JE Journal of International Law
E-ISSN: 0123-3210 || P-ISSN: 0123-3210

IMPLEMENTATION OF INTERNATIONAL ARBITRATION AWARDS

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Received: August 25, 2025 Published: August 28, 2025

Abstract: Arbitration is one of the legal issues that is quite relevant and interesting to discuss, because it has an important role in relation to business growth, which is growing rapidly these days. At the national and international levels of business and trade, the stakeholders in their business contracts generally prefer arbitration agencies rather than judicial institutions to solve business disputes, so the need for arbitration institutions is increasing in popularity. A business dispute filed by the parties through arbitration, as well as the court, always ends with an award, and the award must also be enforceable or executed. An award is meaningless if it can not be enforced. However, even though the award has already been declared, the party does not execute the arbitration award voluntarily or in good faith. In such a case, then at the request of the winning party, the Chairman of the District Court may enforce the Arbitration award by force.

Keywords: arbitration; business dispute; execution

INTRODUCTION

Execution in a civil case is a coercive legal action carried out by the Chairman of the District Court,[1] as part of the overall process of resolving a dispute.[2] A discussion regarding the implementation of an arbitration award in Indonesia will, in turn, involve a discussion regarding its execution. Arbitration is commonly known as one of the alternative dispute resolution settlements, wherein a claimant sets forth a claim/s against a respondent to the arbitration institution or body that is selected as a third party to resolve their dispute.[3]

As a legal action, the procedure and process of execution have been regulated in laws and regulations. The District Court is an

[1] Law Number 48 of 2009 on Judicial Power, Article 54, paragraph 2

[2] Mertokusumo, Sudikno. *Hukum Acara Perdata Indonesia,* Yogyakarta: Liberty, 2002, p. 240

[3] Harahap, Yahya, *Arbitrase*, Ed. II, Jakarta: Sinar Grafika, 2001. p. 61

institution authorized to execute arbitration awards.[4] As for *ad hoc* arbitration institutions and permanent arbitration, they do not have the authority to execute their own awards. Regarding the authority to execute arbitration awards, Mauro Rubino Sammartano said that: [5]

> "The arbitration rules, as we have seen, tend to keep the courts away from arbitration proceedings. In spite of this, Court intervention becomes even more important at the end of the proceedings, when the award is rendered, in jurisdictions where the award cannot be enforced, even in the place of arbitration, unless it has first been adopted by that legal system through a court order, such as in Islamic law countries, or at least through the filing of the award".

Although the courts may not intervene in arbitration matters, the role of the courts in terms of the execution of arbitration awards, where the losing party does not want to execute the award voluntarily, cannot be ignored. In practice, there are still obstacles in the implementation of arbitration awards in Indonesia, because the process of implementing arbitration awards is still difficult and takes a relatively long time, costs a lot of money, and can even be canceled by the court. The nature of the efficiency and effectiveness of the arbitration process seems to be neglected, and this is considered to ignore legal certainty. As a result, Indonesia is considered unfriendly to arbitration.

Starting from what is stated above, the main issues that can be raised are as follows: a) Which agency or institution is authorized to execute arbitration awards both nationally and internationally? B) How is the procedure for executing arbitration awards carried out?

METHODS

The type of legal research used in this study is normative legal research, which is legal research on legal principles, legal rules, statutory regulations, and expert opinions. The research was conducted by examining library materials to obtain secondary data. Therefore, this researcher focused on library research. Library research is research that uses library materials as the main source of data. In legal research, there are several approaches through which the researcher will obtain information from various aspects regarding the issue being

[4] Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution Article 60

[5] Sammartano, Mauro Rubino. *International Arbitration Law,* GA Deventer: Kluwer Law and Taxation Publishers, 1990, p. 245-248.

investigated. The research methods used in this study are the statistical approach, the case approach, and the analytical approach.

a. Statute Approach

   Statutes are written regulations that contain legal norms that are generally binding and are formed or established by state institutions or authorized officials through procedures stipulated in the statutes. This approach involves examining all legal regulations related to the legal issues being addressed. For example, this approach may involve studying the consistency or compatibility between legal regulations.

b. Analytical Approach

   Analytical Approach The analysis of legal materials involves understanding the conceptual meaning of the terms used in legislation, as well as their application in practice and legal decisions. This is done using two methods of examination: 1) Research seeks to obtain new meanings contained in the relevant legal rules. 2) Testing legal terms in practice through analysis of legal decisions.

RESULT DAN DISCUSSION

According to Articles 59 to 64 jo. Article 1, number 4 of Law Number 30 of 1999 on Arbitration Alternative Dispute Resolution (hereinafter referred to as Law No. 30/1999) stipulated that the competent authority to execute national arbitration awards is the District Court of the place of residence of the respondent. According to articles 65 to 69 of Law No.30/1999 jo Presidential Decree No. 34/1981 jo. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (hereinafter referred to as the 1958 New York Convention), the State Court of Central Jakarta is authorized to handle the issue of recognition and enforcement of international arbitration awards. The execution of arbitration awards, like the execution of court decisions, must follow the general principles of execution, namely:[6]

First, what can be executed is a decision that has permanent legal force (*in kracht van gewijsde*). There is a substantial difference between arbitration and the court in determining when an award has permanent legal force. Arbitration awards have permanent legal force from the time the award is rendered by the arbitrator or arbitration tribunal concerned. Article 60 of Law No. 30/1999 regulates the "final and binding" nature of the arbitration award from the time the award

[6] Harahap, M.Yahya. *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Jakarta: Gramedia, 1988, p. 4-19.

is read out. Arbitration awards cannot be appealed, cassated or reviewed. As for the court decision, they are legally binding since there are no further legal remedies. It can occur at the first level, at the appeal level, or at the cassation level. Casuistically, it can differ from one case to another. This is related to the enactment of procedural law in the process of the court; there is the possibility of using legal remedies against decisions that have been handed down.

Second, executable decisions contain dicta or rulings that are condemnatory in nature. According to civil procedural law, a decision that can be executed is a decision whose dictum is condemnatory in nature, namely, a decision that punishes or orders the losing party to perform certain acts. Declaratory or constitutive judgements cannot be petitioned for execution.

Third, the execution action is carried out if the execution respondent, as the losing party, is not willing to voluntarily (in good faith) fulfill the award order. If the execution respondent is willing to fulfill the decision voluntarily, then execution does not need to be carried out. Execution is basically a force against the execution respondent who is not willing to voluntarily fulfill the contents of the award, on the basis of the applicant's request. Thus, the execution of arbitration awards by the District Court is actually an *ultimum remedium or the last resort whose implementation must, of course,* be adjusted to the principles of humanity and justice contained in the values of Pancasila.[7]

In the arbitration process, the execution respondent should be willing to fulfill the decision voluntarily, considering that dispute resolution through arbitration is the result of the parties' own agreement as outlined in the arbitration agreement. In practice, it is not uncommon for the losing party in an arbitration award to be unwilling to fulfill the contents of the arbitration award voluntarily. Because litigants often do not seek justice, but seek to win by all means, both legal and non-legal. In such a situation, the execution of the arbitration award is very reasonable. The execution action is carried out to maintain legal certainty against the arbitration award and to fulfill a sense for the party that has won the case.

Fourth, execution actions are carried out by order and under the leadership of Chairman of the District Court (*op last en onder leiding van den voorzitter van den landraad*). Execution of civil court decisions

[7] Article 54 paragraph (3) of Law Number 48 of 2009 on Judicial Power

and arbitration awards is basically ex officio the authority of the Chairman of the District Court.

Arbitration institutions do not have the authority to execute their own awards. This is partly because, *first,* arbitration institutions are not state institutions, so arbitrations does not have public authority that can be exercised by force on other parties; *second,* there is no legal basis for arbitration institutions to carry out the execution of their own decisions; and *third*, arbitration institutions do not have bailiffs (*deurwaarder*) as found in judicial institutions in charge of carrying out actions related to execution.

The provisions of Article 195 paragraph (1) HIR or Article 206 paragraph (1) Rbg regulated the authority to execute civil court decisions that have permanent legal force. Execution of arbitration awards is the authority of the Chairman of the District Court. Technically, the procedural execution of court decisions. The authority of the Chairman of the District Court, among others, includes receiving a request for execution. Determining execution, determining execution seizure, and leading the execution.

Procedures for the Execution of International Arbitration Awards

Compared to the execution of national arbitration awards, the execution of international arbitration awards has a more complex dimension. Legal arrangements for the execution of international arbitration awards in Indonesia are not only contained in national legislation but also in international conventions that have been ratified by the Indonesia Government. Law no. 30/1999 regulates the execution of international arbitral awards in Indonesia is also regulated according to the 1958 New York Convention. Presidential Decree No. 34/1981.

Article 65 of Law No. 30/1999 stipulates that the competent authority to handle the issue of recognition and enforcement of international arbitration awards is the Central Jakarta District Court. Although the explanation states "quite clearly", Article 65 can be interpreted as follows. *First,* the Central Jakarta District Court is the only court in Indonesia that has the authority to handle the issue of recognition and enforcement of international arbitration awards in the jurisdiction of the Republic of Indonesia. *Second,* regarding the scope of authority, the issue of recognition of international arbitration awards and the enforcement of international arbitration awards.

Basically, an international arbitration award to be enforceable in the authority of a particular country must meet the requirements and

procedures determined by the applicable law in the country concerned. Before an international arbitration award can be recognized and implemented, it must first be seen whether the law of the country concerned has provided its arrangements or not. It must first be seen whether the law of the country concerned has provided for its regulation or not. More importantly, whether the countries are participating countries or countries that have ratified the 1958 New York Convention or not, as is known, the 1958 New York Convention, organized by the United Nations (UN), regulates the issue of Recognition and Enforcement of Foreign Arbitration Awards. A country that has become a participant or ratified the 1958 New York Convention means that it has opened the door to the possibility of recognition and enforcement of international arbitration awards in the jurisdiction of its respective countries. However, each ratifying country will be followed by further and more technical arrangements in its own legislation, whose substance is not always exactly the same between one country and another.

Indonesia, as a country that has ratified the 1958 New York Convention based on Presidential Decree no. 34/1981, in fact still further regulates the matter in Supreme Court Regulation no. 1/1990 on the Procedure for the Implementation of Foreign Arbitration Awards (hereinafter referred to as Perma no.1/1990). Perma no. 1/1990 was made at a time long before the enactment of Law no. 30/1999. Perma no. 1/1990 was intended to regulate procedural technicalities relating to the enforcement of international arbitration awards in Indonesia.

The substance of Article 66 letter (a) concerns the application of the reciprocity principle among countries that have entered into an agreement on the recognition and enforcement of international arbitration awards in the territory of their respective countries. Without evidence of such an agreement, the Central Jakarta District Court will close the application for recognition and enforcement of international arbitration awards in the jurisdiction of the Republic of Indonesia. In relation to the 1958 New York Convention, which has been ratified by Presidential Decree no. 34/1981, the most important reason Indonesia ratified the 1958 New York Convention was to enter as a participant into an international trade association. At the same time, it is also necessary to provide guarantees for foreign parties; if they establish trade relations with Indonesian parties, they have legal certainty. In particular, if a dispute occurs and the dispute is then resolved by an international arbitration body, the award can be enforced in the territory of the Republic of Indonesia. Through the act of ratification of

the 1958 New York Convention by Presidential Decree no. 34/1981, the Republic of Indonesia has placed the following as a "Contracting State" which has the same position as the other states parties to the convention, especially with regard to the issue of recognition and enforcement of international arbitration awards in the territory of each participating state through bilateral or multilateral agreements. The ratification of the 1958 New York Convention implies that the Republic of Indonesia, as well as other state parties to the convention, applies the reciprocity principle, namely that each state "opens the door" to the enforcement of international arbitration awards in the territory of their respective countries.

According to the 1958 New York Convention, Article I, paragraph 1, what is meant by international arbitration awards is "*arbitration awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought*". Article 1, paragraph 2 regulates "international arbitration award, which includes ad hoc arbitration (awards made by arbiters appointed for each case), moreover, institutional arbitration (*awards made by permanent arbitration bodies*)".[8]

The substance of Article 66 letter (b) of Law No. 30/1999 is about the arbitrability of international arbitration awards requested for recognition and enforcement in Indonesia, whether, according to Indonesian Law, they fall within the scope of trade law or not. The benchmark used is not how, according to the law in force in the country where the arbitration award is rendered, but uses the benchmark according to the law in force in Indonesia, as the place where the international arbitration award is requested for recognition and enforcement. In such circumstances, it is possible that there may be substantial differences between the law of the country where the arbitration award is rendered and the applicable law in Indonesia regarding the scope of arbitration competence. It may happen that on the one hand, according to the law in the country where the arbitration award is rendered, the substance of the dispute is a "commercial dispute" so that it falls within the competence of arbitration, but on the other hand, it turns out that according to Indonesian law, it is considered not to be a trade dispute. Consequently, an international arbitration award that is deemed not to be a trade dispute under Indonesian law cannot be recognized or enforced in Indonesia. The Chairman of the Central Jakarta District

[8] Sudiarto, and Zaeni Asyhadie, 2004 *Mengenal Arbitrase, Suatu Alternatif Penyelesaian Sengketa Binsis,* Jakarta : Raja Grafindo Persada.

Court is authorized to objectively assess and interpret whether the dispute that has been decided by international arbitration and requested for recognition and enforcement according to Indonesian law is included in the scope of trade law or not. Such an interpretation should be based on the latest developments in legal science and linked to developments in daily trade practice.

The substance of Article 66 letter (c) of Law no. 30/1999 regarding the requirement that an international arbitration award, as referred to in letter (a), can only be enforced in Indonesia is limited to awards that are not contrary to *public policy*. In practice, this requirement is the most complicated and complex part. [9] It concerns the unclear definition and scope of what is meant by public policy. This issue does not receive any answer in the authentic explanation of Article 66 letter (c) of Law no. 30/1999 because it is only mentioned in the short sentence "quite clear".

The term "public order" is referred to in French as "ordre public", in German as "vorbehaltsklausel", and in common law as "public policy".[10] The term "policy" is used to indicate the substantial influence of political factors in determining whether or not public order exists. Many writers have tried to elaborate on what is meant by public order; however, there is still much disagreement about what exactly is meant by public order. Although there is no unity of opinion on what is meant by public order, it is generally argued that public order plays an important role, in the sense that every legal system of any country requires a kind of safety mechanism or emergency brake, referred to as the term public order.[11] M. Sumampouw also argued that although the legal system of every country recognizes the conception of public order, it should be used as sparingly as possible and only as an exception.[12]

The term "public order" is explained in the formulation of Perma no. 1/1990 Article 4 paragraph (2), which is not further explained in this provision. In such circumstances, the meaning and boundaries will be determined through interpretation based on case-by-case situations and conditions. As a consequence, if an international arbitration award is deemed to be contrary to public policy in Indonesia, then the

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[9] Longdong, Tineke Louise Tuegeh. *Asas Ketertiban Umum dan Konvensi New York 1958, Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-Putusan Mahkamah Agung RI dan Pengadilan Asing,* Bandung: Citra Adirya Bakti, P. 73

[10] Gautama, Sudargo. *Hukum Perdata internasinal Indonesia,* Buku ke-4, Bandung: Alumni, 1989, P. 97

[11] Longdong, Tineke Louise Tuegeh. *Op.Cit.,* P. 73

[12] Sumampouw, M. *Pilihan Hukum sebagai Titik Pertalian dalam Hukum Perjanjian Internasional,* Disertai FH UI, 1968, P. 127

award cannot be requested for recognition and enforcement in the territory of the Republic of Indonesia. According to Setiawan, citing the opinion of Jan van den Berg, the function of public order is basically as a guardian of "the fundamental moral conviction policies of the forum" and is directly related to "the principle of territorial sovereignty".[13] The use of the public order principle as an "escape clause" in Sudargo Gautama's term should be limited: "only as a shield and not a sword". With the understanding, to protect the basic joints of the entire legal system and Indonesian society, and not use it in such a way as a sword to paralyze any possibility of recognition and enforcement of international arbitration awards in the jurisdiction of the Republic of Indonesia. Tiong Min Yeo argues that: "… public policy generally works in a negative way. It opposes the application of foreign law or, more precisely, it is an exception to the choice of law rule that would ordinarily mandate the application of foreign law".[14]

The issue of public order is very important, because its function concerns the setting aside of the applicability of foreign law and foreign arbitration awards that should be implemented. On the grounds that it is contrary to the fundamental principles of the legal system prevailing in the country where the international arbitration award is sought to be enforced. As provided in Article V paragraph (2) letter "b" of the 1958 New York Convention: "the recognition or enforcement of the award would be contrary to the public policy of that country". The use of the principle of "public order" by the Chairman of Central Jakarta District Court as stipulated in Article 66 letter (b) jo. Article 65 of Law No. 30/1999 is intended as a filter to filter and objectively assess each request for enforcement of international arbitration awards in the jurisdiction of the Republic of Indonesia.

According to the Supreme Court, the granting of exequatur is only prima facie, in the sense that it does not contain an assessment of the contents of the agreement made, but only provides an executional title for foreign arbitration awards. The substance of Article 66 letter "d" of Law no. 30/1999 concerns the requirement that international arbitration awards can be enforced in Indonesia after obtaining exequatur from the Chairman of the Central Jakarta District Court. The position of the Chairman of Central Jakarta District Court is

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[13] Setiawan. *Aneka Masalah Hukum Acara Perdata,* Bandung: Penerbit Alumni, 1992, P. 52

[14] Yeo, Tiong Min. "The Role of Public Policy, Overt and Camouflaged in International Litigation and Arbitration," 8th Singapore Conference on International Business Law, Current Legal Issues in International Commercial Litigation, Faculty of Law, University of Singapore, Hlm. 6

very important and decisive with regard to the granting or refusal of execution of requests for the execution of international arbitration awards.

The substance of Article 66 letter "e" of Law no. 30/1999 regulates the condition that if the international arbitration award as referred to in letter "a" of Article 66 a quo concerns the Republic of Indonesia as one of the parties to the dispute, it can only be executed after obtaining execution from the Supreme Court of the Republic of Indnesia which is then delegated to the Central Jakarta District Court. This rule grants execution authority to the Supreme Court as the apex of the judicial body because the respondent, as well as the consequences of the execution of the international arbitration award, concern the interests of the state. The Supreme Court has the authority to grant, and/or otherwise refuse, execution of the request for enforcement of international arbitration awards. The use of the Supreme Court's authority must be carried out objectively and accountably, and not used arbitrarily to refuse to recognize and enforce international arbitration awards just because the respondent for execution is the Republic of Indonesia. States can also act as parties to arbitration agreements and international arbitration proceedings. Thus, if the Republic of Indonesia has acted as the losing party in an international arbitration award, then the award is requested for recognition and enforcement in Indonesia, and in accordance with Article 66 letter "e" of Law No. 30/1999, the Supreme Court of the Republic of Indonesia has a very important role.

In accordance with the sequence of procedures according to Law no. 30/1999, enforcement of international arbitration awards can only be carried out after the international arbitration award has first obtained recognition from the competent court. Article 67 of Law no. 30/1999 stipulated that an application for the execution of an international arbitration award is made after the award has been submitted and registered by the arbitrator or his attorney to the Registrar of the Central Jakarta District Court.

These provisions of Article 67 paragraph (1) appear to parallel Article 59 paragraph (1) of Law no. 30/1999 on national arbitration awards. There are differences regarding the place and period of submission and registration between national arbitration awards and international arbitration awards. National arbitration awards are submitted and registered with the district court of the domicile of the executing respondent, while international arbitration awards are

submitted and registered with the Central Jakarta District Court of the Republic of Indonesia.

The request for execution, accompanied by attachments of various documents as referred to in Article 67 paragraph (2), is intended so that the Chairman of Central Jakarta District Court, before granting execution, first has sufficient opportunity to examine and consider whether the request has met the requirements or not. The Chairman of Central Jakarta District Court is authorized to declare or grant execution of the request for recognition and enforcement of the international arbitration award or state the opposite. Suppose the request for execution is deemed to have met all the requirements specified in Articles 65 to 69 of Law no. 30/1999 and the 1958 New York Convention. President Decree no. 34/1981, then subsequently, the Chairman of the Central Jakarta District Court is authorized to affix an execution order against the international arbitration award in question.

Article 68 paragraph (1) stipulated that against the decision of the Chairman of Central Jakarta District Court as referred to in Article 66 letter (d), which recognized and executed the international arbitration award, no appeal or cassation can be filed. It is intended that the recognition and enforcement of international arbitration awards that the Chairman of the District Court has given in the future cannot be countered by the High Court through the use of appeals or cassations that the respondent of execution may file. As well as to provide legal certainty to the applicant for execution, the international arbitration award can be immediately executed. Conversely, according to Article 68 paragraph (2), the Chairman of the Central Jakarta District Court is also authorized to refuse to recognize or execute international arbitration awards. The refusal is based on the consideration that the application for execution of the international arbitration award does not fulfill the requirements and procedures as referred to in Articles 65 to 67 of Law no. 30/1999 and the 1958 New York Convention. Presidential Decree no. 34/1981. Against the refusal of the Chairman of Central Jakarta District Court to grant execution of the application for recognition and enforcement of international arbitration awards, according to Article 68 paragraph (2) jo. 66 letter (d), a cassation appeal may be filed with the Supreme Court. The refusal to grant recognition and enforcement of international arbitration awards by the Chairman of the Central Jakarta District Court is partly due to the fact that the application is considered not to meet the requirements specified by law.

According to Article 69 of Law no. 30/1999, after the execution is granted by the Chairman of the Central Jakarta District Court, the execution is then delegated to another District Court with the relevant authority to execute it. This is when it concerns the residence of the execution respondent or the location of the object of execution is in the territory of another district court. Although the authority to grant execution is the Chairman of the Central Jakarta District Court, technically, the procedural execution of international arbitration awards can be delegated to other District Courts. The execution of international arbitration awards is carried out according to the procedures for implementing civil court decisions that have permanent legal force, in accordance with provisions of Indonesian civil procedural law. In this case, what is meant is HIR in Java and Madura, and Rbg outside Java and Madura. This also includes the procedure for conducting the execution and confiscation of the property and goods belonging to the execution respondent. Among other things, it begins by calling the respondent to execution so that they are willing to fulfill the contents of the arbitration award voluntarily. Suppose the execution respondent is willing to fulfill the contents of the international arbitration award voluntarily. In that case, there is no need for forced execution unless the execution respondent is not willing to fulfill the contents of the international arbitration award voluntarily. A warning can be delivered to the respondent. If the respondent does not heed the reprimand, then executorial seizure (*executorial beslag*) can be carried out by the local district court bailiffs against the assets of the respondent or goods belonging to the respondent, which precedes movable objects, if there are none insufficient, then immovable objects. The form of execution of an arbitration award depends on the sound and nature of the dictum of the award, whether in the form of payment of a sum of money, so that it is necessary to execute an auction of the respondent's property to fulfill the payment of the amount of money specified in the dictum of the award or in the form of real execution (emptying). The entire process of implementing the decision (execution) is outlined in the official report, as is the official report on the implementation (execution) of a civil court decision that has permanent legal force, and the official report has authentic value.

CONCLUSION

Based on the description as mentioned above, several conclusions can be drawn as follows: 1) The execution of national arbitration award is carried out by the Chairman of District Court of the District Court where

the execution respondet is located, while the execution of international arbitration awards in Indonesia is carried out by the Chairman of the Central Jakarta District Court; 2) Arbitration awards are final and binding, thus they should be fulfilled voluntarily or in good faith by the litigants, considering that arbitration is chosen based on the agreement of the parties as outlined in the arbitration agreement, concerning the agreement to choose the forum, choose the law, choose the place and choose the arbitrator; 3) the execution of national arbitration awards is fully regulated in national law, while the execution of international arbitration awards in addition to being regulated in national law also in the 1958 New York Convention which hase been ratified based on Presidential Decree No. 34/1981. However, technically, the execution provisions apply as the provisions for the execution of civil court decisions stipulated in the HIR and Rbg.

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