



Fair Legal Certainty In The Implementation Of International Arbitration Awards (A Socio Legal Study)

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Abstract: *Arbitration is a method of resolving civil disputes other than in a general court based on an arbitration agreement and made in writing by the disputing parties. For international arbitral awards, there are several requirements that must be met before the decision can be applied for execution and obtain an exequatur in Indonesia, one of which is that the decision does not conflict with public order. However, in several court decisions in Indonesia, this requirement became one of the judges' arguments against the implementation of the decision. The questions in this study are (i) what are the judges' considerations in rejecting the application for the exequatur of an international arbitral award? And (ii) what are the legal implications governing the implementation of international arbitral awards in realizing fair legal certainty? The research method used is the socio-legal method. The results show that the judge's legal considerations regarding what is meant by "public order" among judges also vary. In addition, several articles in Law no. 30 of 1999 is the base of uncertainty regarding the implementation of the international arbitration award in Indonesia which has implications for the collapse of legal certainty in the implementation of the international arbitration award.*

Keywords: *Arbitration; Exequatur Application; Fair Legal Certainty; International Arbitration Award*

INTRODUCTION

Business is one of the means to gain wealth and profit, ranging from buying and selling in traditional markets to buying and selling shares or cryptocurrencies in virtual markets. From a legal point of view, business activities in general will be based on an agreement, be it in terms of buying and selling, exchanging, leasing, and others.

However, occasionally business will not always run well as it should. Often the parties involved in the business have different views and principles from each other so that disputes arise between the parties. In resolving the business dispute, the law appears and functions to reduce or resolve a social conflict and at the same time provide a solution in resolving the conflict¹.

In general, there are 2 (two) dispute resolution methods, namely litigation and non-litigation methods. According to Amriani, as quoted by Lathif and Habibaty, litigation settlement is a dispute resolution method carried out through a judicial mechanism, where the authority to hear and decide lies with the judge who hears the case. The parties face each other to defend and postulate their rights and will end up with a win-lose condition decision.² non-litigation settlement (or generally referred to as Alternative Dispute Resolution (“ADR”)), is a dispute resolution method directed at a win-win condition solution, where the win-win condition solution is able to absorb the wishes and interests of the disputing parties.³

In Indonesia, the positive law that regulates ADR is the Law of the Republic of Indonesia Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. In the last three decades, arbitration is a popular method of out-of-court dispute resolution in resolving business disputes, especially in international business and trade contracts. Arbitration itself comes from the words "arbitrare" (Latin), "arbitrage" (Dutch), "arbitration" (English), "*schiedspruch*" (Germany), and "*arbitrage*" (French), which means the power to settle something according to one's discretion or discretion. amicable by the arbitrator or referee.⁴

According to Felix OS, as quoted by Joni Emirzon, there are several reasons why arbitration is used by the parties, as follows:⁵

1. The existence of freedom, trust, and security;
2. Expertise of the arbitrators;
3. Faster and more cost-effective, and the decision is final and binding;
4. Maintained confidentiality;
5. Non-precedent in nature; and
6. Easier implementation of decisions.

¹ Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan* (Penerbit PT Citra Aditya Bakti, 2013), pp. 2.

² Ah. Azharuddin Lathif dan Diana Mutia Habibaty, 'Disparitas Penyelesaian Sengketa Jalur Litigasi Pada Polis Asuransi Syariah dan Putusan Pengadilan' (2019) Volume 16 No. 1 (Maret), *Jurnal Legislasi Indonesia*, pp. 80.

³ Tim Peneliti Mahkamah Agung, *Laporan Penelitian Alternative Dispute Resolution (Penyelesaian Sengketa Alternatif) dan Court Connected Dispute Resolution (Penyelesaian Sengketa yang terkait dengan Pengadilan)* (Proyek Penelitian dan Pengembangan Mahkamah Agung Republik Indonesia, Jakarta, 2000), pp. 6.

⁴ *Op.cit.*, pp. 137

⁵ Joni Emirzon, *Penyelesaian Sengketa Bisnis melalui Badan Arbitrase dan Implementasi Putusan Arbitrase di Indonesia* (Disampaikan pada Fakultas Hukum Unsyiah, Banda Aceh, September 2017) pp. 7.

Indonesia recognizes 2 (two) types of arbitration, namely national arbitration and international arbitration. However, the relevant laws only provide a general definition of arbitration. Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution defines arbitration as a way of settling a civil dispute outside the general court based on an arbitration agreement and made in writing by the disputing parties⁶ (**Arbitration**).

Although there are 2 (two) types of Arbitration in Indonesia, the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution only provides a definition relating to international arbitration awards, namely decisions made by an arbitration institution or individual arbitrator outside the territory of the Republic of Indonesia, or the award of an arbitration institution or an individual arbitrator which according to the laws of the Republic of Indonesia is considered an international arbitral award⁷ (**International Arbitration Award**). From the above definition, it can be seen that the law defines an International Arbitration Award alternatively, where the first provision is limited to classifying based on the area where the Arbitration award is made, while the second provision tends to use open norms, which can be adapted to the provisions of Indonesian positive law.

In implementing the International Arbitration Award, the arbitrator and the parties still need the role of the state. Therefore, the laws and regulations regulate the requirements and stages that must be met if the winning party wishes to apply for the execution of the Arbitration award, both national and international decisions. This provision is regulated in Supreme Court Regulation Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards and Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Based on the above-mentioned regulations, specifically for International Arbitration Awards, the decision must obtain an exequatur (execution order) from the Central Jakarta District Court and under certain conditions must obtain an exequatur from the Supreme Court in order to be executed in Indonesia. The execution will be given by the Central Jakarta District Court if the International Arbitration Award "does not conflict with public order". However, the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution does not provide further explanation regarding what is meant by not contradicting "public order". Meanwhile, based on the Regulation of the Supreme Court Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards, the meaning of "public order" itself has expanded, namely everything that is contrary to the basic legal system and society. Thus,

⁶ Article 1 point 1 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

⁷ Article 1 point 9 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

the indicators and benchmarks for the implementation of the International Arbitration Award, namely that it should not conflict with “public order”, are blurred, have the potential to give rise to broad meanings, and do not provide certainty and guarantees.

Related to the broad and potentially multi-interpreted term “public order” above, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution also prohibits legal appeals or cassation against the decision of the Head of the Central Jakarta District Court who has acknowledged and implemented the said International Arbitration Award.⁸ This provision certainly causes further uncertainty to the petitioner of the International Arbitration Award, despite the fact that they have received an exequatur from the Central Jakarta District Court.

In fact, the 1945 Constitution of the Republic of Indonesia clearly states that *everyone has the right to fair recognition, guarantees, protection and legal certainty and equal treatment before the law.*⁹ It is this fair legal certainty as referred to in the 1945 Constitution that should be pursued and implemented as much as possible so that the constitutional mandate can be implemented. These efforts should also be clearly and definitely reflected in every norm of legislation, in this case, one of which is the norm that regulates the implementation of International Arbitration Awards.

In addition, the broad definition of the term “public order” allows judges to be very flexible in making judgments about what can be classified as “public order”. In the case between PT Astro et al. against PT Ayunda Prima Mitra et al, for example, judges at the first level up to the judicial review level gave different classifications in relation to public order.

Furthermore, the law also stipulates in a limitative manner that no appeal or cassation legal action can be taken against an International Arbitration Award recognized by the Central Jakarta District Court. Thus, the limited provisions can be tricked by the respondent who has bad intentions to commit legal smuggling by utilizing the ‘appeal’ and ‘cassation’ limitations stipulated by law. As a result, the respondent can still take other legal remedies beyond ‘appeal’ and ‘cassation’ to reject and delay the implementation of the International Arbitration Award in Indonesia, for example legal remedies for rebuttal, resistance, to lawsuits against the law. This is as stated in the case between Harvey Nichols and Company Limited against PT Hamparan Nusantara and PT Mitra Adiperkasa, which harmed the petitioner of the International Arbitration Award and hindered the implementation of the arbitral award.

Based on the description above, the author will examine the following matters:

1. What is the judge's consideration in rejecting the application for the exequatur of the international arbitration award?

⁸ Article 66 letter d of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

⁹ 1945 Article 28D paragraph 1 of the 1945 Constitution of the Republic of Indonesia

2. What are the implications of the laws and regulations governing the implementation of international arbitration awards in realizing fair legal certainty?

METHODS

The type of research used in this paper is socio legal research. According to Herlambang W. Wiratman, socio legal research is essentially an umbrella concept for various approaches to the law, legal system or legal process, which then provides assistance in understanding the context of social or political configurations that affect law and its implementation.¹⁰ In line with this, Sulistyowati Irianto also stated that socio-legal is like a house that houses, among others, legal anthropology, legal psychology, legal politics or legal sociology.¹¹

According to Irianto, socio-legal research uses a combination of normative/doctrinal legal research methods and empirical law. Consequently, socio-legal research uses document/textual studies followed by field studies.¹²

In the document/textual study, the author will take an inventory of the laws and regulations, implementing regulations relating to the International Arbitration Award and court decisions, both the decisions of the Constitutional Court relating to the implementation of the International Arbitration Award and the court decisions that adjudicate the application for the implementation of the International Arbitration Award. The laws and regulations and decisions are collected from the official websites of government institutions or other credible websites.

The statutory regulations and decisions, inter alia, are:

1. *Rechtsglement Buitengewesten* (“**RBg**”);
2. *Herziene Inlandsche Reglement* (“**HIR**”);
3. The 1945 Constitution of the Republic of Indonesia (“**1945 Constitution**”);
4. Law of the Republic of Indonesia Number 14 of 1970 concerning Basic Provisions of Judicial Power (“**Law No. 14 of 1970**”) *jo* Law of the Republic of Indonesia No. 48 of 2009 concerning Judicial Power (“**Law No. 48 of 2009**”);
5. Law of the Republic of Indonesia Number 14 of 1985 which has been amended several times and lastly Law of the Republic of Indonesia Number 3 of 2009

¹⁰ Herlambang P. Wiratman. ‘Penelitian Sosio-Legal dan Konsekuensi Metodologisnya’, pp.1, <https://herlambangperdana.files.wordpress.com/2008/06/penelitian-sosio-legal-dalam-tun.pdf>, accessed on 20 November 2021

¹¹ Normand Edwin Elnizar, ‘Socio-Legal, Mengembalikan Hakikat Hukum yang Tak Sekadar Doktrin Normatif’ (27 Agustus 2019), *hukum online*, <https://www.hukumonline.com/berita/baca/lt5d64b0d431078/socio-legal--mengembalikan-hakikat-hukum-yang-tak-sekadar-doktrin-normatif/>, pp. 4, accessed on 27 September 2021

¹² Sulistyowati Irianto, ‘Praktik Penelitian Hukum: Perspektif Sosiological’. https://www.bphn.go.id/data/documents/materi_cle_8_prof_dr_sulistyowati_irianto_full.pdf, pp. 12, accessed on 18 November 2021

- concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court (“**Supreme Court Law**”);
6. Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (“**UU No. 30 Tahun 1999**”);
 7. Regulation of the Supreme Court Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards (“**Perma No. 1 of 1990**”);
 8. New York Convention 1958 on *Convention on the Recognition and Enforcement of Foreign Arbitral Award* (“**New York Convention 1958**”) which was ratified through the Decree of the President of the Republic of Indonesia No. 34 of 1981 (“**Keppres No. 34 of 1981**”);
 9. Supreme Court Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000 (case between Bankers Trust Company and Bankers Trust International Plc against PT Mayora Indah Tbk);
 10. Determination of the Central Jakarta District Court No. 062 of 2008 (ARB062/08/JL) dated 7 May 2009 jo. Supreme Court Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010 jo. Supreme Court Decision No. 67PK/Pdt.Sus-Arbt/2016 dated September 1, 2016 (case between PT Astro et al against PT Ayunda Prima Mitra et al);
 11. Supreme Court Decision No. 278K/Pdt/2013 dated 28 April 2014 (case between Harvey Nichols and Company Limited against PT Hamparan Nusantara and PT Mitra Adiperkasa); and
 12. Decision of the Constitutional Court Number 15/PUU-XII/2014 concerning Judicial Review of Explanation of Article 70 of Law Number 30 of 1999.
- In the field study, the author conducts interviews with legal practitioners or legal experts who understand and have competence related to the research topic that the author is researching. These resource persons include:
1. Prof. Dr. Ahmad. M. Ramli, S.H., M.H., FCBArb; and
 2. Sdr. Eko Dwi Prasetyo, S.H., M.H (Secretary of the Indonesian National Arbitration Board).

RESULT AND DISCUSSION

1. Considerations of Judges in Rejecting Applications for Execution of International Arbitration Awards

In civil procedural law, there are 2 (two) types of lawsuits, namely contentiosa claims and voluntary claims. Contentiosa lawsuits in practice are popularly known as lawsuits, while voluntary lawsuits are often referred to as petitions. The main difference is that a contentious lawsuit is filed against another party (the defendant), in other words a contentious lawsuit contains a conflict/dispute with another party. In contrast to a contentiosa lawsuit, a voluntary lawsuit does not require the presence of another party, so

theoretically it does not contain a conflict with another party.¹³ Another key difference is the product of the judge examining and adjudicating. A *contentiosa* lawsuit will be in the form of a decision, while a voluntary lawsuit will be in the form of a determination.

According to the author, this definition is not appropriate when it is associated with the context of the *exequatur* request. In an *exequatur* application, essentially it contains a dispute with another party, but it has been deemed completed through an arbitration award issued by the arbitrator or arbitration institution.

Positive law in Indonesia does not specifically define the definition of 'judge's consideration. The Law on Judicial Power only states that a court decision must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant legislation or unwritten legal sources that are used as the basis for adjudicating.¹⁴ In addition, in Article 53 paragraph (1), the stipulations and decisions as referred to in paragraph (1) must contain the 'legal considerations of the judge' which are based on appropriate and correct reasons and legal grounds. From the two formulations, the author argues that judges' considerations are legal arguments produced by judges that contain related legislation and/or unwritten laws that are used as the basis for issuing a decision or determination.

An *exequatur* application is an application submitted by the winner/petitioner of the International Arbitration Award to the Central Jakarta District Court (in certain cases the Supreme Court), so that an *exequatur* can be issued and the said International Arbitration Award can be enforced in Indonesia. The final product of the *exequatur* application is a determination from the Central Jakarta District Court, namely refusing or acknowledging and implementing the application.

Uniquely, at the level of examination that hears cassation and review, the final product of the examination is in the form of a decision and not a determination. In this paper, the author describes the considerations issued by the panel of judges who examine, hear, and decide on the request for execution of the International Arbitration Award through 2 (two) examples of court decisions.

The first decision is the case between Bankers Trust Company and Bankers Trust International Plc against PT Mayora Indah Tbk. Through Stipulation dated February 3, 2000 No. 001/Pdt.Arb.Int/1999/PN.Jkt.Pst jo No. 002/Pdt/Arb.Int/1999/PN.Jkt.Pst. jo No. 02/Pdt.P/2000/PN.Jkt.Pst, the Central Jakarta District Court refused to give an *exequatur* to the International Arbitration Award issued by the London Court of International Arbitration No. 02/Pdt.P/2000/PN.Jkt.Pst. 8119.

Subsequently, the Bankers Trust Company and Bankers Trust International Plc made a cassation to the Supreme Court against the rejection of the *exequatur* application.

¹³ M. Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Sinar Grafika, 2013), pp. 46.

¹⁴ Article 50 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power

However, the Supreme Court through Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000 again rejected the cassation, with the following considerations:

Legal Considerations on the Cassation Decision (Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000)¹⁵

*“A quo case is still in dispute between the Petitioner and the Respondent which has been decided by the South Jakarta District Court, where the Petitioner is on the losing side, while the case does not yet have permanent legal force, then the execution request must be postponed until the decision of the South Jakarta District Court has permanent legal force, **because it is contrary to the procedural law (process order)**.*

*The Central Jakarta District Court was correct, because although the examination of the application for the exequatur of the international arbitral award is only administrative in nature, in accordance with the provisions of article 66 letter c, the **Court has the authority to consider the material of the application regarding whether or not it is contrary to public order, including the applicable legal order.***

*Whereas therefore, the exequatual application **must be rejected because it is contrary to the applicable legal order**, in particular the order of procedure and the exequatual Petitioner should know that the legal relationship which is the basis for the international arbitration award cannot be justified because the Petitioner himself is a party to the case at the South Jakarta District Court.*

Based on the decision of the Bankers Trust Company and Bankers Trust International Plc case against PT Mayora Indah Tbk above, it is clearly seen in the legal considerations that the judge classified 'law order' as **part of** 'public order', implicitly through the sentence *whether or not it contradicts with public order, including the rule of law in force*. Thus, according to the panel of judges, a violation of the existing legal order in Indonesia is also a violation of public order.

Furthermore, the second decision is a case between PT Astro et al. against PT Ayunda Prima Mitra et al. Through the Determination of No. 062 of 2008 (ARB062/08/JL), the Central Jakarta District Court declared the SIAC international arbitration award No. 062 of 2008 (ARB062/08/JL) which was decided on May 7, 2009 is non-exequatur (cannot be implemented). The legal considerations of the judges of the first instance are as follows:

Legal Considerations on Determination of No. 062 of 2008 (ARB062/08/JL)¹⁶

*“Considering, that the substance of the International Arbitration Award based on SIAC Regulation No. 062 of 2008 (ARB062/08/JL), the above is **in excess of the authority that has been determined, namely having intervened in the implementation of the judicial process in Indonesia which has been running in accordance with applicable laws and regulations (according to the rule of law/law order)**, the International Arbitration Award referred to cannot be executed (**non- exequatur**)”*.

Considering, that based on this, the Central Jakarta District Court is of the opinion, so to prevent errors that will arise in the future if the exequatur application is still carried out,

¹⁵ Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000, pp. 11-12

¹⁶ Determination No. 062 of 2008 (ARB062/08/JL), pp. 4

the Central Jakarta District Court deems it necessary to declare that the SIAC Arbitration Decision No. 062 of 2008 (ARB062/08/JL) which was decided on 7 May 2009, cannot be implemented (non-exequatur).

Subsequently, PT Astro et al filed an cassation to the Supreme Court. Through Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010, the Supreme Court essentially rejected the cassation filed by the cassation applicants, with the following considerations: Legal Considerations on Cassation Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010¹⁷

“That the refusal to grant exequatur by Judex Facti was correct and appropriate because the order in the arbitration award to stop the judicial process in Indonesia violates the principle of sovereignty of the Republic of Indonesia, no foreign power can interfere with the ongoing legal process in Indonesia. This clearly violates public order in Indonesia.

The material contained in the SIAC arbitration award is not included in the field of trade but is included in procedural law”.

Furthermore, because the Supreme Court rejected the cassation request, the cassation applicant again took legal action for judicial review to the Supreme Court. Through Decision No. 67PK/Pdt.Sus-Arbt/2016 dated September 1, 2016, the Supreme Court essentially still rejects the application based on the following reasons and considerations:

Legal Considerations on the Judicial Review Decision No. 67PK/Pdt.Sus-Arbt/2016 dated September 1, 2016¹⁸

“Whereas one of the international arbitral awards based on SIAC Regulation No. 62 of 2008 (ARB062/08/JL) which was decided on 7 May 2009 is to immediately stop the judicial process in Indonesia (case No. 1100/Pdt.G/2008/PN.Jkt.Sel) as long as it relates to C.6, C. 7, C.8 and Mr. Marshall.

Whereas in accordance with the principles of civil procedural law applicable in Indonesia, an ongoing case examination can only be terminated upon the agreement of the two litigants, it cannot be forcibly terminated by another party.

Whereas therefore, the decision of the Central Jakarta District Court which stated that the petition for the Exequatur was not granted was correct”.

Based on the decisions from the first instances to the level of judicial review above, it is clear that the Panel of Judges uses different legal considerations. Through these 3 (three) decisions, the judge uses at least 2 (two) reasons, namely a violation of 'law order' at the first instances of legal considerations and a violation of 'public order' at the cassation level legal consideration. Meanwhile, at the judicial review stage, the panel of judges did

¹⁷ Supreme Court Cassation Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010, pp. 36-37

¹⁸ Supreme Court Judicial Review Decision No. 67PK/Pdt.Sus-Arbt/2016 dated 1 September 2016, pp. 15-16

not provide any explanation regarding the violation, whether it was in the context of a violation of 'law order' or a violation of 'public order'.

Through the 2 (two) case examples above, we can see that the parameters and indicators regarding what is meant by "public order" among judges are also inconsistent and different. This shows that the interpretation of public order is very broad and in certain cases it becomes multiple interpretations so that it does not provide certainty. This is clearly contrary to the spirit of the constitution in Indonesia which states that basically everyone has the right to recognition, guarantees, protection, and fair legal certainty.

2. Implications of the Legislation Regulating the Implementation of International Arbitration Awards in Realizing Fair Legal Certainty

Based on the *Kamus Besar Bahasa Indonesia* (KBBI), the implications have the following meanings:¹⁹ *first, the involvement or state of being involved; second, which is included or concluded; suggested, but not stated. In addition, the implications can also be interpreted as a possible future effect or result.*²⁰ Thus, what is meant by implication in this case is the involvement of the provisions of the laws and regulations governing the implementation of the International Arbitration Award in realizing fair legal certainty and the results that occur using current provisions (positive law).

As explained above, Arbitration is a way of settling a civil dispute outside the general court based on an Arbitration agreement made in writing by the disputing parties. According to Felix OS, as quoted by Joni Emirzon, there are several reasons why arbitration is used by the parties:²¹

- a. The existence of freedom, trust, and security;
- b. Expertise of the arbitrators;
- c. Faster and more cost-effective, and the decision is final and binding;
- d. Maintained confidentiality;
- e. Non-precedent in nature; and
- f. Easier implementation of decisions.

However, in fact, the above opinion is not entirely true. This is explained in the explanation of Law No. 30 of 1999 which states as follows:

*“because in certain countries **the judicial process can be faster than the arbitration process.** The only advantage of arbitration over courts is its confidential nature because its decisions are not made public. However, dispute resolution through arbitration is still more desirable than litigation, especially for international business contracts”.*

Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a state of law, which means that all activities and implementation of policies, decisions and others must

¹⁹ <https://kbbi.web.id/implikasi>, accessed on November 20, 2021

²⁰ <https://www.merriam-webster.com/dictionary/implication>, accessed on November 20, 2021

²¹ Joni Emirzon, *op.cit*, pp. 7

be based on law. This also applies to the implementation of International Arbitration Awards regulated in Indonesian positive law.

Initially, Law No. 14 of 1970 has not recognized the optimal implementation of arbitration, as evidenced as follows:

*“This article means that apart from state courts, it is no longer allowed to have courts conducted by non-state judiciary bodies. **Settlement of cases outside the Court on the basis of settlement or through a referee (arbitrage) is still allowed**”.*²²

International Arbitration Award began to gain legitimacy in August 1981. Through Presidential Decree No. 34 of 1981, Indonesia began to ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and then, in early 1990, the Supreme Court issued Perma No.1 of 1990. Among other things, this regulation regulates the conditions for the execution of foreign arbitral awards in Indonesia, executors, procedures for applications to obtain executors, procedures for confiscation, and execution of decisions and costs.

For regulations at the level of law, the implementation of International Arbitration Awards is regulated in Law No. 30 of 1999. This regulation is a regulation that comprehensively regulates arbitration provisions, both national and international arbitral awards.

It should be noted that between Perma No. 1 of 1990 and Law No. 30 of 1999 there are differences in diction, where Perma No. 1 of 1990 uses the term "foreign arbitration award", while Law No. 30 of 1999 using the term "International Arbitration Award". According to Prasetyo, this does not have serious legal implications, but it creates confusion. Referring to the 1985 New York Convention, the correct terminology is “foreign arbitration award”. This is because when using the term “International Arbitration Award”, the international criterion is the presence of UNCITRAL multi-national elements. This is different from foreign arbitration decisions which are based on territorial principles.²³

According to the author, there are 3 (three) sections in the current legislation that are gaps and reduce the value of legal certainty in the implementation of the International Arbitration Award, as follows:

- a. Provisions for public order in the exequatur application;
- b. Limitative legal remedies against exequatur application; and
- c. The scope of intervention by the state judiciary in a case that already has an arbitration agreement.

As previously mentioned, the 1945 Constitution as a state constitution provides directives that legal certainty is a human right for everyone, as clearly stated in Article 28D of the 1945 Constitution, as follows:

²² Elucidation of Article 3 paragraph (1) of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power

²³ Eko Dwi Prasetyo, interview via Whatsapp, 19 November 2021

“Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law”.

Thus, legal certainty does not only prioritize the element of certainty but also has the value of justice.

Legal certainty can be seen from various perspectives. In the perspective of substance, according to Wijayanta, legal certainty is defined as the clarity of a provision so that it can be used as a guide for people who are subject to the regulation.²⁴ In addition, the certainty of a norm can also be realized if the norm is formulated clearly and logically. Obviously, in this case, it means that it does not cause doubt (multi-interpretation) and is logical so that it becomes a system of norms with other norms that do not conflict or cause norm conflicts.²⁵

Thus, according to the author, legal certainty in this context is a condition where a legal norm listed in the legislation has a clear formulation of orders, prohibitions, or provisions against the community and has a clear and limited interpretation.

1) Provisions for public order in the exequatur application

Initially, this provision appeared in the Indonesian regulation in Perma No. 1 of 1990. Article 3 of Perma No. 1 of 1990 states that foreign arbitral awards are only recognized and can be enforced within the jurisdiction of the Republic of Indonesia if they meet the following requirements:

- a) This award is rendered by an Arbitration Board or by an individual in a country which is bound by the State of Indonesia or together with the State of Indonesia in an international convention concerning the recognition and implementation of foreign arbitrations.
Implementation is based on the principle of reciprocity (reciprocity).*
- b) Arbitration decisions as referred to in paragraph (1) above are only limited to decisions which according to Indonesian law are included in the scope of Commercial Law.*
- c) The foreign arbitration awards referred to in paragraph (1) above can only be implemented in Indonesia, **limited to decisions that do not conflict with public order.***
- d) A foreign arbitration award may be enforced in Indonesia after obtaining an exequatur from the Supreme Court of the Republic of Indonesia.*

²⁴ Tata Wijayanta, ‘Asas Kepastian Hukum, Keadilan, dan Kemanfaatan dalam Kaitannya dengan Putusan Kepailitan Pengadilan Niaga’ (2014) Volume 14 No. 2 (Mei), *Jurnal Dinamika Hukum*, pp. 219.

²⁵ R. Tony Prayogo, ‘Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang’ (2016) Volume 13. No. 2 (Juni), *Jurnal Legislasi Indonesia*, pp. 194.

Furthermore, in relation to the exequatur requirements above, Article 4(2) of Perma No. 1 of 1990 provides the following provisions:

“Exequatur will not be granted if the Foreign Arbitration award is clearly contrary to the basic principles of the entire legal system and society in Indonesia (public order)”.

Subsequently, the provisions regarding international arbitration were renewed by Law No. 30 of 1999. This law then specifically divides the authority of institutions that issue exequatur and the conditions that must be met in order for an International Arbitration Award to be recognized and enforced in Indonesia. It should be noted that initially, Perma No. 1 of 1990 clearly appoints the Supreme Court which has the authority to issue exequatur. However, in Law no. 30 of 1999, in general the Central Jakarta District Court has the authority to issue exequatur (but in the case of the Republic of Indonesia as a party to the dispute, only the Supreme Court has the authority to provide exequatur).

Furthermore, Article 66 of Law No. 30 of 1999 states that the International Arbitration Award is only recognized and can be enforced in the jurisdiction of the Republic of Indonesia, if it meets the following requirements:

- a) *The International Arbitration Award is rendered by an arbitrator or arbitral tribunal in a country with which Indonesia is bound by an agreement, either bilaterally or multilaterally, regarding the recognition and implementation of the International Arbitration Award;*
- b) *International Arbitration Award as referred to in letter a is limited to decisions which according to Indonesian law are included in the scope of commercial law;*
- c) *International Arbitration Award as referred to in letter a can only be enforced in Indonesia, **limited to decisions that do not conflict with public order;***
- d) *International Arbitration Award may be enforced in Indonesia after obtaining an exequatur from the Chief of the Central Jakarta District Court; and*
- e) *The International Arbitration Award as referred to in letter a concerning the Republic of Indonesia as one of the parties to the dispute, can only be implemented after obtaining an exequatur from the Supreme Court of the Republic of Indonesia which is then delegated to the Central Jakarta District Court.*

However, in contrast to Perma No. 1 of 1990 which formulates negatively the exequatur requirements can be issued, Law No. 30 of 1999 **does not explain** in detail what are the conditions so that the exequatur can be given to the exequatur applicant.

In line with this, Article 81 of Law No. 30 of 1999 also states the following:

“At the time this Law comes into force, the provisions regarding arbitration as referred to in Article 615 to Article 651 of the Regulation on Civil Procedure (Reglement op de Rechtsvordering, Staatsblad 1847:52) and Article 377 of the Updated Indonesian Regulation (Het Herziene Indonesisch Reglement, Staatsblad 1941 :44) and Article 705 of the Program Regulations for Regions Outside Java and Madura (Rechtsreglement Buitengewesten, Staatsblad 1927:227), are declared invalid”.

Through the editorial above, it can be implicitly interpreted that the provisions in Perma No. 1 of 1990 is still valid and is not canceled by Law No. 30 of 1999. This means that the provisions of Article 4 (2) regarding exequatur in Perma No. 1 of 1990 will also be enforced, which will only be given if it does not conflict with the basic principles of the entire legal system and Indonesian society (public order). This is because Law No. 30 of 1999 itself did not provide a detailed explanation about exequatur and "public order" and only wrote the sentence "quite clear" in the elucidation of Article 66 (c) of Law No. 30 of 1999.

According to Prasetyo, the doctrine of public order exists in almost every legal system around the world. Its main purpose is to provide resistance to the entry of foreign laws that are inconsistent with or contrary to the legal system of a particular country. However, the application of the doctrine should be carried out only as a *shield*, not as a *sword*. If treated as a *sword*, then this doctrine will always be used to prevent or hinder any International Arbitration Award. However, if this doctrine is seen as a *shield*, then its application is very limited and is only used in special circumstances, namely in the event of a threat to public order, namely if the arbitration award is clearly contrary to the basic principles of the Indonesian legal system.²⁶

As already mentioned above, that according to Article 4 paragraph (2) of Perma No. 1 of 1990, exequatur will not be given when the International Arbitration Award is contrary to the basic principles of the entire Indonesian legal system and society (public order). With this editorial, it will certainly lead to the interpretation that public order according to the Supreme Court means the fundamental joints of the entire legal system and society in Indonesia. In fact, the legal system and society certainly have fundamental differences in their scope and sources. A further problem is that there is no explanation as to what is meant by the basic principles of the entire legal system and Indonesian society. In the absence of a clear limitation of this public order terminology, it will open up too wide a space for interpretation.

²⁶ Eko Dwi Prasetyo, interview via Whatsapp, 19 November 2021

2) Limitative legal remedies against exequatur application

Article 68 paragraph (1) of Law No. 30 of 1999 states as follows:

*“Against the decision of the Chief of the Central Jakarta District Court as referred to in Article 66 letter d which recognizes and implements the international arbitration award, **no appeal or cassation can be filed**”.*

Mertokusumo, as quoted by Chakim, explained that court decisions are not always correct and without errors, and do not even rule out the possibility of favoring one of the parties. Therefore, every judge's decision must be able to be reviewed, so that if there are errors listed in the decision, it can be revised and corrected. The effort to correct a court decision is what is called a legal effort.²⁷

Against the decision of the civil court, at least the following legal remedies can be submitted:

- a) Appeal (based on Article 199 to Article 205 Rbg and Law Number 20 of 1947 concerning Retrial Court Regulations in Java and Madura which revoke the appeal provisions contained in the HIR;
- b) Cassation (based on Article 20 of Law No. 48 of 2009 in conjunction with Article 28 of the Supreme Court Law);
- c) Judicial Review (based on articles 66 – 77 of the Supreme Court Law); and
- d) Cassation in the interest of law (based on Article 45 Paragraph (1) of the Supreme Court Law).

The legal remedy against the determination is essentially a cassation. This is as regulated and stated in Article 30 of the Supreme Court Law, as follows:

*The Supreme Court in the cassation level **annuls** the decisions or **determination** of the courts of all judicial circles because:*

- 1) *Not authorized or exceeds the limit of authority;*
- 2) *Improperly applying or violating applicable law;*
- 3) *Failure to fulfill the conditions required by the laws and regulations which threaten the negligence with the cancellation of the decision in question.*

Implicitly, Article 68 paragraph (1) of Law No. 30 of 1999 prohibits the respondent of the International Arbitration Award from filing a cassation or appeal. This clause, which only prohibits cassation and appeal, is prone to juridical problems. First, the execution by the Central Jakarta District Court is in the form of a determination, not a decision, so essentially the legal remedy that can be filed against the determination is an appeal as described previously.

²⁷ M. Lutfi Chakim, ‘Mewujudkan Keadilan Melalui Upaya Hukum Peninjauan Kembali pasca Putusan Mahkamah Konstitusi’ (2015) Volume 12 No. 2 (Juni), *Jurnal Konstitusi*, pp. 332.

Second, this is used as a juridical loophole by the defeated party in the arbitration award committing legal smuggling by using other legal actions with the aim of thwarting the executions that have been issued by the Central Jakarta District Court. In this regard, Prasetyo has the following opinion:

“It should be understood that what is meant in the article is that no appeal and cassation can be made against the determination of the exequatur. Thus, once the determination of the exequatur is determined, there is no longer any legal effort to cancel the stipulation of the exequatur. As for the problem, because the issue of execution is "equated" with the procedural law of execution in a district court, all legal remedies other than appeals and cassation, such as resistance to executions are often used. The goal is only to delay the implementation of the decision. Because in the end, their efforts are usually rejected by the courts”.

The use of other legal remedies other than appeal or cassation results in the cancellation of the arbitration agreement. This happened in the case of Harvey Nichols and Company Limited against PT Hamparan Nusantara and PT Mitra Adiperkasa. In this case, Harvey Nichols and Company Limited has obtained an Execution Decision from the Central Jakarta District Court Number 88/2011.Ex., dated January 20, 2012 which essentially states that:

- a) To grant the application of Harvey Nichols and Company Limited; and
- b) To declare that the International Arbitration Award from the International Court of Arbitration ICC (ICC International Court of Arbitration) Case IDSR 129100009, which has been rendered in London on September 8, 2010 and the Addendum to the Final Award (Addendum to Final Award) dated October 7, 2010, which has been registered/stored at the Registrar's Office of the Central Jakarta District Court on Tuesday, March 22, 2011, registered under Number 05/PDT/ARB-INT/2011/PN.Jkt.Pst., in accordance with the provisions of Article 65 to Article 69 jo . 67 (1) jo. Law Number 30 of 1999, **in order to be able to carry out its execution in the State of the Republic of Indonesia (Exequatur).**

In fact, Supreme Court Decision No. 278K/Pdt/2013 dated April 28, 2014 rejected Harvey's cassation, which rejected the decision of the South Jakarta District Court and Jakarta High Court which canceled the parties' Exclusive License Agreement which contained an arbitration clause. The considerations of the panel of judges of cassation are as follows:²⁸

“Whereas in the main case, which is related to the "exclusive license agreement" which turns out to be in the material the content does not involve special licenses in the field of intellectual property rights, but the content is about franchising, thus

²⁸ Supreme Court Cassation Decision No. 278K/Pdt/2013 dated 28 April 2014, pp. 55

*referring to various provisions in this case Government Regulation Number 42 of 2007, especially Article 1 paragraph 1 and Permendag Number 31/M/DG/8/2008., Article 5 paragraph 1, the Defendant/Applicant for cassation is proven to have committed an unlawful act (in this case **contrary to the principle of public order** related to the franchise, among others, the absence of a business license, the use of the Indonesian language and the existence of an unequal position) ”*

This loophole and smuggling of the law itself is in fact also recognized by the judge through his legal considerations in his decision. Through Supreme Court Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010, the panel of judges clearly stated the following:²⁹

*“Whereas although Article 66 of the Arbitration Law does not stipulate that third parties may give objections during the registration process to obtain recognition and implementation of foreign arbitral awards, but the principles of procedural law in force in Indonesia **give the right to everyone with an interest to defend their rights** that have been violated or threatened in the principle of "poin't of interest poin't de action" gives the right to the party concerned with the arbitration award to give a rebuttal on the possibility of execution that is detrimental to him ”.*

From the legal considerations above, it can be seen that the judge agrees that there are legal remedies other than 'appeal' and 'cassation' that can be taken by the respondent, considering that the party is the party concerned and has an interest in the International Arbitration Award being applied for.

3) The scope of intervention by the state judiciary in a case that already has an arbitration agreement.

Furthermore, referring to the case between Harvey Nichols and Company Limited against PT Hamparan Nusantara and PT Mitra Adiperkasa, this is essentially contrary to the provisions of Article 3 of Law No. 30 of 1999 which states that district courts are not authorized to adjudicate disputes between parties who have been bound by arbitration. This is reaffirmed through Article 11 paragraph (1) of Law No. 30 of 1999 which states that the existence of a written arbitration agreement nullifies the rights of the parties to submit a dispute resolution or difference of opinion contained in the agreement to the District Court.

Unfortunately, the provisions in Article 3 and Article 11 paragraph (1) of Law no. 30 of 1999 is again **excluded** in Article 11 paragraph (2), which states that the District Court is obliged to refuse and will not intervene in a dispute resolution that has been determined through arbitration, except in certain cases stipulated in this Law. In other words, the district court may intervene in the settlement of disputes determined through arbitration in the cases mentioned by the law. In the explanation of Law no.

²⁹ Supreme Court Cassation Decision No. 01K/Pdt.Sus/2010 dated February 24, 2010, pp. 36

30 of 1999, this article is interpreted as "sufficiently clear". In fact, according to the author, the term "interference" gives rise to multiple interpretations.

That furthermore it is true that Law No. 30 of 1999 regulates the role of Indonesia's judicial power institutions in arbitral awards, namely the first recognition and implementation of the award, secondly the annulment of the arbitral award. However, it should be remembered that the form of submission to the district court regarding the implementation of the arbitral award and the annulment of the arbitral award is an application (volunteer lawsuit) not a lawsuit (*contentiosa*), as regulated in Articles 70 and 67 of Law No. 30 of 1999. Thus, the application for recognition and implementation or the application for cancellation is not essentially a dispute resolution between the parties, because the dispute resolution has been completed and the district court only assesses the content of the decision alone.

According to Prasetyo, the court is not authorized to examine materially disputes that are bound by the arbitration agreement. However, the arbitration process also has some formal issues that must be decided if an agreement is not reached between the parties. If the arbitration is held institutionally, all disagreements regarding formal matters will be decided by the arbitration institution concerned. However, if the arbitration is held on an ad-hoc basis (independent/not bound by an institution), then any formal disagreements will be determined by the District Court.³⁰

According to the author, several articles in Law no. 30 of 1999, as in Article 66 letter (c) which mentions public order, Article 11 paragraph (2) which mentions the exclusion of interference by the district court, and Article 68 paragraph (1) which limits legal remedies to only appeals and cassation against the recognition of the International Arbitration Award is the basis of uncertainty regarding the implementation of the said award in Indonesia. The implication of this series of juridical loopholes is the collapse of legal certainty in the implementation of International Arbitration Awards. Which is bad for the world of arbitration as stated by Huala Adolf in the Constitutional Court Decision which states:³¹

"Today, there are still views from foreign businessmen that Indonesia is seen as an unfriendly country for arbitration. The real reason was that the arbitration award which was final and binding was in fact annulled. The cancellation of an arbitral award hurts the feelings of a party who has good intentions in resolving their dispute in arbitration".

This was also emphasized by Ramli, who stated that if these obstacles occur on an ongoing basis, it is possible that the experience of implementing the International Arbitration Award in Indonesia will set a frightening precedent for the winning parties

³⁰ Eko Dwi Prasetyo, interview via Whatsapp, 20 November 2021

³¹ Constitutional Court Decision Number 15/PUU-XII/2014 concerning Explanatory Material Review of Article 70 of Law Number 30 of 1999, pp. 43

of the International Arbitration Award. In the end, Indonesia has the potential to become a non-arbitration-friendly country and the winners of the arbitration award will look for another country where the respondent's assets are located so that they can be executed. This is in line with the principle of the *principal of effectiveness*, where the execution will be carried out in the country that is easiest to implement.³²

To improve legal certainty in the implementation of international arbitral awards in Indonesia and in order to reduce the negative stigma as an unfriendly country for arbitration, it is necessary to make improvements to related norms. First, the terminology of public order in Article 66 letter c of Law No. 30 of 1999 was returned to the term public policy as stated in Article 5 paragraph (2) letter b of the New York Convention 1958. According to the author, public policy has a narrower interpretation because it only comes from one source, namely the government, while public order opens a wider interpretation because it can come from the community. After being replaced with the terminology of public policy, the law must provide an explanation of its scope. For example, what is meant by public policy is the provisions of procedural law applicable in Indonesia.

Second, Article 11 paragraph (2) of Law no. 30 of 1999 which gives the court authority to intervene in a dispute that has been determined through arbitration, a further article must be made which specifies the scope or legal reasons that allow such intervention. Third, the formulation of Article 68 paragraph (1) of Law no. 30 of 1999 which only prohibits the respondent of the International Arbitration Award from filing a cassation or appeal, was amended by a clause which basically prohibits all legal remedies, including but not limited to lawsuits against the law which are addressed in other district courts.

In addition, the Supreme Court may also issue a Supreme Court Circular or a Supreme Court Regulation which is a reference for the Heads of the District Courts. The Circular or Regulation of the Supreme Court basically stipulates that the court does not accept a lawsuit against the law if the lawsuit contains an arbitration clause issue.³³

CLOSING

1. Conclusion

The judge's legal considerations in rejecting the implementation of international arbitral awards turned out to be related to reasons contrary to public order. Parameters and indicators regarding what are meant by "public order" among judges are also inconsistent and different. This shows that the interpretation of public order is very broad and in certain cases it becomes multiple interpretations so that it does not provide certainty.

³² Ahmad. M. Ramli, through a seminar entitled Indonesia and the Development of Arbitration in the Digital Era, dated November 18, 2021

³³ Eko Dwi Prasetyo, interview via Whatsapp, 20 November 2021

Several articles in Law No. 30 of 1999, as in Article 66 letter (c) which mentions public order, Article 11 paragraph (2) which mentions the exclusion of interference by the district court, and Article 68 paragraph (1) which only prohibits appeals and cassation against the recognition and implementation of international arbitral awards regarding the absence of legal options for the recognition of the International Arbitration Award, is the basis of uncertainty regarding the implementation of the International Arbitration Award in Indonesia. The implication of this series of juridical loopholes is the collapse of legal certainty in the implementation of International Arbitration Awards.

2. Suggestion

To improve legal certainty in the implementation of international arbitral awards, it is necessary to do the following things:

- 1) The terms of public order should be returned to the term 'public policy' as stated in the New York Convention 1958. In addition, it is necessary to have a measurable formulation of what is meant by public policy. For example, provisions relating only to procedural law in Indonesia.
- 2) The provisions in Article 11 paragraph (2) of Law No. 30 of 1999 should be given an explanation that contains measurable limits on the extent to which district courts can intervene.
- 3) The provisions in Article 68 paragraph (1) of Law No. 30 of 1999 was replaced with a clause which basically prohibits all legal remedies, including but not limited to lawsuits against the law that are addressed in other district courts. In addition, the Supreme Court can also issue a Supreme Court Circular or Supreme Court Regulation which is a reference for the Heads of the District Courts so as not to accept a lawsuit against the law in the court they lead if the lawsuit contains an arbitration clause issue.

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