

## Application of the Principle of Legal Certainty in the Execution of an Arbitral Award in Indonesia

Vivi<sup>1\*</sup>, L.Alfies Sihombing<sup>2</sup>, Yeni Nuraeni<sup>3</sup>

Universitas Pakuan Bogor, Indonesia

Email: [tantosudarso80@gmail.com](mailto:tantosudarso80@gmail.com)<sup>1\*</sup>, [alfiessihombing63@gmail.com](mailto:alfiessihombing63@gmail.com)<sup>2</sup>,  
[yeninuraeniii95@gmail.com](mailto:yeninuraeniii95@gmail.com)<sup>3</sup>

\*Correspondence

### ABSTRACT

**Keywords:** Execution, Trial, Arbitration Award.

In principle, the legal system regulates the life of a community so that conflicts do not occur, although often these conflicts cannot be avoided, a principle of legal certainty is needed in resolving disputes through arbitration and how the execution of an arbitral award in Indonesia can be applied or implemented. The legal system has an important role to play in resolving these conflicts. The legal system in the judicial world has a major influence in the application of law, especially for judges in examining and deciding a case. Judges in deciding a case will definitely pay great attention to the legal system in their jurisdiction. In addition, the Panel of Judges uses the decisions of other judges who decide cases whose substance in principle has similarities to be used as a reference and consideration in deciding a case.



### Introduction

In general, the process that will be taken by the parties in resolving disputes through the courts and each community has various ways to obtain agreements in resolving cases, conflicts and disputes (Rosy, Mangku, & Yuliantini, 2020). People tend to resort to customary dispute resolution methods and turn to laws recognized by the government, such as through litigation in the general judiciary. In an attempt to gain agreement between the parties, this sometimes appears to be a hidden form of coercion (Boboy, Santoso, & Irawati, 2020). The parties to the dispute are required to agree on the contents of the agreement that has been agreed for the benefit of certain parties so that the needs and interests of the disputing party are not met at all, due to the weakness of the procedure which results in losses to the party in dispute / litigation (Bianti, 2023).

An agreement is a procedure and law for the parties that makes it mean that the agreement is binding not only on one party but the agreement is binding on both parties, according to Indonesian civil law, the validity of an agreement meets 4 conditions, namely:

1. Agreement of the binding parties;
2. Ability to make an engagement/agreement;
3. A sure thing;

4. A lawful causa;

If an agreement has been concluded (consensus), then each party is bound by the other therefore and is obliged to fulfill its performance (Wijaya, 2021). Still, sometimes it creates obstacles that affect the implementation of the agreement so that disputes and disputes arise and resolving the problem requires a grace period to resolve the problem and to establish good relations. The Parties include special clauses in an agreement such as dispute resolution includes:

1. Through informal agreements;
2. Through conciliation;
3. By arbitration;
4. Through the courts.

If the parties wish to resolve the dispute, it can be agreed to be resolved out of court. The agreement that has been mutually agreed upon by the parties is a law for the parties that binds themselves (*pacta sunt servanda*), which is used as the legal basis in alternative dispute resolution or alternative dispute resolution mechanisms is the free will of the parties to resolve their disputes outside the court as stated in article 3 of Law Number 14 of 1970 concerning the principles of judicial power (Nurlia & Apriani, 2022).

In Indonesia, the parties can choose to resolve disputes through two channels: litigation (court) or non-litigation channels (mediation, negotiation, conciliation, consultation, expert assessment, and arbitration).

Talking about arbitration or arbitration institutions has existed for centuries and was first introduced by the Greek community before Christ. In contrast, in Indonesia, arbitration began to be known by the public as an alternative dispute resolution through non-litigation channels. Dispute resolution through non-litigation, such as arbitration, is the most preferred method by business actors because it is considered the most effective way to meet the needs of the business/trade world.

Arbitration is created from the clauses outlined in the contracts they have agreed to. Thus, the parties pouring the agreement into the contract/agreement can resolve their disputes using this method. Therefore, the author will discuss the application of the principle of legal certainty in executing an arbitral award.

The objectives of this study are:

1. To find out and analyze the legal certainty that applies in Indonesia.
2. To find out whether legal considerations contained in a decision can be used as a judgment and then legal considerations that are used as a reference for carrying out an execution.

## **Method**

### **Types of Research**

The type of research carried out is Normative Juridic research. Normative Research, commonly called Legal Dogmatics, is the way science works, meaning what and how the method is will be determined by what the science is looking for, or in other words, what

the vision and mission of the science concerned and related to it, what is the main problem or core problem in the science.

Normative legal research is legal research that uses secondary data sought by more civil decisions handed down by the Arbitrase Court, District Court, High Court, and Supreme Court. Secondary data other than those sourced from decisions also come from statutory studies and literature research related to the research topic. Secondary data comes from primary legal materials, secondary legal materials, and tertiary legal materials.

In this type of legal research, law is conceptualized as what is contained in laws and regulations, court decisions, or other legal sources, which are conceptualized as rules or norms that are a benchmark for appropriate human behavior.

### **Research Approach**

The research approaches used in this thesis are the statute approach and the case approach. The statutory approach examines the rules relating to existing arbitration awards in Indonesia and international arbitration awards.

## **Results and Discussion**

### **How to execute an arbitral award that has the force of law remains**

Arbitration is a way of resolving civil disputes outside the court based on a written agreement whereby the parties to the dispute go to the arbitrator or panel of arbitrators to decide a dispute whose decision is final and binding (Rosy et al., 2020).

The parties choose dispute resolution by arbitration because the reach of the award resulting from the arbitration proceedings can cross national borders or can be recognized and enforced by many States, which in principle can be recognized and enforced in other countries bound by a bilateral, regional, or multilateral agreement on the recognition and enforcement of foreign arbitral awards (adi Astiti, 2018).

Arbitration is a specialized form of court. What distinguishes courts from arbitrations is that the court route uses one permanent court (standing court), while arbitration uses a tribunal forum for these activities (Entriani, 2017). In arbitration, the arbitrator acts as a judge in the arbitral tribunal and a permanent judge, although only for the case at hand (Maretta, 2017).

In the opinion of Frank Elkoury and Etna Elkoury, arbitration is an easy process chosen by the parties voluntarily, whose case is decided by a neutral separator according to the choice of the parties, where the decision is based on the arguments in the case. The parties agree from the outset to accept the award as final and binding.

According to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the conflict.

The most crucial thing in a dispute is the execution of the decision on the dispute, which is often referred to as execution. It is futile in a case that already has permanent legal force but, in the end, cannot be executed. In civil cases, there are at least two important institutions that can be a place to resolve a case, namely the court and

arbitration. The Arbitral Body may conduct a fair and faster hearing of the dispute. Still, the Arbitral Body does not have the organ to compel the losing party to carry out its decision, just as a court has a bailiff to execute. Therefore, the role of the district court is needed. In order for the court to carry out the execution, some conditions must be met, namely within a maximum of 30 (thirty) days from the date the award is pronounced, the original sheet or authentic copy of the arbitral award is submitted, and registered by the arbitrator or his attorney to the clerk of the district court. Arbitration, one of the out-of-court dispute resolution institutions developed since the 18th century, now has a vital role in resolving trade disputes such as buying and selling and other civil disputes. In Indonesia, arbitration as a dispute resolution institution has been known since the Dutch colonial era, regulated in Articles 615 to 651 Reglement op de Rechtverordering Staatsblad 1847 Number 52 and Article 377 Het Herziene Indonesisch Reglement Staatsblad 941 Number 44 and Article 705 Rechtsreglement Buiten Gewesten Staatsblad 1927 Number 705. Arbitration is growing at this time, especially after the existence of a law made by the Indonesian nation to regulate arbitration, namely Law Number 39 of 1999 concerning Arbitration and Alternative Dispute Resolution.

The procedure for implementing an arbitral award in Indonesia is differentiated based on the type of award, i.e., whether the award is a national or international arbitration award. Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution must clearly distinguish national and international arbitral awards (Winarta, 2022). Nevertheless, the difference between national and international arbitration awards can be seen in the definition of international arbitration awards as stipulated in Article 1 number (9) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Tampongangoy, 2015).

The execution of an arbitral award shall be carried out in accordance with the provisions of the civil procedure law in force in the court, in the territory of the country where the application for execution was filed. The arbitral award shall be final and have permanent and binding force on the parties. Finally, here it is intended that the arbitral award cannot be appealed, caused, or reviewed, and the award is binding for the parties to voluntarily comply with in good faith because before the award is made, they have also agreed to settle it through arbitration with all its consequences. In the case of execution of the award, this shall be executed within a grace period of not more than 30 days from the date on which the award is rendered. At this time, the original sheet or authentic copy of the arbitral award is submitted and registered by the arbitrator or attorney to the district court clerk and by the registrar provided with a record constituting a registration deed. The execution of the arbitral award will only be carried out if the arbitral award is in accordance with the arbitration agreement and, meets the requirements contained in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. and not contrary to decency and public order.

The role of the court is vital in providing justice and creating an orderly society; in John Rawls' opinion, the importance of seeing justice as the main virtue that must be upheld and, at the same time, become the essential spirit of various primary social

institutions of society, in carrying out its function of providing justice for people who are experiencing disputes, disputes or differences of opinion. The state gives the court authority to hear cases and execute their decisions so that the litigants can feel justice. One of these authorities is the authority to execute arbitral awards, both National and International, as stipulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

### **How is the execution of an arbitral award if it will be executed in Indonesia**

Speaking of arbitration or arbitral institutions, it actually exists and has been practiced for centuries (even first introduced by Greek society before Christ). The emergence of alternative dispute resolution ("APS") began in 1976 when Chief Justice Warren Burger pioneered this idea at a conference in Saint Paul, Minnesota, United States. This was motivated by the various factors of the reform movement in the early 1970s. At that time, many observers/opinions of law experts and the academic community began to feel severe concerns about the increasing negative impact of litigation in court. Then, the American Association (ABA) realized the plan and added the APS Committee to their organization. This was followed by including the APS curriculum in law schools in the United States, especially economics schools.

In Indonesia, the public also knows arbitration as an alternative dispute resolution through non-litigation channels. The exact definition of arbitration still raises differences of opinion. However, these differences of opinion do not eliminate the meaning of arbitration as an alternative to dispute resolution but instead provide different concepts regarding arbitration. This illustrates that resolving disputes through arbitration is the most preferred method by business actors because it is considered the most compatible with the needs of the business world.

The term arbitration comes from the word "arbitrare" (Latin) which means "the power to settle a case according to discretion". Definitions in terminology are interpreted differently by scholars today even though they actually have the same meaning, including:

Subekti states that arbitration is the settlement or termination of a dispute by a judge or judges based on an agreement that the parties will submit to or abide by the decision rendered by the judge they choose.

According to H. Priyatna Abdurrasyid, arbitration is a process of examining a dispute conducted judicially, such as by the parties to the dispute, and its resolution will be based on evidence submitted by the parties.

In the opinion of H. M. N Poerwosujipto used the term refereeing for arbitration to be interpreted as a court of peace, in which the parties agree that their dispute over personal rights over which they can control be thoroughly examined and tried by an impartial judge appointed by the parties themselves and the decision shall be binding on both parties. Arbitration is a unique form of court. The difference between court and arbitration is that the court uses a permanent or standing court, while arbitration uses a tribunal forum explicitly formed for these activities. In arbitration, the arbitrator acts as a judge in the arbitral tribunal, as well as a permanent judge, although only for the case at hand. According to Law Number 30 of 1999 concerning Arbitration and Alternative

Dispute Resolution, arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the conflict.

From some of the definitions of arbitration above, there are several elements of similarity, namely:

1. There is an agreement to hand over disputes, both those that will occur and those that happen, to one or several third parties outside the general court for decision.
2. Dispute resolution that can be resolved is a dispute involving personal rights that can be fully controlled, especially here in the fields of industrial trade and finance.
3. The judgment is final and binding.

Business people usually use this alternative dispute resolution because the nature of dispute resolution is usually a win-win solution: closed to the public, the parties' confidentiality is guaranteed, and the proceeding process is faster and more efficient. Alternative dispute resolution first developed in the United States, where at that time, alternative dispute resolution developed because of the background of the following:

1. Reduce congestion in the court. The large number of cases submitted to the court causes court proceedings to be often prolonged, resulting in high costs and usually resulting in unsatisfactory results;
2. Improve public order in the dispute resolution process;
3. Facilitate and expand access to the courts;
4. Provide opportunities for the creation of dispute resolution that results in a decision that is acceptable to all parties and satisfactory.

The existence of this arbitral institution already has a juridical/legal basis that remains in the Indonesian national legal system. M. Yahya Harahap mentioned three legal bases of this institution, namely:

Basis of Arbitration Departure Point. Namely, article 377 HIR or article 705 RBG reads: "If Indonesians or Foreign Easterners want their disputes to be decided by the separator, then they must obey the rules of the court of cases applicable to Europeans."

Everyday Basis of Arbitration. Namely, the Third Book of the Civil Procedure Law Regulation or Rv, starting from article 615 to article 651 Rv.

Foreign Arbitration Platform. The arbitration provisions provided for in the RV make no mention of foreign arbitration at all. It is as if this regulation excludes the Indonesian nation from the living environment of relations between states in arbitration. To fill this foreign arbitration vacuum, the government is motivated to regulate it which can be seen from international conventions that Indonesia has ratified, such as the International Center for the Settlement of Investment Dispute (ICSID) with Law Number 5 of 1968.

The historical development of the implementation of arbitration institutions as an alternative dispute resolution can be seen in the following description:

Dutch East Indies era At this time, Indonesia was grouped into three groups, including:

- a. Europeans and those equated apply Dutch law (Western Law) with the judicial bodies Raad van Justitie and Residentie-gerecht with the procedural law used based on the law contained in the Reglement op de Burgelijke Rechtsvordering (B.Rv or Rv).
- b. The earth's sons and those who are equated apply their customary laws. However, Western law can be applied to them if public and social interests are needed. The judicial bodies used are Landraad and several other courts such as district courts, districts, etc. The procedural law used is sourced from Herziene Inlandsch Reglement (HIR) for those living on the Java island and its surroundings. And sourced from Rechtsreglement Buitengewesten (Rbg).
- c. Chinese and other foreign Easterners since 1925 have been enforced under Western law with a few exceptions.

In addition to the judiciary as a dispute resolution institution at that time, arbitration was regulated in Article 377 HIR or Article 705 Rbg. This article shows that arbitration was controlled in the Indonesian legal system during the Dutch East Indies era.

Since 1849 (the enactment of the Code of Criminal Procedure) in articles 615 and 651 Rv which contains the understanding, scope, authority and function of arbitration. From this provision, every person in dispute at that time has the right to submit the resolution of their dispute to a person or several referees (arbitrators). The trusted arbitrator examines and decides the dispute submitted to him according to the principles and provisions desired by the parties involved. There are three arbitrations established by the Government of the Netherlands, namely:

1. Arbitration body for the export of Indonesian produce.
2. Arbitration body on fires.
3. Accident insurance arbitration body.
4. Japanese Reign

In this era, the trials of Raad van Justitie and Residentiegerecht were abolished. Japan forms one kind that applies to all people named Tihoo Hooin. This judicial body is the continuation of the Landraad. The procedural law still refers to HIR and Rbg. Regarding arbitration, the Japanese government still applies the Dutch arbitration rules based on the regulations of the Japanese Army Government, which reads: "All government bodies and legal powers of the former government remain recognized as valid for the time being as long as they do not conflict with the rules of the Japanese military government."

### **Independent Indonesia**

Article II of the Transitional Rules of the 1945 Constitution was enacted to prevent a legal vacuum after Indonesia's independence: "All existing State bodies and regulations shall immediately apply, as long as no new one has been established according to this Constitution." Thus, the arbitration rules of the Dutch era are still declared valid. Some of the series of laws and regulations that form the juridical basis of arbitration in Indonesia are:

1. Law Number 14 of 1970 concerning the Principles of Judicial Power, in the explanation of article 3.

2. Civil Code, in article 1338 paragraph (1).
3. Article 377 HIR or article 705 RBg.
4. Articles 615-651 Rv.
5. Law Number 30 of 1999 concerning Arbitration and APS.

Dispute resolution through arbitration is relatively faster than dispute resolution through general court because no other legal remedy can be submitted against the decision of the arbitration board. The decision of the arbitral board is final and binding; in contrast to the principle of judicial proceedings that are open to the public, dispute resolution through arbitration is carried out behind closed doors intended to maintain the good name of the parties.

According to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, a foreign arbitral award can be recognized and enforced in Indonesia if:

1. Such foreign arbitral award shall be rendered by an arbitrator or arbitral tribunal in a country with which bilateral and multilateral agreements concerning the recognition and enforcement of international arbitral awards bind Indonesia.
2. According to Indonesian law, The international arbitration award falls within the scope of trade law, which includes commerce, banking, finance, investment, industry, and intellectual property rights.
3. Such foreign arbitral awards are not contrary to public order.
4. The arbitration award has obtained an executor from the Central Jakarta District Court.
5. Arbitration awards involving the Republic of Indonesia as a party, the award can be recognized and enforced if it has obtained an executor from the Supreme Court, which is then delegated to the Central Jakarta District Court.

Through Law number. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, it is stipulated that the authority to handle the implementation of foreign arbitral awards is the Central Jakarta District Court. The application for the implementation of the decision is carried out after the decision is submitted and registered at the Central Jakarta District Court, by attaching the following:

1. Original sheet or authentic copy of the judgment agreement and its official translated text in Indonesian.;
2. The original sheet or authentic copy of the agreement on which the judgment is based and its certified translation in Indonesian;

A statement from the Indonesian Diplomatic Representative in the country where the decision was determined states that the applicant country is bound by bilateral and multilateral agreements with the Republic of Indonesia regarding the recognition and implementation of foreign arbitrate decisions. After the Chief Justice of the Central Jakarta District Court gives the execution order, the next execution is delegated to the Chief Justice of the District Court, who is relatively authorized to carry it out.

## **Conclusion**



Based on the results of the formulation and discussion as referred to above in the paper, it can be concluded as follows:

1. The arbitral award shall be final, have permanent legal force, and be binding on both parties. The execution of the arbitral award will only be carried out if the arbitral award by the arbitration agreement meets the requirements contained in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and does not conflict with public decency and order
2. The award from arbitration may be annulled by the parties to the dispute/dispute by asking the District Court for part or all of the contents of the prize if it is alleged to contain certain elements that can make the award void.

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