Non-Enforcement of Foreign Arbitration Award in Indonesia

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ABSTRACT
Arbitration is an alternative dispute resolution that is of interest to business actors. At the international level, foreign arbitration is known as the choice of settlement of cases by the parties based on the agreement agreed in the contract. It becomes a legal issue when the implementation of a foreign arbitral award decided in a country will be implemented in the territory of another country, while on the other hand international law recognizes the sovereignty of each country not to recognize foreign arbitral awards outside the territory of their country's sovereignty, so that the decision cannot be enforced. The Supreme Court Regulation Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards (PERMA No. 01/1990) applies the principle of executorial power (executory kracht principle), which means that foreign arbitral awards are the same as court decisions which have permanent legal force. In addition, the foreign arbitral award is final, meaning that the decision cannot be submitted for further legal action, so that it is binding on the disputing parties, therefore the parties are obliged to implement the foreign arbitral award voluntarily. The research aims to find out whether the International Arbitration Award can be enforced in Indonesia and what is the impact if it cannot be enforced on international trust in Indonesia? The research method was using qualitative legal research with a statutory approach and examines relevant cases. If the International Arbitration Award can be implemented in Indonesia, it will have implications for the trust of other countries to partner in business with Indonesia.

Keywords: *Award; International Arbitration*

1. INTRODUCTION

Arbitration is an effective way of resolving commercial/business disputes, where many experts recommend taking arbitration rather than litigation in court considering its effectiveness and advantages. However, if the foreign arbitration award is not recognized and cannot be enforced, then the arbitration becomes meaningless. Foreign arbitration is a method used to resolve disputes between parties bound in an international trade agreement, when the parties are in different countries. For example, between entrepreneurs in Indonesia and entrepreneurs in Singapore, if a dispute arises from the agreement and the parties use arbitration to resolve it, this arbitration is called international arbitration [1].

This is one of the legal issues in the practice of resolving foreign arbitration disputes, one of the problems is the implementation of a foreign arbitration award decided by an arbitrator in a country, will be implemented in the territory of another country. On the other hand, internationally recognizes the sovereignty of each country not to recognize any decision given outside its territory by a foreign government, including not to implement the decision.

In the context of international law, it also recognizes the full sovereignty of a country in the eyes of the international community. This means that in principle, no country in the world can impose a law in another country, in any way whatsoever, as long and as long as it is not in accordance with the principles and principles of state life or in the sense of the word unwanted. by the other country [2].

Before Indonesia had Law Number 30 of 1999 which regulates Arbitration and Alternative Dispute Resolution (Arbitration Law), Indonesia was once considered a not arbitration-friendly country. In that era, for many years Indonesia was considered as a country that was inconsistent and impossible to enforce foreign arbitral awards. The most important international arbitration provisions are regulated in the Convention on the Recognition and Enforcement of Foreign Arbitration

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Awards (New York Arbitration Convention), known as the New York Convention.

However, because the convention does not at all regulate how the mechanism and procedure for implementing foreign arbitral awards will arise, different interpretations arise from one country to another, namely whether a special implementing regulation or regulation is needed (implementing legislation) or by direct ratification applied.

The difficulties faced by several countries that have ratified the convention are also experienced by Indonesia, where Indonesian legal experts have different opinions about whether or not implementing legislation is necessary. Due to the absence of implementing regulations, there is a legal vacuum in the implementation of the convention. Therefore, from 1981 to 1990, Indonesia did not have an implementing regulation regarding the mechanism for implementing foreign arbitral awards. This has led to a perception of the applicability of Article 634 of the Regulation on Civil Procedure – Reglement op de Rechtsvordering (RV) which stipulates that registration and application for the implementation of an arbitral award must be made through the District Court where the award was rendered.

In 1990, the Supreme Court issued Supreme Court Regulation No. 1/1990 (PERMA No. 1/1990), stating that the outcomes of foreign arbitral awards in nations that have accepted the New York Convention can be implemented by registering the judgement at the Central Jakarta District Court. Furthermore, the Head of the Central Jakarta District Court will submit the application to the Supreme Court, which is the only institution entitled to deliver an executorial judgement on the foreign arbitration verdict, within 14 days.

Following the issuance of the exequatur, the decision is returned to the Head of the Central Jakarta District Court for implementation. If the decision's implementation occurs outside of the Central Jakarta District Court, the decision is sent to the local District Court, where it will be executed. Unfortunately, PERMA No. 1/1990 does not specify how long the Supreme Court must rule on a request for implementation of a foreign arbitral judgement.

On 12 August 1999, Indonesia issued a comprehensive and effective Arbitration Law. With the issuance of the Arbitration Law, all provisions governing arbitration, such as Article 615-651 RV, as well as the provisions of Article 377 of the Updated Indonesian Regulation (Het Herziene Indonesisch Reglement) and Article 705 of the Regulations for Events for Regions Outside Java and Madura (Rechtsregement Buitengewesten) is declared invalid (Article 81 of the Arbitration Law).

2. METHOD

The research method was using qualitative legal research with a statutory approach and examines relevant cases. This study uses secondary data consisting of primary legal resources and secondary legal resources, which are analyzed qualitatively to obtain answers to research questions regarding the implementation of international arbitral awards in Indonesia.

3. RESULT AND DISCUSSION

3.1. International Arbitration Award may or may not be enforced in Indonesia

Article 1 number 10 of the Arbitration Law defines an International Arbitration Award as a decision rendered by an arbitration institution or individual arbitrator outside the Republic of Indonesia's jurisdiction, or a decision rendered by an arbitration institution or individual arbitrator that is considered an international arbitration award under the laws of the Republic of Indonesia.

The Central Jakarta District Court is allowed to handle the issue of recognition and implementation of an International Arbitration Award under Article 65. Furthermore, Article 66 states that an International Arbitration Award is only recognized and can be enforced in the territory of Indonesia if it meets six conditions, including the existence of an agreement between the parties, the scope of trade law, does not conflict with public order, obtains an exequatur from the Court, and obtains an exequatur from the Supreme Court if the State of Indonesia is the parties.

In practice, the administration of the application file, which consists of the original sheet/original copy of the arbitral award, the original/authentic copy of the agreement that forms the basis of the arbitral award, and a statement from the Indonesian diplomatic representative in the country where the international arbitral award is stipulated stating that the applicant country is bound by a bilateral and multilateral agreement, is frequently a source of problems.

In fact, the information from the diplomatic representative has not been effectively communicated by the Indonesian Ministry of Foreign Affairs to its diplomatic representatives. This condition has an impact on increasing the administrative burden and resulting in delays in being able to be registered at the District Court.

The application is submitted and registered by the arbitrator or his proxy to the Registrar of the Central Jakarta District Court (Article 67 paragraph 1). The decision of the Chairman of the Central Jakarta District Court which recognizes and implements the international arbitration award cannot be appealed (Article 68 (1), so it is binding and final. No legal action can be taken against the decision. recognize and implement an

international arbitral award, an appeal may be filed (Article 68 paragraph (2), in which a cassation can be filed within 30 days of the submission and registration of the arbitral award in the District Court (Article 71 of the Arbitration Law).

Furthermore, the Supreme Court will consider and decide on any appeal for a decision that refuses to recognize and implement an international arbitral award (Article 68 (3). As for cases in which the Indonesian state is a party, the decision of the Supreme Court cannot be appealed against Article 68 (4).

The main legal issue lies in number 3, in this case it does not explain a clear understanding of public order. Article 3 paragraph (3) PERMA No. 1/1990 requires Foreign Arbitration Award to be enforceable in Indonesia

Some of the problems that arise in the practice of implementing international arbitration in Indonesia:

3.1.1. The Central Jakarta District Court Decision No. 05/PDT.ARB.INT/2009/PN.JKT.PST.

One example of a case where an international arbitration award was rejected was in the Central Jakarta District Court (PN) Decision No. 05/PDT.ARB.INT/2009/PN.JKT.PST, Dated 28 October 2009. The Parties to the dispute between PT Astro All Asia Network (Astro Group) and PT. Ayunda Prima Mitra (Lippo Group), whose dispute was decided by the Singapore International Arbitration Center (SIAC). Whereas, in the decision, in essence, the Central Jakarta District Court did not accept the arbitration award for execution in Indonesia [4].

The brief chronology of the rejection of the Central Jakarta District Court Decision Number: 05/PDT.ARB.INT/2009/PN.JKT.PST, dated 28 October 2009 is as follows: Whereas, in 2010, there was an international arbitration award by the Singapore International Arbitration Center/ The SIAC was rejected by the Head of the Central Jakarta District Court, and the rejection was later upheld by the Supreme Court (MA) of the Republic of Indonesia. Starting from PT Ayunda Prima Mitra as the owner of PT Direct Vision together with Lippo Group (LG), in which LG has a 49% stake. And the remaining 51% owned by Silver Concord. PT Astro All Asia Network is owned by PT First Media, 99% in the form of an investment of Rp. 34.54 million and PT MVC with an investment of Rp. 35 thousand (1%). Whereas, the lawsuit stems from a dispute related to the cooperation of private television PT Astro All Asia Network with LG through PT Direct Vision. This cooperation requires LG to invest 50 percent of their shares in Astro, but it was not fulfilled. That, finally, the decision of the arbitral tribunal determined that PT. Direct Vision had to pay US$230 million. Meanwhile, PT First Media (FM) and PT Astro All Asia Network, also a subsidiary of LG, are required to pay a total of US$ 95 million. According to information from AAAN's attorney, PT. APM has failed to finalize the cooperation plan between PT Astro All Asia Network and Astro Group (AG) within PT Direct Vision, so PT Astro All Asia Network exercised its rights by registering the matter with Arbitration in Singapore, SIAC. The SIAC arbitral tribunal decided that PT Ayunda Prima Mitra had to pay a fine of US$ 230 million to PT. Astro All Asia Network with the decision of SIAC No. 62 of 2008 dated 7 May 2009.

Then the attorney for PT Astro All Asia Network, the arbitration award from SIAC was registered at the Central Jakarta District Court with registration number No. 05/2009, September 1, 2009. On the next day, PT Direct Vision separately filed a request for cancellation of the SIAC Arbitration decision with Register Number: 177/PDT.P/2009/PN.JKT. PST, dated September 2, 2009. Similarly, PT Ayunda Prima Mitra, also filed a request to cancel the SIAC international arbitration award with Register Number: 178/PDT.P/2009/PN.JKT.PST. Based on the Central Jakarta District Court Decision dated October 28, 2009, the request for implementation of the international arbitration award by PT. Astro All Asia Network was declared unenforceable (Non-Execution) by the Chief Justice on the grounds that the law was against public order.

The decision was appealed by Astro Group Malaysia in Supreme Court Decision Number 877 K/Pdt.Sus/2012, dated March 26, 2013, against PT. Direct Vision, according to the Supreme Court that examined the a quo case, also gave a decision to reject the application for the implementation of the foreign arbitral award [5]. Based on the Supreme Court's cassation decision, then PT Astro All Asia Network filed a judicial review (PK) in Case Number: 26 PK/Pdt-Sus-Arbt/2016 dated 18 May 2018 with the verdict rejecting the PK request [6].

Based on the chronology of the case, it can be concluded that the SIAC International Arbitration Award between the Astro Group and the Lippo Group cannot be enforced in Indonesia on legal grounds that is contrary with the prevailing public order in Indonesia [7].

3.1.2. The Central Jakarta District Court Decision No. 194/Pdt.P/2014/PN Jkt Pst.

The case involving PT Indiratex Spindo against Everseason Enterprises, Ltd. Where PT Indiratex Spindo submitted an application for the cancellation of the international arbitration award ICA (The International Cotton Association Limited) domiciled in England, with 6 reasons, namely:

a. The ICA's decision dated December 14, 2012 was handed down by the Cotton Trade Arbitration Institute outside the jurisdiction of Indonesia, namely England.
b. The existence of a ruse/document regarding the legality and legal position of the Respondent which was hidden.

c. The ICA decision has no binding legal force and cannot be enforced in the territory of Indonesia because it has been appealed to the ICA Appeal Committee.
d. The decision is contrary to Article V number 1 letter c of the 1958 New York Convention with respect to disputes not referred to in the agreement.
e. ICA's International Arbitration Award in respect of a dispute which is not stated in the agreement (ultra petita).
f. The Respondent is domiciled in the British Vorgon Islands, which has not ratified the 1958 New York Convention, therefore the ICA Arbitration Award cannot be enforced in Indonesia.

The Central Jakarta District Court has decided on the cancellation request with the following ruling: The Central Jakarta District Court is not authorized to hear a quo petition. The decision was upheld by the Supreme Court which decided to reject the cassation request from the applicant PT Indiratex Spindo in Decision No. 219 B/Pdt.Sus-Arbt/2016 dated 18 July 2016.

The Supreme Court's refusal on the grounds that the objection submitted by the applicant was unjustified and stated that the Central Jakarta District Court Judge had not wrongly applied the law which in his judgment stated that the International Arbitration Award was filed in the court of the country where the International Arbitration Award was handed down, therefore the application should be submitted to the court in England. With the rejection of the request for cancellation of the ICA International Arbitration award, the winning party (Everseason Enterprises, Ltd) can apply for the execution of the decision in Indonesia as the legal domicile of the losing Party (PT. Indiratex Spindo). As in the Arbitration Law, an application for an Execution Determination is submitted to the Head of the Central Jakarta District Court.

From the two decisions above, it can be concluded that whether or not an international arbitral award can be enforced in Indonesia is casuistic in nature, based on the results of the examination of legal facts and the application of law in each case. In Central Jakarta District Court Decision No. 05/PDT.ARB.INT/2009/PN.JKT.PST, international arbitral awards cannot be enforced because they are contrary to public order, but the Central Jakarta District Court Decision No. 194/Pdt.P/2014/PN Jkt.Pst. who refused to cancel the ICA International Arbitration award gave a different decision from the previous case.

3.1.3. Reasons for Refusal to Implement International Arbitration Award

In practice, what happens is that there are many more foreign arbitral awards that also apply for rejection and then the Head of the Central Jakarta District Court gives a non-executure decision. This is one of the reasons why the implementation of foreign arbitral awards in Indonesia is something that is very vital or important to pay attention to. Because the principle of public order (public policy) is often "used" as a legal loophole by the losing party in a foreign arbitral award, so that it is legally clear to provide an opportunity to apply for the cancellation of the implementation of a foreign arbitral award in Indonesia on the grounds of "public order" in this case The Court Central Jakarta, which in principle foreign arbitration awards are final.

According to Sudargo Gautama, foreign arbitral awards are only recognized and enforceable within the jurisdiction of the Republic of Indonesia, limited to decisions that do not conflict with public order, and the exequatur principle will not be granted if the foreign arbitral award is manifestly in conflict with the principles of the entire legal system and society in Indonesia [8].

With the provisions regarding public order as contained in Article 66 letter C of the Arbitration Law, it creates a "legal loophole" so that it is very clear that legal problems and legal uncertainty will be created in the application of foreign arbitral awards in the State of Indonesia, which in principle are final and have legal force. permanent, and binding on the disputing parties, thus, it is also legally possible that an appeal, cassation or judicial review cannot be filed against a foreign arbitral award.

Whereas according to the researcher, the legal product of the Decision of the Head of the Central Jakarta District Court Number: 05/Pdt/ARB-INT/2009 on the applicant's application for the execution of the SIAC Arbitration decision contained errors or was inaccurate. The chairman of the Central Jakarta District Court should have been more careful in examining and making legal decisions so that there would be no discrepancy in the application of the law.

The application of Article 66 of the Arbitration Law, which basically clearly regulates the conditions for carrying out the execution of international arbitral awards in Indonesia, in terms of whether the Chairperson of the Central Jakarta District Court pays attention to the existence of legal rules regarding the grounds for rejecting international arbitral awards in Indonesia.

The legal product of the stipulation of the Chairman of the Central Jakarta District Court Number: 05/Pdt/ARB-INT/2009 turned out to be an error which resulted in uncertainty in the implementation of the law in Indonesia. With this error, the question arises whether the reasons for refusal given by the judges of the Central Jakarta District Court are in accordance with the reasons for refusal as regulated in Indonesian positive law and international law.

If you look at the perspective of international law, there are several reasons for submitting a request for rejection of the execution of an international arbitral award as regulated in international law sources, namely

New York in 1958, the Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) and UNCITRAL. (Model Law on International Commercial Arbitration).

Efforts to refuse the implementation of an international arbitral award can be made if it fulfills the conditions as stipulated in Article V (1) of the Convention. If you look at the basis for the implementation of the 1958 New York Convention in Indonesia, that on October 7, 1981, Indonesia has participated on signing the International Agreement which regulates the recognition and implementation of international arbitral awards, as well as Singapore since August 21, 1986, has been legally a member of the New York Convention. York 1958.

With the participation of Indonesia and Singapore as members of the 1958 New York Convention, the SIAC arbitration award No. 062 of 2008 has received legal recognition in Indonesia, so it can be executed. Likewise in the case of PT Indiratex Spindo V. Everseason Enterprises, Ltd. which was tried by the ICA Arbitration domiciled in England has also ratified the 1958 New York Convention, so that its decision has legal recognition in Indonesia. The establishment of the New York Convention 1958 serves to encourage cooperation between contracting countries and to standardize the customs of these countries in implementing foreign arbitral awards and is considered an international treaty [10].

In addition to the 1958 New York Convention, there are also sources of international law, the ICSID Convention, which regulates the refusal to enforce international arbitral awards. The ICSID Convention is more specific in resolving business disputes in the investment sector. Therefore, there are significant differences regarding the scope of authority of the two sources of international law. There is a difference in the terminology of cancellation and rejection. According to Black's Law Dictionary, a disclaimer or refusal is "A renunciation of one's legal right or claim", meaning a rejection of a person's legal right or claim. Meanwhile, nullification or cancellation is defined as "Having no legal effect, without binding force" [11]. Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more as stated in Article 52 (1) of the ICSID Convention [12].

In addition to these conditions, Article 52 paragraph 4 of the ICSID Convention explains the steps that must be taken to file for annulment of the ICSID arbitral award. Article 52 paragraph 4 of the ICSID Convention states that "The provisions of Articles 41-45, 48, 49, 53 and 54, and Chapters VI and VII will apply mutatis mutandis to proceedings before the Committee".

Article 54 of the ICSID Convention regulates the obligations of the parties to recognize and enforce the arbitral award that has been made by ICSID. Chapter VI and chapter VII of the ICSID Convention regulate the cost of the case and the venue for the ICSID Arbitration [13].

The cancellation of international arbitral awards is also implicitly regulated by UNCITRAL, in principle UNCITRAL does not recognize the existence of an institution authorized to cancel international arbitral awards, but can only interpret an international arbitral award, has the authority to correct decisions and make additional decisions.

UNCITRAL's authority in improving international arbitral awards is regulated in Article 36 "Grounds for refusing recognition or enforcement" UNCITRAL.

In addition, UNCITRAL is also authorized to add international arbitral awards. In this case, a request for an additional decision can only be made if there is a legal reason, that in the arbitral award there are claims or demands of the parties that are not listed in the award or are not included as consideration in making the decision. On the other hand, if it does not have a legal basis, the additional application will be rejected with a determination [15].

The procedure for granting this addition pursuant to Article 37 paragraph (2) of the UNCITRAL Arbitration Rule can immediately provide repairs or additions without requiring a trial process. Thus, in this case, there is no need for a re-examination process regarding the reasons for the additional application being submitted.

If you review the dispute between PT Astro All Asia Network and PT Ayunda Prima Mitra. Whereas in the contents of the Central Jakarta District Court Decision No. 05/Pdt.Arb.Int/2009/PN.Jkt.Pst explained that the basis of considerations used to reject the implementation of SIAC Singapore's decision Number: 062 of 2008 dated 07 May 2009 is that the substance of the SIAC Singapore Arbitration Provision Decision does not include substance in the trade sector. Then, if we refer to the explanation section of Article 66 letter (b) of the Arbitration Law, it turns out that what is included in the scope of the trade law is business activities such as the following: [16] banking commerce; finance; capital investment; industry and intellectual property rights.

Then, if it is related to the dispute on the refusal to implement the SIAC arbitration award No. 062 of 2008 in Indonesia, then this dispute should be included as a dispute within the scope of trade law, so the provisions of Article 66 point (b) of the Arbitration Law should be applied.

In this regard, the jurisprudence as contained in the Supreme Court's decision no. 2288/1979 dated June 10, 1981 in a case between PT. Nizwar against Navigation

Maritime Bulgare. In this case, for the first instance through the Central Jakarta District Court in its stipulation No. 2288/1979 dated June 10, 1981 has determined that the foreign company Navigation Maritime Bulgare has requested that the respondent PT. Nizwar in Jakarta can implement the arbitration decision that has been made by the arbitrator in London on July 12, 1978 to pay a certain amount to the company. This decree proves that the Geneva Conventions of 1927 are still in effect. Thus, it can be stated that although Presidential Decree no. 34 of 1981 has not yet come into force, there has been a decision of the Central Jakarta District Court confirming that foreign arbitral awards can be enforced in Indonesia [17]. While the positive law of Indonesia, regarding refusal is contained in Article 66 of the Arbitration Law which is stipulated. the following: International Arbitration Awards are only recognized and can be enforced in the Legal Territory of the Republic of Indonesia, if they meet the following requirements: [18]

a. The award is handed down by the arbitrator or arbitration tribunal in a country which is bound by the agreement with the Indonesian state, both bilaterally and multilaterally.
b. The decisions as referred to in letter a are limited to decisions that fall within the scope of trade law.
c. The decision as referred to in letter a can only be implemented in Indonesia which does not conflict with public order.
d. Decisions can be implemented in Indonesia after obtaining an exequatur from the Chairman of the Central Jakarta District Court; and

Decisions concerning the Republic of Indonesia as a party 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.

With this in mind, the question arises whether the SIAC Singapore arbitration award No. 062 of 2008 has violated the requirements of Article 65 of the Arbitration Law?, then if a violation of the law is found, what legal provisions were violated resulting in the SIAC arbitration award No. 062 of 2008 cannot be executed.

The two questions are not clearly found in the SIAC arbitration award No. 062 of 2008 Singapore a violation of the conditions for rejection of international arbitral awards as regulated in Article 65 of the Arbitration Law. That the rejection of the SIAC arbitration award No. 062 of 2008 by the Central Jakarta District Court is not appropriate, because considering the grounds for the judge's consideration to reject the SIAC Singapore arbitration decision No. 062 of 2008 has not referred to the source of international law, namely the 1958 New York Convention.

Ideally, the Chairman of the Central Jakarta District Court should pay more attention to and respect the SIAC Singapore Arbitration Award No. 062 of 2008, because in principle international arbitral awards have legal recognition in Indonesia based on participation as a member of the 1958 New York Convention. Whereas: judges in this institution should have been more careful in examining the determination of the Central Jakarta District Court, regarding Article 66 of the Arbitration Law carefully researched and applied. In addition, are the grounds for refusal given by the judges of the Central Jakarta District Court in accordance with the grounds for refusal set out in the 1958 New York Convention [19].

Rejection of the implementation of the international arbitration award SIAC Singapore No. 062 of 2008 sets a bad precedent in Indonesia, and will be a record for foreign investors who wish to apply for registration of the implementation of international arbitral awards in Indonesia. Based on data from the Central Jakarta District Court as of December 31, 2016, after the rejection of the SIAC Singapore arbitration decision No. 062 of 2008 in the case of PT Astro All Asia Network with PT Ayunda Prima Mitra, there was a registration application for the cancellation of an international arbitral award, namely the decision of the British ICA Arbitration, which was rejected by the Central Jakarta Negeri Court [20].

4. CONCLUSION

The implementation of an International Arbitration Award in Indonesia can be carried out if it meets the requirements in Article 66 of the Arbitration Law which is in line with the 1958 New York Convention, the ICSID Convention and UNCITRAl, as stated in the PT Indiratex Spindo Case Decision against Everseason Enterprises. Ltd., PT. Nizwar against Navigation Maritime Bulgare Karaha Bodas Company case against Pertamina. However, if there are requirements that are not met and based on legal facts in the trial it is not proven then the International Arbitration Award cannot be implemented in Indonesia as in the Astro Group Case against Lippo Group.

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