

# **REGULATIONS CONCERNING INTERNATIONAL ARBITRAL AWARDS IN INDONESIA (AN APPROACH TO THE THEORY OF LEGAL VALUES BY GUSTAV RADBRUCH)**

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*Abstract:* One of the aims that underlies the establishment of the board of arbitration is to keep business dispute settlement efficient. The principle of resolving disputes through arbitration is final and binding, indicating that this decision can be directly enforced. The law concerning Arbitration in Indonesia asserts that an arbitral award can be taken further for an appeal to a District Court, or it can even be revoked. This is normative research with a theoretical approach. The research results conclude that international arbitral awards in Indonesia do not correspond to Gustav Radbruch's theory because it fails to guarantee proportional justice for all interests and fails to ensure legal certainty due to conflicts of norms that may harm one of the parties. The clauses in the law governing arbitration in Indonesia need revising to fit Gustav Radbruch's theory by removing articles that are not accordance with the principle of justice, certainty and expediency, should be a guarantee that arbitration international awards will be recognized dan implemented in Indonesia without any interference from Indonesia courts.

*Keywords:* reward, justice, legal certainty, utility

## Introduction

Arbitration is one of the models used to settle trade disputes through Alternative Dispute Resolution (ADR) such as mediation, conciliation and dispute resolution in general courts. Arbitration is unique and semi-formal in resolving disputes between parties, and it is implemented based on the legislation of each country in dispute and regulated under an international convention. In essence, the presence of arbitration is to give a solution to the impasse amidst trade dispute resolution taking place in a general court that tends to be very formal, costly, time-consuming, and tends to disclose the dispute one of the parties is facing.

Article 34 Paragraph (1) of Law Number 30 of 1999 points out “dispute resolutions taking place in the board of arbitration can refer to either the national or international arbitration bodies as agreed upon by the parties involved.” This article underlines that arbitration consists of two; national and international, either of which has permanent arbitration and ad hoc arbitration. According to Sri Retno Widyorini, international arbitration is between two countries or between two or more people of two different countries, or two people of the same country who choose to settle disputes in an international arbitration board.<sup>1</sup> Another definition of international arbitral awards according to Law Number 30 of 1999, Article 1 Point (9) describes it as a decision taken by an arbitration body or an independent arbitrator outside the jurisdiction of Indonesia, and this decision is deemed to be an international arbitral award by the legal provision in Indonesia.

According to Susanti Adi Nugroho, an arbitral award given outside the jurisdiction of Indonesia is categorised as an international or foreign arbitral award. The territorial space of a state, according to international law, refers to part of the jurisdiction of the country concerned. Deciding whether a decision can be categorised as a national or international arbitral award

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<sup>1</sup>Sri Retno Widyorini, *Penyelesaian Sengketa Dengan Cara Arbitrase*, Jurnal Hukum dan Dinamika Masyarakat, Edisi Oktober (2006), 64.

should take into account the territorial principle and law referred to as the basis of resolving arbitral disputes.

The definition of foreign arbitration is specified in the Regulation of the Supreme Court Number 1 of 1990, defining the decision passed by an arbitration body or an independent arbitrator outside the jurisdiction of Indonesia, or the decision issued by an arbitration body or an independent arbitrator as a foreign arbitral award that holds permanent legal force according to Presidential Decree Number 34 of 1981, the State Gazette of 1981 Number 40 dated 5 August 1981. Two essential elements are included within this scope:

- a. An arbitral award issued outside the jurisdiction of Indonesia
- b. An international arbitral award

The first element is referred to as a foreign arbitral award, while the second is an international arbitral award. It is important to underline that a foreign arbitral award is different from an international arbitral award, where the former may belong to the arbitration of another country that deals with domestic or international disputes, while international arbitration is established to specifically handle international disputes. Such an international arbitration is commonly founded by an international organisation such as UNCITRAL Model Law International Commercial Arbitration, ICSID (International Centre of Settlement Investment Dispute) founded by the World Bank, and ICC (International Chamber of Commerce) founded by the Chamber of Commerce and Industries (KADIN). In terms of international boundaries, Sudargo Gautama said what is referred to as international has nothing to do with two countries but within a national scope. The term international should not be defined as the “law of nations”, not the law between countries but this term international should be understood as something that carries foreign elements.<sup>2</sup>

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<sup>2</sup>Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, (Bandung, Binacipta, 1987), 6.

Hendhy Timex points out that to determine whether an arbitral award can be deemed a national arbitral award, the following factors can be taken into account:

1. The country where the decision was made. It is a national arbitral award when it is released within the jurisdiction of the Republic of Indonesia.
2. Rules used as references when resolving disputes. If a decision is delivered in Indonesia over the disputes between Indonesian parties but it still refers to the rules of the International Chamber of Commerce/ICC), this is categorised as an international (foreign) arbitral award.<sup>3</sup>

According to Jimmy Joses Sembiring, arbitral awards refer to two, the national and international arbitral awards,<sup>4</sup> where the national arbitral awards are delivered by a domestic arbitration body of a country over domestic disputes, while international arbitral awards are delivered over international disputes. From the perspective of arbitral awards in Indonesia, Gunawan Widjaja sees arbitration in the following way:

1. National arbitral awards are delivered in Indonesia.
2. International (foreign) arbitral awards are delivered outside Indonesia

Noticing these two differing elements is important to discuss the implementation of arbitral awards.<sup>5</sup>

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution relating to national and international arbitral awards asserts that, in essence, international arbitral awards aim to give protection to the international arbitral awards taking place in Indonesia. Article 66 governs that

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<sup>3</sup>Hendhy Timex, "Pelaksanaan dan Pembatalan Putusan Arbitrase," *Lex Privatum*, Volume 1 Nomor 2, (2013), 81.

<sup>4</sup>Jimmy Joses Sembiring, "Cara Menyelesaikan Sengketa di Luar Pengadilan," (Visimedia, 2011), 91.

<sup>5</sup>Gunawan Widjaja, *Alternatif Penyelesaian Sengketa*, (Jakarta: RajaGrafindo Persada, 2001), 138.

international arbitral awards are recognised and enforced only within the jurisdiction of Indonesia if they fulfil the following criteria;

- a. International arbitral awards are given by arbitrators or the board of arbitrators of another country bound by an agreement with Indonesia, either in bilateral or multilateral scopes, regarding the recognition and enforcement of international arbitral awards;
- b. International arbitral awards as referred to in letter a are limited to the decisions over trade cases;
- c. International arbitral awards as referred to in letter a can only be enforced in Indonesia and are limited to the decisions not contravening public policy;
- d. International arbitral awards can be implemented in Indonesia after an authority to enforce is granted by the Chief Judge of the District Court of Central Jakarta; and
- e. International arbitral awards as referred to in letter a involving Indonesia as one of the conflicting parties can take place after the authority to enforce is granted by the Supreme Court of the Republic of Indonesia, and this authority is further delegated to the District Court of Central Jakarta.

Law is made to guarantee justice, legal certainty, and utility for all, including foreign parties. A good law must provide justice, ensure legal certainty, and provide utility to all parties. Looking at the provision specified in Article 66, the author sees juridical problems and regards the clauses regarding agreements, public policy, and execution from the Chief Judge of the District Court of Central Jakarta as not in line with the principles of justice, certainty, and utility, thus, also not in line with the theory of legal values as introduced by Gustav Radbruch. Departing from these problems, this research seeks to profoundly investigate the problems of arbitration law in Indonesia seen from the three aspects mentioned regarding the regulations and implementation of international arbitral awards in Indonesia.

The types of this research is normative juridical research with object of statutory regulations, with statutory and theoretical

approach, data sources used secondary data, all data are reviewed in such a way that they are related to the research object so that they are able to answer the problems studied, all data is analysed using qualitative analysis method and the end deductive conclusions can be drawn.

### **Regulations Concerning International Arbitral Awards In Indonesia (An Approach To The Theory Of Legal Values By Gustav Radbruch)**

Gustav Radbruch, in his book *“einführung in die rechtswissenschaften”*, mentions three fundamental values: justice, legal certainty, and utility. This triad is principally rooted in three sources of essential tenets of law, consisting of philosophical, legal, and sociological principles. Justice value is sourced from sociological tenet. That is, the establishment and the enforcement of a good law in a state should adhere to these three elements. Law must be able to create justice capable of encompassing all individual and public interests. The law must serve as a pillar of certainty and must not carry legal loopholes and conflicting norms or murky norms; the law must be able to guarantee the greatest benefits for all individuals, people as a whole, and the state. Principally, the existence of the legal certainty principle should be understood as a condition of certainty resulting from a concrete power in the law concerned.<sup>6</sup> To principally attain the law, an ideal legal product must also encompass all three elements as a unity within which those elements are closely knitted.<sup>7</sup>

With Gustav Radbruch’s theory, this research will investigate disproportionality in arbitration law in Indonesia seen from the perspective of justice, legal certainty, and utility.

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<sup>6</sup> Maryo Julyano, Aditya Yuli Sulistyawan, “Pemahaman Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum”, *Jurnal Crepido*, Vol.1 No.1 ( 2019), 14.

<sup>7</sup> Nuraida Fitrihabibi, Rafikah, Ardian Kurniawan, “Kepastian Hukum, Kemanfaatan Dan Keadilan Pemidanaan Kejahatan Asal Usul Perkawinan (Analisis Putusan No. 387/Pid.B/2021/Pn.Jmb)”, *Al-Jinâyah: Jurnal Hukum Pidana Islam* Vol. 7, No. 2, (2021), <https://doi.org/10.15642/Aj.2021.7.2.484-509>

## A. Justice

The term justice is often associated with an attitude or character in most literature. This is justice which will encourage a person to act or to hope for justice,<sup>8</sup> while law enforces justice, and judicial institutions are expected to deliver verdicts over cases justly. In this context, requesting business-related dispute resolution in an arbitration body is nothing but to expect justice, to claim the right and to demand the fulfilment of obligations not attained by other parties according to a binding agreement. Justice is defined as fair and impartial treatment. Justice only favours the right ones and must not harm others; justice represents equality for all proportional to every person's right.<sup>9</sup> The embodiment of justice and social justice in a state of law is a primary, fundamental, but complicated, structural, and abstract principle.<sup>10</sup> Dispute resolutions through arbitration are mainly intended to bend lengthy bureaucracy common in general courts. Therefore, dispute resolutions in arbitration are expected to be faster, more efficient, and affordable, while the interests of all parties should be accordingly maintained.

Like other arbitration bodies, the Indonesian National Board of Arbitration (henceforth referred to as BANI) asserts that decisions made by BANI are final and binding. The process is expected to be fast, less complicated, and holds permanent legal force for immediate execution. Registering an arbitral award to the clerk of the District Court should not be an issue of delaying the enforcement of an arbitral award. Regarding this issue, Arif Edison argues that

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<sup>8</sup> Inge Dwisvimiar, "Keadilan Dalam Perspektif Filsafat Hukum", *Jurnal Dinamika Hukum* Volume 11 Nomor 3 (2011), p.523.

<sup>9</sup> Hari Agus Santoso, "Perspektif Keadilan Hukum Teori Gustav Radbruch Dalam Putusan PKPU "Ptb"", *Jatiswara* Volume 36 Nomor 3 (2021), 325-334)

<sup>10</sup> Purwanto, "Perwujudan Keadilan dan Keadilan Sosial Dalam Negara Hukum Indonesia", *Indonesia Arbitration Quarterly Newsletter*, Volume 10 Nomor 3 September (2019), p.2.

registering an arbitral award to the clerk of the District Court that serves as the formal requirement may hamper the implementation of the arbitral award. In other words, this condition undermines the authority of an arbitration body.<sup>11</sup>

The mandatory registration of an arbitral award that has to be submitted to the clerk of the District Court has weakened the self-executable power of the arbitral award, and it has positioned the arbitration body as the “sub-element” of the District Court. This registration of the international arbitral award to the District Court of Central Jakarta should serve only as an administrative requirement to prove that a decision has been made. This compulsory registration of the arbitral award to the clerk of the District Court may render the decision not executable, which contravenes the principle of good judicature. Erman Suparman holds that in the case of the jurisdiction of the District Court towards the arbitration forum, Law Number 30/1999 is biased and contains ambivalent norms. This law renders excessive authority to the District Court in interfering with the dispute resolution process through arbitration. From the time an arbitrator is appointed to the time an arbitral award is enforced, the District Court has held a dominant power. That is, the jurisdiction of the District Court toward the forum of arbitration is deemed powerful, rendering the arbitral award final and binding for all parties. However, such power status does not hold any executorial power without the interference of the court.

This is the fact outlined in the Law Number 30 of 1999 stating that an arbitration body responsible for resolving disputes does not hold any legal power without any interference from the role of the court. An international arbitral award should be entitled to recognition from the

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<sup>11</sup>Arif Edison, “Mekanisme Peradilan oleh Mahkamah Agung yang Bertentangan dengan penerapan Klausula Arbitrase Menurut Undang-Undang Nomor 30 Tahun 1999 (Studi Kasus Putusan Mahkamah Agung Nomor 586K/PDT.SUS/2012,” Usep Ranawidjaja Research Center



District Court of Central Jakarta, or this award is not executable in Indonesia. With political will, as said by Erman Suparman, the government of Indonesia can put the arbitration forum as one of the forums in a position equal to the district court where the trade disputes are resolved. This step may be initiated by amending Law Number 30 of 1999. Some Articles in the law seem to subordinate the arbitration to the district court, and this provision should be scrapped and replaced by another provision marking the arbitration status to ensure that this arbitration body is equal to the district court.

This research is in line with the thought of Erman Suparman holding that arbitration is one of the options to settle disputes, and it should be positioned equal to the level of other courts, thereby granting the arbitration absolute authority to settle business-related disputes. It is more like the government granting authority to an adat institution, allowing local communities to settle the problems according to their adat law. All of this possibility is impossible unless the government carries strong goodwill to make this happen.

Departing from the above elaboration, this research senses unfair treatment by the government to the arbitration body in dealing with trade problems:

1. Request for recognition of settling trade disputes from the District Court of Central Jakarta that is made mandatory indicates that the international arbitration body has been subordinated to the District Court;
2. A mandatory request for execution to the District Court to allow for the execution of an international arbitral award indicates that an international arbitration body does not hold any absolute authority;
3. Mandatory request for execution to the Supreme Court in the case involving the Indonesian government as one of the parties indicates that most-favourite-nation principle remains dominant;

4. There are only three reasons underlying the cancellation of an arbitral award, limiting the rights of the parties to request the cancellation of an arbitral award. However, the cancellation of the award, particularly the international arbitral award, should adhere to the cancellation governed in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Award and the United Nations Commission on International Trade Law (Uncitral) Model Law on International Commercial Arbitration.<sup>12</sup>

This mandatory request for the execution that has to be registered to the District Court shows the absence of an equal-before-the-law principle between national and international arbitral awards. This tendency may raise global distrust of the Indonesian government, particularly when the Indonesian government is the party that has to request enforcement from the Supreme Court, notwithstanding its connection to international arbitrations such as Uncitral, ICC, and ICSID with excellent reputation and credibility in settling business-related disputes at an international level.

It is without doubt that the government has overlooked justice principles, harming the parties in dispute, while these parties leave the trust to the arbitration body to settle disputes with the agreement of the two parties. The agreement seems to get an unfair return simply when an arbitration body is only positioned as a sub-element of the District Court. In this condition, the arbitration body loses its power to execute simply because it is not granted absolute authority to settle trade-related disputes. Arbitration Law limits those concerned to refer to only three reasons for

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<sup>12</sup>Tri Aripriabowo, R. Nazziyah, "Pembatalan Putusan Arbitrase oleh Pengadilan dalam Putusan Mahkamah Konstitusi Nomor 15/PUU-XII/2014", *Jurnal Konstitusi*, Volume 14 Nomor 4 (2017), 712.

cancelling an arbitral award, and this policy revokes the rights of the parties in dispute to transcend those three reasons.

The justice principle in settling trade disputes is considered paramount and needs to be upheld in arbitration practices because the *ex aequo et bono* principle has to be applied. The enforcement of the law that adheres to this principle also carries the sense of the principle of *res judicate pro veritate acciptur*, asserting that what is outlined in a decision is deemed true.<sup>13</sup> Gustav Radbruch believes that law represents “the will to act justly”. The presence of positive law is to “promote moral values”, particularly justice.<sup>14</sup> Justice is the idea in the law that holds a primary, vital, and fundamental aspect. That is, the position of an arbitration body should be made equal to other courts in terms of its authority to settle disputes. Drafting law should take into account the concept of penal mediation/reconciliation. It has been the norm that when the case is settled in penal mediation, this case should not be brought further to the penal procedure and no interference from the court is necessary. The presence of arbitration must be prioritised to show that respect for the preference of legal remedies among the parties involved is upheld according to the agreement made. The recognition and the implementation of an arbitral award should come as a consequence of ratifying the New York Convention on 5 August 1981 according to the Presidential Decree Number 34 of 1981, and this ratification was promulgated in the Official Gazette Number 40 of 1981 and officially registered on 7 October 1981.<sup>15</sup>

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<sup>13</sup> Ricco Akbar, “Ex Aequo Et Bono Di Dalam penerapan Lembaga Arbitrase Nasional Indonesia”, *Indonesia Arbitration Quarterly Newsletter*, Volume 11 Nomor 1, (2019),14.

<sup>14</sup> Nafi' Mubarak, “Keadilan Hukum Dalam Penyelesaian Sengketa Lingkungan Hidup Di Indonesia”, *al-Daulah: Jurnal Hukum Dan Perundangan Islam*, Volume 10, Nomor 2, (2020). <https://doi.org/10.15642/ad.2020.10.2.335-368>

<sup>15</sup> Nirmala, *Pengakuan dan Pelaksanaan Putusan Arbitrase Internasional (Asing) di Indonesia*, (Jakarta: Binus University, 2017).

## B. Legal Certainty Aspect

Legal certainty is defined as a legal instrument of the state that can guarantee the rights and obligations of every citizen.<sup>16</sup> The main difference between a court decision and an arbitral award lies in the nature of the decision. Court decisions can go further to an appellate court, cassation, or judicial review, while arbitral awards hold permanent legal force and are final and binding to all parties (Article 59 paragraph (2) of Law Number 48 of 2009 concerning Judiciary Power and Article 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution). Article 54 paragraph (1) asserts that an arbitral award must contain the phrase “for justice that complies with God Almighty” in the heading of the arbitral decision. This phrase is standard and mandatory in a court decision. The decision failing to contain this phrase is defective. Susilawetty holds that, as cited by Jessicha Tengar Pramolango, the phrase above carries the meaning that the arbitral award holds permanent legal force equal to that of the court decision, as in line with Article 2 of Law Number 48 of 2009 paragraph (1) concerning Judiciary Power, stating that judicature takes place for justice that complies with the God Almighty.<sup>17</sup>

Notwithstanding the above proposition, international arbitral awards cannot necessarily be recognised and enforced in Indonesia since the authority to enforce must be requested from the District Court of Central Jakarta. If the Indonesian government is one of the parties involved in the dispute, the authority to enforce must be obtained from the Supreme Court, as governed under Article 66 points d and e. However, an arbitral award can be revoked by one of the

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<sup>16</sup> Nyoman Gede Remaja, “Makna Hukum dan Kepastian Hukum, Kertha”, *Widya Jurnal Hukum*, Volume 2 Nomor 1, (2014), 2.

<sup>17</sup> Jessicha Tengar Pramolango, “Tinjauan Yuridis Terhadap Kewenangan Arbitrase Dalam Penyelesaian Sengketa,” *Jurnal Lex Administratum*, Volume III Nomor 1, (2015), . 151).

parties by submitting the request addressed to the Chief Judge of the District Court, as regulated under Article 70 of Arbitration Law, but both national and international arbitral awards are not further elaborated in this article.

Article 59 Paragraph (2) of Law Number 48 of 2009 concerning Judiciary Power implying that arbitral awards hold permanent legal force and are final and binding to all parties must be obeyed by all parties in dispute with good faith, considering that arbitration is taken by the parties under an agreement outlined in an arbitral agreement.<sup>18</sup> However, things agreed upon voluntarily are prone to breaches.<sup>19</sup>

At a closer look, the articles concerning legal problems of the recognition, implementation, and revocation of international arbitral awards contravene one another in either arbitration law or judiciary power law, leading to legal uncertainty.

The following provisions may serve as instruments to measure the conflict of norms in Law Number 30 of 1999:

- a. Article 59 paragraph (2) of Law Number 48 of 2009 concerning Judiciary Power asserts that “arbitral awards hold permanent legal force and are final and binding to all parties”. However, an executorial statement must be requested from the District Court of Central Jakarta. Revoking the grounds as the basis for the awards from Article 70 by the Constitutional Court Decision Number 15/PUU-XII/2014 has also ruined legal certainty;
- b. Article 3 of the Law concerning Arbitration and Alternative Dispute Resolution asserts that “The District Court is not authorised to judge disputes of parties who are bound by the arbitral agreement,”

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<sup>18</sup>Panusunan Harahap, “Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan”, *Jurnal Hukum dan Peradilan*, Volume 7 Nomor 1 (2018),.147.

<sup>19</sup>Mosgan Situmorang, “Pelaksanaan Putusan Arbitrase Nasional di Indonesia”, *Jurnal Penelitian Hukum De Jure*, Volume 17 Nomor 4 (2017), .310.

while the revocation of an international arbitration body can involve appeal in the Supreme Court. This leads to legal uncertainty for all parties bound by the arbitral agreement. The involvement of a judiciary institution allows for bureaucratic and formal arbitral processes, rendering them more complicated and costly.<sup>20</sup> At this level, the court concerned should not meddle in disputes, in which all parties agree to settle disputes through arbitration, let alone revoking an arbitral award (with less intervention of the state);<sup>21</sup>

- c. In terms of the request for the recognition of an international arbitral award submitted to the District Court of Central Jakarta, If the request for the recognition of arbitral awards is refused, the arbitral award can be deemed “non-existent”.
- d. The requirement requiring international arbitral awards to take place in Indonesia will raise a greater issue hampering the implementation of international arbitral awards in Indonesia.
- e. The clause concerning arbitral awards can only be implemented in Indonesia unless this clause contravenes “public policy” and if the interpretation only refers to that made by the Indonesian government.
- f. The restriction of reasons behind the cancellation of an arbitral award referred to by parties in Law Number 30 of 1999 is not relevant to the New York Convention and Uncitral Model Law, leading to legal uncertainty for parties planning to request cancellation in Indonesia, while Indonesia has ratified the New York Convention.

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<sup>20</sup>Ayu Atika Dewi, “Problematika Pelaksanaan Putusan Arbitrase Internasional di Indonesia, (Kajian Terhadap Konsep Keadilan Dalam Perspektif Filsafat Hukum dan Filsafat Hukum Islam”, *Jurnal Panorama Hukum*, (2017), .133.

<sup>21</sup>Yeni Widowaty, Fadia Fitriyanti, “Membangun Model Perlindungan Hukum Terhadap Masyarakat Sebagai Korban Pencemaran dan/atau perusakan lingkungan oleh Korporasi dengan Prinsip Restorative Justice”, *Jurnal Media Hukum*, Volume 21 Nomor 2 (2014),.216.

This provision is also prone to delay in the obligation to enforce the award.<sup>22</sup>

In the context of final and binding awards, Imas Rosidawati Wiradirja sees there is inconsistency among those who drafted Law Number 30 of 1999. On one hand, arbitral awards are final and binding; on the other hand, they are left to be reviewed and examined in terms of either their execution or cancellation of arbitral awards.<sup>23</sup>

The above articles show that arbitral awards are final and legally binding to parties. These articles do not need further interpretation on account of the absolute nature of arbitral awards. Arbitral awards hold legal force to be immediately executed, but the law seems to leave a chance for them to be settled outside the arbitration, which contravenes the provision of Article 3 of the Law that strictly forbids interference from the court in dealing with disputes under arbitral agreements.

Article 59 states that thirty days after an award was declared, the authentic copy of an arbitral award should be submitted and registered by an arbitrator or the person in charge to the clerk of the District Court. This submission involves the authentic copy of the appointment of arbitrators. Without this submission, the arbitration may not take place. This Article implies that an arbitral award cannot be immediately enforced because it has to be first registered with the clerk of the District Court. The author senses that the arbitration body established under the mandate of the law should be authorised to execute the award. Imas Rosidawati Wiradirja also states:

The incomplete drafting of Law Number 30 of 1999 is particularly related to enforcement. As a proper legal system, this system should be supported by a set of

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<sup>22</sup>Mosgan Situmorang, "Pembataan Putusan Arbitrase", *Jurnal Penelitian Hukum De Jure*, Volume 20 Nomor 4 ( 2020),.583.

<sup>23</sup>Imas Rosidawati Wiradirja, "Pelaksanaan Eksekusi Putusan Arbitrase Nasional Dalam Sistem Hukum Indonesia", Makalah, 9..

instruments. As a system used in private dispute resolution, it should involve executorial instruments, recalling that this executorial process takes place at the final stage of resolving disputes when the parties involved are not willing to implement awards voluntarily. Without these instruments, arbitral awards may face issues in their implementation.<sup>24</sup>

At the stage of setting an arbitral award, the award still carries permanent legal force, but without any authority given, the award concerned is no longer final and binding. That is, there should not be any more excuses for delaying the execution of the arbitral award if this law conforms to final and binding principles; therefore, all parties are obliged to respect the decision delivered by the arbitration body, considering that the choice of arbitration is based on the will of the parties involved in the dispute without any coercion from general courts. All parties should, with good faith, respect and execute the arbitral award or the panel of arbitrators with open arms. In line with the principle of *pacta sunt servanda*, the principle of good faith must be present before, during, and after the arbitral award regardless of the result of the decision.<sup>25</sup>

The final and binding principle is also governed under the Regulation of the Procedure of BANI, Article 32, stating “decisions are final and binding to all parties. The parties involved are to immediately execute the award”.<sup>26</sup> In the decision, the Panel sets the time limit for the losing party to enforce the award where sanctions/fines/interests may be imposed at reasonable amounts if the losing party fails to comply with the result of the award. This indicates that BANI expects the losing party to abide by the international

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<sup>24</sup>*Ibid.*, hal. 8.

<sup>25</sup>Magdalena Sirait, “Asas Itikad baik Dalam Penyelesaian Sengketa Komersial Melalui Lembaga Arbitrase BANI (Badan Arbitrase Nasional Indonesia)”, *Indonesia Arbitration Quarterly Newsletter*, Volume 11 Nomor 1, (2019),17.

<sup>26</sup>Badan Arbitrase Nasional Indonesia (BANI), *Peraturan Prosedur Arbitrase Badan Arbitrase Nasional Indonesia*, Pasal 32.



arbitral award. Yahya Harahap said “The final and binding of the awards delivered by BANI are obvious; they can be immediately executed, and there is no chance for cassation for simpler, more efficient, and faster arbitral processes. Without both appeal and cassation, the decisions are more efficiently executable.”<sup>27</sup>

### C. Utility Aspect

It is mandatory for all countries having ratified the New York Convention 1958 governing the recognition of foreign arbitral awards to execute the provisions specified under this convention. By ratifying the New York Convention through Presidential Decree Number 34 of 1981, the Indonesian Government is bound by the provisions outlined in the Convention.

Mutiara Hikmah in her journal article entitled *Pengakuan dan Pelaksanaan Putusan Arbitrase Asing di Indonesia* holds that by joining the New York Convention 1958, Indonesia is bound by the provisions outlined in the Convention. “<sup>28</sup> Article I of the New York Convention 1958 asserts that this Convention must be enforced for the recognition and the execution of an arbitral award given within the jurisdiction other than the country where the recognition and execution have been requested. The execution has to apply to domestic awards in the state where the recognition and execution of the arbitral award has been requested.

Article III asserts that the signatory states of this Convention are obliged to recognise arbitral awards as binding and execute the awards according to the system that applies in the country where the awards are to be executed. No heavier consequences or burdening costs should arise in the recognition and execution of arbitral awards according

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<sup>27</sup>Yahya Harahap, *Arbitrase*, Jakarta Sinar Pustaka, 2006), 254.

<sup>28</sup>Mutiara Hikmah, “Pengakuan dan Pelaksanaan Putusan Arbitrase Asing di Indonesia”, *Indonesia Journal of International Law*, Volume 5 Nomor 2 (2008), 322.

to the Convention compared to the domestic arbitral awards. That is, the Convention requires every state to recognise arbitral awards of other institutions and/or other states and to execute the awards like in domestic arbitral awards. The New York Convention 1958 is the vital source of law in the recognition of foreign/international arbitral awards, as Michael Hwang S.C and Shaun Lee state "*the importance of implementing legislation cannot be understated as ratification alone might still be insufficient to protect the right of parties seeking to enforce their arbitral award.*"<sup>29</sup> Therefore the ratification of the Convention is to safeguard all parties requesting the execution of the arbitral awards. This convention also regulates the reasons for which countries may refuse to recognise and enforce foreign arbitral awards, as in line with Article V:

- a. The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b. The party against whom the award is invoked was not given proper notice of the appointment of arbitrators or the arbitration proceedings or was otherwise unable to present his case; or
- c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters

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<sup>29</sup>Michael Hwang S.C. and Shaun Lee, "Survey of South East Asian Nations on the Application of the New York Convention," *Journal of International Arbitration, Kluwer Law International*, Netherland, (2008), 874.

- submitted to arbitration may be recognised and enforced; or
- d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - e. The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.<sup>30</sup>

Arbitral awards can be refused if the authority of the country where recognition is requested has the following problems:

- a. The matters concerned are not congruous with applicable legal provisions in the country.
- b. The recognition and enforcement of the foreign arbitral award contravene the public policy of the country concerned.

This Convention obviously carries murkiness. On one hand, the Convention requires every country to recognise arbitral awards. On the other hand, there is a chance to refuse foreign arbitral awards, certainly affecting the rules of the country which also set the requirements for the recognition of foreign arbitral awards. This refusal will lead to the condition where foreign arbitral awards may not be enforced, leaving the awards in vain, particularly for the winning party. Ahmad Rizal in in the journal *The 1958 New York Convention is the Foundation of International Commercial Arbitration Stands* states that “considered as the most successful convention in private world, New York Convention still has some weaknesses. One of them is that the Court can refuse to enforce the

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<sup>30</sup>Article V Point 1 of New York Convention 1958.

Regulations Concerning International Arbitral Awards in Indonesia *awards by its own initiative or by the initiative of one party.*<sup>31</sup> Although the New York Convention is a success in international private matters, this Convention still has shortcomings, where courts can refuse foreign arbitral awards due to either the initiative of the court or the initiative of one of the parties. However, this Convention was established to provide legal certainty for the winning party and force the losing party to execute the award immediately.

Law Number 30 of 1999 regulates the recognition of international arbitral awards, particularly in Article 65 stating that the District Court of Central Jakarta is authorised to recognise and enforce international arbitral awards. Article 66 governs that international arbitral awards can only be recognised and enforced within the jurisdiction of Indonesia if they meet restricted requirements.

The award made by an international arbitration cannot necessarily be recognised in Indonesia because the law concerned sets strict rules regarding the recognition of international arbitral awards. The first requirement is that the two countries have ratified the New York Convention of 1958 concerning the Recognition and Enforcement of Foreign Arbitral Awards. The scope of the awards only covers trades. The awards must not contravene public policy and have received an executorial statement from the District Court of Central Jakarta. The existence of the measures taken to request the recognition of international arbitral awards indicates that the awards do not have any legal certainty, particularly when the awards are deemed to contravene public policy, prone to multi-interpretation, and have to be granted the executorial statement by the District Court. In other words, international arbitral awards are

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<sup>31</sup>Ahmad Rizal, "New York Convention is the Foundation of International Commercial Arbitration Stands," *Indonesia Arbitration Quarterly Newsletter*, Volume 7 Number 2, .31.

under the control of the District Court. Susanti Adi Nugroho argues that the following three factors hinder the enforcement of international arbitral awards in Indonesia; first, the awards are not final; second, the awards contravene the legislation in Indonesia and public policy; third, the decisions made are not the ones that can be settled by arbitrators (non-trade cases). As long as international arbitral awards meet these three provisions, the District Court of Central Jakarta and/or the Supreme Court must recognise and enforce the awards.

An international arbitral award registered to be recognised has no permanent legal force to be enforced because it has to wait for further process with varied legal measures used by parties. It renders the existence of arbitration incapable of guaranteeing benefits for all businesses, considering that fast and simple resolution is the fundamental need for all business owners. That is, this provision needs amending. Hikmahanto Juwana points out that if the existing law fails to fit the needs of the people, adjustment needs to take place to ensure that the performance of the economy and businesses in Indonesia is well supported.<sup>32</sup>

The above analysis implies that international arbitral awards made by arbitrators or the board of arbitrators cannot be immediately enforced in Indonesia because they need to be first registered with the District Court of Central Jakarta and receive recognition and an executorial statement from the court. Similarly, international arbitral awards whose enforcement was requested in Malaysia cannot immediately be enforced since they have to be granted recognition from the High Court of Malaysia. Jelly Nasserri in his journal entitled *Eksistensi Konvensi New York dalam Pelaksanaan Putusan Arbitrase Internasional di Indonesia* argues that foreign arbitral awards should be enforced immediately

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<sup>32</sup>Hikmahanto Juwana, *Politik Hukum UU bidang Ekonomi di Indonesia*, (teaching material of the first lecture in the subject of Economic Development Law in PPS FH UII 15 January 2012). 7.

right after they are registered to the District Court of Central Jakarta, recalling that the results of the arbitral awards follow win-win solution principle.

In terms of the clause asserting that international arbitral awards can only be recognised unless they contravene public policy, Jelly Nasserri adds that the absence of limitation in the definition of public policy renders the enforcement of international arbitral awards impossible because the awards fail to conform with public policy. This implies that judges in Indonesia have access to unlimited power to investigate foreign arbitral awards before they are enforced. However, an arbitral award has been embedded with executorial power since the day it was made and it holds legal force and has a position equal to a court decision. The registration of the intention of a foreign arbitral award should be used as an administrative requirement before being executed.

The meaning of public policy is in essence not definitive, and it has raised legal uncertainty for the parties because this definition may extend and get wider. There may be varied interpretations on account of the absence of standards between countries. The contravention of public policy is the reason that has been used as an excuse by a country to refuse the recognition and the enforcement of an arbitral award. Such a situation raises legal uncertainty affecting parties. Legal certainty should encompass all aspects of the law, not only the substantive matter of the law but also the enforcement. In the context of public policy, Nor Sa'adah Abd Rahman, et. al in their book *The Principles of Commercial Law* asserts: "A void contract does not give rise to any rights or obligations. It is important to remember that a contract is only void so far as contrary to public policy. This means that the whole agreement may not be void."<sup>33</sup> This

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<sup>33</sup>Nor Sa'adah Ardurrahman, et. al, *The Principles of Commercial Law*, (Universitas Teknologi Malaysia, Johor Bahru, 2011), 94.

indicates that although an arbitral agreement can be cancelled on the grounds of its contravention of public policy, not all the agreements deemed contravening public policy can be cancelled. This is because it may give a sense that cancellation is easy to do due to its contravention of public policy, while the limit of public policy has not been vividly regulated and each country will have its own view towards public policy. Mahmud Siregar explains that in the legal system in Indonesia, the nature of final and binding principle in an arbitral award is imperatively recognised in Article 60 of Law Number 30 of 1999 simply because there is no chance given for appeal, cassation, and judicial review of the arbitral award. A dispute was once decided under an arbitral award, and it was controversial. The execution of the award was too lengthy, ending up assuming that legal certainty in Indonesia was tenuous.<sup>34</sup>

The consequence of the inconsistency of the regulations regarding arbitration may lead to tenuous legal certainty in the settlement of disputes through arbitration in Indonesia. Not only will it trigger controversy, but the capability of Indonesia to deal with arbitral law may be underestimated by the world.

Seen from the utility of the regulation in a law, arbitration law in Indonesia should guarantee positive influences on the settlement of trade disputes, particularly when this settlement involves foreign elements. The following are the arguments given by the author implying that arbitration law in Indonesia has not fully met the utility aspect:

1. The arbitral agreement between the parties involved in trade disputes settled through arbitration is not fulfilled due to the intervention of the District Court and the Supreme Court;

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<sup>34</sup> Mahmud Siregar, "Kepastian Hukum Dalam Transaksi Bisnis Internasional dan Implikasinya Terhadap Kegiatan Investasi di Indonesia," (Paper. Research Result Seminar, a Lecturer of Law Faculty, Universitas Sumatera Utara).

2. The expectation for faster and more efficient dispute settlement between business owners cannot be met because the awards must be first registered for recognition from the District Court of Central Jakarta;
3. The measures of curtailing the piling work of trade disputes in the District Court are hampered, contrary to the purpose of the establishment of arbitration to expedite the settlement of trade disputes;
4. Lengthy dispute settlement may leak information on the disputes that a business is suffering from, ruining the privacy and the interest of the business concerned;
5. The regulation that requires the registration for the recognition of international arbitral awards will raise distrust of the performance of judicatures in Indonesia globally, particularly when one of the parties involved is the Indonesian government. This condition may also lead to an assumption that there is a greater political interest outweighing the objectivity of the case that takes place.

Base on the fact that the provisions in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in the clause governing recognition and implementation of international arbitration award in Indonesia are not in line with Gustav Radbruch's theory of legal value then the clauses in the law governing arbitration in Indonesia need revising to fit Gustav Radbruch's theory by removing articles that are not accordance with the principle of justice, certainty and expediency, should be a guarantee that arbitration international awards will be recognized dan implemented in Indonesia without any interference from Indonesia courts.

## **Conclusion**

International arbitral awards are not congruous with Gustav Radbruch's theory since they have not fulfilled the balance of justice for varied interests and legal certainty due to the conflict of



norms that remains, and all parties perceive no significant benefits. This certainly raises global distrust, doubting the capability of Indonesia, and contravenes the New York Convention of 1958 concerning the Recognition and Enforcement of Foreign Arbitral Awards. Problematic clauses specified in Law Number 30 of 1999 may weaken the will of the business actors to use arbitration to settle their disputes simply because the spirit to revive arbitration as one of the effective business-related dispute settlements does not conform to the regulations specified in the law.

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