THE ISSUE OF ARBITRAL AWARD ENFORCEMENT IN INDONESIA*

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Abstract

International arbitration has been significantly growing in many countries. This dispute settlmement mechanism has been pursued in cases not only between companies, but also between investors and State. Despite that, the enforcement of arbitral awards can be problematic. In Indonesia, both domestic and foreign arbitral awards must be enforced through the national court. In this regard, the Indonesian law that governs arbitration allows the annulment of arbitral award if it contradicts public order. However, the definition of public order is quite unclear and provides loophole that leads to its misapplication. Numerous arbitral awards in Indonesia are annulled based on public order grounds. As such, there is a need for countries, particularly Indonesia, to provide certainty for parties of arbitration in enforcing arbitral awards that have been rendered.

Intisari

Arbitrase internasional telah berkembang secara signifikan di banyak negara. Mekanisme penyelesaian sengketa ini banyak diupayakan bukan hanya di antara perusahaan, tetapi juga antara penanam modal asing dan negara. Meskipun demikian, proses pelaksanaan putusan arbitrase dapat menimbulkan masalah. Di Indonesia, baik putusan arbitrase domestik maupun asing, harus ditetapkan melalui pengadilan nasional. Dalam hal ini, hukum Indonesia yang mengatur mengenai abritrase mengizinkan pembatalan sebuah putusan arbitrase jika bertentangan dengan ketertiban umum. Namun, definisi ketertiban umum tidak jelas dan justru memberikan celah yang dapat menyebabkan penerapan yang salah. Berbagai macam putusan arbitrase di Indonesia telah dibatalkan bedasarkan alasan terkait dengan ketertiban umum. Oleh karena itu, timbul kebutuhan bagi negara-negara, khususnya Indonesia, untuk memberikan kepastian bagi para pihak arbitrase dalam pelaksanaan putusan arbirtrase.

Keywords: arbitration, enforcement of arbitral awards, Arbitration Law No. 30/1999
Kata Kunci: *arbitrase, pelaksanaan putusan arbitrase, UU Arbitrase No. 30/1999*

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A. Introduction

The effects of the growth of technology in this current century are no doubt extensive and rapid. It influences every individual's day-to-day lives in the form of social media, gadgets, medical tech and so on. It grows and births business relationship from all kinds of background and legal subjects, whether it is between individuals, multi-national companies, or even big investments of States. This however, will unfortunately and inevitably, open the doors to disputes and fragile business agreements prone to clashes of claims and problems. These disputes will then handle a diverse legal issue, complex relationships and settlement, and a lot of money.

The settlement of disputes involves strategic planning and settlement, which creates a risk to the companies' money and reputation. The law is present to fill and accommodate such scenario by providing access to litigation or through the judicial process. Yet these mechanisms comes with its own disadvantages as well. From costly expenses, tiered trials that takes a long time to get to a final and binding decision, too much administration, to even incompetent judges.

Therefore, a dispute resolution process was introduced with non-litigation channels outside the judicial process through Alternative Dispute Resolution ("**ADR**") mechanism. ADR is a dispute resolution mechanism through procedures agreed upon by the parties (*Pariadi, p. 54*). One of the forms of ADR is arbitration (*Hutagalung, p. 315*).

Article 1 (1) of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement ("**Arbitration Law No. 30/1999**") provides that Arbitration refers to the means of settling a civil dispute outside a general court based on an arbitration agreement made in writing by the parties to the dispute. Arbitration Law No. 30/1999 regulates the composition and jurisdiction of an arbitration agreement, the execution of arbitration proceedings, the taking of evidence, the applicable law, the annulment and rejection of the verdict, and the involvement of the court through the recognition and execution of the verdict, including the grounds for not executing.

According to the Indonesian National Arbitration Centre or *Badan Arbitrase Nasional Indonesia* ("**BANI Arbitration Center**") and its Rules and Procedure ("**BANI Rules**"), the purpose of arbitration is to provide fair and speedy settlement in civil disputes arising out of trade, industry, both national and international (*Preamble, BANI Arbitration Center Rules and Procedure*).

In essence, arbitration does in fact delivers its promise, but the problem in Indonesia now is the execution of arbitral awards. In order for an arbitral award to be implemented, Indonesia must execute and recognize the award. Otherwise, the award is void and pointless. This is not only a crucial step to ensure the effectiveness in arbitration, but can also be considered as major flaw in Indonesian law.

A discussion regarding the implementation of an arbitral award in Indonesia will in turn involve a discussion regarding its execution. Arbitration is commonly known as one of the ADR settlements, wherein a claimant sets forth a claim/s agaist a respondent to the arbitration institution or body that is selected as a third party to resolve their dispute (*Harahap, p. 61*).

Thus, what is the point of bringing a case to arbitration and arguing before a panel of arbitrators when the outcome of the arbitration cannot be executed?

What an ironic situation: a tremendous loss suffered by the winner of

the arbitration. With that being said, it is important to note how it will impact and has impacted previous arbitration cases.

B. Arbitral Award Execution in Indonesian Law

Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**") in 1981 by virtue of the Presidential Decree No 34 of 1981. Article III of the New York Convention states that every contracting state must recognize and enforce awards rendered in other contracting states without imposing substantially more onerous conditions than are imposed upon recognition or enforcement of domestic awards. As a contracting party, Indonesia implemented its regulation for enforcement of arbitral awards, by designating the District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat*) as the venue to enforce arbitral awards as set out in the Supreme Court Regulation No. 1 of 1990.

The execution of arbitral awards in Indonesia is regulated in Chapter VI Article 65 to Article 69 of Arbitration Law No. 30/1999. It is stated that the authority to handle the issue of recognition of the implementation of International Arbitration Ruling is the Central Jakarta District Court after the decision has been submitted and registered by the arbitrator (*Art. 21, Arbitration Law No. 30/1999*).

If the Central Jakarta District Court decides not to enforce the award, such award can be brought to the Supreme Court, which will be examined and decided at the latest 30 (thirty) days after the application for cassation has been received by the Supreme Court. Article 66 of Arbitration Law No. 30/1999 states that foreign arbitration awards are only recognized and may be exercised in the jurisdiction of the Republic of Indonesia, if they meet the following conditions:

1. The foreign arbitral award must be rendered by an arbitrator or an arbitral tribunal in a country, in which the Indonesian State is bound to by virtue of a bilateral or multilateral treaty on the acknowledgment and implementation of the International Arbitration Ruling.
2. The foreign arbitral award must only be pertaining to commerce.
3. The foreign arbitral award can only be executed in Indonesia if it is not contrary to public order.
4. The foreign arbitral award can only be executed in Indonesia after obtaining an exequatur from the Chairman of the Central Jakarta District Court.
5. The foreign arbital award must involve the Republic of Indonesia as one of the parties to the dispute, and can only be executed after obtaining an exequatur from the Supreme Court of the Republic of Indonesia and subsequently delegated to the Central Jakarta District Court.

Although Arbitration Law No. 30/1999 clearly regulates the implementation of the arbitral award, the Vice Chairman of BANI Arbitration Center, [*Umar*], Indonesia is still referred to by the international community as "*an arbitration unfriendly country*" due to the difficulties in enforcing or executing an arbitral award in Indonesia. This is due to the legal uncertainty in the Arbitration Law No. 30/1999.

Where there are two outlines of this legal uncertainty is first, the definition of the arbitration itself and second, the unclear meaning of public policy or public order as the reason for not executing arbitration decision (*Sudiarto, p. 72*).

C. The ambiguous definition of "Arbitration" in Arbitration Law No. 30/1999

Arbitration is defined in Article1(9) of Arbitration Law No. 30/1999 as a decision imposed by an arbitral tribunal or personal arbitrator outside the jurisdiction of the Republic of Indonesia or the decision of an arbitration or personal arbitrator which, according to the law of the Republic of Indonesia is considered as an international arbitration ruling. It means that arbitration decisions outside Indonesia are foreign or international arbitration rulings, and those within Indonesian territory are national arbitration rulings.

In comparison, Article 1 of the United Nations Commission on International Trade Law Model Law ("**UNCITRAL Model Law**") states that international arbitration is when the disputing parties are of different countries, nationality, business location, and others. Thus, what is interesting about Arbitration Law No. 30/1999 is that it does not distinguish between national and international arbitration, except for the purpose of the execution of the verdict, which relates to the time period for the award to be executed.

National arbitral awards takes 30 days after the submission to be executed, whilst international arbitral awards is not stated. The possible problem arising from this is that if an international arbitration is declared a national arbitration only because it is conducted in Indonesia, it would entail a different procedure that will conform to Indonesian procedure. In turn, it will create more problems between the parties as the procedure will evidently effect the timeline and outcome on the execution (*Gunawan, p. 177*).

For instance, in the case of *Pertamina v. PT Lirik Petroleum*, the South Jakarta District Court declined to hear Pertamina's application to set aside an arbitration award arising from a case seated in Jakarta governed by the ICC Rules. The Supreme Court, however, took the view the award was a foreign award due to the fact that the arbitration was conducted under the ICC Rules. This shows that the interpretation of some judges in Indonesia towards the definition of arbitration based on Arbitration Law No. 30/1999 depends on the seat of arbitration.

D. The non-exhausted use of "Public order"

Indonesia is no stranger to using public policy reasons as an excuse to not execute an international arbitral award. The international community considers this reason not to give legal certainty at all because the application of the criteria of public policy is unclear. This incident can be seen in the case of *Karaha Bodas co., L.L.C. v. State Petroleum and Natural Gas Company (Pertamina)* in the United States Court of Appeals (*Karaha Bodas Co., L.L.C., v. Perusahaan Pertambahan Minyak dan Gas Bumi Negara; et al.*).

Karaha Bodas entered into an agreement with Pertamina from 20 September 1997 to 2000. The project implementation agreement of Karaha Bodas was suspended and continued 4 times. Finally, Karaha Bodas, on April 30, 1998, brought the case to the Geneva Arbitration in Swiss in accordance with the place chosen by the parties in the agreement. The tribunal ordered Pertamina to pay compensation to KBC approximately US $ 270,000,000. Even though the decision is indeed final and binding, Pertamina refused to pay and Karaha Bodas responded by filing an application to implement the Geneva Arbitration Ruling in Courts of several countries where Pertamina's assets and goods are located, except in Indonesia

(*Karaha Bodas Co., L.L.C., v. Perusahaan Pertambahan Minyak dan Gas Bumi Negara; et al; LSM*).

On 27 August 2007, the Central Jakarta District Court granted Pertamina's written suit and ordered Karaha Bodas to take no action on the implementation of the arbitration award and to impose a fine of US $ 500 thousand per day if Karaha Bodas ignored the ban (*Silambi, p. 43*). The Central Jakarta District Court's reasoning was due to the action the implementation of the Geneva arbitration decision violates the public order and should be tried in the jurisdiction of Indonesia. Because of annulment of the already final and binding arbitration award in Geneva, the Texas District Court considered Pertamina conducting contempt of court.

On the other hand, it can also be seen in the case of *Pertamina v PT Lirik Petroleum*. Pertamina filed an application to the Central Jakarta District Court to set aside the award rendered by an arbitral tribunal constituted under ICC Rules. One of the arguments was that the award has violated the public order because it disregarded Pertamina's authority as the government's only representative in the oil and gas sector. By the fact that Pertamina failed to commercialize PT Lirik Petroleum's oil and gas fields, Pertamina viewed that it was a violation of public order.

In the end, the Central Jakarta District Court rejected the argument and declared that the ICC Tribunal had exclusive jurisdiction to examine and adjudicate the dispute between them. This is because both parties have mutually agreed in their dispute settlement and the application to set aside the award by Pertamina was rejected. Furthermore, the Supreme Court affirmed this finding, as the decision issued by the Central Jakarta District Court was final and binding. This shows that the term "public order" was interpreted broadly in order to set aside the obligations rendered under the awards.

E. Conclusion

As the economic of Indonesia is constantly developing, there will be a lot of foreign investors entering into Indonesia, which will lead to the conclusion of multifarious contracts between Indonesian companies with foreign legal entities.

Arbitration is the most neutral mechanism compared to the national court and/or domestic arbitration in Indonesia. As such, international arbitration would then most likely be the most feasible dispute settlement mechanism that will be chosen by the parties.

Despite that, by the fact that there are circumstances that could infringe the interest of one of the parties, Indonesia is still considered as "*an arbitration unfriendly country*" for foreign legal entities in order to resort their dispute settlement agreement to an international arbitration.

Against these backgrounds, Indonesia should consider to amend the Arbitration Law or at the very least establish a clear definition of "public order" and an array of illustration that could fall within the definition of such term. The relevant articles are Article 62 (for national arbitration) and Article 66 (for international arbitration) that deals with the matter concerning the annulment of arbitral awards.

Last but not least, Indonesia is also advised to the revise the term "international arbitral awards" under Article 9 of the Arbitration Law No. 30/1999. The literal meaning of such term would be different from the UNCITRAL Model Law. This ambiguity will impact the procedure that must be undergone by the parties to execute the arbitral awards.

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