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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

The 5th International Conference and Call for Paper Faculty of Law 2019 Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

<i>FRONT PAGE</i>	<i>I</i>
<i>Information of The International Seminar</i>	<i>III</i>
<i>Committee Composition</i>	<i>IV</i>
<i>PREFACE</i>	<i>V</i>
Fulfillment Of Teacher Protection Rights <i>Yenny AS, Rini Setiawati</i>	<i>I</i>
Legal Reconstruction Of Laws Regarding Human Rights Through Judicial Re- view To The Constitutional Court <i>Umar Ma'ruf</i>	<i>13</i>
Legal Analysis Of Social Security Transformation And The Reality Of Its Implementation In The Community In Indonesia <i>Siti Ummu Adillah, I Gusti Ayu Ketut Rachmi Handayani ,Adi Sulistiyono</i>	<i>30</i>
Increasing Voluntary Compliance Of Tax Payments In Micro Small And Medium Enterprises (Msmes) Post-Issuance Of Government Regulation Number 23 Of 2018 (Case Study In Semarang City) <i>Amin Purnawan, Akhmad Khisni, Aryani Witasari</i>	<i>41</i>
Legal Analysis Of Racist Exams In Surabaya Papua Dormitory <i>Ma'aruf Akib</i>	<i>50</i>
Reconstruction Of Misdemeanor Settlement Based On Pancasila Value <i>S. Andi Sutrasno</i>	<i>57</i>
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights <i>Adhi Budi Susilo, Indra Yuliawan</i>	<i>63</i>
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice <i>Rahmatsyah</i>	<i>67</i>
Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice <i>Widayati , Winanto</i>	<i>73</i>

Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methodsbased On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Sopyono, Nuridin</i>	82
Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice <i>Carto Nuryanto, Gunarto, Anis Mashdurohatun</i>	91
Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP) <i>muhamad Iqbal al Hakiem,aryani witasari</i>	96
Reconstruction Completion Of The Crime Of Light On Value Pancasila <i>Andi S. Sutrasno</i>	102
Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value <i>Wieke Dewi Suryandari ; Gunarto; Amin Purnawan</i>	108
Reconstruction Of Transport Regulatory On Marine Toll To Support Sea Connectivity Based On Pancasila Justice <i>Hartanto, Gunarto, Anis Mashdurohatun</i>	114
Reconstruction Of Scientific Investigation In Indonesia Based On Justice <i>Teguh Prihmono; Gunarto, Sri Endah Wahyuningsih</i>	120
Legal Construction On Training Ship Management Belongs To Human Resources Development Of Transportation (Bpsdmp) Based On Dignity Justice Value <i>Wahyu Wibisono, Gunarto, Anis Mashdurohatun</i>	126
Protection Of Law Refugees/Asylum Seekers In Indonesia (As A Transit State) No Ratify 1951 Convention Of And The 1967 Protocol <i>Muhammad Djamir</i>	133
Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children) <i>Cucuk Kristiono, Gunarto, Anis Mashdurohatun; Suparji</i>	144
Legal Protection Against Indonesian Workers (Tki) In Abroad <i>Yaya Kareng ,Ong Argo Victoria ,Sri Yulianingsih</i>	149
Recontruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice <i>Moh Djarkasih**</i>	158

Reconstruction Policy Of Sanctions Against Destruction Of Evidence Illegal Fishing Based Small Fishing Welfare Values <i>R. Juli Moertiyono</i>	165
Reconstruction Of Legal Policy Interfaith Marriage In Indonesia <i>Moh. Zeinudin, Dian Novita</i>	179
Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia <i>Nana Ruhyana</i>	186
Legal Protection Against Disability In Getting Work <i>Oktavianto Setyo Nugroho</i>	193
Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice <i>Agus Sugiarto</i>	203
Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws <i>Yanto Irianto</i>	208
Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice <i>Asep Hermawan</i>	220
Reconstruction Of Performance Assessment Of Drinking Water Companies (Pdam) Based On Consumer Protection <i>Bustaman</i>	225
Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt <i>Euislistianti</i>	229
Reconstruction Of Operational System As A Community Economic System Based On Welfare <i>Abbas Ibrahim Idris</i>	234
Reconstruction Of Criminal Responsibility For Actors Prostitutorial Criminal Justice In The Criminal Justice Based On Value <i>Iwan Rasiwan</i>	242
Reconstruction Of Legal Drinking Water Management Company (Pdam) Based On Justice <i>Suharyadi</i>	248

Reconstruction Of Private Criminal System Implementation In The Commitment Values In Indonesia Justice <i>Sumanto</i>	252
Reconstruction Of Justice Law Protection Law Protection <i>Wamyani</i>	260
Criminal Code Draft Law And Development In Indonesia <i>Nany Pujianti Suwigjo</i>	265
Deconstruction of the Principle of Legal Thinking <i>Sriyati</i>	270
Development Of The Law Of Complete Systematic Land Registration (Ptl) And Effect Of Conduct Values of Land Based On Dignify Justice In The District Of Kendal, Central Java <i>Desy Dwi Nurhayati Hartanti</i>	279
Interpretation Teaching Of Human Rights Laws Against Material In Corruption Provisions <i>Burham Pranawa, Hartiwiningsih, Hari Purwadi</i>	293
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice <i>Rahmatsyah</i>	301
Law Due To Delay The Registration Under Fiduciary Guarantee Pmk No 130 / Pmk.010 / 2012 <i>Jaenudin Umar</i>	307
The Effectiveness Of The Handling Of The Criminal Acts Of Light Tend To Be Settled Judicial Custom <i>Supena Diansah</i>	313
Interpretation Human Rights Law Against The Teaching Material In Corruption Criminal Offenses <i>Burham Pranawa, Hartiwiningsih, Hari Purwadi</i>	319
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights <i>Adhi Budi Susilo, Indra Yuliawan</i>	327
Independence Institute Of Justice And Judge In Perspective Judicial Reform Blueprint 2010 - 2035 <i>Ahmad Agus Bahauddin</i>	331

Policies Against Crime Criminal Law Made By Children <i>Achmad Arifulloh</i>	341
Law Enforcement Of Law Number 23 Of 2004 In Preventing Efforts Human Rights Violations In Indonesia <i>Andri Winjaya Laksana , Lathifah Hanim.</i>	350
Position Of Agreement On Land Acquisition For Development For Public Interest <i>Djoni Sumardi Gozali</i>	359
The Village Fund As Indonesian Social Welfare Program: The Gap Between Regulatory And Practice (A Study On Penal Perspective) <i>Ifrani*</i>	367
The Finality Of Arbitration: The Pros And Cons Of The Court's Power To Setting Aside Arbitral Awards In Indonesia <i>Yati Nurhayati</i>	376

The Finality Of Arbitration: The Pros And Cons Of The Court's Power To Setting Aside Arbitral Awards In Indonesia

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ABSTRACT

The finality of arbitration award raises several questions when it clashes with the court's authority to set aside the foreign award. These problems are resulting in a contradiction with the primary goals that become the reasons for the birth of arbitration as a non-litigation resolution based on the good faith of the parties. Therefore it is important to review the extent of the role and intervention of the court in the arbitration award. As for the problems are formulated to aim for the answers as follows: (1) The court authority to set aside foreign arbitral awards in Indonesia: (2) The pros and cons of court power in setting aside a foreign arbitral award. The research method used in this study is normative juridical, which focused on secondary data in the form of primary, secondary, and tertiary legal material. The result of this study shows that the Court intervention in the arbitration is present as a protection for the parties. Nevertheless, it is undeniable that the Court plays a vital role in order to prove the validity of an award or arbitration process. Therefore we believe in providing space for the court to enter into arbitration but with rigorous limitations. The court's intervention in the arbitration award raises the discourse on the independence of the arbitration. This results in pros and cons views on the authority of the court in arbitration with the basic arguments of countering conflict of interest by check and balance while also argue that the court intervention affecting the length of the litigation process in an attempt to overturn the award removes the essence of arbitration as a quick settlement.

Keywords: Arbitration; Litigation; ADR; Dispute; Indonesia.

INTRODUCTION

The litigation for a long time is generally known as the primary option for dispute resolution. Yet outside of court, there are several alternative means that can be used by the community in resolving the dispute.

⁶²⁷ One of them is the arbitration forum as a choice in business disputes resolution because it is carried out by emphasizing the

principles of final and binding. Final and binding deals with legal certainty as to the right of every person as a citizen, making sure the parties obtaining a final resolution with instant executive power to answer the desires of the parties to settle disputes quickly and effectively.

However, the finality of arbitration award raises several questions when it clashes with the court's authority to set aside the

⁶²⁷ Susanti Adi Nugroho, (2015), *Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya*, Jakarta: Prenada Media Group, page. 1.

foreign award. These problems are resulting in a contradiction with the primary goals that become the reasons for the birth of arbitration as a non-litigation resolution based on the good faith of the parties. Whereas Arbitration has a vital role for Indonesia as a developing country which slowly entering new eras in the business world, from the era of globalization to being forced into the ASEAN Economic Community (AEC) which opens up enormous opportunities for business across countries. This condition is reasonable for disputes to occur not only for local disputes but also for foreign parties. So it is important to review the extent of the role and intervention of the court in the arbitration award.

As for the problems are formulated to aim for the answers as follows:

1. The court authority to set aside foreign arbitral awards in Indonesia
2. The pros and cons of court power in setting aside a foreign arbitral award

RESEARCH METHOD

The research method has a vital role in the research and development of knowledge because it has several functions. Among others, is to increase the ability of scientists to conduct or carry out research better, or more fully and provide greater possibilities, to examine the unknown. Particularly, legal research⁶²⁸ is vital to measure the meaning and validity of law to be used for legal reasoning to predict and guide future legal decision-making.⁶²⁹ Moreover, Richard A. Posner argues that legal research is crucial for understanding and improving the established law.⁶³⁰

The research method used in this

study is normative juridical, which focused on secondary data in the form of primary, secondary, and tertiary legal material.⁶³¹ Therefore, this type of research will refer to the legal norms contained in legislation, court decisions, and common habits. Data analysis is carried out in a qualitative descriptive manner. While the legal material is collected, sorted, and subsequently studied and analyzed for content, so that the level of synchronization, the feasibility of norms, and the submission of new normative ideas can be review.

RESULT AND FINDINGS

The Finality of Arbitral Awards

An arbitral award is a decision given by the ad-hoc arbitration forum on a business dispute with the basis of contract or agreements on the settlement (containing an arbitration clause) submitted at the institution chosen by the parties. Based on the jurisdiction of awards, in general, the award can be divided into First, the national award, which is an arbitral award taken or issued in the Republic of Indonesia; Second, the International Award or Foreign Award, which is an award issued in a country outside Indonesia.⁶³²

Arbitration awards are final and bindings. The finality of awards is the fundamental principles in arbitration. Therefore, it must be built from the basic concepts of effective and efficient dispute resolution that distinguish it from litigation. The principle of law is the basis in creating the laws. The principle of law is the main foundation in the legal formulation. Final and binding have an interrelated meaning, which means the end of an examination process, then has the power to unite all wills and

⁶²⁸ Legal research has a distinguished history both as a teaching tools and a guide for legal reasonings. See Steven M. Barkan, (1982), "On Describing Legal Research", *Michigan Law Review*, Vol. 80, page. 925.

⁶²⁹ McCrudden, (2017), "Legal Research and Social Sciences", *Legal Theory and the Social Sciences*, Vol.2, July, page.19.

⁶³⁰ Richard A. Posner, (2017), "Legal Research and Practical Experience", *University of Chicago Law Review*, Vol. 84, page.239

⁶³¹ Mukti Fajar ND and Yulianto Ahmad, (2010), *Dualisme Penelitian Hukum*, 1st Edition, Yogyakarta: PT. Raja Grafindo Persada, page. 28.

⁶³² Gunawan Widjaja dan Ahmad Yani, (2003), *Hukum Arbitrase*, Jakarta: PT Raja Grafindo Persada, page.11-14.

cannot be refuted again.⁶³³ That what is meant by the final and binding is a final decision or final process of all series, processes or stages of examination in an action or event that has binding power on the wishes of the parties and cannot be challenged.⁶³⁴

Challenging Foreign Awards Through Litigation

Injustice awards may occur when the decision is contrary to the nature of justice. Thus in this condition the Court is present as a protection for the parties. Among other things, the Court's intervention in arbitration is related to legal remedies of refusal to execute the foreign awards or to grant a request to set aside of awards based on the request of the party. The party may submit a right to refuse, which is filed with sufficient reason and authentic evidence to doubts that the arbitrator will potentially have conflict of interest in making a decision. Therefore, although the arbitrators are appointed by the parties, they must, of course, take into account the possibility of using the recusal right. However, if the arbiter is still appointed by the parties, then the parties are deemed to have agreed not to exercise their right to refuse based on the facts present when appointing the arbiter. However, this does not rule out the emergence of new evidence that was not previously known, thus giving the parties the right to use this right based on this new finding.⁶³⁵

Then, after the issuance of the award, it still is a subject for setting aside by the Chair of the District Court, and this decision later can be appealed to the Supreme Court. Application for setting aside is submitted to the District Court if the award is allegedly containing elements as stipulated in Article 70 of the Arbitration and ADR Law as follows:⁶³⁶

⁶³³ Ahsan Yunus, (2011), "Analisis Yuridis Sifat Final dan Mengikat (Binding) Putusan Mahkamah Konstitusi", *Jurnal Konstitusi*, Volume III Nomor 2, November, page.6

⁶³⁴ Karimatul Khasanah, (2018), "Problematika Hukum Implementasi Sifat Final dan Binding Putusan yang dibuat Oleh Basyarnas Dalam Penyelesaian Sengketa Bisnis Syariah", *Jurnal Volksgeist*, Volume 1 Nomor 1 June, page. 41-42.

⁶³⁵ Article 25 of Law 30 / 1999. Lihat Cicut Sutiarmo, (2011), *Pelaksanaan Putusan Arbitrase Dalam Sengketa Bisnis*, Jakarta: Yayasan Pustaka Obor Indonesia, page. 109.

⁶³⁶ Article 70 of Law 30 / 1999 on Arbitration and Alternative Dispute Resolution.

1. Letters or documents submitted during the examination, after the award is handed down, are recognized as false or are declared to be false;
2. After the award has been taken, decisive documents are found, which are hidden by the opposing party; or
3. The award is taken from the results of fraud by one of the parties in the examination stage.

The Court Ability to Setting Aside Foreign Awards

The arbitration is chosen by the parties for a reason. The long process of court settlement and the hostile environment of litigation are the main reasons to prefer Arbitration over the Court. Therefore, many believe that the arbitration forum should be independent without the intervention of the court. Nevertheless, it also cannot be denied that the Court plays a vital role in order to prove the validity of an award or arbitration process. This is also an international believes in providing space for the court to enter into arbitration but with rigorous limitations.

The UNCITRAL Model Law clearly regulates the limitation the court intervention in arbitration as explained in Article 5, "In matters governed by this Law, no court shall intervene except where so provided in this Law." Which means that no court shall interference the arbitration proceedings or the awards, unless with reasons specified in UNCITRAL Model Law. So it can be seen that the role of the court is important but is limited to maintain the nature of arbitration.

It was further explained in Article 6 that the court authority only concerning matters in the provisions of Article 11 (3) and (4),

Article 13 (3), Article 14, Article 16 (3) and Article 34 (2). Which described as follows:

1. Article 11 (3) and (4) concerning the authority of the Court in determining the arbiter or the third arbiter if the parties cannot reach an agreement.
2. Article 13 paragraph (3) regarding the Parties may submit an objection to the appointment of the arbitrator in accordance with the procedure agreed upon. In addition, the Court is also authorized to decide on the objections of the parties in the appointment of the arbitrator if the procedure chosen previously does not produce results. With respect to the court's ruling, an appeal cannot be made.
3. Article 14 on the authority of the court in aborting the mandate of the arbitrators if they fail to carry out their functions. With respect to the court's decision to revoke the arbitrator's mandate, an appeal cannot be made.
4. Article 16 (3) on the Authority of the Court in granting the parties' request to assess the arbitrator's jurisdiction in resolving disputes. With respect to the court, an appeal cannot be made.
5. Article 34 (2) on the authority of the Court in deciding an application to set aside an arbitration award. Then the Court is also authorized to determine whether the arbitration award is contrary to public policy in their country.

The Pros and Cons of Court Intervention in International Manners

Before the Hague Convention on Choice of Court Agreements in 2005, many courts in various countries had different views on the status of foreign arbitral awards. Several courts even refused to execute foreign awards for various reasons. That there are many courts do not acknowledge the forum choice clauses agreed upon by the parties. The

setting aside requires court involvement as the competent authority to overturn the award.

While the authority of the court arises on the basis of state control of foreign arbitration awards, such as:

1. The court's authority to execute. When the losing party does not abide by the arbitration award, then the execution can be carried out through the Fiat Execution. The official authorized to led the execution was the Chair of the District Court.
2. The authority of the Chair of the District Court in the exequatur research function of the arbitral award is to grant the exequatur or refuse the granting of the exequatur.
3. The authority of the Chair of the District Court to set aside the awards.

The court's intervention in the arbitration award, as explained above raises the debate regarding the independence of the arbitration. This results in pros and cons views on the authority of the court in arbitration. The first view that court intervention will benefit because:

1. The court intervention is a way for the State to control institutions that are non-governmental in nature;
2. The arbitrator is an ordinary human being who can make mistakes in awarding the party, on the basis of that reason, the setting aside serves as a 'correction.'
3. Court intervention is a check and balance to provide justice for the parties. Nevertheless, the Court's intervention must be limited and contains certainty and fairness.
4. The court intervention in setting aside the awards act as a countermeasure if there are arbitrators who abuse their

authority for the benefit of a party or themselves.

While, the cons of the court intervention are not in a way to challenging the concept of court checks and balances on arbitration forums, but rather:

1. There is no clear limit to court authority. Whereas in some cases the reasons for setting aside the award were extended beyond the provisions of article 70.
2. The setting aside is often granted by the court without consideration to returning the award to the arbitrator for 'corrections'.
3. The length of the litigation process in an attempt to overturn the award removes the essence of arbitration as a quick settlement.
4. The significant differences of opinion between the District Court and the Supreme Court so that the Court often flips 'winners' and 'losers' of the case.

It is undeniable that it is extremely difficult to reach a fair award in arbitration or litigation for both parties. Justice for one party may not necessarily be felt fair by the other. According to Hart⁶³⁷ :

"The general principle latent in these diverse applications of the idea of justice is that individuals are entities in respect of each other to a certain relative position of equality or inequality. This is something to be respected in the vicissitudes of social life when burdens or benefits fail to be distributed; it is also something to be restored when it is disturbed. Hence justice is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as "treat like cases alike," thought we need to add to the later and treat different cases

differently."

Thus, for Hart, justice should be applied in accordance with the case. In different cases different methods are applied (treat different cases differently). That justice will depend on the type of case, meaning that justice in one case will be different from another. However, justice must still be obtained by the people in each case. Another opinion expressed by Hans Kelsen who argued about the difficulty of finding justice.⁶³⁸ That satisfying everyone and meeting their expectations of justice will still be challenging even for centuries in the future.

CONCLUSION

In summary, the Court intervention in the arbitration is present as a protection for the parties. Among other things, the Court's intervention to refuse the execution of the foreign awards or to set aside the awards should only be filed with sufficient reason and authentic evidence that the arbitrator potentially has conflict of interest in making a decision. After the issuance of award, it still is a subject for setting aside by the Chair of the District Court, and this decision later can be appealed to the Supreme Court. Application for setting aside is submitted to the District Court if the award is allegedly containing elements as stipulated in Article 70 of the Arbitration and ADR Law. Nevertheless, it is undeniable that the Court plays a vital role in order to prove the validity of an award or arbitration process. Therefore we believe in providing space for the court to enter into arbitration but with rigorous limitations.

The court's intervention in the arbitration award raises the discourse on the independence of the arbitration. This results in pros and cons views on the authority of the court in arbitration. The first view that the court intervention will benefits as a check and balance while also act as countermeasure for correction of the award if there were found a conflict of interest affecting the awards.

⁶³⁷ Hart, H.L.A., (1972), *The Concept of Law*, Oxford: Oxford University Press, page. 155.

⁶³⁸ Kelsen Hans, (1957), *What is Justice? Justice Law and Politics in The Mirror of Science*, Berkeley and Los Angeles: University of California Press, page. 1-2

While, the cons of the court intervention is not in a way to challenging the concept of court checks and balances on arbitration forums, but rather arguing that there is no clear limit of court authority. Whereas in some cases the reasons for setting aside the award were extended beyond the provisions of article 70 which affects the length of the

litigation process in an attempt to overturn the award removes the essence of arbitration as a quick settlement. Furthermore there is also an argument that claims there were significant differences of opinion between the District Court and the Supreme Court so that the Court often flips 'winners' and 'losers' of the case.

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