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# PEREGRINASI ARBITRASE DI INDONESIA : ADALAH UNDANG-UNDANG NO. 30 TAHUN 1999 EVOLUSI PRAKTIK ARBITRASE YANG SEBENARNYA?

## *PEREGRINATION OF ARBITRATION IN INDONESIA: IS LAW NO. 30 OF 1999 A TRUE EVOLUTION OF ARBITRATION PRACTICE?*

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*Abstrak:* *Indonesia terutama pada akhir-akhir ini telah menjadi destinasi bagi investor dan pedagang untuk melaksanakan kegiatan bisnisnya. Indonesia yang digadang gadang akan menjadi salah satu pusat bisnis di Asia Tenggara, telah memiliki segala yang dibutuhkannya, tidak hanya untuk menjadi tempat untuk berbisnis tetapi juga menjadi forum untuk menyelesaikan sengketa terkait bisnis sebagaimana Indonesia telah meratifikasi juga perjanjian-perjanjian internasional yang penting seperti Konvensi New York Tahun 1958 dan Konvensi ICSID, dan juga Indonesia telah memiliki undang-undang arbitrase yang mengatur keseluruhan prosedur pelaksanaan arbitrase dan melaksanakan putusan arbitrase di Indonesia. Namun hukum ini telah berusia lebih 20 tahun yang artinya Indonesia telah melewati beberapa dinamika ekonomi dan perubahan tren bisnis. Perubahan tren tersebut dapat memengaruhi relevansi dan efektivitas penerapan Undang-Undang Arbitrase dan dengan demikian menyingkap kekurangan-kekurangan seperti potensi praktek denial of justice, kelalaian arbiter dan kaitannya dengan tidak dapat dilaksanakannya suatu putusan arbitrase serta tidak jelasnya batasan terkait konsep ketertiban umum, yang harus diperbaiki di perubahan undang-undang tersebut kedepannya*
*Kata Kunci: Denial of Justice, Ketertiban Umum, Kelalaian*

*Abstract:* *Indonesia has recently become a favorite destination for investors and traders to do business, either investor or to trade. Indonesia as a soon to be one of business hubs in South East Asia Region has everything it needs to become not only a place to do business but also to settle business related dispute through arbitration, as Indonesia itself has ratified several important*

*conventions such as the 1958 New York Convention and ICSID Convention, further Indonesia has already had an arbitration law which governs the whole procedure of conducting arbitration in Indonesia or enforce an award in Indonesia. This law is already more than 20 years old, which means Indonesia has gone through several economic dynamic and changes of business trends. Those changes, undeniably may affect the relevancy and effectiveness of Law No 30 of 1999 and therefore reveal the loopholes and irrelevancy of this law, such as the potential of denial of justice practice, arbitrator negligence which may result in an unenforceability of an arbitral award and unclear definition of public order, which shall be revised and repaired in the future amendment for the sake of legal certainty*

*Keywords: Denial of Justice, Public Policy, Negligence*

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## INTRODUCTION

Legal certainty stands as one of the most important aspects and also factors for individuals before carrying out its business. In doing transaction, an individual will ask his attorney or legal counsel, whether the particular object of transaction has a good regulatory compliance or not, whether it has acquired all of the required licenses, or whether such object has been involved in a litigation proceedings or not, which may indicate such object of transaction is troublesome or not. Legal certainty may also be interpreted in another narrow sense, whether there will be an effective and efficient dispute resolution if a dispute arose from or in connection to such transaction (agreement or contract). To overcome the latter issue, arbitration exists and its practice spread throughout the world.

A brief of historical background about arbitration as a concept and practice, there are 2 (two) general perspectives towards arbitration in its early appearance. The first one is the ancient Greek perspective, this perspective elucidate that arbitration is not a new practice, because it already exists before, the concept of arbitration itself exists. So the practice has already there however, the concept or the term it is called as arbitration has not yet existed in the ancient Greek era. The first "so called" arbitration case appeared in Greece, approximately in 200 B.C. It was the case between *Samos v. Priene*, the dispute was concerning a territorial dispute (physical seizure of land).[1] Both *Samos* and *Priene* were Greeks that seek dispute resolution outside the local court, later they decided to choose City of Rhodes as a place of dispute resolution, and

[1] Sheila Ager, *Interstate Arbitrations in the Greek World 337-90 B.C.*, California: UC Berkeley Press, 1996, p.67.

choose 5 judges, appointed by both parties (now called as arbitrators), which all of them domiciled in Rhodes. Later it is discovered, the reason why the disputing parties by agreement, decided to settle their dispute outside the local court, and prefer to choose it independently in the island of Rhodes, was because the practice of local court indicate inefficiency and ineffectiveness in settling territorial dispute, the court did have backlog of cases which hardly be settled immediately.[2] From this starting point, arose a concept that is often in its development called as "third court", a court that provide a means of reconciling disputes effectively and immediately be able to render a binding decision for both parties.[3]

The second perspective is the perspective of contemporary history of arbitration, began in the land of British. At that time Britain was an industrial hub, many metal trader and industry owner operated their business there. Quoting the standpoint of *Pollock* and *Maitland*, the concept of arbitration firstly emerged in the 13th century, in England, at that time, gold traders from Gloucester seek for compensation from gold traders came from other cities in England, as their actions during the interstate trade warfare, detriment the continuity of their business.[4] These traders agreed to proceed into a dispute settlement process however they refused to do it before the local court governed by the national law of England as they reputed, dispute resolution before the local court won't be fair for both parties.[5] However besides of this difficulty, they did realize that there may be an alternative.

At that time, to become a gold trader in the United Kingdom, those traders must be registered and licensed by a trading partnership or syndicate known as The Gild. The Gild is a kind of association of gold traders that received a mandate from the Government of the United Kingdom to prevent monopolies, unfair trade practice and maintain price stability in the gold market. Under The Gild Charter, it is stipulated *"At which feast (trinity) all private quarrels and emulations were heard and ended"*, The Gild as a non-governmental body, has their own dispute settlement mechanism, which the judge himself, is a gold trader and appointed by the parties who are also members of The Gild to settle their dispute in accordance with the Law of Merchant *(Lex Mercatoria)*. The case, which one of the parties is a gold trader from Gloucester and settled

[2] *Ibid,* p.68

[3] N. G. L. Hammond, "Arbitration in Ancient Greece", *Arbitration International*, Vol,1, Issue 2, 1985, p.188

[4] Earl S. Wolaver, "The Historical Background of Commercial Arbitration", *University of Pennsylvania Law Review,* December, 1934, p.133

[5] *Ibid,* p.135.

through "The Trinity" (The Gild's dispute settlement mechanism), became the forerunner of arbitration in Europe.[6]

Subsequent developments and practices also happen in a close period, after the existence of The Gild as a body that also provided dispute resolution mechanism, this idea and practice spread through Europe, and after that gold trades in mainland Europe began to hold "hearings" outside state court, as was the case in the Borough and London in more or less same period. This practice also happened in France and Germany, which surprisingly, at that time, educational institutions moved as a body that resolved trade disputes. Through some of these historical records of arbitration, we may perceive how flexible and effective arbitration is, even when the term of "arbitration" has not yet been recognized, much more flexible that courts under the auspices of a state's judicial power. It was stated by scholars that time, the traders demanded their disputes to be resolved in accordance with the "fair law" law that emerge and develops among traders, based on their practice and economic interest, and not national laws which were too rigid and could have been overly detrimental for their economic interest and goals. Before the terms and concept turned into what we know as arbitration, these practices was known as the "Courts of the Fair" in Europe.

The current or modern practice of arbitration depart from these historical record and surprisingly the main concept has not changed a bit, what develops is the institution or the body and the rule that governs its practice and process, including in Indonesia. Arbitration practice in Indonesia has already began when the state was colonialized by the Kingdom of Netherland. Far before the regime of Law No.30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("Indonesian Arbitration Law"), arbitration was governed and recognize by *Herzien Inlandsch Reglement (HIR), Rechtreglement voor de Buitengewesten (RBg)* & *Reglement op de Rechtsvordering (RV)*, which are part of Indonesian civil procedural code. According to article 377 of HIR or article 705 RBg, it is stipulated that "if Indonesian or foreign eastern wish to settle their dispute before an arbitrator, therefore they must obey every civil court regulation applicable to Europeans." These articles do recognize the existence of arbitration, however it does not assert the separation between arbitration and court litigation proceedings, it does not exactly describe that arbitration occurs in a different realm outside national court. Most importantly HIR, RBg and RV, do not give any regulation or disposition regarding international arbitration, where most arbitration proceedings that involves Indonesian were carried out in international arbitration as Indonesia itself has not yet had a domestic arbitral body.[7]

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[6] *Ibid*, p.137

[7] Subekti, *Arbitrase Perdagangan*, Bandung: Bina Cipta, 1992, hlm.3

In 1968, as General Soeharto sworn in as President of Indonesia, one of his monetary policy was to open the "investment faucet" in Indonesia and to ensure the legal certainty especially in investor-state dispute settlement, Indonesia ratified the convention of International Center for the Settlement of Investment Dispute ("ICSID Convention"), however as Indonesia, until now has not yet clarify the position of international law instrument in its domestic legal system, however this ratification only does not answer Indonesia's need for regulation related to arbitration which can afford every process of arbitration in its domestic law system. The ratification of such convention only specify Indonesia's position as a party in International Investment Arbitration and a member state of ICSID as an international arbitral institution. Indonesian Arbitration Law appeared even after BANI (Badan Arbitrase Nasional Indonesia) was established in 1977, before the Indonesian Arbitration Law regime, all affairs pertaining to arbitration especially enforcement of the award was governed by supreme court rules, which was PERMA No.1 tahun 1990, BANI institutional rules and presidential decree No.34 of 1981 (for foreign arbitral award) this was very different and lagging behind other states around the world which at that time, has already had a particular law that governs arbitration.[8] Therefore, by virtue of this background, in 1999 the government of Indonesia decided to enact Law no 30 of 1999 concerning arbitration and alternative dispute resolution, which may be said as a complex of regulation that governs arbitration from its upstream to downstream.

However, although Indonesia has already had a specific law, not every provision inside the law is specific and certain enough, for instance there are several arbitration award in Indonesia, although before the regime of Indonesian Arbitration Law, was unenforceable for it is contradictory with public policy, it was the case between E.D. & F.MAN (Sugar) LTD v. Yani Haryanto in 1990.[9]Nevertheless, this term of "public policy" which in character is multi-interpretation, still exist in the current law, and Indonesian Arbitration Law does not specify the meaning of public policy and leave it to the national court interpretation. There are other loopholes within the law which may risk the enforcement of the arbitral award and cause doubt in business actors in settling their dispute in Indonesia or maybe establish their business in Indonesia.

This journal aims to provide an assessment towards Indonesian Arbitration Law and identify vagueness and loopholes within the law that may cause unfavorable situation for business actors in settling their dispute through arbitration in Indonesia. Hence we may foresee whether the

[8] Hulman Panjaitan, "Pelaksanaan Putusan Arbitrase di Indonesia", *Universitas Kristen Indonesia*, Vol. 4, No.1, hlm. 32

[9] Indonesian Supreme Court Decision No: Reg. No.1205K/Pdt/1990, 14 December 1991.

current Indonesian Arbitration Law is already sufficient to overcome with current business dispute developments and whether by the existence of this law, Indonesia will be able to provide an effective and efficient dispute resolution for business actors, especially in the era where Indonesia is enacting many favorable legislation products to increase the number of investment in its territory, such developments shall also be accompanied by a sufficient legal framework in case there is a need in settling through arbitration.

## METHODOLOGY

In writing and compiling this article, the author uses a juridical normative approach, particularly descriptive and analytical methodology. In accordance with this methodology, in this article the author will analyze the provisions within the Law No. 30 of 1999 concerning arbitration and alternative dispute resolution and compare it with common arbitration practice, and compare the provisions with other states arbitration act or regulations. Also, in analyzing such law, the author will use primary source such as national legislation, treaties, general norms and also secondary source such as journals, books, doctrine by highly qualified publicist, and also case laws.[10]

### 1. Arbitration

Arbitration is currently one of the most popular way to settle dispute among business actors. As has been mentioned in the abovementioned paragraphs, arbitration is not a "fresh" concept and practice of dispute settlement otherwise, its practice has been going on for decades, or maybe centuries. Currently, especially in modern era, arbitration is popular for its simplicity, the basis of arbitration is consent, unlike court, anybody can bring their dispute before the court, without considering prior amicable redress, well arbitration is totally different, as usually it is preceded by a form amicable settlement.[11] Business actors, although arbitration is much more expensive, do prefer arbitration over national court for its decision or *final award* is final and binding, or simply called as undisputable. Unlike court, which appealing a court decision takes time, and appealing a court decision for instance in Indonesia is not merely a single level of appeal, there are several levels of court till we reach the supreme court to have an *inkracht* decision (final and binding), where on the other hand, arbitration give you a "single shot" of final and binding decision once the award has been rendered by the tribunal.[12]

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[10] Zainuddin Ali, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2018, p.24-27.

[11] Nigel Blackaby, et.al, *Redfern and Hunter on International Arbitraion*, Oxford: University Press, 2015, p.100

[12] *Ibid*, p.2

Arbitration is also independent, arbitration by practice, is not full of interests from internal parties, because as we know the arbitrators must be neutral, as they are appointed by the parties or a single or third arbitrator are usually appointed by the institution. Arbitration is also distant from government intervention or government interest, at least it is what arbitration practice is upholding right now. In arbitration proceedings there is no governmental intervention in making their decision, and usually governmental officer is not allowed to act as an arbitrator of a dispute. A person does not have to be a lawyer to become an arbitrator, but he or she must not a government officer.[13] Indonesia in its arbitration law, has also regulated this, as one of the requirement to become and appointed as an arbitrator. [14]

Arbitration also upholds confidentiality, especially in commercial arbitration, even the award will not be disclosed to the public if the parties do not want to. Public may take a look at the overview but not the details of the award. Arbitration itself has been classified into several classifications. In Indonesia we have BANI (Badan Arbitrase Nasional Indonsia), we also have BAPMI (Badan Arbitrase Pasar Modal Indonesia) or Indonesia Capital Market Arbitration Body, we also have BADAPSI (Badan Arbitrase dan Alternatif Penyelesaian Sengekta Konstruksi Indonesia), Indonesian Construction Dispute ADR and Arbitration Body and many others arbitral body. Generally, in international practice, arbitration is only divided into 2 classifications, the first one is Commercial Arbitration and the second one is Investment Arbitration, both of these type of proceedings usually afforded by the same arbitral body, for instance SIAC also provide commercial arbitration proceedings as well as investment arbitration.[15] However, we also notice there are public international law disputes that is also settled through arbitration, for instance the current case between Philippine and China concerning the maritime entitlements of South China Sea Territory (South China Sea Arbitration), is settled by PCA (Permanent Court of Arbitration).[16] These practices has shown us how diverse arbitration practice can be.

As this article will be discussing about the Law No.30 of 1999 concerning Arbitration and Alternative Dispute Resolution (ADR), this law

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[13] Margareth L. Moses, *The Principles and Practice of International Commercial Arbitraion*, Cambridge: University Press, 2008, p.162

[14] Article 12 (2), Law No.30 of 1999

[15] Alastair Henderson et.al, "Arbitration Procedures and Practice in Singapore: Overview", *Thomson Reuters Practical Law*, 1 April 2021, https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)&firstPage=true, Accessed on 18 April 2022

[16] *South China Sea Arbitration*, Philippines v. China, Award, PCA Case No.2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration.

is currently Indonesia's core regulation in governing arbitration. In this law, arbitration is defined as a mechanism of settling civil disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing parties.[17] In Indonesia arbitration may be held under the authority of an arbitral body or ad hoc arbitration. The disputing parties may choose whether they want to establish an ad hoc arbitration proceeding or just hand their dispute an established arbitral body such as Badan Arbitrase Nasional Indonesia (BANI).

In regards to the practice of the arbitral proceedings, Indonesian arbitration act has provided similar provisions with other states arbitration act, which is focusing on consent between parties, and its arbitral award must be enforced by national court, which is going to be discussed later about its pro and cons. Indonesia has also had a quiet decent set of arbitration related instruments, as we have already ratified the ICSID convention *(Convention of International Center for the Settlement of Investment Dispute)* and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award *(New York Convention 1958)*

However, despite of its sophistication, arbitration practice in Indonesia is still receiving a lot of critics, which until now, makes Indonesia not a so favorite place for foreign business actors to settle their dispute. For instance, court intervention in Indonesia, possibility of arbitration administrative negligence, issues in executing the award and etc.[18]

**2. Investment Arbitration**

As we know that in general arbitration is divided into 2 types of arbitration, which are commercial arbitration and investment arbitration. Investment arbitration itself is also commonly known as IIA (International Investment Arbitration) and ISA (Investor – State Arbitration), which the parties are Investor and State based on an investment treaty (Bilateral Investment Treaty or Multilateral Investment Treaty). The arbitration agreement or consent to arbitration is not concluded in a contract, however it is concluded in a treaty between states.

**3.** Public Order (Public Policy)

Public Order or *Public Policy* is a very common and decisive element in Indonesian private law regime. Public Order is a concept whether a foreign judicial decision or in this case, foreign arbitral award, which is going to be enforced by the court is against the public interest or not. *Public Policy* or Public Order has a very wide interpretation, however most of Indonesia court deeming Public order is the essential interest of the

[17] Elucidation, Law No.30 of 1999

[18] Mosgan Situmorang, "Pelaksanaan Putusan Arbitrase Nasional di Indonesia". *Jurnal Penelitian Hukum De Jure*, Vol. 17, No.4, 2017, p.312

society, it can be security, peace or norms that live and develop among Indonesian society.[19] A violation towards public order will result in an unenforceable arbitral award.

### 4. Exequatur

As we know that many countries do not let arbitration rule the execution of its award independently, some of the countries still let major intervention from national court to execute or to enforce a foreign arbitral award, including Indonesia. Exequatur *(read in French)* is a permission or approval in a form of document, issued by the court to the authorized officer to execute an arbitral award within its jurisdiction. An authorized officer can be the head of a district court or other person in accordance with the applicable law. In Indonesia, according to Law No.30 of 1999 concerning arbitration and alternative dispute settlement, Exequatur is issued by both Head of District Court and the Supreme Court. For regular commercial disputes where the parties are business entity, the enforcement of foreign arbitral award only requires an exequatur issued by the Head of District Court.[20] On the other hand, in the event of Indonesia Government is one of the parties to a dispute, such foreign arbitral award, may only be executed if there is an exequatur released by the Supreme Court of Indonesia (Mahkamah Agung).

### 5. Denial of Justice

Denial of Justice is concept that is commonly known in international law and investor-state arbitration, as a part of providing fair and equitable treatment, by states to investors. Denial of justice is a situation when a state fails to ensure judicial protection to investors[21]. Judicial protection can be interpreted widely, it may be a denial of access to national courts to seek redress, this may be closely related to exhaustion of local remedies, excessive length of proceedings, and other unreasonable and abusive act committed by states through its judicial body including failure to execute final judgements or arbitral award.[22] As we know that arbitral proceedings

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[19] Adi Purwadi, *Dasar-Dasar Hukum Perdata Internasional*, Surabaya: Pusat Pengkajian Hukum dan Pembangunan FH Universitas Wijaya Kusuma Surabaya, 2016, p.111.

[21] M. Sornarajah, *The International Law of Foreign International* Law (Third Edition), Cambridge: University Press, 2010, p.357

[22] In the *Montano Case (Peru v. United States of America)* decision of 1855 the Umpire found the USA guilty of a palpable denial of justice since a sentence 'was not made effective through the fault of the public officer who was under obligation to execute it' (at 1635). In the *Fabiani (No 1) (France v Venezuela)* decision of 1896 the arbitrator held that Venezuela was responsible for denial of justice insofar as a Venezuelan court had refused to

is a long way run, not only the hearings, but we need to take into account the enforceability of the award, an unlawful act committed by a state through its judicial body to prevent investors from achieving justice and adequate compensation shall be deemed as a practice of denial of justice.[23]

## RESULTS AND DISCUSSION

During this section, the author wants to take the reader to see whether Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution is still sufficient and has already been a crystal clear regulation for arbitration practice both domestic and international arbitration. As we know that the current Indonesian arbitration law is more than 20 years old, therefore, through this article we may see if there is any amendment or further development towards this law in overcoming the current arbitration practice. The author at least has highlighted several issues or drawbacks that may arise from the current law and may be unfavorable for investors or business actors in doing their business in Indonesia, and with Indonesia.

### ***Denial of Justice and Failure to Enforce Foreign Investment Arbitral Award by Indonesian Supreme Court***

The first issue which the author considers as the most important issue that should be highlighted also by the readers is the possibility of the occurrence of denial of justice in enforcing international arbitral award, particularly investment arbitration award. Article 66 (e) stipulates as follows:

*"An International Arbitration Award, as contemplated in item (a), in which the Republic of Indonesia is one of the parties to the dispute, may only be enforced after obtaining an order of Exequatur from the Supreme Court of the Republic of Indonesia, which order is then delegated to the District Court of Central Jakarta for execution."*

We can see based on this article, for an international arbitration award to enforceable, when Indonesia Government is one of the parties to the dispute, an exequatur issued by the Supreme Court (MA) is an absolute requirement. This article has given the Indonesian Supreme Court a latitude to reject, to recognize, to accept and to execute a foreign arbitration award, which is normatively, shall be done on an objective basis, and not a partial or subjective basis.[24] The question is, when it comes to Indonesian Government as one of the disputing parties, how the supreme court

execute an arbitral award handed down in France between two private companies, stating expressly that failure to execute final judgments amounts to denial of justice (at 4895).

[23] *Ibid.*

[24] Panusunan Harahap, "Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan", *Jurnal Hukum dan Peradilan*, Vol.7, No.1, 2018, p.131

supposed to act? Furthermore, if the issuance of such order of exequatur will financially steer the Government financial interest? Based on this logic, we can see that the element of national or political interest may "insinuate" to this loop hole, of course it is a bad news for investors, and further may implicate to the decrease in the ease of doing business in Indonesia.

Before we dive deeper into the matter of exequatur and enforcement of arbitral award we need to settle a same understanding on the concept of denial of justice and its impact towards the enforcement of foreign arbitral award. Denial of Justice is a famous concept, recognized both in the field of private international law and public international law, as it is related on how local courts treat legal entities in seeking judicial redress.[25] Denial of justice is a concept and practice to protect foreign entities and foreign individuals against harmful acts of foreign state's judicial body, in investment arbitration it usually exists as part of host state to provide fair and equitable treatment towards foreign investors.[26] In current practice, if we talk about discuss about denial of justice, people will only focus on the aspect of access to court or issuance of license, well it is not wrong as many cases in investment arbitration practice, in addressing the issue of denial of justice are mostly going around in the issues of license issuance and difficult access to court as It usually has a strong connection with the practice of exhaustion of local remedies, as it usually used by claiming parties to deemed tardiness of local courts as part of denial of justice.[27] However if we take a look again at the essence to the concept of denial of justice, it must have a broader scope. [28]

The arbitral tribunal in *Duke Energy v. Ecuador* in its final award has broadened the definition of denial of justice, by interpreting article II of US – Ecuador BIT, the tribunal determined that other than access to courts, the existence of institutional mechanisms for the protection of investments is also part of host state effort to prevent the practice of denial of justice.[29] The next question that may arise is whether the enforcement of arbitral award is part of institutional mechanism or not. The tribunal in *Bahgat v. Egypt* states that the concept of denial of justice shall be understood to include the whole judicial process of a case for in a criminal process, not only the main trial or hearings, but also the pre and post-because, a judicial

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[25] Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", *The International Lawyer*, Vol. 39, No.1, p.91.

[26] M. Sornarajah, *Op.Cit*, p.358

[27] Rudolf Dolzer, *Op.Cit*, p.93

[28] *Victor Pey Casado v. Republic of Chile* (Award) [2008] *ICSID Case No.ARB/98/2*, para.660

[29] *Duke Energy Electroquil Partners & Electroquil S.A v.Republic of Ecuador* (Award) [2008] *ICSID Case No. ARB/04/19*, para.391

process cannot be fragmented, it is indeed divided into several sections however to preserve justice, a judicial process is the whole process.[30]

By the understanding given by these tribunal decisions, the latter question has been more conical, now the question is whether the enforcement or the execution of an arbitral award can be considered as a part of a whole judicial process, and therefore an intentional failure to enforce or to execute an arbitral award can be considered as denial of justice?

In 2014 there was a case adjudicated by the Supreme Court of America between United States and Flores-Montano (Peru) or usually called as *The Montano Case*. One of the most important points in the decision is the Umpire found that the failure to execute a judicial decision by an authorized officer is part of denial of justice.[31] Also in *Fabiani Case* (France v. Venezuela) in Venezuela Supreme Court, Venezuela was held responsible for committing denial of justice as the authorized Venezuela district court had refused to execute an arbitral award or we can simply say a refusal to execute or enforce a foreign arbitral award is clear omission and therefore constitute denial of justice .[32] Also in the case of *Timofeyev v. Russia* held in the European Court of Human Rights in 2004, it stated that an execution of a judgment by court or other judicial body shall be understood as an integral part of the "trial" or in the case of civil proceedings called as hearings.[33]

Based on author's humble opinion, an arbitration would not be considered as arbitration if the award cannot be enforced, because the core of justice that has been sought by the claimant or maybe the parties exist in the execution of the award, once the award cannot be enforced or executed the award will only be a several piece of papers kept in a shelf.

In the case of investment arbitration as one of the parties and usually the respondent are states, enforcing foreign investment arbitral award is a sensitive discussion among scholars. From dozens of rendered arbitral awards not all of them can be enforced by state judicial body, some of them are defect however not all of them, there are also other external factors that delay or fail the enforcement of such award. Normatively an arbitral award either investment or commercial arbitral award shall be complied and executed voluntarily by the "losing" party, however when it comes to state as the "losing" party, we cannot deny a state has its own

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[30] *Mohamed Abdel Raouf Bahgat v. Egypt* (Final Award) [2019] *PCA Case No. 2012-07*, para 250

[31] *Montano Case*, United States v. Flores Montano, 541 U.S. 194 (2004)

[32] United Nations – French & Venezuelan Commission, Reports of International Arbitral Awards: *Antoine Fabiani Case (France v. Venezuela)*, 1902, p.94

[33] *Timofeyev Case*, Timofeyev and Kiryushkina v. Russia, (Final Judgment) [2004] European Court of Human Rights, *Application No. 58263/00*, para.40

interest especially if the enforcement will negatively affect their interest. For instance, in the case between *Franz Sedelmayer v. Russia* in 1998, Sedelmayer claim's won by the tribunal and Russia was ordered to compensate Mr. Sedelmayer in the amount of 2.3 Million US Dollars, however they refuse to do so and it force Mr Sedelmayer to extraordinary and countless effort to recover its loss, by several alternative proceedings in other state.[34] It is very normal and understandable although it is a violation, because in investment arbitration legal entities are dealing with states a sovereign legal subject, a state does not want to be dictated especially if it may affect its own essential "financial" interest. Therefore, there are practices, where when a state or states concluding an investment protection treaty, they make it clear on states obligation to recognize and to enforce a foreign arbitral award, for instance in article 26 (8) of the Energy Charter Treaty (ECT) it is stated as follows:[35]

*"The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government authority of the disputing Contracting party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without undue delay any such award and shall make provision for the effective enforcement in its Area (territory) of such awards."*

It is clearly agreed by the contracting parties of the Energy Charter Treaty that, they must provide an effective mechanism to enforce such awards, well particularly as Energy Charter Treaty is an investment treaty, a foreign investment arbitral award. Such provision reflects an obligation to enforce a foreign arbitral award by a state, even though they are the losing party in arbitration, and a failure to enforce it is a violation towards an obligation given by the treaty.

Back to Indonesian Arbitration context, Indonesia is a contracting party to New York Convention on the Recognition and Enforcement Arbitral Award 1958. In Article III of the New York Convention 1958 it is stated as follows:[36]

*"Each Contracting State shall recognize arbitral award as binding and enforce them in accordance with the rules of procedure of the*

[34] Hamid G. Gharavi, "Discord Over Judicial Exporpriation:", *ICSID Review Foreign Investment Journal*, Vol. 33, Issue.3, 2018 p. 351

[35] Article 26(8), Energy Charter Treaty

[36] Article III, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

*territory where the award is relied upon, under the conditions laid down in the following articles…"*

There has been a clear order for contracting states to fulfill their obligation to recognize foreign arbitral award as binding and be able to enforce them. This provision under article III give an absolute order, when an arbitral award is not defect or against the law of the contracting parties it shall be effectively enforced, for its unenforceability will leave the arbitration proceedings meaning less and merely a waste of money, and most importantly the enforcement shall not harm the claimant, meaning it shall be enforced immediately.[37] If we take a look again at the provision written in article 66 (e) of Law No.30 of 1999 concerning arbitration and alternative dispute settlement, an award that involves Indonesian government as one of the parties, shall be enforced after obtaining an order of exequatur by Indonesian Supreme Court.

Based on author's analysis and humble opinion, such provision is inadequate for a law to afford the obligations given by International Law to Indonesia concerning the enforcement of a foreign investment arbitration award. There is no time limit set by the law for the supreme court to issue the exequatur and delegate it to the district court to execute and enforce the award, therefore there is a loophole that may trigger abusive practice by a court to delay the issuance of such exequatur, when on the other hand, the execution and enforcement of arbitral award shall be made effectively (immediately when it is available). Also in a more extreme condition, there is no provision in Indonesian arbitration law that obliges the supreme court to issue the exequatur, there is not conditions set by the law, when the exequatur shall not be issued and when such exequatur shall be issued promptly, meaning that if there is a false interpretation towards this law, it can also be interpreted that the supreme court does not have an absolute obligation, in a normal situation to issue the exequatur.

This ambiguity may negatively affect the investors and also Indonesia as a state in terms of ease of doing business. Therefore, this point shall be taken into account as one of the important points to amend the current Indonesian arbitration law, the drafters shall consider and interpret the obligation given by international legal instruments to Indonesia in the matter of enforcing arbitral award effectively, and therefore they may construct a more advance provision regarding enforcement of foreign arbitral award when Indonesian government is one of the disputing parties,

[37] Reinmar Wolff, *Convention on the Recognition and Enforcement of Foreign Arbitral Awrds 1958: Article-by-Article Commentar* (Second Edition), Munchen: Verlag C.H. Beck Publisher, 2019, p.203

which must be fair not only for Indonesia but also for investors and most importantly provide a clear order and not ambiguous.

***The Potential of Arbitrators Negligence in the Award Enforcement Process***

According to Law No. 30 of 1999 concerning arbitration and alternative dispute settlement, one of the requirements or I would say as a mandatory procedure for a foreign arbitral award to be enforceable is it must be registered and handed over to the clerk of Central Jakarta District Court. In author's humble opinion, what is confusing is, why such award shall be registered and handed by the arbitrator and not the disputing parties. In author's opinion this might be very dangerous to the interest of both parties in the event that an arbitrator that is obliged to register and hand it over to the clerk is negligent. This mandatory procedure applies not only to the enforcement of foreign arbitral award but also local arbitral award, for instance rendered and issued by BANI. The failure to comply with this obligation will result in such award is unenforceable.

However, we need to keep in mind that this particular scenario will only happen if the execution of the arbitral award is not voluntarily made by the "losing" party. Therefore, let us come to the assumption that there is a situation when an award is not executed voluntarily, and therefore need an enforcement order by the court. Well this situation does happen often in arbitration practice, therefore we need a legal answer towards this issue. Article 59 of Law No.30 of 1999 stipulates that *"within thirty (30) days from the date the arbitral award is rendered, the original or an authentic copy of the award shall be submitted for registration to the clerk of the District Court by the arbitrator (s) or a legal representative of the arbitrator (s)…. Failure to comply with the requirements set out above shall render the arbitration award unenforceable."*

This is one of the loopholes that must be fixed in the future amendment towards Indonesia arbitration law, because any parties may be resistance not to voluntarily execute or enforce an award, and therefore the arbitrators or their representative shall be the one who carry out the mandatory procedure, to register it to the court. We need to keep in mind that, the parties with the major interest are the disputing parties, arbitrators are paid, however they are ordered not to have interests towards the award it renders. Therefore, the one that shall be responsible for the enforcement in the event there is no voluntary enforcement or execution is the claimant, because they are the one has the biggest interest for such award to be enforced. Article 59 put too much burden on the arbitrators back. If we may compare to other state's arbitration act, for

example Australia, in act No. 136 of 1974 concerning international arbitration, in section 9 paragraph 1 it is stated as follows:[38]

*"In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this part, he or she shall produce to the court: (a) the duly authenticated original award or a duly certified copy; and (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.."*

If we see at the abovementioned provisions within Australian arbitration act, the burden to carry out the procedure in the enforcement of an arbitral award are in the parties back, not the arbitrators, the arbitrators are only obliged to authenticate the award, the one who produce or hand it over to the court are the disputing parties, because when an event of negligence happen, the mistake is on the parties and not the arbitrators. This is very contradictory with the practice under Law no.30 of 1999, in article 67, in regards to the enforcement of foreign arbitral award there are several requirements that must be fulfilled by the arbitrator (s) in registering the application of the enforcement of such award to the clerk of Central Jakarta District Court as follows:[39]

- Such application shall be accompanied by the original text of the foreign award or an authenticated copy, together with an official translation of such award to Bahasa Indonesia;
- The original or the authenticated copy of an agreement which is the basis of such foreign arbitral award; or an authenticated copy (authenticated in accordance with the provision on authentication of foreign documents) together with the official translation to Bahasa Indonesia;
- A certification from the diplomatic representative of the Republic of Indonesia in the country in which such foreign arbitral award was rendered stating that such country and the Republic of Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of such foreign arbitral award.

If we take a look to all of those requirement, arbitrators, a party with minor interest to the proceedings are charged with complicated responsibility which a minor negligence in fulfilling those requirements may cause the foreign arbitral award is unenforceable. Therefore, as I have mentioned in the previous paragraphs such responsibilities shall be shifted, it supposed to be pointed to the disputing parties and not the arbitrators, and an amendment towards Indonesian arbitration act should make this crystal clear in the new provision.

[38] Section 9(1), Australian Arbitration Act (Act No.136 of 1974)
[39] Article 67(2) Law No.30 of 1999

***Unclear definition of Public Order (Public Policy)***

The clause of *Public Order* or public policy (in bahasa called as kepentingan umum) is mentioned several times in many provision of Law No.30 of 1999 concerning arbitration and alternative dispute settlement. First if we can see in Article 62 paragraph 2, in regards to the enforcement of an arbitral award, the Head of District Court shall carry out an inspection towards the award to check whether such award, when enforced, it is against the public order or not, when it is against the public order therefore, such award cannot be enforced or the head of the district court will not issue an exequatur to enforce or execute such an award. Second, we can see in the basis of the annulment or challenge to the enforcement of foreign arbitral award. Article 66 stipulates that foreign arbitral award can only be enforced in Indonesia, if such award is not against the public order. The question that arises are, if the public order concept or clause is so important, what are the limitation of public order? Who shall determine the limitation of public order in regards to the enforcement of foreign arbitral award? If these questions cannot be answered by the law, then the law needs to be amended, in author's humble opinion, the terms public order play a very big role in arbitration practice under Law No.30 of 1999, because as we know, enforcement is one of the most important elements in arbitration, if an award is unenforceable the award will only be a several piece of papers kept in a shelf.

Quoting from Prof. Erman Rajagukguk an Indonesian Professor in Private International Law, in his book, *Arbitration in Court Decision (arbitrase dalam putusan pengadilan)*, the terms of Public Order is often politicized, court do not enforce the award for the reason of public order, which the definition itself is still vague and uncertain.[40] Based on Law No.30 of 1999, court has the right to determine whether an arbitral award complies with public order or not, as it has the authority in recognizing and enforcing the award, however the court must not assess the terms "public order" arbitrarily, there must be a limitation towards this term.[41] In short, by looking at the utilization of "public order" concept in Indonesian arbitration law further clarification is required for such concept to be applied or implemented precisely.

Actually, the terms or I would say as a concept, of "public order" is a common concept in private international law. In Indonesia private international law regime, "public order" is simply define as a concept that may disregard foreign law or the application of foreign law as it is against the basic principles of Indonesian law, on the basis of the judge's belief or

[40] Erman Rajagukguk, *Arbitrase dalam putusan pengadilan*, Jakarta: Chandra Pratama, 2000, p.339

[41] *Ibid.*

consideration.[42] This kind of definition has constituted an ambiguity in implementing such concept, normatively, as Indonesia's legal system is European continental system or civil law system, judges are not that free or flexible in interpreting the law, there must be a limitations determined by the law itself.[43]

Let us take a look to other state practice in their national legislation in connection with arbitration on how they limit the term "public order" or "public policy" as a basis to challenge and enforce foreign arbitral award. The first one is an arbitration act of Indonesia's neighboring country, Malaysia. In Act No.646 of 2005 (Malaysian Arbitration Act), in Section 37 concerning the application for setting aside an arbitral award, it is stated that an arbitral award may be set aside if the high court of Malaysia finds that such an award is in conflict with the public policy (public order of Malaysia. However, Malaysian arbitration act does provide detail towards the term of Public Policy or Public Order in this act, in section 37 paragraph letter b, the condition of conflicting with the public policy or public order of Malaysia is when; (a) the making of such award was induced or affected by fraud, corruption and other criminal practice; second, there is a breach of natural justice during the arbitral proceedings; or in connection with the making of the award.[44] Based on that we can see that Malaysia in its arbitration law assess the relevance of public order or public policy during the whole proceedings of arbitration, which if we can simplify, a correct procedure will not render false award, and a false award is rendered based on a violation of public policy or public order. Therefore, if an award is proven made by violating a procedure and natural justice in Malaysia, it is conflicting with the public order or public policy of Malaysia.

By mirroring to Malaysia's arbitration law, we can see that Indonesia's current arbitration law has not yet specified the narrow notion or limitation of public policy, moreover it does not give a clear reference, whether such public order or public policy refers to international public policy or domestic public policy.[45] In the assumption that it refers to domestic public policy, then the definition of public policy is too abstract, however if it refers it international public policy, we may define it as in accordance with basic morality and justice under international law, or international law order.[46] In China, they do not specify the limitation of an

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[42] Yulia, *Hukum Perdata* Internasional, Lhokseumawe: Unimal Press,2016, p.106

[43] Fajar Nurhadianto, "Sistem Hukum dan Posisi Hukum Indonesia", *Jurnal Hukum TAPI*, Vol. 11, No.1, 2015, p.38

[44]Malaysian Arbitration Act, (Act No.646 of 2005)

[45] Erman Rajagukguk, "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy", *Jurnal Hukum Internasional*, Vo.5, No.2, 2008, p.188

[46] *Ibid.*

arbitral award to be deem as in accordance or against the public policy, however, they do define public policy as social public interest, then if an arbitral award will negatively affect the social public interest in China, its enforceability may be questioned.[47] Social public interest here shall be define as social value including sociological impact and also economic impact. For instance, in the case between *Kai Feng City and Taichun Intl Trade v. Henan Garments Co.* in 1992, the arbitral award could not be enforced by the court as the court consider, the enforcement of such award will negatively harm the local economy, the local economy in hear means small and mid-size garments industry which struggles to enter garment export market.[48] The reason why China Supreme Court use the term negatively harm the local economy is because China has a strong practice of protectionism, therefore this protectionism may put aside the enforcement. By looking at the practice in China based on its arbitration act, we can see that China is upholding domestic public policy not international public policy, because if we compare it with international obligation to reduce protectionism under WTO or GATT, the arbitral award shall be enforced, but at least what I am trying to say China has determined a clear limitation for such a term, unlike Indonesia.

In Indonesian Arbitration Law, there is no clear reference, whether the public order or public policy refers to international public policy or domestic or national public policy (order), yet it has not yet been clarified the definition or a limitation of public policy, which renders this particular term is very vague, and the court has an absolute discretion to determine its scope. In author's opinion this must be revised as Indonesia, a civil law nation, which by the essence leaning by limitation and provision given by written law, and act or written law as the highest source of law, not judge consideration or judicial decision. There must be a clear reference and also limitation to the term of public policy. For instance, if the author may suggest, there must be a separate article or paragraphs that mention, *"public policy or public order mentioned in article (1) shall be interpreted as basic morality and justice, and shall not be contrary to the applicable law in Indonesia"; "*or *it can be extended to the process of making an arbitral award, that it should be made unlawfully or against the applicable law in Indonesia"*, the latter one has set the limitation to an arbitral award shall not be made for instance under influence from external party, shall not be made partially by an arbitrator, or shall be made subsequently with a practice of corruption during the award making process or etc which violates the Indonesian Law, therefore the definition of public order or public policy will become clearer. By setting a clear definition of public

[47] *Ibid.*

[48] Jing Zhou Tao, *Arbitration Law and Practice in China* (3rd Edition), Amsterdam: Wolter Kluwer, 2012, para.548

order or public policy, the risk of this term to be politicized can be reduced, and a decision to enforce or not to enforce will become more legitimate.

## CONCLUSION

By the aging of Law No.30 of 1999 concerning arbitration and alternative dispute settlement, we have discovered several loopholes that may affect the practice of arbitration in Indonesia and also may affect Indonesia significantly as a place to settle business dispute through arbitration. Those highlighted provisions in the abovementioned paragraphs may be considered as an important point for future amendment by the Government and the house of representatives. The practice of denial of justice, unregistered arbitral award and vagueness of the terms public policy or public order will certainly affect business actor decision to have business relationship with Indonesia or its nationals, which further may implicate to the economic growth and economic development.

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