

## Executorial principles in international arbitration awards in the Indonesian legal system

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**ABSTRACT** International arbitration awards in practice do not always run smoothly in carrying out their executions, so there is a need for affirmation of regulations both fundamentally or the principles and regulations. That is the background why this needs to be studied. So the legal issues in the research are: How is the power of the executive principle in international arbitration decisions in terms of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 1999 concerning Procedures for Implementing Foreign Arbitration Awards? The problems that arise in carrying out the execution of foreign arbitration awards in Indonesia?. This study uses a normative juridical research method using a doctrinal legal approach, which analyzes laws and regulations, legal theories, doctrines, legal principles, which are analyzed in the form of descriptions. The results of the study show that: basically the legal force of an international arbitral award which is final, binding and legally binding remains the same as a court decision that has permanent legal force. What makes the difference is that an international arbitral award does not have executive power before the award is registered and requested for executorial fiat at the Central Jakarta District Court. The problem that often arises in Indonesia is the use of reasons for decisions that are contrary to public order (public policy) to refuse the execution of decisions. So that in such circumstances the international community sees it as a legal uncertainty.

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### 1. INTRODUCTION

The execution of an international arbitration award which is a series of settlements of a business dispute through an international arbitration forum is a very important stage, especially for business actors who experience business disputes (Suparman, 2012). said this is important, because a decision has no meaning at all if it cannot be implemented. Therefore, the execution of international arbitral awards in Indonesia must be in accordance with the law or the legal system in Indonesia. Hartono (2016) that the Indonesian Legal System or the National Legal System, which includes the values contained in Pancasila and the 1945 Constitution, principles/principles of law that are generally accepted for the formation and implementation of law (general principles of law and law enforcement),

Among the many laws and regulations that have been promulgated by the Government of Indonesia to respond to developments and for the sake of advancing international trade, including Law Number 1 of 1967 concerning Foreign Investment and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Trade disputes at the international trade level or what are called interna-

tional trade disputes are trade disputes arising from international trade relations based on contracts or not (Wyasa, 2020). Disputes or conflicts are essentially a form of actualization of a difference and/or conflict between two or more parties (Sutiyoso, 2016). must be made in the form of a notarial deed.

A written agreement that does not contain the matters referred to in paragraph (3) is null and void. Types of arbitration can be identified, including from the Convention of the Settlement of Investment Disputes Between States and National of Other State or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958), as well as based on the provisions in the UNCITRAL Arbitration Rules, which divide the types of arbitration into: a. Ad-hoc Arbitration. Ad-hoc arbitration (volunteer arbitration) is an arbitration specially formed to resolve or decide a particular dispute. b. Institutional Arbitration. Is a permanent institution or arbitration body (Hartini et al., 2020).

Disputes are also defined as contradictions or conflicts that occur in people's lives (social populations) that form opposition/contradictions between people, groups or organizations against a problem object. He further explained

that the types of disputes can be divided into two major groups, namely social disputes and legal disputes. Social disputes relate to ethics, manners or morals that live and develop in certain community associations. Legal disputes are disputes that have legal consequences, either because of a violation of the rules of positive law or because of a conflict of rights and obligations of a person regulated by the provisions of positive law. Legal disputes are broadly divided into several groups.

Basically, apart from court forums or out-of-court forums, such as arbitration, the parties can also submit their dispute resolution through alternative dispute resolution known as Alternative Dispute Resolution (ADR) or Alternative Dispute Resolution (APS). Article 1 point 1 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution states that "Arbitration is a method of resolving a civil dispute outside of a general court based on an arbitration agreement made in writing by the disputing parties". Whereas in article 1 point 10 of the same article it states "Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlements out of court by means of consultation, negotiation, mediation, conciliation, or expert judgment. Based on the things described in the two articles, it is implied that Arbitration and Alternative Dispute Resolution (APS) are two different things, although there are also similarities between the two (Hartini & Alam, 2020).

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the decision of which is called the "International Arbitration Award." In Article 1 point 9 of Law no. 30 of 1999 states that "International Arbitration Award is a decision handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or a decision by an arbitration institution or an individual arbitrator which according to the law of the Republic of Indonesia is considered an international arbitration award" (Panjaitan, 2018). Several international arbitration institutions are: the International Center for Settlement of Investment Disputes (ICSID) Washington, United States of America, for alternative investment dispute resolution; United Nations Commission on International Trade Law (UNCITRAL); settlement of disputes between countries in international trade transactions; Singapore International Arbitration Convention (SIAC); and the London Court of International Arbitration (LCIA), which is the oldest arbitration institution in the world based in London, England, and usually for dealing with trade disputes.

The choice of the type of arbitration institution, whether national arbitration or international arbitration, to resolve a dispute that arises is based on the agreement of the parties (Wahid, 1991). The disputing parties are given the right to choose an arbitration institution or an individual arbitrator to be used for the resolution of disputes that arise. This is regulated in Article 34 paragraph (1) of Law no. 30 of 1999. Paragraph (2) of Article 34 further stipulates: "The settlement of disputes through an arbitration institution as referred to in paragraph (1) shall be carried out according to the rules and procedures of the chosen institution, unless otherwise stipulated by the parties" (Muhajir, 2019).

In international trade, foreign parties tend to enter into treaty relationships with arbitration clauses. This tendency, according to Rajagukguk (1990). is due to several

reasons. First, in general, foreign parties are not familiar with the legal system of other countries. Second, there are doubts about the objectivity of the local court in examining and deciding cases in which foreign elements are involved. Third, foreign parties still doubt the quality and ability of developing country courts to examine and decide cases on the scale of international trade and technology transfer. Fourth, the emergence of allegations and impressions, dispute resolution through the formal channels of the judiciary takes a long time.

Goodpaster (1992) suggests the reasons for business actors to prefer arbitration to resolve disputes rather than through litigation in court, namely: (1) Settlement through arbitration provides very broad freedom and autonomy to the parties; (2) Settlement through arbitration is faster than settlement through court; (3) The cost of settlement through arbitration is smaller than settlement through court; (4) The people who are chosen as arbitrators are people who are trusted by the parties as experts in the disputed field; (5) Settlement through arbitration is preferred because arbitration is private and closed. (6) Arbitration decisions generally have no precedent; (7) In resolving disputes,

Subekti (2010) also states that for the world of trade or business, dispute resolution through arbitration or arbitration has several advantages, namely that it can be done quickly, by experts, and confidentially. This is also in accordance with the explanation of Law no. 30 of 1999 it is stated that in general, arbitration institutions have advantages compared to judicial institutions, namely: a) the confidentiality of the parties' disputes are guaranteed; b) delays caused by procedural and administrative matters can be avoided; c) the parties may choose an arbitrator who in their belief has sufficient knowledge, experience and background regarding the issue in dispute, is honest and fair; d) the parties can determine the choice of law to resolve the problem as well as the process and venue for the arbitration; and e) the arbitrator's decision is a decision that is binding on the parties and can be implemented through simple procedures (procedures). An International Arbitration Award will not be enforceable if it is rejected by the District Court which has the authority to enforce the award. That the implementation of the International Arbitration Award which must be implemented in another country that is not in the country of the International Arbitration Award is decided, which must be subject to or in accordance with the legal system or legal system in the country implementing the award. An International Arbitration Award will not be enforceable if it is rejected by the District Court which has the authority to enforce the award. That the implementation of the International Arbitration Award which must be implemented in another country that is not in the country of the International Arbitration Award is decided, which must be subject to or in accordance with the legal system or the Legal System in the country implementing the award. An International Arbitration Award will not be enforceable if it is rejected by the District Court which has the authority to enforce the award. That the implementation of the International Arbitration Award which must be implemented in another country that is not in the country of the International Arbitration Award is decided, which must be subject to or in accordance with the legal system or the Legal System in the country implementing the award.

Such as the international arbitration decision regarding the business dispute between Karaha Bodas Company (KBC) vs Pertamina and PLN. In this case, the Arbitration Tribunal in Geneva, Switzerland, through its decision on December 18, 2000, has approved the claim or won the KBC, which among other things requires Pertamina and PLN to jointly pay a certain amount of compensation (Faisal, 2015).

Based on this decision, Pertamina has filed a lawsuit for the cancellation of the foreign arbitration award at the Central Jakarta Court. Through its decision on April 1, 2002, the Central Jakarta District Court has approved the Plaintiff's claim so that the Arbitration Award which was determined in Geneva, Switzerland cannot be enforced in Indonesia. From this case, the execution of the International Arbitration Award must be in accordance with and subject to the Indonesian Legal System. An International Arbitration Award that is not in accordance with Indonesian law or laws will result in the International Arbitration Award not being enforceable in Indonesia because it has been rejected by the competent court.

In relation to the implementation of the International Arbitration Award, the principle of judicial power that is free from interference from other parties is reflected in Article 3 paragraph (4) of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 1999 concerning Procedures for Implementing a Foreign Arbitration Award which states "A Foreign Arbitration Award can be implemented in Indonesia after obtaining the Exequatur from the Supreme Court of the Republic of Indonesia." This means that the implementation of foreign or international arbitral awards in Indonesia must be implemented or subject to the laws or procedures for implementing the arbitral awards in force in Indonesia, without prejudice to the nature of the arbitral award which is final, binding and has executorial power.

This is especially so if the arbitral award is not implemented voluntarily by the parties. In practice, the implementation or execution of International Arbitration Awards in Indonesia is not always smooth, but on the contrary obstacles arise, either because of the non-fulfillment of the requirements as stipulated in the laws and regulations governing this matter or for reasons that have not been or are not specifically regulated in the regulations. existing legislation (Sutiarso, 2015).

In this study, of course, previously seen several previous references such as the journal by Prof. Rahayu Hartini with the theme "Arbitration of Business Disputes within the Asian Economic Community: Context Indonesia and Malaysia" explaining that business dispute resolution through arbitration is the most popular choice for business people. , although there are significant differences in terms of completion, process, time and cost. Based on the explanation of the background of the problem as described in the sub-chapter above, the formulation of the problem described below is formulated.

### 1.1 Formulation of the Problem

In this study, the author brings two formulations of the problem, among others, as follows:

- a. What are the problems and obstacles in the execution of foreign arbitration awards in Indonesia?
- b. How is the power of the executive principle in international arbitration awards in terms of the Regulation of

the Supreme Court of the Republic of Indonesia Number 1 of 1999 concerning Procedures for Implementing Foreign Arbitration Awards?

## 2. METHOD

Legal research uses a normative juridical research approach or doctrinal or dogmatic legal research. Soekanto (2010), said that normative legal research is legal research that includes research on: legal principles, legal systematics, level of legal synchronization, legal history and legal comparisons.

In this legal research, data analysis is carried out using qualitative methods, namely by analyzing the applicable laws and regulations, theories on legal experts or doctrines, legal principles that are relevant to the legal problem being sought. the answer. Also included here are secondary and tertiary data. All data were compiled systematically and completely, then analyzed in the form of a description. The data obtained from the results of library research as well as from related documents are then categorized into problems or findings contextually and then discussed and analyzed according to a predetermined systematic.

## 3. RESULT & DISCUSSION

### 3.1 The strength of the executive principle in international arbitration awards is reviewed from the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 1999 concerning Procedures for Implementing Foreign Arbitration Awards.

#### 3.1.1 International Arbitration Awards in the Indonesia Legal System

In accordance with Article III of the 1958 New York Convention, an international arbitral award is in principle final and binding. Final means that no legal action is open to the arbitral award, either appeal, cassation or judicial review. And binding means that the decision is binding on the parties, therefore it must be implemented voluntarily. Seeing the legal force possessed by the international arbitral award, it can be interpreted that the arbitral award can be executed immediately after the decision is handed down. This is of course by first fulfilling the provisions required by the laws and regulations in the country where the arbitration award is requested to be implemented.

To be recognized and enforced in Indonesia, international arbitral awards must go through a process determined by law. First, the international arbitration award must first be deposited to the Central Jakarta District Court. Deponing is the activity of registering or registering the arbitration award to the clerk of the district court to further record the registration in a special book. The purpose of deponing is so that executions can be carried out when the parties do not want to carry out the decision voluntarily (Prayogo, 2016).

After the deposition has been made, the next process is the submission of an exequatur application to the international arbitration award. An exequatur request is a request to the chairman of the District Court to issue an execution order against an arbitration award. At this stage the arbitration award will be assessed for its feasibility whether it is possible to enforce it in Indonesia or not. The request will be answered through a determination in the form of

granting or refusing an order to execute the international arbitration award.

Juridically with the ratification of the 1958 New York Convention through Presidential Decree no. 34 of 1981 Indonesia is bound to recognize and enforce international arbitral awards filed in Indonesia. This provision requires participating countries to treat international arbitral awards the same as domestic decisions and there should be no discrimination (Irfan, 2021). The main principles contained in the presidential decree give the nature of self-execution to international arbitral awards. The nature of the self-execution is based on the principle of reciprocity or the principle of reciprocity between Indonesia and the country concerned. This means that the willingness of the Indonesian state to recognize and execute international arbitral awards must be reciprocal with the acknowledgment and willingness of other countries to execute international arbitral awards requested by the Indonesian side in their country. In order to achieve this, an agreement must be made between Indonesia and the country concerned.

### 3.1.2 Giving Exequatur and Procedural Arbitration Award

In principle, arbitral awards are universal, meaning they can be enforced in any country, as long as that country has ratified the 1958 New York Convention on the Recognition and Implementation of International Arbitral Awards. Its implementation in all countries through the local state court (Kantaprawira, 1987).

The request for an exequatur request is made by the interested parties themselves to the District Court, because the arbitrator is no longer involved after registration. In essence, to be able to carry out an exequatur from the court, registration is required first, if the registration exceeds the predetermined time limit, it will be considered by the chairman of the district court to accept or reject the exequatur application. If the decision cannot be executed, then the exequatur is rejected with the issuance of a determination letter accompanied by the reasons for its consideration. However, if the decision can be executed, the Chief Justice can issue an exequatur and will then issue an execution order (Tutojo, 2015).

The execution order is issued by the head of the district court after giving the exequatur to the decision. So, before refusing or accepting the exequatur, which then issues an order for execution, the chairman of the district court must first study and examine whether the arbitration decision can be executed or not.

The implementation of the execution order has been issued by the chairman of the district court, so the next role of the court is to carry out the same procedures as other ordinary civil cases. In this case the court will issue an anmaning or reprimand, by summoning both parties together to court. In practice the anmaning is carried out in 3 stages, but usually the parties do not go through the 3 stages of the anmaning, this is because there is peace from the parties during the anmaning process.

### 3.1.3 The Power of Law and Executional Principles in International Arbitration Awards

Arbitration decisions that have permanent legal force are an inseparable part of legal services, especially for justice seekers and are at the same time an elaboration of the principle of quick, simple and low-cost examination. It is ap-

propriate, when a decision is final, the applicant for execution should obtain a guarantee that the arbitration award that has been won as soon as possible can be carried out according to the stages that have been determined. If the execution in question proceeds as it should, then the fundamental nature of the arbitral award can be truly felt by the party or applicant for execution as a result of his struggle for justice (Fitryalita, 2016).

Based on the above discussion, it is concluded that basically the legal force of an international arbitration award which is final, binding and has permanent legal force is the same as a court decision which has permanent legal force. The difference is that an international arbitral award does not have executive power before it is registered and requested for executorial fiat at the Central Jakarta District Court. In contrast to court decisions which already have permanent legal force, executive power is directly attached.

In addition, the Central Jakarta District Court has the authority to examine court decisions requested for executorial fiat, but this is limited to administrative examinations and the court has no right to examine the contents of arbitral awards. And if something is found that is contrary to Law Number 30 of 1999, especially Article 70 which regulates the cancellation of the arbitral award, the District Court has the right to cancel the arbitral award. Then the arbitration decision that has been given fiat execution by the Central Jakarta District Court can only be executed in the territory of Indonesia using the applicable law in Indonesia which regulates execution .

### 3.2 The Problems that arise in the execution of Foreign Arbitration Awards in Indonesia.

The problem that often arises in the implementation of international arbitral awards in Indonesia is the use of reasons for decisions that are contrary to public order (public policy) to refuse execution of decisions. Indonesian courts are often labeled as reluctant to implement or reject the implementation of international arbitral awards on the grounds that the decisions concerned are contrary to the public interest. Although public policy is formulated as the basic provisions and principles of law and the national interest of a nation, in this case Indonesia, the concrete application of these criteria is not always clear, so that such a situation is seen by the international community as a legal uncertainty.

The definition of public policy is generally different in each country. This can be understood because the philosophical foundation of the country, the legal system and culture in each country is different. The lack of a common interpretation in terms of public policy then becomes an obstacle in practice because it is often misused. Dedi Harianto said that this public interest can sometimes become an unruly horse that can run here and there because it is often influenced by political interests, especially in terms of recognizing and implementing foreign arbitral awards (Umar, 2016).

In Perma No.1 of 1990 it is stated that foreign arbitral awards can only be recognized and enforced in the State of Indonesia as long as the arbitral award does not conflict with the public interest. Sudargo Gautama stated that it is contrary to the public interest if it contains a matter or condition that is contrary to the basic principles and values and the national interest of a nation. Meanwhile, Erman

Rajagukguk stated that the public interest is sometimes defined as order, welfare and security or equated with law and order or justice (Rajagukguk, 1990).

It is interesting to note that in addition to reasons contrary to public order as regulated in Law no. 30 of 1999, the 1958 New York Convention also includes a number of provisions that can be grounds for rejection of international arbitral awards, especially those concerning due process of law. But the reasons for refusing the execution of international arbitral awards in the New York Convention are rarely used by judges. Whereas Indonesia has taken part in ratifying the 1958 New York Convention through Presidential Decree No. 34 of 1983 (Dewi, 2017).

In addition to the rejection of the decision, another reason that becomes a problem is the attempt to cancel it. In respect of an arbitral award, the parties may apply for annulment if the award is suspected to contain the following elements:

- a. The letter or document submitted in the examination, after the decision is rendered, is admitted to be false or declared false
- b. After the decision is taken, decisive documents are found, which are hidden by the opposing party
- c. The decision is taken from the results of deception carried out by one of the parties in the examination of the dispute (Easterbrook, 1991)

The problems of implementing international arbitral awards as described above when viewed from the perspective of justice which is the goal of the law are contradictory. The reason the parties choose an arbitration institution as an alternative dispute resolution is to obtain justice. If you look at the initial principle of dispute resolution according to the Trias Politica doctrine, the authority to resolve disputes actually lies in the hands of the judiciary (the power to adjudicate violations of the law), namely through the courts. However, the current trend is that people's trust in the judiciary as a place to seek justice has decreased (Assegaf, 2015).

Long procedures and convoluted bureaucracy cause the time to settle cases in court to be long and costly. Justice seekers (justitiabelen) become restless because efforts to find a solution to the problem become adrift. Therefore, there was an initiative to look for alternative dispute resolution institutions that were more effective and efficient, with the hope that the pending search for justice through court settlements could be realized with certainty. One of the efforts taken is through an arbitration institution.

The arbitration institution is chosen by the parties with the aim of being able to provide answers to efforts to seek justice. The arbitrator or panel of arbitrators is expected to be able to provide solutions to the problems encountered through their decisions. Justice is expected to manifest in the arbitrator's decision. However, seeing the problems of implementing arbitral awards, especially international arbitrations as described above, the fate of justice is expected to be faced by the parties again with uncertainty. The involvement of judicial institutions in the implementation of international arbitral awards causes the effectiveness of the arbitration process leading to the good will of law enforcement officials (government) to enforce the law through orders for the execution of international arbitral awards (Azhari, 2001).

#### 4. CONCLUSION

International arbitration awards are basically final and binding. However, this nature is not absolute because legal remedies are still open, such as efforts to cancel and reject the execution of decisions. Based on its final and binding nature, the arbitral award should have the power of self-execution. However, with the opening of these efforts, the implementation of international arbitral awards cannot be immediately executed.

The problem that often arises in the implementation of international arbitral awards in Indonesia is the use of reasons for decisions that are contrary to public order (public policy) to refuse execution of decisions. Indonesian courts are often labeled as reluctant to implement or reject the implementation of international arbitral awards on the grounds that the decisions concerned are contrary to the public interest. Although public policy is formulated as the basic provisions and principles of law and the national interest of a nation, in this case Indonesia, the concrete application of these criteria is not always clear, so that such a situation is seen by the international community as a legal uncertainty.

#### 5. SUGGESTION

There is a need for affirmation of regulations and detailed attention to international arbitration decisions, which were previously known to have many obstacles in implementing the execution of these decisions, although in Indonesia itself there is the Indonesian National Arbitration Board, thus the role of these institutions needs to be strengthened and expanded so that trust and the application of the executive principle in international arbitration award went smoothly.

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