

3.1 Implications of the Criminal Process in the Criminal Justice System for the Civil Dispute Examination Process in General

The criminal justice system can be interpreted as an institution that was deliberately established to carry out criminal law enforcement efforts, the implementation is limited by

a certain working mechanism in a legal procedure known as criminal procedural law.[5] Mardjono Reksodiputro provides limitations to the definition of the criminal justice system, namely the crime control system consisting of police, prosecutor's office, court and correctional institutions.[6] The criminal justice system is divided into three phases, namely the pre-adjudication phase, the adjudication phase, and the post-adjudication phase.[7]

The pre-adjudication phase is the inquiry and investigation phase as regulated in the Criminal Procedure Code (KUHAP). Article 1 point 5 of the Criminal Procedure Code defines investigation as a series of investigative actions to search for and discover a criminal incident that is suspected of being a criminal act in order to determine whether or not an investigation can be carried out according to the method regulated in the Criminal Procedure Code. Meanwhile, the definition of investigation is a series of investigative actions in terms of and according to the methods regulated in the Criminal Procedure Code to search for and collect evidence with this evidence to shed light on the criminal act that occurred and in order to find the suspect. Next, the adjudication phase is the implementation of a court process so that the material truth can be found regarding an event that is suspected to be a criminal act and it can be determined whether a person accused of committing a criminal act is proven guilty or not.[8] The final phase is the post-adjudication phase, which is the stage for defendants who have been found guilty and have permanent legal force and thus become convicts. [9]

In connection with the criminal case examination process that occurs in the criminal justice system as mentioned above, there is often a civil case examination process in court at the same time with the same subject and object as the criminal case. There are several provisions that regulate the legal process that must take precedence if a situation occurs where criminal and civil legal processes occur simultaneously, including Article 1 of Supreme Court Regulation (Perma) No. 1 of 1956 determines that if in the criminal case examination it is necessary to decide whether there is a civil matter regarding an item or about a legal relationship between two particular parties, then the criminal case examination can be postponed to wait for a court decision in the civil case examination regarding the existence or non-existence of that civil right, that regulation as refered by Supreme Court Decision Number 363 K/Pid/2012 dated July 2nd, 2012, which contains legal consideration , “based on the reasoning that a civil case dispute between the Defendant and the reporting witness, which has been decided by the North Jakarta District Court in Decision Number 268/Pdt.G/2009/PN.Jkt.Utr, and is currently under appeal and not legally binding, therefore, district court decision, which was affirmed by the hight court, to postpone the decision on ciriminal process until the civil case obtains permanent legal force, is an appropriate ruling referring to Supreme Court Regulation Number 1 of 1956”.

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[5] Eva Achjani Zulfa and Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan*, cet.2 (Bandung: Lubuk Agung, (2011), p. 19.

[6] Mardjono Reksodiputro, "Sistem Peradilan Pidana Indonesia (Melihat kepada Kejahatan dan Penegakan Hukum dalam Batas-batas Toleransi)", Inaugural Speech on Accepting the Position of Permanent Professor in Legal Studies at the Faculty of Law, University of Indonesia, (1993), p. 1.

[7] Eva Achjani Zulfa and Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan*, cet.2 (Bandung: Lubuk Agung, (2011), p. 19.

[8] Eva Achjani Zulfa and Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan*, cet.2 (Bandung: Lubuk Agung, (2011), p. 22.

[9] *Ibid.*

After Supreme Court Regulation No. 1 of 1956 was issued, the Supreme Court also reiterated the suspension of criminal cases in the event that there are ongoing civil cases, as regulated in Supreme Court Circular Letter No. 4 of 1980 concerning Article 16 of Law No. 14 of 1970 and "Prejudicieel Geschiel". Supreme Court Circular No. 4 of 1980 regulates as follows: *1)* Some of these "prejudiciel geschil" are "question prejudicielle a I'action" and some are "question prejudicielle au jugement; *2)* "Question prejudicielle a I' action" is regarding certain criminal acts mentioned in the Criminal Code (including Article 284 of the Criminal Code); *3)* In this case, civil provisions are decided first before criminal prosecution is considered; *4)* "Question prejudicielle au jugement" concerns issues regulated in Article 81 of the Criminal Code; This article merely gives authority, not obligation, to the Criminal Judge to postpone the examination, awaiting the Civil Judge's decision regarding the dispute. The formulation in the Supreme Court Circular No. 4 of 1980 regarding the interpretation of "Prejudicieel Geschiel" is referred to the Indonesian Supreme Court Decision No. 413 K/Kr/1980 dated 26 August 1980.

Based on Supreme Court Regulation No. 1 of 1956 and Supreme Court Circular No. 4 of 1980 concerning Article 16 of Law No. 14 of 1970 *Jo.* Supreme Court of the Republic Indonesia Decision No. 413 K/Kr/1980 dated 26 August 1980, in the event that there is a criminal case and a civil case occurring simultaneously, then for the civil case there is no consequence of the process being suspended first, on the other hand, the criminal case can be postponed if there is a civil case regarding certain matters, for example, in the provisions of Article 284 of the Criminal Code which requires that complaints of the crime of adultery must be preceded by a civil decision regarding divorce.

However, if the type of criminal act that takes place simultaneously with the civil case process is a criminal act of corruption, then it is appropriate to pay attention to the provisions of Article 25 of Law No. 31 of 1999 concerning the Eradication of Corruption Crimes which regulates the following: *"Investigations, prosecutions and examinations in court in cases of criminal acts of corruption must take priority over other cases in order to resolve them as quickly as possible."*

The explanation of Article 25 states that if there are 2 (two) or more cases that are determined to be prioritized then determining the priority of these cases is left to each competent institution in each judicial process. Article 25 Law No. 31 of 1999 is a continuation of the provisions of Article 4 of Law no. 3 of 1971 concerning the Eradication of Corruption Crimes.

Regarding which matter should be prioritized between criminal corruption cases which are in the process of being investigated and civil cases which are also being examined in court, Article 25 of Law No. 31 of 1999 does not provide confirmation as to whether one case can be suspended from another. Although, referring to the practice of criminal justice as stated in the Supreme Court of the Republic of Indonesia Decision No. 1437 K/Pid.Sus/2016 dated November 30, 2016, which provides legal considerations that although the object in the Corruption Crime Case is also the object of a civil dispute currently ongoing in the District Court, in accordance with Supreme Court Regulation No. 1 of 1956, the corruption crime case does not have to wait for a decision in the civil case, and based on Article 25 of Law No. 31 of 1999, the Corruption Crime Case is prioritized for resolution. Therefore, indirectly, the Supreme Court of the Republic of Indonesia's decision provides a provision that when there are ongoing simultaneous legal processes involving the object of a civil dispute and the object of a corruption crime dispute, the corruption crime case must be prioritized.

When referring to the Supreme Court Circular No. 4 of 2016 which regulates that in the event of a criminal act of corruption that is related to a case being examined in a civil

manner, the Civil Decision is not binding in accordance with the provisions of Article 3 of Supreme Court Regulation No. 1 of 1956, based on these provisions it can be concluded that civil proceedings taking place in court do not have to be suspended because of the investigation process in cases involving criminal acts of corruption. Supreme Court Circular No. 7 of 2012 formulates that if an agreement is deviated from and has caused state losses then the act is a criminal act of corruption, so that the ongoing civil process should not provide a decision that is contrary to the formulation given in the Supreme Court Circular No. 7 of 2012.

Substance in Supreme Court Regulation No. 1 of 1956, Supreme Court Circular No. 4 of 1980, and Supreme Court Circular No. 7 of 2012 has differences with the provisions of the Civil Procedure Law in Indonesia, including Article 165 Civil Procedure Regulations (Reglement op de Rechtsvordering) *Jo.* Article 138 paragraph (7) and (8) HIR *Jo.* Article 164 paragraphs (7) and (8) RBg which basically states that if during the trial examination of a case there are allegations of forgery by a person who is still alive, then the judge because of his position or at the request of the public prosecutor is ordered to submit the documents to the public prosecutor for examination by the criminal judge, and the civil dispute is postponed until there is a criminal decision. Therefore, based on the provisions of this article, if during the examination of a civil case it is found that there is an allegation that a document used as evidence has been forged by a living person, then the examination of the civil case can be postponed until a District Court Decision is made regarding the alleged forgery of the document.

In Article 81 of the Criminal Code, it is stipulated that the postponement of criminal prosecution is due to pre-judicial disputes, delaying the statute of limitations. Van Bammelen translated it as a temporary suspension due to a civil case. Meanwhile, according to Eva Achjani Zulfa, the temporary suspension is not only because there is a civil case, but also includes pre-judicial disputes which could affect the criminal case being examined.[10]

As a comparison, researchers also reviewed the rules that apply in Bankruptcy and Suspension of Debt Payment Obligations as stipulated in Article 28 paragraph (1) and Article 29 of Law no. 37 of 2004 concerning Bankruptcy and Requests for Postponement of Debt Payment Obligations (PKPU), as follows:*"(Article 28 paragraph (1)) A lawsuit filed by the Debtor and which is ongoing during the bankruptcy period, at the request of the defendant, the case must be postponed to give the defendant the opportunity to call the Curator to take over the case within the time period determined by the judge. (Article 29) A legal claim in court that is filed against the Debtor as long as it aims to obtain fulfillment of obligations from the bankruptcy estate and the case is ongoing, is terminated by law with the pronouncement of a decision to declare bankruptcy against the Debtor."*

3.2 Implications of the Corruption Crime Investigation Process for the Arbitration Dispute Examination Process

In the New York Convention 1958, UNCITRAL Model Law, and Law No. 30 of 1999, there are no provisions that explicitly regulate the attitude or decisions that must be taken by the arbitrator or arbitration panel in dealing with the legal facts of a corruption investigation process which is currently taking place at the same time as the arbitration dispute examination process at the Arbitration Institution. The UNCITRAL Model Law provides a legal framework for international arbitration but does not specifically regulate

[10] Eva Achjani Zulfa, *Gugurnya Hak Menuntut, Dasar Penghapus, Peringan, dan Pemberat Pidana*, (Bogor: Ghalia Indonesia), 2010, p. 31.

the intersection between arbitration proceedings and criminal proceedings that are ongoing simultaneously.

UNCITRAL Model Law focuses on the principle of autonomy of the parties (*party autonomy*) and the principle of separateness (*separability*) of the arbitration agreement. Meanwhile, the New York Convention 1958 focuses on the recognition and enforcement of international arbitration awards. The New York Convention 1958 does not provide guidelines or regulations on how to handle the process of examining arbitration disputes in the event that there is a criminal case investigation process that is ongoing in the jurisdiction or competent authority and is related to the object of the arbitration dispute that being examined by the arbitrator or arbitration panel. However, Article V of the New York Convention 1958 stipulates that one of the reasons for refusing recognition and enforcement of an award is if the arbitration agreement is invalid according to applicable law or if the implementation of the award is contrary to public policy of the country where the recognition of the arbitral award is requested, which describes the autonomy of the parties as not absolute or unlimited.[11] Where, public policy or public order in question can include situations where there is a legal process for criminal acts of corruption which of course can affect the validity of the arbitration award or affect the validity of the object of the arbitration dispute.

United Nations Convention Agains Corruption (UNCAC) which has been ratified by the Republic Indonesia based on Law No. 7 of 2006 has the aim of preventing, detecting and inhibiting in a more effective way the international transfer of assets obtained illegally and to strengthen international cooperation in terms of asset recovery. In the opening section of UNCAC it is stated that UNCAC recognizes the basic principles of legal procedures in criminal and civil proceedings or administrative processes to adjudicate property rights.

Articles 34 and 35 of the UN Convention on Anti-Corruption *(United Nations Convention Againts)* stipulate that: *"With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action. Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."*

Furthermore, Article 43 paragraph (1) of UNCAC stipulates that: *"State Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption."*

Therefore, in accordance with the provisions of Articles 34 and 35 of UNCAC, UNCAC implicitly regulates that regarding an agreement, including but not limited to arbitration agreements, each party state must take action, including canceling agreements that contain criminal acts of corruption, or each state party can take other corrective actions. Thus, it can be interpreted that if there is a process of examining a criminal act of corruption and a process of examining an arbitration dispute simultaneously, or the object in a criminal act of corruption is the same as the object in an arbitration dispute then the examination of a criminal act of corruption must take precedence and the decision in the

[11] Desri Novian, The Application of Party Autonomy Principle in Arbitration. *Jurisprudentie: Department of Law, Faculty of Sharia and Law*, *11*(1), (2024). p. 28 https://doi.org/10.24252/jurisprudentie.v11i1.48364

criminal act of corruption will bring implications for the examination of arbitration disputes and/or arbitration awards.

The discourse regarding the jurisdiction of arbitrators or the arbitrability of disputes related to criminal acts of corruption has been started at least since the mid-20th century by a Swedish arbitrator named Gunnar Lagergren as described in the introductory part of this article. In examining arbitration disputes at the ICC, arbitrator Lagergren discovered the legal fact that the agreement made between the parties includes an agreement on certain payments to be used as a bribe to obtain a government decision necessary for the benefit of one of the parties. Arbitrator Lagergren decided that the dispute that had arisen could not be submitted to arbitration because it was contrary to public decency and morality.[12] An Arbitration Award may be denied recognition and enforcement based on Article V of the New York Convention 1958 on the grounds that it is contrary to public policy. Therefore, Lagergren's opinion is also compatible with the provisions of Article V of the New York Convention 1958, thus the arbitrator or arbitral tribunal has an obligation to recognize and implement the rules of international law and choose a proactive position regarding disputes where there are indications of criminal acts of corruption, so that agreements are contaminated with criminal acts of corruption must be canceled or can not be accepted for examined and decided by arbitration.[13]

Different opinions from several arbitration practitioners are that the arbitrator or arbitration tribunal must continue the procedures and process of examining arbitration disputes regardless of allegations of criminal acts of corruption, and must adhere to the arbitration agreement. The policy for continuing the arbitration dispute examination process is based on principles or principles *party autonomy* which cannot be violated by an arbitrator or arbitration tribunal.[14] This doctrine agrees that the arbitrator or arbitration tribunal has jurisdiction to examine and provide decisions on arbitration disputes contaminated by allegations of criminal acts of corruption based on the principle of separateness/severability,[15] and international arbitration tends to continue examining and providing arbitration awards in cases involving criminal acts of corruption.[16] Therefore, there is an opinion that in the event of a postponement of the arbitration dispute examination process or termination of the arbitration dispute examination process, it must be based on an agreement between the parties, where the parties expressly agree to temporarily suspend the arbitration dispute examination or the parties agree to withdraw the submitted arbitration request as regulated in Article 47 Law No. 30 of 1999. Likewise, the inclusion of a third party in the process of examining an arbitration dispute is required

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[12] Redfern, A., Hunter, M. *Redfern and Hunter on International Arbitration.* Oxford: Oxford University Press. (2015), hlm. 153

[13] A Timothy Martin, 'International Arbitration and Corruption: An Evolving Standard' (2003) 3 International Energy & Mineral Arbitration 1, hlm. 5.

[14] Iman Mirzazadeh, "Addressing Corruption in International Arbitration: The approach of Arbitrators When They Confronted with Cases Involving Allegation or Suspicion of Corruption: Eyes shut or Pro-Active." (2020). hlm. 1, https://www.diva-portal.org/smash/get/diva2:1435223/FULLTEXT01.pdf.

[15] *Ibid,* p. 12

[16] *Ibid,* p. 13

to obtain an agreement from the parties to the dispute and the approval of the arbitrator or arbitration tribunal.[17]

Llamzon's opinion regarding the implications of criminal corruption cases with the process of examining arbitration disputes, is that there are two different situations in connection with the legal process for criminal acts of corruption with the arbitration process. In the first situation, for example in the case of Siemens v. Argentina, an investor won an arbitration award, but later pleaded guilty in a national investigation into corrupt behavior related to the same contract, after which the investor was required to withdraw the claim in their arbitration award. In the second situation, in the case of Niko Resources Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd., the arbitral tribunal stated that if an investor pleads guilty in a national court to engaging in corrupt conduct in obtaining a contract, the corruption in question must be proven to have tainted the investment itself and there must be a causal relationship. If the opposing party cannot prove that causality links the corrupt behavior to the investment, the arbitration may proceed.[18]

The UNCITRAL Model Law does not regulate the impact of criminal legal proceedings on the process of examining arbitration disputes that are taking place simultaneously. However, the provisions in the UNCITRAL Model Law regarding the annulment of arbitration awards, the implementation of arbitration awards, and the principle of severability can relate to issues arising from criminal acts or acts, including in Article 34 and Article 36 of the UNCITRAL Model Law which regulate the Implementation of Awards. Arbitration and Cancellation of Arbitration Decisions, as follows: *an arbitration award may be annulled by a court as intended in article 6 only if: (a) the party submitting the request provides evidence that: (i) ... the agreement is invalid under the law applicable to the parties or, if there is no indication as to whether therein, under the laws of this State; or (b) the court decides that: (ii) the decision is contrary to the public policy of this State."*

The above provisions are the same as the reasons for refusing recognition or implementation of an arbitration award as regulated in Article 36 paragraph (1) letters (a) (i) and letter b UNCITRAL Model Law, with the addition of Article 36 paragraph (1) letter b UNCITRAL Model Law regulating the recognition or implementation of awards can also be rejected because they conflict with public policy of the country where the arbitration award is implemented.

The New York Convention 1958 does not provide regulations if there is a conflict between the examination of an arbitration dispute taking place at the same time as the examination of a criminal act of corruption or the same object between the arbitration dispute and a criminal act of corruption. However, Article V paragraph 1 letters (a) and b of the 1958 New York Convention regulates the reasons why the recognition and implementation of an arbitration award can be rejected if the arbitration award is contrary to public policy/public order of the country where the arbitration award is implemented. Based on the provisions of the UNCITRAL Model Law and the New York Convention 1958, the implications of criminal process in arbitration are more important when the arbitration award has been given by the arbitrator or arbitral tribunal. Where, if the arbitration agreement is proven to conflict with the law of a country, the agreement

[17] Desri Novian, "Problematika Hukum Masuknya Pihak Ketiga Dalam Proses Pemeriksaan Sengketa Arbitrase Di Indonesia". *UNES Law Review 6,* no. 1 (September 13, 2023): 1261-1271. Accessed August 28, 2024. https://review-unes.com/index.php/law/article/view/868. p. 1270

[18] Briscoe, Adam, dan Björn Arp. "Conference Report: Handling Allegations of Corruption in Arbitration and Judicial Dispute Settlement." *Arbitration Brief* 6.1 (2019): 2, p. 9

becomes invalid so that the arbitration award cannot be implemented and/or the award can be set aside.

Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution also does not explicitly regulate the implications of criminal cases of corruption on the examination of arbitration disputes, either in the case of both cases being examined at the same time or there is same object in cases of criminal acts of corruption and examination of arbitration disputes. Implicitly, the connection between criminal cases or criminal case decisions is contained in Article 70 of Law no. 30 of 1999, as follows:*"Regarding an arbitration award, the parties can submit a request for annulment if the award is alleged to contain the following elements: a. Letters or documents submitted in the examination, after the decision has been handed down, are recognized as fake or stated to be fake; b. after the decision is taken, documents of a decisive nature are discovered which have been hidden by the opposing party; or c. the decision was taken as a result of deception carried out by one of the parties in the investigation of the dispute."*

The issue of criminal acts of corruption which are currently in the process of being investigated in the criminal justice system again raises questions when the process of examining arbitration disputes is simultaneously ongoing. The hesitation of the arbitrator or arbitral tribunal to examine the arbitration dispute when there is a criminal case of corruption taking place simultaneously can be in the form of hesitation to accept or refuse to examine and decide the arbitration dispute as described above, or also the choice of action of the arbitrator or arbitral tribunal to postpone the process of arbitration until the criminal process is completed or continuing the arbitration process even though the criminal process has not been completed.

Based on the opinion developing in arbitration, the option of postponing the arbitration process is considered inappropriate, for the reasons:[19] *1)* The arbitrator or arbitration tribunaldoes not exercise its authority to examine disputes within an uncertain time or period. This is because the authorities in charge of the ongoing criminal process cannot provide certainty regarding the time period for completing the criminal process; *2)* The Respondent in the arbitration process will benefit because during the postponement of the arbitration process, the Respondent can avoid the contractual consequences of their actions before the arbitration panel; *3)* The Petitioner in the arbitration process will be disadvantaged because it will take longer to recover losses suffered as a result of the Respondent's actions.

Although the criminal process does not delay the examination of arbitration disputes, the criminal process has a significant influence on the process of examining arbitration disputes, namely in the process of examining the facts that occurred in the dispute.[20]Referring to several legal provisions in several countries, it is found that if there is an ongoing criminal case, the arbitration process is suspended. The United Arab Emirates Criminal Procedure Code requires arbitrators to suspend arbitration documents if criminal proceedings have been initiated,[21] with the summary of the article as follows: *"if, during the course of arbitration, a preliminary issue, which is outside the powers of the arbitrator, arises or if a challenge has been filed that a document has been counterfeited, or if criminal proceedings have been taken*

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[19] Matthew Happold,. "International Arbitration and National Criminal Proceedings: Presentation Given to the Luxembourg Arbitration Association, 30 June 2020." *University of Luxembourg Law Working Paper* 2020-020 (2020), p. 4

[20] Matthew Happold,. "International Arbitration and National Criminal Proceedings: Presentation Given to the Luxembourg Arbitration Association, 30 June 2020." *University of Luxembourg Law Working Paper* 2020-020 (2020), p. 5

[21] United Arab Emirates Civil Procedure Code, Federal Law No (11) of 1992, Article 209 (2)

regarding such counterfeiting or for any other criminal act, the arbitrator shall suspend the proceedings until a final judgement on the same has been passed." In addition to the provisions in the United Arab Emirates mentioned above, before 2007 the French Criminal Procedure Code contained principles *"lecriminel tient le civil en l'état"* or criminal matters take priority over civil matters, and stipulates the obligation to stop civil proceedings pending resolution of criminal cases, with the following provisions: *"The civil action may also be exercised separately from the public prosecution. However, the judgment in any action exercised before the civil court is suspended until a final decision is made on the merits of the public prosecution where such a prosecution has been initiated"*

However, the above provisions were amended by Article 4 of the French Criminal Procedure Code by no longer regulating the postponement of the arbitration process. The decision of the French Court leaves it to the arbitrator or arbitral tribunal to assess the extent to which the ongoing criminal process affects the resolution of the dispute in arbitration, and the above rules do not apply in international arbitration.[22]

Principle *"lecriminel tient le civil en l'état"* also applies in Belgium but is only limited to domestic arbitration, whereas for international arbitration if there is a criminal complaint that affects the arbitration process, the decision to suspend the arbitration process or continue the examination of the arbitration process is left to the judgment of the arbitrator or arbitral tribunal. Meanwhile in Sweden, the suspension of the arbitration process in the event of criminal proceedings can only be done for reasons of "extraordinary importance" to the arbitration.[23]

In an arbitration matter in Switzerland between B Fund against A. Group[24] it is stated that an arbitral tribunal has the discretion to postpone arbitration pending a criminal investigation. Furthermore, the arbitration panel in this case also stated that the difficulty of proof due to the existence of a criminal case was not a sufficient reason to postpone the arbitration process. With these considerations in mind, the arbitration panel refused to postpone the arbitration process until the criminal process was completed, and conducted an arbitration examination and found that the agreement was tainted by the crime of money laundering, so the arbitration panel declared the agreement null and void. When hearing the application for annulment of the arbitration award, the Swiss Federal Court confirmed that the arbitral tribunal had jurisdiction to consider the norms of criminal law to assess the validity of the agreement, and with the following legal considerations: *"The arbitral tribunal may order a postponement of the proceedings if it considers it to be in the interests of the parties; however, if there is any doubt, the principle of speed of proceedings must be upheld as a postponement of the proceedings may constitute a denial of justice or an unjustified delay (…). A postponement of the proceedings may be specifically justified up to legal situations are clarified through other*

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[22] John Savage dan Emmanuel Gaillard, eds, Fouchard Gaillard Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999), paragraf 1660.

[23] Pierre Heitzmann, "Arbitration and Criminal Liability for Competition Law Violations in Europe" in Gordon Blanke & Phillip Landolt, eds, EU and US Antitrust Arbitration: A Handbook for Practitioners (Kluwer Law International, 2011) 1251. See Swedish Court of Judicial Procedure, SFS 1942:740, Bab 32, Bagian 5, online: Government Offices of Sweden https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedishcode-of-judicial-procedure-ds-1998_65.pdf on Dmytro Galagan,. *Provisional measures in international arbitration as a response to parallel criminal proceedings*. Diss. 2019, hlm. 39

[24] B Fund Ltd vs A Group Ltd, Putusan 19 February 2007, Kasus No 4P_168/2006 (Swiss Federal Tribunal) [B Fund v A Group], on Sébastien Besson, "Corruption and Arbitration" on Domitille Baizeau & Richard H Kreindler, *Addressing Issues of Corruption in Commercial and Investment Arbitration 13* (Kluwer Law International, (2015) hlm. 103.

procedures, when they relate to preliminary questions that should be resolved independently by the arbitral tribunal (…). when, as in this case, the arbitral tribunal directly announces that, if necessary, it will take steps appropriate to the circumstances)"[25]

Besson suggests that the arbitrator or arbitral tribunal, when deciding whether to suspend the arbitration process pending resolution of the criminal case, consider the following five factors: (i) the relevance of the criminal investigation, (ii) the timing of the request to suspend the arbitration and the stage of the criminal investigation, (iii) efficiency , independence and impartiality of the authority handling the criminal investigation, (iv) the likelihood of the criminal investigation achieving results within a reasonable time, and (v) the reasonableness of the burden of proof. Thus, if the criminal investigation is unlikely to yield information that can be used in the arbitration, the adjournment request is filed at an advanced stage of the arbitration and based on a criminal investigation that has only just begun, then it is unlikely that the arbitrators will suspend the proceedings.[26]

Regarding the suspension or continuation of this arbitration process, Henry G. Burnet and Jessica Bees und Chrostin review the temporary measures that can be taken by the arbitrator or arbitral tribunal in the arbitration process which is generally given in the form of an Interim Order or Decision, where the interim measure (IM) is the provision of temporary protection to protect the rights of a party during the final dispute resolution process. These temporary measures are often provided for four types of protection: *(i)* prevent publication to the media or public of matters disclosed during the arbitration process; *(ii)* suspend or influence related litigation proceedings in domestic forums; *(iii)* safeguard evidence that may be relevant to the conduct and outcome of the arbitration; And *(iv)* ordered security for costs.[27]

Based on the description above, the arbitrator or arbitral tribunal should take several actions necessary for the legal interests of the parties while also paying attention to public order. This means, in the event that there is an arbitration dispute examination process that takes place simultaneously with the process of examining a criminal act of corruption, the arbitrator or arbitral tribunal can carry out an examination or request information from the competent authority, for example by sending an official letter to the criminal law enforcement apparatus, especially the enforcement of criminal acts of corruption (Police / Prosecutor's Office and/or Corruption Crime Court at the District Court) to obtain accurate information regarding the object of the corruption investigation process so that the arbitrator or arbitration panel can assess whether the object of the case being examined has similarities with the object of the case in the arbitration dispute submitted to him.

If the arbitrator or arbitration panel finds that there are significant similarities between the object in the corruption case and the object in the arbitration dispute, then the arbitrator or arbitration panel can take a position on several options. The first option is to grant an interim decision to postpone the examination of the arbitration dispute. The

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[25] Dmytro Galagan, *Provisional measures in international arbitration as a response to parallel criminal proceedings*. Diss. (2019), https://dspace.library.uvic.ca/server/api/core/bitstreams/8869790f-de17-4931-b5a9-5df6e90ed77e/content hlm. 38

[26] Dmytro Galagan,. *Provisional measures in international arbitration as a response to parallel criminal proceedings*. Diss. 2019, https://dspace.library.uvic.ca/server/api/core/bitstreams/8869790f-de17-4931-b5a9-5df6e90ed77e/content hlm. 40

[27] Henry G. Burnett dan Jessica Beess und Chrostin, Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings, 30 Md. J. Int'l L. 31 (2015). Dapat diakses pada: http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/5, p. 33

granting of interim decisions by an arbitrator or arbitral tribunal may based on the provisions in Article 56 paragraph (1) of Law No. 30 of 1999 where the arbitrator or arbitral tribunal makes decisions based on legal provisions, or based on justice and propriety. Therefore, by referring to the provisions of the laws and regulations that have been described previously, including Article 25 of Law no. 31 of 1999 and taking into account Article 165 of the Civil Procedure Regulations (Reglement op de Rechtsvordering) *Jo.* Article 138 paragraph (7) and (8) HIR *Jo.* Article 164 paragraphs (7) and (8) RBg, the arbitrator or arbitral tribunal can give an interim decision to postpone the examination of the arbitration dispute until a decision on the corruption criminal case has permanent legal force (*Inkracht van Gewisjde).* Delays in examining arbitration disputes will raise questions regarding the period for examining arbitration disputes which is set at a maximum of 180 days in Article 48 paragraph (1) of Law no. 30 of 1999. However, when referring to Article 32 paragraph (2) of Law no. 30 of 1999 which basically states that the period for implementing provisional decisions or other interlocutory decisions is not counted within the time period as intended in Article 48 of Law no. 30 of 1999, then these provisions can be taken into consideration by the arbitrator or arbitral tribunal to remain within the time period permitted by Law no. 30 of 1999, added further in Article 48 paragraph (2) of Law no. 30 of 1999 also opens up the opportunity for the arbitration dispute examination period to be extended with the agreement of the parties. Apart from that, Article 33 of Law no. 30 of 1999 also provides provisions that the arbitrator or arbitral tribunal has the authority to extend the term of their duties as a result of the stipulation of a provisional award or interim decision, or is deemed necessary by the arbitrator or arbitration panel for the purposes of examination.

Furthermore, the second option is that the arbitrator or arbitral tribunal can give a decision stating that it cannot accept the arbitration request submitted to it as Lagergren opinion. The arbitrator or arbitral tribunal can base its legal considerations on Article 16 of the UNCITRAL Model Law which states that the arbitration panel can decide regarding its own authority, including regarding the validity of the arbitration agreement. In civil procedural law in Indonesia, if the dispute being examined is not a case that falls within the jurisdiction of the district court, then the judge, whether requested or not requested, based on his position, can declare that he is not authorized to examine the case, as regulated in Article 134 HIR. So that the arbitrator or arbitral tribunal can also give an arbitration decision stating that the arbitration request cannot be accepted. Meanwhile, the option to reject the arbitration request because there is no authority is not appropriate because if the decision is rejected, it means that the dispute submitted to arbitration is indeed the authority of the arbitration, but the applicant cannot prove its arguments. Therefore, the decision in this state of incompetence should be given with the injunction that the arbitration request cannot be accepted.

The third option that can be carried out by the arbitrator or arbitration tribunal is to convey to the parties that the parties should first withdraw the request for arbitration, by providing an explanation that the resolution of the arbitration dispute contains or contains the invalidity of the agreement because there is a criminal act of corruption related to or contrary to public order, and it may affect the arbitration award can not being implemented or even being canceled as stipulated in Article 62 paragraph (2) of Law no. 30 of 1999 and Article 66 of Law no. 30 of 1999. Therefore, on the advice of the arbitrator or arbitral tribunal, in order to avoid arbitration awards that cannot be implemented or are set aside, based on Article 47 of Law No. 30 of 1999 the applicant withdraws the request for a dispute through arbitration with the consent of the respondent.

Paying attention to the absence of explicit regulations in the New York Convention 1958, UNCITRAL Model Law, and Law no. 30 of 1999, it is necessary to regulate the confirmation of the action or policy of the arbitrator or arbitral tribunal in the process of examining an arbitration dispute which has the same object as the object of the case in the ongoing criminal process for criminal acts of corruption in the criminal justice system, especially in Indonesia, so the regulation can serve as a basis for consideration and reference for both the panel of judges in criminal matters, and, for the arbitrator or arbitral tribunal when handling arbitration disputes.

4. Conclusion

The connection between the criminal legal process, especially criminal acts of corruption, and the process of examining arbitration disputes shows significant complexity. Although arbitration is generally considered as a private trade dispute resolution mechanism, the existence of allegations of criminal acts or ongoing criminal proceedings, especially criminal acts of corruption, can affect the validity and implementation of arbitration agreements, and this matter will become a discourse over the authority of the arbitrator or arbitral tribunal to examine arbitration disputes. Based on analysis of various cases and literature, while still paying attention to the provisions in Law No. 30 of 1999, UNCITRAL Model Law and the New York Convention 1958, there are differences in how to handle arbitration disputes that are contaminated by the legal process of criminal acts of corruption. In general, if the arbitration agreement is related to corruption, some jurisdictions declare that they are not authorized to examine the dispute through arbitration, while others continue to proceed with the arbitration procedure taking into account the principle of autonomy of the parties and the principle of severability. Therefore, it is important to evaluate and harmonize regulations and practices to ensure legal certainty in cases where arbitration and criminal legal proceedings take place simultaneously.

References

Blanke, Gordon, and Phillip Louis Landolt. *EU and US Antitrust Arbitration: A handbook for practitioners*. Vol. 1. Kluwer Law International BV. (2011).

Briscoe, Adam, and Björn Arp. "Conference Report: Handling Allegations of Corruption in Arbitration and Judicial Dispute Settlement." *Arbitration Brief* 6.1 (2019)

Burnett, Henry G. and Jessica Beess und Chrostin, Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings, 30 Md. J. Int'l L. 31 (2015). http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/5,

Draye, Maarten. "Commentary on Part VI of the Belgian Judicial Code, Chapter V: Article 1700" in Niuscha Bassiri & Maarten Draye, eds, Arbitration in Belgium (Alphen aan den Rijn: Kluwer Law International. (2016)

Galagan, Dmytro. *Provisional measures in international arbitration as a response to parallel criminal proceedings*. Diss. (2019). https://dspace.library.uvic.ca/server/api/core/bitstreams/8869790f-de17-4931-b5a9-5df6e90ed77e/content

Garajová, M. "The Issue of Corruption in The International Trade-Questioning The Arbitrators' Jurisdiction." *PEOPLE: International Journal of Social Sciences* 4.2 (2018): 1-6.

Happold, Matthew. "International Arbitration and National Criminal Proceedings: Presentation Given to the Luxembourg Arbitration Association, 30 June 2020." *University of Luxembourg Law Working Paper* 2020-020 (2020).

Hiber, Dragor, and Vladimir Pavic. "Arbitration and crime." *Journal of International Arbitration* 25.4 (2008).

Llamzon, Aloysius. "Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha" 30:2 ICSID Rev 315. (2015)

Martin, A. Timothy. "International arbitration and corruption: an evolving standard." *Transnational Dispute Management* 1.2 (2004)

Mirzazadeh, Iman. "Addressing Corruption in International Arbitration: The approach of Arbitrators When They Confronted with Cases Involving Allegation or Suspicion of Corruption: Eyes shut or Pro-Active." (2020).

Novian, Desri. Hukum Acara Arbitrase di Indonesia. Yogyakarta : CV. Arti Bumi Intaran. (2023).

Novian, Desri. The Application of Party Autonomy Principle in Arbitration. Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum, 11(1), (2024). hlm. 26-36 https://doi.org/10.24252/jurisprudentie.v11i1.48364

Novian, Desri. "Problematika Hukum Masuknya Pihak Ketiga Dalam Proses Pemeriksaan Sengketa Arbitrase Di Indonesia". UNES Law Review 6, no. 1 (September 13, 2023): 1261-1271. Accessed August 28, 2024. https://review-unes.com/index.php/law/article/view/868.

Reksodiputro, Mardjono. "Sistem Peradilan Pidana Indonesia (Melihat kepada Kejahatan dan Penegakan Hukum dalam Batas-batas Toleransi)". Pidato Pengukuhan Penerimaan Jabatan Guru Besar Tetap dalam Ilmu Hukum pada Fakultas Hukum Universitas Indonesia. (1993).

Savage, John, dan Emmanuel Gaillard. "Fouchard, gaillard, goldman on international commercial arbitration." (1999). 1-1320.

Uluc, Inan. "Corruption in International Arbitration" (2016). SJD Dissertations. Paper 1. https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Reply%20%28Redacted%20per%20PO8%29/Legal%20Authorities/CL-0052.PDF

Zulfa, Eva Achjani dan Indriyanto Seno Adji. Pergeseran Paradigma Pemidanaan. Cet.2 Bandung: Lubuk Agung. (2011)

Zulfa, Eva Achjani. Gugurnya Hak Menuntut, Dasar Penghapus, Peringan, dan Pemberat Pidana, Bogor: Ghalia Indonesia. (2010).