The procedure of execution on foreign arbitral awards in Indonesia and issues

S.B. Yunari*

Universitas Tri Sakti, Jakarta, Indonesia

ABSTRACT: This paper aims to discuss regulations, procedures and problems arising from the implementation of foreign arbitration awards in Indonesia. This study uses legal research with secondary legal materials obtained from literature research for primary, secondary and tertiary legal materials to be analyzed prescriptively against the laws and regulations governing the implementation of foreign arbitration in Indonesia. One of the important issues in dispute resolution through foreign arbitration is the existence of obstacles in the implementation of the foreign arbitration award requested by the exequatur through the Central Jakarta District Court, Indonesia. The constraints found are more directed at not fulfilling the formal requirements of the exequatur and technical problems when the execution of the decision will be carried out by the clerk of court in practice when the foreign arbitration award in question has been accepted for implementation in Indonesia.

Keywords: arbitral-awards, foreign, execution, procedure, Indonesia

1 INTRODUCTION

Asian Economic Community (referred as AEC) implemented on ASEAN countries is intended to establish a single market cycle in the Southeast Asia region. ASEAN leaders agree that AEC will form a single market in the Southeast Asia region at the end of 2015 (ASEAN 2025). The establishment of this single market is believed to enable a country in marketing its “goods and services” to other countries throughout Southeast Asia in the midst of stringent competition, because AEC does not merely open the flow of goods and service commerce, but also market for professionals, such as lawyers, doctors, accountants, and other concerned parties. If the emerging competition podium has been established, particularly in the industry and human resources sectors such as medical experts, the competition in the trade and industry sectors will potentially cause dispute, such as in the implementation of contracts or business cooperation between each country.

Hence, the existence of AEC does not merely affect the economy sector but also the legal sector. With the implementation of AEC in 2015 on ASEAN countries, the legal sector deals with the existence of institutions for dispute settlement in international trade transactions appointed by member countries of AEC. Foreign arbitration institution as one of the dispute settlement institutions has been mostly preferred by countries that should play a bigger role, if chosen as a dispute settlement institution by member countries of AEC, including Indonesia. Therefore, It is required for the concerned parties to give attention to goods and services to be “recognized and enforced” in Indonesia.

Recently, there are several reasons why business people employ arbitration as dispute settlement institution in business transaction, such as: the existence of freedom and extensive autonomy for the parties, the confidence and security that it gives to situation, uncertainty in connection with

*Corresponding Author

different legal system governing the parties; the parties have confidence in the arbitrator who has expertise in dispute settlement; arbitration is seen as a faster way in rendering the award which is less expensive hence cost-effective; in rendering the award the parties are protected from matters that may jeopardize their business interest in public. Arbitration applies values that are naturally private in rendering the award and waive public matter; enforcement of award is more convenient.

Based on the aforementioned reasons, it is undeniable that arbitration is exceptionally attractive for business people as a dispute settlement institution, particularly in the international business environment. Currently, there are several foreign arbitration boards as dispute settlement institutions whose existence is recognized by ASEAN countries and worldwide countries that are members of international organizations, such as: “The International Chamber of Commerce, The International Centre for The Settlement of Investment Dispute and United Nations Commission on International Trade Law”. Another important matter that also requires attention in settlement of international business dispute is the enforcement of international arbitral-award by the disputing countries, because a dispute already decided by foreign arbitration board will not be effective if pointless to be enforced in a country for any reason.

Hence, the parties engaging an international business transaction within ASEAN or in global scope, must find out the commitment of the business partner country; whether it has ratified the treaty on “the recognition and enforcement of foreign arbitral awards” issued by International organization of United Nations such as the New York Convention of 1958 concerning about Recognition and Enforcement of Foreign Arbitral-Awards (referred “New York Convention”), that has come into effect as of June 7, 1959. Currently, New York Convention has been ratified by 150 countries, including Indonesia, declaring its ratification and accession of New York Convention by Presidential Decree Number 34/1981 on “The Ratification of the Convention on The Recognition and Enforcement of Foreign Arbitral-Awards” on August 5, 1981 (referred as Presidential Decree Number 34/1981) (Claver-Carone 2002; Kadir & Murray 2019).

A country ratifying New York Convention such as Indonesia must recognize and enforce any applied foreign arbitral-award for recognition and enforcement by countries that fulfill the requirements as provided in Articles 65–69 of Law Number 30/1999 on Arbitration and Alternative Dispute Settlement (referred as Law Number 30/1999) (Isrihadi 2018). Practically, it provides guidelines on how foreign arbitral-awards are enforced in Indonesia, including the obstacles related to foreign arbitral-awards. However, it remains debatable whether foreign arbitral-awards are nullified or challenged. Thus, this paper aims to address such issues by presenting understanding and illustration to academic community and legal practitioners in Association Southeast Asian Nations in order to understand law implementation of foreign arbitral-awards in Indonesia (Hamzah 2018).

2 METHODS

The type of this research is “legal research” or “doctrinal research” with secondary legal material obtained from library research for primary, secondary and tertiary legal material to be prescriptively analysed on laws and regulations governing arbitration as well as relevant sectoral laws. The methods in this research are statute and cases approach which are conducted by analyzing all the concepts related to the legal issues of foreign arbitration (Hutchinson 2002; Marzuki 2011; Yaqin 2007)

3 RESULTS AND DISCUSSION

3.1 *Definition and form of foreign arbitration*

As foreign arbitration commonly recognized as “international arbitration” or “commercial arbitration” is a term employed by New York Convention, where foreign Arbitration definition under it becomes an institution/person that settles dispute among citizens, issued in a state other than the state where the award is recognized and enforced (article 1) (Fry 2009; Girsang 1989). The form

of foreign arbitration institution/body is Ad-hoc or institutional (Fauziah 2009). For example, the example national institutional international arbitration board in Indonesia is Indonesian National Arbitration Agency (BANI) (Butler 2009). In general, each country has a nationally Institutional Arbitration as center of national arbitration in the respective country, such as: Nederland's Arbitrate Institute, The Japan Commercial Arbitration Association, The American Arbitration Association, The British Institute of Arbitrators etcetera. In addition to the regional Institutional Arbitration established by third world countries (developing countries), such as *Asia Afrika Legal Consultative Committee* (AALCC), the International Chamber of Commerce (ICC), Investment Dispute (ICSID), United Nations Commission on International Trade Law (UNCITRAL) (Asouzu 1999; Efrat 2016; Yunari 2017).

3.2 *Scope of recognition and enforcement of foreign arbitral-awards*

In principle, awards are rendered by foreign arbitration board, ad-hoc as well as institutional, to countries that have ratified the New York Convention, and must be recognized and enforced. It is in line with Article 1 paragraph (1) of New York Convention that states foreign arbitral-awards: "arbitral awards are made in the territory of a state other than the state where the recognition and enforcement of such awards are sought" (Amro 2013).

Hence, if discussing foreign arbitral-awards, the issue will regard the scope of requirements in enforcing such this institution in the District Court of Central Jakarta as regulated in Article 65, Law Number 30/1999. The requirements regulate that a foreign arbitral-award are "eligible to be recognized and enforced" in Indonesia which include:

- 1) International arbitral-awards made by arbitrator or council of arbitrators in a state that is bound by an agreement with Indonesia, bilaterally or multilaterally, on the recognition and enforcement of international arbitral-awards" (*reciprocity principle*).
- 2) The relevant international arbitral-awards are limited to awards within the scope of the law of commerce under Indonesian laws (Mertokusumo 2013).
- 3) International arbitral-awards that can be enforced in Indonesia are limited to those awards that are not contrary to public order.
- 4) Foreign arbitral-awards can be enforced in Indonesia, after obtaining an enforcement order (*exequatur*) from the Head of the District Court of Central Jakarta.
- 5) Foreign arbitral-awards that involve "The Republic of Indonesia" as a party to a dispute can only be enforced after obtaining *exequatur* from the Supreme Court of the Republic of Indonesia, and thereafter reverted to the District Court of Central Jakarta.

3.3 *Procedures of execution on foreign arbitral-awards in Indonesia*

The procedures to obtain *exequatur* on foreign arbitral award in Indonesia through Central Jakarta District Court are as follows:

- 1) The application for enforcement of foreign arbitral award is made after the relevant award is submitted and registered by the board of arbitration/arbitrators residing outside the territory of Indonesia, represented by the Arbitrator or legal representative of the Applicant (Indonesian advocate) through Junior Clerk of Civil Affairs at Secretary Clerk of District Court of Central Jakarta.
- 2) Submission of enforcement application documents must be accompanied with:
 - a) Certificate of registration/deponir of the applicant;
 - b) Special Power of Attorney, if the request is performed by the attorney deponir applicant;
 - c) *Exequatur* requests a letter from Clerk Secretary of District Court of Central Jakarta;
 - d) Original or certified authentic copy of the foreign arbitral award and its formal Indonesian translation.
 - e) Original or certified authentic copy of agreement based on which the foreign arbitral award is made and its formal Indonesian translation.

- f) Originally a statement from “the diplomatic representative of the Republic of Indonesia” in the country where the foreign arbitral award is made stating, that the state of applicant is bound by “bilateral or multilateral agreement” with the Republic of Indonesia concerning the recognition and enforcement of foreign arbitral awards.
- 3) After obtaining registration (*deponir*) number, at the latest 1 (one) week as of the submission of application for enforcement documents of such foreign arbitral award, the enforcement officer/bailiff will examine the requirement of application for *exequatur* that has been submitted, and then the bailiff will prepare a resume stating the nature of the foreign arbitral award as sought by *exequatur*, whether it is a condemnation award or declaratoire award, to have the opinion of Head of the Central Jakarta District Court.
- 4) Head of the Central Jakarta District Court will provide opinions related to the legal considerations of whether the foreign arbitral award is “acceptable” or “rejected”. If acceptable, it means that “the foreign arbitral-award can be recognized and enforced in Indonesia”, and subsequently the Head of the Central Jakarta District Court will issue an order (*Exequatur*) that the foreign arbitral-award is “eligible to be enforced”. However, if refused, then the foreign arbitral-award can be submitted for classification to the Supreme Court. Within a maximum of 90 (ninety) days as receipt of the classification request, the Supreme Court shall provide consideration and decide the request.
- 5) As a follow up of foreign arbitral-award that has been accepted by the Head of the Central Jakarta District Court after obtaining *exequatur*, the bailiff will notify the respondent in the form of summons (*aanmaning*), by serving notice to the parties to perform the foreign arbitral-award, at the latest 8 (eight) days as of the summon (*aanmaning*). Thereafter, enforcement attachment can be performed with the assistance of the bailiff, on assets and property of the respondent for enforcement. The procedures of attachment, and enforcement of foreign arbitral-award against the respondent for enforcement shall follow the procedures in civil law.
- 6) If the respondent domiciles outside the jurisdiction of the Central Jakarta District Court, then the serve of notice will be made through delegation by requesting the assistance of the District Court where the respondent domiciles.
- 7) If the parties have performed the award, then the applicant and the respondent shall submit a notification accompanied with proof that the parties have performed such foreign arbitral-award.

Based on the notification and proof, the enforcement section will discharge the registered foreign arbitral-award case from the registration number that has been previously recorded.

3.4 Issues in the implementation of foreign arbitral-awards in Indonesia

Based on research, there were 92 cases filed by petition “*deponir*” and “*exequatur*” in the District Court of Central Jakarta; consisting of 52 cases which constituted a request *deponir* and 41 cases were plea *Exequatur* and entirely granted by Head of the Central Jakarta District Court, to be later proceeded with the *meaning* of the parties by the Central Jakarta District Court bailiff. However, there are still constraints in the execution of foreign arbitral-awards which requested *deponir* and *exequatur* in the Central Jakarta District Court, because:

- 1) There is no clear standard fee for filing registration (*deponir*) and *exequatur* of foreign arbitral-awards in the Central Jakarta District Court. Therefore, *deponir* application and *exequatur* are not similar to the registration and application filing in the Central Jakarta District Court. This finding obviously needs to be regulated by the Central Jakarta District Court, if certain costs incurred related to legal certainty and *Exequatur* in the Central Jakarta District Court. This reason is in contrast with the arrangement before the enactment of Law Number 30/1999, in which the first *Exequatur* costs carried by the clerk of the Secretary of the Supreme Court was IDR. 250.000 – (two hundred and fifty thousand rupiah), deposited through “Bank BRI Branch Office of Veterans”.
- 2) The absence of clear and strict rules regarding the status of the continuation of Registration (*deponir*) or *Exequatur* was inevitable. In relation with petition *deponir* course, after application

registration is completed, then there is no clear mechanism to follow up *deponir* by the parties, if a foreign award has been executed by the parties. Similarly, if the application has been given by Head *Exequatur* of the District Court of Central Jakarta, there is no clear and firm mechanism; therefore, foreign arbitral-awards requesting *exequatur*, will otherwise be executed by the parties, with the proven existence proof of the statement from the parties completing the decision, and is submitted in writing to the District Court of Central Jakarta bailiff.

- 3) With regard to jurisdiction, if the execution of foreign arbitral-awards are outside the territory of the District Court of Central Jakarta, a foreign award shall be conducted by the District Court in another Indonesian region, then it becomes a problem because there is no clear and unequivocal rule, to whom the cost of the delegation and the calling of the parties shall be borne.
- 4) The limitations shall be emphasized on “requirements of foreign arbitral-award”, which must not conflict with the “public order” in Indonesia, to prevent different interpretations in practice.

4 CONCLUSIONS

Based on the above discussion, this research concludes that Indonesia has principally set regulations on the recognition and enforcement of foreign arbitral-awards in the Presidential Decree Number 34/1981 on the Ratification the New York Convention, 1958, as well as procedures for the implementation of foreign arbitral awards. *Exequatur* is regulated in Article 65–69 of Law Number 30/1999. According to Law Number 30/1999, the only one institution authorized for “the filing of the application for Registration application (*depone*)”, and “*Exequatur* for the recognition and enforcement of foreign arbitral-awards” in Indonesia is the District Court of Central Jakarta (Relative Competence). As an exception, if the disputing parties are not in the State of Indonesia, then an *exequatur* will be issued by the Supreme-Court. Upon obtaining an *exequatur* by the Supreme-Court, then the *exequatur* documents will be reverted to the District Court of Central Jakarta for the execution. Foreign arbitral awards which recognition and enforcement have been accepted by the Head of District Court are ineligible to be appealed nor submitted for classification. However, foreign arbitral awards whose recognition and enforcement have been rejected by the Head of District Court, are eligible to be submitted for classification. To add, the Supreme Court decision remains unchallenged.

REFERENCES

- Amro, I.A.S. 2013. *Recognition and enforcement of foreign arbitral awards in theory and in practice: a comparative study in common law and civil law countries*. Cambridge: Cambridge Scholars Publisher, ProQuest Ebook Central.
- ASEAN. 2015. *Forging ahead together*. Jakarta: ASEAN Secretariat.
- Asouzu, A.A. 1999. African states and the enforcement of arbitral awards: Some key issues. *Arbitration International* 15(1): 1–52.
- Butler, N. 2019. Non-disputing party participation in ICSID Disputes: Faux Amici? *Netherlands International Law Review* 66(1):143–178.
- Claver-Carone, M.J. 2002. Post-handover recognition and enforcement of arbitral awards between Mainland China and Hong Kong SAR: 1999 agreement vs. New York convention. *Law and Policy in International Business* 33(2): 369–403.
- Efrat, A. 2016. Promoting trade through private law: Explaining international legal harmonization. *The Review of International Organizations* 11(3): 311–336.
- Fauziah, F. 2019. Annuitant legal protection associated with Act Number 40 of 2014 About Insurance Business. *Journal of Legal, Ethical and Regulatory Issues* 22(1): 1–7.
- Fry, J.D. 2009. Disorder public international under the New York Convention: Wither truly international public policy. *Chinese Journal of International Law* 8(1): 81–134.
- Girsang, S.U.T. 1989. *Arbitrase*. Jakarta: Publisher Djambatan.
- Hamzah. 2018. Bilateral investment treaties (BITS) in Indonesia: A paradigm shift, issues and challenges. *Journal of Legal, Ethical and Regulatory Issues* 21(1): 1–13.

- Hutchinson, T. 2002. *Researching and writing in law*. New South Wales: Published Lawbook Co.
- Isrihadi, E.I. 2018. A study of commercial arbitration and the autonomy of the Indonesian arbitration law. *Journal Legal, Ethical and Regulatory Issues* 21(1): 1–8.
- Kadir, M.A. & Murray, A. 2019. Resource nationalism in the law and policies of Indonesia: A contest of state, foreign investors, and indigenous peoples. *Asian Journal of International Law* 9(2): 298–333.
- Marzuki, P.M. 2011. *Legal research*. Jakarta: Publisher Kencana Prenada Media Group.
- Mertokusumo, S. 2013. *Civil law of procedure*. Yogyakarta: Publisher Cahaya Atma Pustaka.
- Yaqin, A. 2007. *Legal research and writing*. Malaysia: Malayan Law Journal Sdn Bhd-LexisNexis.
- Yunari, S.B. 2017. *Effectiveness of enforcement of foreign arbitral awards in Indonesia*. Result of Research Report. Dept. of Business Law, Faculty of Law, Universitas Trisakti, Jakarta.