

CHAPTER I

INTRODUCTION

1.1 Background

Arbitration is an alternative dispute resolution (ADR) method which encompasses a method for private resolution of dispute.¹ According to 2018 International Arbitration Survey, 97% of respondents opted for international arbitration as a method to resolve cross-border dispute which indicates an increase of 8% compared to the same surveys conducted in 2015 with a result of 90% of respondents who preferred international arbitration to solve cross-border dispute.² Parties from different nationalities prefer to appoint international arbitration rather than domestic court in the territory of one of the parties to solve a dispute. The preference of choosing international arbitration is for neutrality and to prevent any conflict of interest in the event of disputes between the parties.³ International arbitration which carried out in a third country will not apply domestic law or regulations of one of the parties that might lead to an unfair decision to another party. Rather, the parties to the dispute will apply the rules of the arbitral institution or other rules agreed by the parties.⁴

¹ Steven C. Bennett, *Arbitration: Essential Concepts*, (New York: ALM Publishing, 2005), p. 4.

² Queen Mary University of London and School of International Arbitration, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018, p. 5.

³ Richard Garnett, "International Arbitration Law: Progress Towards Harmonization", 3 MJIL (2002), p. 403.

⁴ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (United Kingdom: Cambridge University Press, 2017), p. 1.

International arbitration will issue a foreign award containing the decision on the dispute between the parties. However, the recognition of an award does not automatically enforce the award itself. Recognition of the award means that the award is accepted as a valid award under the law of one country.⁵ Whereas enforcement means an action to claim the award as ordered.⁶ There is also a distinction between enforcement of the award in a jurisdiction wherein the arbitration was seated and in a country outside the seat of the arbitration. The enforcement procedure in a country of the seat of the arbitration is straightforward. In contrast, the enforcement of foreign award is much more intricate depending on the relevant law and procedure in that respective country.⁷

Indonesia is a contracting state and ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) through Presidential Decree No. 34 of 1981. Under the New York Convention, Indonesia made a reciprocity reservation that a foreign award may only be enforced if such award is rendered in a contracting state to the New York Convention.⁸ Further, Indonesia also made a commerciality reservation which requires the foreign award to be within a scope of commercial dispute.⁹ As such, Indonesia incorporates principles contained in the New York Convention into Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution (Indonesian Arbitration Law) to govern any arbitration activities and regulate enforcement of foreign

⁵ A. Tweeddale and K. Tweeddale, *A Practical Approach to Arbitration Law* (London: Blackstone Press, 1999), p. 291.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ M. Yahya Harahap, *Arbitrase*, (Jakarta: Sinar Grafika, 2001), p. 22.

⁹ *Ibid.*, p. 23.

award in Indonesia. It is also worth noting that Indonesian Arbitration Law also governs other ADR methods such as negotiation, conciliation, mediation and consultation.

The scope of Indonesian Arbitration Law covers the resolution of disputes arising between the parties who have entered into the arbitration agreement.¹⁰ Such arbitration agreement usually contains the choice of seat of arbitration, venue of arbitration, language, appointment of the arbitrators, governing law as well as the procedure to be followed by the arbitral tribunal.¹¹ Thus, the arbitral tribunal will not exist unless the parties to the dispute consensually undertake to establish arbitral tribunal to solve their dispute. Based on the doctrine of separability, agreement between the parties to arbitrate is separate from the contract and will survive in spite of failure of the contract.¹² Prior the enactment of Indonesian Arbitration Law, arbitration in Indonesia is regulated under Articles 615 - 651 of the *Reglement op de Burgerlijke Rechtsvordering* (RV), Article 705 of the *Rechtsreglement Buitengewesten* (RBg), and Article 377 of the *Het Herziene Indonesisch Reglement* (HIR). Moreover, before the Indonesian Arbitration Law, enforcement of foreign award was regulated under the Regulation of the Supreme Court No. 1 of 1990 regarding the Procedure for Implementation and Execution of Foreign Arbitral Award (Supreme Court Regulation 1/1990). However, Indonesian Arbitration Law does not revoke or overrule the Supreme Court Regulation 1/1990 and thus, it can be considered as still in force. In the event that there is conflict between the

¹⁰ Article 2 of Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution.

¹¹ Peter Ashford, *Handbook on International Commercial Arbitration, Second Ed*, (New York: JurisNet LLC, 2014), p. 17-20.

¹² *Ibid*, p. 5.

Indonesian Arbitration Law and Supreme Court Regulation 1/1990, based on the hierarchy of the law, the provisions under Indonesian Arbitration Law will prevail. The provisions regarding the enforcement of foreign award are similar in both Supreme Court Regulation 1/1990 and Indonesian Arbitration Law. However, the Indonesian Arbitration Law does not contain any provisions regarding the execution order.

Under Indonesian Arbitration Law, arbitration is a method to solve civil disputes outside the court pursuant to the arbitration agreement between the parties.¹³ The arbitration agreement entered into between the parties shall be in a written form of an arbitration clause before a dispute arises, or any separate written arbitration agreement after a dispute arises.¹⁴ Arbitral awards are distinguished based on the venue or the seat of arbitration for the purpose of enforcement of the award. Although there is no express definition of domestic arbitral award under the Indonesian Arbitration Law, Article 1 paragraph (9) of Indonesian Arbitration Law describes foreign Award as award issued by an arbitration institution or ad hoc arbitration outside the territory or legal jurisdiction of Indonesia.¹⁵

In Indonesia, foreign award will only be recognized and be enforced within the jurisdiction of Indonesia if:¹⁶

1. The foreign award is issued by arbitral tribunal or an arbitrator in a country that is a Party to the New York Convention,
2. The foreign award relates to commercial dispute,

¹³ Article 1 paragraph (1) of Indonesian Arbitration Law.

¹⁴ Article 1 paragraph (3) of Indonesian Arbitration Law.

¹⁵ Article 1 paragraph (9) of Indonesian Arbitration Law.

¹⁶ Article 66 of Indonesian Arbitration Law.

3. The foreign award is not in contrary with public order,
4. The foreign award has obtained an exequatur from the Chairman of the Central Jakarta District Court, and
5. The foreign award in which the Republic of Indonesia is one of the Parties to the dispute, has obtained Exequatur from Supreme Court of Indonesia.

Pursuant to the *Res Judicata* principle¹⁷, an arbitral award is final and binding towards the parties. However, the relevant foreign award must be registered to the Central Jakarta District Court by the arbitrators or the legal representative of the winning party to be enforced in Indonesia.¹⁸ Indonesian Arbitration Law provides time limit for the registration of domestic arbitral award which is 30 days after the domestic arbitral award is rendered.¹⁹ If the domestic arbitral award fails to be registered within the time limit, therefore the award will remain unenforceable.²⁰ Further, foreign award must also obtain an exequatur from the Chairman of Central Jakarta District Court to enforce such award.²¹ If the foreign award in which the Republic of Indonesia is one of the Parties to the dispute, the exequatur must be obtained from the Supreme Court of Indonesia.²²

The application to obtain an exequatur may only be submitted once the foreign award has been registered to the Central Jakarta District Court.²³ The

¹⁷ *Res Judicata* principle refers to finality and binding nature of the judgement which cannot be subject to appeal; Peter R. Barnett, *Res Judicata, Estoppel and Foreign Judgements: The Preclusive Effects of Foreign Judgments in Private International Law*, (New York: Oxford University Press, 2011), p. 8.

¹⁸ Article 67 paragraph (1) of Indonesian Arbitration Law.

¹⁹ Article 59 paragraph (1) of Indonesian Arbitration Law.

²⁰ Article 59 paragraph (4) of Indonesian Arbitration Law.

²¹ Article 66 paragraph (d) of Indonesian Arbitration Law.

²² Article 66 paragraph (e) of Indonesian Arbitration Law.

²³ Article 67 paragraph (1) of Indonesian Arbitration Law.

application for the exequatur must be submitted with the original copy of the award and official translation in Indonesian language, the original copy of the agreement as well as arbitration clauses underlying the establishment of the arbitral tribunal and its official translation in Indonesian language, certification letter from the official representative of Indonesia to the Country wherein the award was rendered to authenticate the bilateral relationship between Indonesia and that country.²⁴ An appeal against the exequatur which recognize and enforce the foreign award is not allowed.²⁵ However, appeal against the exequatur which refuse to recognize and enforce the foreign award may be appealed.²⁶

An issue arises as regard to when the losing party refuses to enforce the foreign award. Although it is not regulated under the Indonesian Arbitration Law, the losing party may apply to the District Court to request for order to execute the foreign award. The District Court will then give an *Aanmaning*²⁷ or warning letter to the losing party for request of enforcement of foreign award.²⁸ In the event the losing party does not conform to the *Aanmaning* to execute the foreign award, the District Court will then issue an *Executorial Beslag*²⁹ or writ of executorial to execute confiscation of the losing party's assets.³⁰ However, it is unclear as regard

²⁴ Article 67 of Indonesian Arbitration Law.

²⁵ Article 68 paragraph (1) of Indonesian Arbitration Law.

²⁶ Article 68 paragraph (2) of Indonesian Arbitration Law.

²⁷ *Aanmaning* is warning letter given to the respondent to enforce a court verdict of a civil case which has a final and binding nature; Zainal Asikin, *Hukum Acara Perdata di Indonesia*, (Jakarta: Prenadamedia Group, 2015), p. 163.

²⁸ Article 196 of HIR and Article 207 of RBg.

²⁹ *Executorial Beslag* is an order to confiscate the assets of the losing party to the dispute in the event that there is no compliance in spite of the decision which has the legal force to carry out the decision voluntarily; Article 197 of HIR.

³⁰ Article 197 HIR and Article 208 of RBg.

to the recourse against the foreign award and refusal to comply by the losing party to foreign award.

One of cases regarding the enforcement of foreign award in Indonesia is the case of PT. Pertamina (Pertamina) v. PT. Lirik Petroleum (Lirik Petroleum), in which the final award was issued by the International Chamber of Commerce (ICC) Arbitration as the forum chosen by both parties in the Enhanced Oil Recovery (EOR) contract with the arbitration venue in Jakarta on February 27, 2009. The arbitral tribunal issued a decision in favor of Lirik Petroleum and require Pertamina to pay for compensation as well as the arbitration costs.³¹ The first issue in the case of Pertamina v. Lirik Petroleum is on the definition of foreign award, wherein Pertamina argued that the award which was rendered in Jakarta is considered to be a domestic award. However, Supreme Court affirmed that the award which was seated in Indonesia is considered as foreign award as the forum for the arbitration was administered under the rules of International Chamber of Commerce.³²

The second issue is in regard to the refusal to enforce the foreign award by Pertamina despite of the *Aanmaning* No. 029/2009 EKS issued by Central Jakarta District Court as requested by Lirik Petroleum. The *Aanmaning* required Pertamina to appear before the Chairman of Central Jakarta District Court in order to give reprimand to Pertamina to enforce the foreign award voluntarily.³³ However, Pertamina did not respond to the *Aanmaning* and filed for a claim against the

³¹ Karen Mills and Mirza A. Karim, "Disputes in the Oil and Gas Sector: Indonesia", 3 Journal of World Energy Law and Business 1 (2010), p. 61.

³² *PT. Pertamina (Persero) v. PT. Lirik Petroleum*, Decision of Supreme Court No. 904K/Pdt.Sus/2009 (2010), p. 96-98.

³³ *PT. Pertamina (Persero) v. PT. Lirik Petroleum*, Decision of Supreme Court No. 144 K/PDT/2012 (2012), p. 10.

registration of the foreign award at the Central Jakarta District Court.³⁴ Although a forced attempt to confiscate the assets of Pertamina may be conducted to pay for the compensation, there is a challenge in making the inventory of the assets and conducting an auction of the assets as further costs may arise. In addition, there is legal uncertainty towards Lirik Petroleum under the Indonesian Arbitration Law as there is no time limit for the Central Jakarta District Court to respond to the request of execution and appeal against the enforcement.

The enforcement procedure of foreign award in Indonesia is to be compared with the enforcement procedure of foreign award in Singapore. Singapore is also a contracting state to the New York Convention and enforces awards rendered in other States based on reciprocity. Consequently, Singapore enacted Singapore Arbitration Act and Singapore International Arbitration Act to govern the recognition and enforcement of arbitral awards in Singapore. The enforcement of foreign award in Singapore may only be enforced by action, judgement or order with the leave of the High Court.³⁵ A judgement will be entered once a leave of the High Court has been granted³⁶ and the award will be recognized as binding and may be used by the parties in legal proceedings in Singapore.³⁷ The Singapore International Arbitration Act provides a time limit for the enforcement of foreign award, which is six years since the award is rendered in a country party to New York Convention.³⁸ The enforcement may take more time in the event that there is

³⁴ *Ibid.*

³⁵ Article 19 of Singapore International Arbitration Act.

³⁶ Section 19 of Singapore International Arbitration Act

³⁷ Section 29(2) of Singapore International Arbitration Act.

³⁸ Order 69A Rule 6 of Singapore Rules of Court.

an opposition towards the application from the other party and there is a request to set aside the registration or the order for enforcement. In addition, the foreign award does not automatically become enforceable if the order which grants the enforcement of the award has been issued as the other party will be given time to apply to the court for setting aside the order.³⁹

Compared to arbitration system in Singapore, the procedure to enforce the foreign award in Indonesia does not contain any provisions regarding time period for enforcement and registration, delay in the enforcement of the foreign award, execution order, and consequence for refusal to comply to the foreign award. The legal gap in the regulations of the enforcement of the foreign award in Indonesia will give rise to legal uncertainty and inconsistency in the legal system of Indonesia. Therefore, the author will make a comparison of enforcement and execution of the foreign award between the Indonesian arbitration system and Singapore arbitration system. Based on the foregoing, the author decided to make this thesis with the title of **“A Comparison between the Enforcement of Foreign Arbitral Award under the Legal System in Indonesia and Singapore”**.

1.2 Problem Formulation

Formulation of issues is necessary to help the authors in discussing and analyzing the issues. Regarding the topic of this thesis, the author would discuss the following formulation of issue:

³⁹ Article 31 of Singapore International Arbitration Act.

1. How is the enforcement and execution of the foreign award in Indonesia compared to the arbitration system in Singapore?

1.3 Research Objectives

A legal research is carried out to achieve certain objectives and this research is aimed to:

1. Identify and analyze the challenges in the enforcement of foreign award in Indonesia by making a comparison with the enforcement procedure of foreign award under the legal system in Singapore.

1.4 Benefits of the Research

1.4.1 Theoretical Benefits

The theoretical benefits of this research are to contribute to the development of legal science particularly on the area of arbitration and to enhance the literature on the challenges in the enforcement procedure of the foreign award in Indonesia. Further, the result can also be used to provide more references for any further research regarding this issue.

1.4.2 Practical Benefit

The practical benefits of this research are to provide solutions and answers to the issues, and to provide suggestions to the Government of Indonesia in regulating the enforcement regime of the foreign award in Indonesia. Moreover, the research can be used as reference or considerations in filling the gap within the legal system

in Indonesia, particularly with respect to the enforcement of the foreign award in Indonesia.

1.5 Systematics of Writing

Chapter I : INTRODUCTION

The first chapter comprises introduction which include the background of the issue, problem formulation, objectives of the research, benefits of the research, and the systematics of writing.

Chapter II : LITERATURE REVIEW

The second chapter will discuss and elaborate theoretical foundation and conceptual framework to assist the author in analyzing the issues formulated in the first chapter. All the combined literatures will be summarized in this chapter in order to formulate develop an area for further research. Theoretical framework which gives details to underlying concepts of the issues will be done through identifying relevant theory, examining key variables of the issues, and identifying critical questions arising from the issues. While the conceptual framework will be done through gathering information from law journals, opinions of experts and prevailing laws in Indonesia.

Chapter III : RESEARCH METHODS

The third chapter describes the research methods and procedures taken by the author in conducting the legal research in order to identify the rules and legal principles to answer the legal issues.

Chapter IV : DISCUSSION AND ANALYSIS

The fourth chapter contains discussion and analysis of the issues based on the existing rules, jurisprudences, and theoretical foundation. In this chapter, the author will conduct a comparison of enforcement and execution of foreign award between the Indonesian arbitration system and Singapore arbitration system.

Chapter V : CONCLUSION AND RECOMMENDATION

The fifth chapter will discuss the conclusion of the research and recommendation from the author towards the issues based on the discussion and the analysis of the formulated issues.