

# Harmonization Arbitration Law: A Discourse for Investor–State Arbitration in the ASEAN Economic Community

by  
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## ABSTRACT

*The implementation of the ASEAN Economic Community (AEC) may increase trade and commercial activities in the number of intra-ASEAN, including investment disputes between investors and ASEAN Member States. In that regard, the ASEAN Comprehensive Investment Agreement (ACIA) provides aggrieved investors the option to refer their disputes to arbitration in resolving their disputes. Many foreign arbitrage decisions are found to be time-consuming when it comes to enforcing the decision and cases over the final and legal binding arbitrage decision being overturned by the court's decision in Indonesia. Thus, the efficiency and effectiveness of the arbitration process are being negated. The ASEAN Comprehensive Investment Agreement (ACIA) that provides the legal basis for the AEC's liberalized investment regime establishes an investor-state dispute resolution mechanism (ISDR mechanism).*

*Keywords:* ASEAN Economic Community; Enforcement Arbitral Award; Harmonization of Arbitration Law.

## 1. Background

It has not been felt that it has lasted more than three years of implementation of the ASEAN Economic Community (AEC) and in fact, many business activities that occur or are carried out by businesses include state investments in the family sphere

or the house of the Association of Southeast Asian Nations (ASEAN).<sup>1</sup> The AEC aims for a single market and production base allowing for the free movement of goods, services, investment, capital and skilled labor; additionally, it aims to realize the development of a competition policy, the protection of intellectual property, the facilitation of e-commerce and the introduction of a more comprehensive investment protection and dispute resolution system also. Businesses in the region will not see immediate rewards, but will eventually enjoy access to an ASEAN market with harmonized regional trade regulations. By significantly promoting intra-ASEAN trade and investment and strengthening the global importance of the ASEAN as an economic block, the AEC is expected to give the whole region a significant economic shot in the arm.<sup>2</sup>

However, despite the immediate rewards, Indonesia is one of the best Intra ASEAN investment destinations<sup>3</sup>, including investment in projects in the Oil and Gas sector (F2), downstream mining, tourism, airports, electricity, toll road and manufacturing.<sup>4</sup> The free movement of investment is a vital aspect of the ASEAN Economic Community (AEC). The higher levels of investment between ASEAN member states will increase the likelihood of disputes arising between private investors and governments. Accordingly and in response with the ASEAN

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<sup>1</sup> With a population of 620 million and a combined GDP of over USD 2.4 trillion, the ASEAN Economic Community will stimulate consumerism and cross-border trade within the region as costs of trade within the member countries reduce gradually over the next five years.

<sup>2</sup> Ranajit Dam., *Arbitration and the ASEAN Economic Community*, Asian Legal Business., Sep 1, 2015, p.1. < <http://www.legalbusinessonline.com/features/arbitration-and-aec/70536>>. Visited 7 February 2019.

<sup>3</sup> Tribunnews, *Indonesia-masuk-dalam-negara-terbaik-tujuan-investasi-intra-asean* <<http://www.tribunnews.com/bisnis/2018/01/08/indonesia-masuk-dalam-negara-terbaik-tujuan-investasi-intra-asean>>, Visited 7 February 2019.

<sup>4</sup> Investment in the field of Exploration of Oil and gas in cooperation between PT. Pertamina (Persero) with CPC Corporation is a state owned company from Taiwan, other strategic cooperation, for example PT. Aneka Asahan Alumunium, Tbk., dengan Alumunium of China Limited (Chalco), see. [www.bisnis.tempo.co/amp/1135388/pertemuan-imf-14-bumn-jalin-kerja-sama-investasi-hingga-rp-201-t](http://www.bisnis.tempo.co/amp/1135388/pertemuan-imf-14-bumn-jalin-kerja-sama-investasi-hingga-rp-201-t)

Comprehensive Investment Agreement (ACIA),<sup>5</sup> a multilateral treaty that provides the legal basis for the AEC’s liberalized investment regime establishes an investor-state dispute resolution mechanism (ISDR mechanism). The ISDR mechanism can be a useful, albeit limited, the tool for resolving disputes between investors and ASEAN governments.<sup>6</sup>

The increase in trade may very well translate to a corresponding in the number of intra-ASEAN disputes, including investment disputes between investors and ASEAN member states. In that regard, the ASEAN Comprehensive Investment Agreement (ACIA) gives aggrieved investors the option to refer their disputes to arbitration if attempts at resolving their disputes. The rise in the quantum of trade and investment, however, is likely to lead to disputes, and with the 10 ASEAN countries’ legal systems at various, disparate stages of development, arbitration looks set to be the dispute resolution mechanism of choice going forward.<sup>7</sup>

Although Indonesia is signatory party to the New York Convention or also known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>8</sup> the country is perceived by the international community of being unfriendly to the international arbitration decision. Many foreign arbitrage decisions are found to be time-consuming when it comes to enforcing the decision and cases over the final and legal binding arbitrage decision being overturned by the

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<sup>5</sup> The ASEAN Comprehensive Investment Agreement (ACIA) entered into force on March 29, 2012, aiming to create a free and open investment environment through the consolidation and expansion of existing agreements between the ASEAN member countries.

<sup>6</sup> International Bar Association, *Investor–State Arbitration in the ASEAN Economic Community*, (Hongkong: Asia Pacific Regional Forum News, 2015), p. 1.

<sup>7</sup> Introduction to the ASEAN Comprehensive Investment Agreement < <https://www.aseanbriefing.com/news/2013/04/12/introduction-to-the-asean-comprehensive-investment-agreement.html>> visited 17 February 2019.

<sup>8</sup> The New York Convention superseded the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. The Presidential Decree No. 34 of 1981, Indonesia ratified the New York Convention. Article I (3) of the New York Convention offers the possibility to the Contracting States to reserve the applicability of the Convention to “awards made only in the territory of another contracting States.

Indonesian court's decision. Thus, the efficiency and effectiveness of the arbitration process are being negated.

Many foreign parties as an investor viewed that Indonesia lacks legal certainty regarding the international arbitration decision. This opinion was declared that foreign investor viewed Indonesian courts as inconsistent and biased towards Indonesian parties, especially those who have lost to foreign parties in the arbitration, where that the revocation of international arbitration ruling by the Central Jakarta District Court on that case presented an enormous problem.<sup>9</sup> Since the ruling is beyond the district court's jurisdiction, as asserted by a ruling from the Supreme Court (Mahkamah Agung).

Another problem is concerning the provision on arbitration law in Indonesia, that the dispute settlement mechanism is being regulated under the Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement (Arbitration Law). However, there is a big gap between the Arbitration Law and the United Nation Convention on the Recognition and Enforcement of Arbitral Awards and Agreements (New York Convention). Furthermore, there are possible reasons in the Arbitration Law which allows for rejection of a ruling resulting from international arbitrations, if the matter has no relationship in frame trade issues; if the parties have all ratified the New York Convention; and if the complying with the ruling would violate public interest. On

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<sup>9</sup> For example, refer a case of *Pertamina v. Karaha Bodas*, the arbitration arose from a commercial dispute over the construction and operation of a 220 MW geothermal power project in the Telaga Bodas area in West Java, popularly known as Karaha Bodas Project. The project includes primarily two zones: the Karaha Zone and the Telaga Bodas Zone. Based on arbitration clauses stipulated in Article 13 of the Joint Operation Contract and Article 8 (2) of the Energy sales Contract, the Arbitration was the conducted under the rule of the United Nation Commission on International Trade Law (UNCITRAL) in accordance with the agreement made the Parties.

In short in order in supporting Indonesia Action, Pertamina contended to the Indonesian Court that Pertamina had registered the Arbitral Award with the District Court Central Jakarta in Accordance with the article 67 (1) of the Indonesia Arbitration Law (The Arbitral Award was registered on 8<sup>th</sup> March 2002 under Reg. No. 001/Pdt/Arb.Int/2002/PN.Jkt.Pst.). on the 27<sup>th</sup> August 2002, the Central Jakarta District Court rendered its judgment annulling the Arbitral Award as well as the preliminary award was rendered by the Arbitral Tribunal with all of its legal consequences.

the other hand, the New York Convention allows for other reasons in addition to the above to reject an arbitration ruling. If a ruling cannot be overturned in Indonesian court in other ways, the question remains whether those other reasons could be used as a basis for refusal in Central Jakarta District Court.

Many parties are still sceptical about the Indonesian arbitration process given the problems at the Indonesian courts.<sup>10</sup> There are no guarantees that a ruling from international arbitration would be executed in Indonesia. However Indonesian court is viewed as inefficient, and unreliable, the disputing parties tend to settle through foreign arbitration, even though one of the parties is Indonesian, for instance, many of them choose Singapore.<sup>11</sup>

In the past year, there has been an increasing investment focus in Asia with a phenomenal surge in the number of foreign investors within the region. As such, it has become imperative that the various countries develop their arbitration systems in order to pave the way for a stable and healthy investment climate.<sup>12</sup> In ASEAN Countries a has responded to such demands effectively with the dominant players displaying nothing short of stellar growth, coupled with significant efforts to update and improve their arbitration laws. Development in Singapore, Malaysia, and

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<sup>10</sup> A written arbitration agreement obviates the rights or the parties to bring a dispute in the District Courts, which would otherwise have jurisdiction over civil disputes (Article 11(1) of the Indonesian Arbitration Law). The District Courts have no authority to hear disputes where parties are bound by an arbitration agreement (Article 3 of the Indonesian Arbitration Law), and are required to reject, and not participate in the resolution of, disputes which have already been adjudicated by arbitration, except in limited circumstances as provided in the Arbitration Law (Article 11(2) of the Indonesian Arbitration Law).

<sup>11</sup> Suyud Margono., *Enforcement Of Arbitration Awards In Indonesia: An Approach in Harmonization Arbitration Law ASEAN Countries.*, (2012) Indonesian Law Journal., National Law Development Agency, Ministry of Law and Human Rights RI, Vol. 5, p. 29.

<sup>12</sup> Chong Yee Leong, Qin Zhiqian, *Comparative Arbitration in Asia*, Global Arbitration Review., p. 1. <[www.globalarbitrationreview.com/review/38/section/134/chapter/1410/comparative-arbitration-law-asia/#ftn\\_1](http://www.globalarbitrationreview.com/review/38/section/134/chapter/1410/comparative-arbitration-law-asia/#ftn_1)> visited 7 Februari 2019.

Indonesia, and examine the increased receptiveness to arbitration in ASEAN, along with the current state of harmonization of arbitration laws and its effects.<sup>13</sup>

Moreover, Indonesia one of a large oil and gas industry in ASEAN, Currently has procurement rules stipulated by the Oil and Gas Supervisory Agency (BPMIGAS) provide that, to be eligible for cost recovery, an agreement providing for the settlement of disputes by arbitration must designate Indonesia as the site of arbitration under the BANI Rules.<sup>14</sup> State-owned enterprises generally require that their procurement agreements include submission to the Indonesian courts or arbitration in Indonesia under the BANI Rules. In this perspective, the issue of the enforcement of international arbitration awards for Investor–State Arbitration in the ASEAN Economic Community is exceedingly relevant. Arbitration has gained in regional acceptance within the ASEAN countries,<sup>15</sup> and the investor has final option to arbitrate at an ASEAN regional arbitration center.<sup>16</sup>

The works on this issue have been on the rise, relevant to the growth of trade in the region and deal with the development on the exciting issues of the enforcement of international arbitration awards and levels of investment between ASEAN member states will increase disputes arising between private investors and governments. On the basis of these facts, it may be concluded that contract between Investor– member State, does embody foreign law element in it. It is also right to conclude an

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<sup>13</sup> Suyud Margono, *Loc. Cit.*, p. 31

<sup>14</sup> To avoid any unnecessary legal risks, the arbitration clause should be in Indonesian if both parties to the agreement are Indonesian, although the agreement may be in English or a national language used by one of the parties with an Indonesian translation if at least one of the parties is foreign (Article 31 of Law No. 24 of 2009 regarding the National Flag, Language and Emblem and the National Anthem (July 9, 2009).

<sup>15</sup> Huala Adolf, *Improving the Enforcement of International Arbitration Awards in ASEAN Countries.*, paper presented ASEAN Law Association, 10<sup>th</sup> General Assembly, 10<sup>th</sup> General Assembly of the *ASEAN Law Association*, Hanoi 14th to 18th October 2009., p.1.

<sup>16</sup> In example Kuala Lumpur Regional Centre for Arbitration (KLRCA), Singapore International Arbitration Center (SIAC) trend of regional has seen a steady increase in the number of disputes between ASEAN based parties – in particular, parties based in Singapore, Malaysia and Thailand.

international contract which is including the meaning of private international law dispute.<sup>17</sup> Private international law according to legal doctrine in Indonesia is the national law which regulated the legal issues which are international in nature (or the existence of foreign element).<sup>18</sup> Another problem arising from private (investor) – state relationship under contract should be short in highlight as conception and based on unilateral state permission (the unilateral act of state) or at least shall be named as an ‘administrative contract’.<sup>19</sup>

## 2. The Investor–State Arbitration (ISDR) Mechanism Works

### 2.1. Scope of Claims

An investor can make a claim under the ISDR mechanism if a host state breaches its ACIA obligations and the investor incurred loss or damage arising from the breach.<sup>20</sup> The ACIA’s host country obligations are those commonly found in conventional bilateral investment agreements. These include the following:

- **National treatment:** Other ASEAN-based investors must be given the same procedure as domestic investors.
- **Senior management:** A host country cannot require its nationals to be appointed as senior management in an investment vehicle (but can require that locals comprise the majority of the board of directors).
- **Fair and equitable treatment:** Other ASEAN-based investors must receive equal treatment by the host state (e.g., due process, security, *et cetera.*).

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<sup>17</sup> Huala Adolf. (2012). “*The Meaning of International Arbitration according to UNCITRAL Arbitration Model Law and Indonesian Arbitration Law.*”, Indonesian Law Journal., National Law Development Agency, Ministry of Law and Human Rights RI, Vol. 5 December., p. 10

<sup>18</sup> Sudargo Gautama. (1986). *Internasional Business Contract*, (Bandung: Alumni.),p. 18.

<sup>19</sup> *Ibid.*, p. 61.

<sup>20</sup> These are a limited number of industries, as follows: manufacturing, agriculture, fishery, forestry, mining, and services related to these sectors.

- **Compensation:** A host country cannot discriminate against ASEAN-based investors with respect to compensation arising from losses caused by civil strife or armed conflict.
- **Free flow of capital:** A host country cannot restrict the free flow of capital in relation to an investment project.
- **No expropriation:** An investment cannot be expropriated or nationalized (except under limited circumstances).

Despite being called “comprehensive,” the ACIA, in fact, applies to a limited number of industries. The ACIA’s signatories have also submitted extensive reservations that further limit the scope of the treaty’s coverage. Additionally, only certain types of investors are eligible to receive the ACIA’s benefits. Judicial persons are considered investors; natural persons are not. Further, investors that are owned or controlled by a non-ASEAN national and do not have substantive business in their “home” ASEAN state are ineligible.<sup>21</sup>

## 2.2. Pre-Claim Conciliation

The ACIA requires disputing parties first to seek conciliation. The investor must serve the host state with a written notice. The burden is on the investor to present the legal and factual basis for the dispute. The investor could then submit its claim for arbitration if the dispute cannot be resolved within 180 days of the host state’s receipt of the notice.

## 2.3. Choice of Arbitration and Governing Law

Investors can choose where to submit their claims. The first option is a host state court or administrative tribunal. ASEAN countries are, however, at varying levels of

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<sup>21</sup> John Frangos, *Investor–State Arbitration in the ASEAN Economic Community*, International Bar Association January 27, 2015, published by Tilleke & Gibbins. See <<http://www.tilleke.com/resources/investor-state-arbitration-asean-economic-community>>. Visited 13 Februari 2019.



development regarding judicial independence and the rule of law. Local courts may be biased toward the state and susceptible to influence, corruption, or lobbying. The second option is to arbitrate under the International Centre for Settlement of Investment Disputes (ICSID), or the ICSID Additional Facility Rules (Additional Facility Rules). This is a favorable option for investors, as the ICSID was created for investor–state arbitration. Established in 1965, it has significant experience handling investor-state disputes. Moreover, the ICSID’s awards have “final judgment” status in the courts of countries that are members of the Washington Convention, the multilateral agreement that created the ICSID.

To arbitrate under the ICSID, ACIA requires that both the host state and investor’s home country are parties to the Washington Convention. However, Laos, Myanmar, Thailand, and Vietnam have not yet acceded to the Washington Convention. For cases involving these countries, arbitration under the Additional Facility Rules may be possible. The ACIA allows arbitration under the Additional Facility Rules when either the host country or the investor’s home country are members of the Washington Convention. As such, a dispute between a Thai investor and the government of Myanmar, for example, would not be eligible for arbitration under the ICSID or the Additional Facility Rules.

The third option is to arbitrate at a tribunal under the Rules of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL tribunals have presided over many investor-state arbitrations, including in Southeast Asia. Moreover, UNCITRAL tribunals have awarded significant damages to investors in many cases, making it another viable choice for investors. The investor’s final option is to arbitrate at an ASEAN regional arbitration center. The default center is the regional center for arbitration at Kuala Lumpur. Most ASEAN countries have commercial arbitration centers. However, their experience in handling investor-state

arbitration is limited. Despite this, geographical proximity could keep costs reasonably low. Parties may also be more familiar with local centers.

#### **2.4. Arbitrators**

The arbitration tribunal comprises three arbitrators, though the parties may agree on a different number. Each party appoints one arbitrator. The third arbitrator must be mutually agreed on by the parties. Importantly, the third arbitrator, who is also the chairperson of the tribunal, must be from a non-ASEAN country. The third arbitrator also cannot have permanent residence in either the host country or the investor's home country. Decisions are reached by majority vote and are binding.

#### **2.5. Awards**

Awards for damages are comprised of monetary compensation with interest or restitution of property. Punitive damages are prohibited. A party can enforce the award after it is apparent that the losing side will not seek revision or annulment proceedings. Enforcement can also take place after such proceedings are complete. Each ASEAN state is required to allow for the enforcement of an award in its territory.

#### **2.6. Limitations:**

Since the ACIA covers a limited number of industries, so does its dispute resolution mechanism, and when the reservations are included, the actual areas of investment that can be brought to arbitration are even more restricted. The ISDR mechanism is also untested. The ACIA came into effect in 2012, but to date no claims have been brought. It is therefore uncertain how the mechanism would be practically applied. There are no precedents to assist in future cases,<sup>22</sup> the fact that they were brought

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<sup>22</sup> Two ASEAN-related cases were brought under ACIA's 1987 precursor, the Agreement for the Promotion and Protection of Investment Protection: *Yaung Chi Oo Trading Pte Ltd v*

shows that an ASEAN-based investor-state arbitration mechanism can work. At present, the arbitration agreement has become a necessity that cannot be avoided in traffic in the world of business and trade association, both of which occurred in the form of a joint venture (investment) or the form of technology transfer (transfer of technology). Almost all transactions and joint venture agreements and trade-scale trans-national are always accompanied by an additional agreement in the form of the arbitration clause.<sup>23</sup>

With the arbitration clause contained in a standard contract that confirms all disputes that arise be settled by arbitration, has been publishing the arbitration agreement of a standard contract directly. The standard contract in the arbitration agreement is the arbitration clause which forms part of the general requirements contained in the agreement. In other words, in the standard contract, the arbitration agreement is already as one of the requirements of the common terms in standard contracts concerned.<sup>24</sup>

### 3. Court Intervention for enforcement Arbitral Award

Most arbitral awards are considered final and binding to the parties,<sup>25</sup> having received an Award made in its favor, the successful party in an arbitration can expect one of three things to happens:

- a. The other party to the arbitration honors the award by:

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*Myanmar and Cemex Asia Holdings Ltd v Indonesia*. While no damages were awarded in these cases (*Yaung Chi Oo* was decided on jurisdictional grounds and *Cemex Asia Holdings Ltd* was settled),

<sup>23</sup> Suyud Margono. (2010). *Business Dispute Resolution: Arbitration and Mediation*. Bogor: Ghalia Indonesia, p. 131.

<sup>24</sup> M. Yahya Harahap. (1991) *Arbitration*. Jakarta: Pustaka Kartini, p. 109.

<sup>25</sup> Tony Budidjaya. (2002). *Public Policy as Ground for Refusal of Recognition and Enforcement Foreign Arbitral Award in Indonesia*, Jakarta: PT. Tatanusa, p.1.

- 1) Voluntarily paying to this successful party the amount awarded to it;  
or
  - 2) Accepting any declaration made in the award and acting (or, as the case may be, desisting from a particular course of conduct), in accordance with them; or
- b. The other party falls to honor the Award but takes no active steps to resist the award.

Most arbitral awards are carried out voluntarily<sup>26</sup> by the losing party as indicated in case (a) above, and in this case enforcement of the arbitral awards is not necessary. In cases (b) and (c) the successful party will have to take further steps to have the award enforced if it is to enjoy the fruits of its efforts in obtaining the award.<sup>27</sup>

A point to note is that unlike a court judgment, an arbitral award cannot be enforced immediately. Arbitrators, being private persons, do not have the authority to order executory measures. The use of coercion against individuals is generally considered as a privilege or monopoly of a state emanating from its sovereignty. Accordingly, court intervention or assistance will be required for the enforcement of an arbitral award if the losing party does not want to comply with the award voluntarily. In this regard, a distinction should be made between domestic arbitral awards and foreign arbitral awards because different, though occasionally overlapping, procedures are available for their recognition or enforcement. For present purposes, a domestic arbitral award is one which is to be recognized or enforced in the country in which it was made. A foreign arbitral award, which is also

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<sup>26</sup>Alan Refern & Martin Hunter. (1991). *International Commercial Arbitration*, p. 416.

<sup>27</sup>Mark Huleatt-James & Nicholas Gould. (1996). *International Commercial Arbitration (A Handbook)*, LLP., p. 109.

called as an international arbitral award, is one in respect of which recognition or enforcement is sought in a country other than that in which it was made.

In enforcing an arbitral award, it is required that the award is valid and enforceable. An award that is not valid is not capable of enforcement. While the validity of an award is a condition precedent for its enforcement, it does not necessarily follow that all valid awards will be enforced, mainly where this is to take place abroad.<sup>28</sup> The primary consideration to enforce an arbitral award is the location of the assets against which enforcement is sought. A court can only assist with the enforcement of an award against assets that are within the jurisdiction of that court. Where assets are to be found in many separate jurisdictions, a separate application for enforcement will be required for each jurisdiction in which there are assets needed to meet award.<sup>29</sup> The location of assets is not, however, the only relevant factor. An application for the enforcement of a foreign award will not get far if the law of the jurisdiction in which the assets are found does not contain a provision for the enforcement of awards made in the country in which the foreign award was made.<sup>30</sup>

Since the use of arbitration as a method of resolving disputes has grown with the growth of international trade, it has become imperative to regulate the issue of enforcement of arbitral awards. In the context of foreign arbitral awards, enforcement frequently occurs within the framework of a bilateral treaty or multilateral treaties or conventions. The most popular and influential of these is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, frequently known as the New York Convention. It is in force for 132 countries.<sup>31</sup> Furthermore, the New York Convention severely limits the reasons for which recognition and enforcement of an arbitral award may be refused. In the New York

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<sup>28</sup> Mark Huleatt-James & Nicholas Gould., *Ibid.*, p. 105.

<sup>29</sup> *ibid.*, p. 110-111.

<sup>30</sup> *Ibid.*,

<sup>31</sup> At the time of this writing, 132 countries are signatories to the New York Convention.

Convention, the grounds for refusal of enforcement are concentrate in one single Article V. They are further divided into two parts. First, listed in the first paragraph, are the grounds for refusal of enforcement, which must be proven by the respondent. These grounds are as follows:<sup>32</sup> (1) invalidity of the arbitration agreement; (2) violation of due process; (3) award made in excess of authority of the arbitration; (4) failure to follow the arbitration agreements; (5) non-binding force of the award; or (6) invalidity of the award in the rendering country. Second, listed in the second paragraph of Article V, are the grounds on which the court may refuse the enforcement on its own motion, whether the respondent invoked these grounds or not. These grounds are as follows; (7) non-arbitrability of the subject matter; or (8) violation of public policy of the forum. It is of general importance to observe that the grounds mentioned in Article V of the New York Convention are exhaustive.

Moreover, no review of the merits of the award is allowed. It is a settled rule in international arbitration under the New York Convention that a court faced with a foreign arbitral award will not review such an award on the merits. In addition, the court has an obligation to consider whether the enforcement of such an award is contrary to the public policy of its country. Nevertheless, this examination should be limited.<sup>33</sup>

It would seem that the success of enforcement of a foreign arbitral award will also depend on the attitude of a national court toward international arbitration and arbitral awards, in particular, as we will discuss later, how the enforcement court interprets the public policy defense in the context of enforcement of foreign arbitral awards. As mentioned earlier, all arbitral awards rendered in Indonesia (which are, by

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<sup>32</sup> Under the New York Convention, the arbitrability depends on the law of the state where recognition and enforcement of the award is sought. Indonesian courts honour arbitration agreements with increasing frequency. .

<sup>33</sup> Mulyana. (1995). *Attacking Arbitral Awards under the New York Convention of 1958*” in *The American Review of International Arbitration*, p. 94.

definition, domestic awards regardless of the nationality of the parties or other ‘international’ factors) must be registered with the clerk of the District Court (Pengadilan Negeri) in the District having jurisdiction over the respondent<sup>34</sup> within 30 days of its rendering. The awards are final and binding on the parties<sup>35</sup> and if they fail voluntarily to comply, a party may apply to the Chief Judge of that District Court for an order of execution.

The Court as a judicial institution that has the authority to force through a legal decision, because the role of this Court determines the enforcement of arbitral institutions, this may be the rejection of one of the parties to implement the arbitration award.<sup>36</sup> In deciding whether to issue such order, based on Indonesia Arbitration Law, the Judge may not examine the merits of the award, but is authorized to examine the award only to determine whether the following criteria are met:<sup>37</sup>

- (a) The agreement to arbitrate is valid and in a signed writing, and otherwise complies with the requirements therefore as described in Article 4 of the Arbitration Law;
- (b) full legal authority to have settled amicably, all as required under Article 5 of Arbitration Law; and
- (c) The award is not in against with public morality or order.

The application must be made within 30 days of the date of the award is submitted for registration, and the court has only 30 days to act on the application. The decision of the district court can be challenged to the Supreme Court, and it shall

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<sup>34</sup> Articles 1 (4) and 59, Indonesia Arbitration Law (Law No. 30 Year 1999).

<sup>35</sup> Articles 60, Indonesia Arbitration Law.

<sup>36</sup> Suyud Margono, *Loc Cit.*, p. 153

<sup>37</sup> Articles 62, Indonesia Arbitration Law.

finally decide the matter within a further 30-day period.<sup>38</sup> Once an order of executed against such party's assets and property in accordance with the provisions of the Code of Civil Procedure, in the same manner as the execution of judgments in civil cases that are final and binding.<sup>39</sup>

One of the innovations of the new Arbitration Law is the provision which empowers the arbitral tribunal to issue interlocutory decisions ordering security attachment, a deposit of goods with third parties, or sale of perishable goods.<sup>40</sup> This provision has not as yet been tested, but it should operate to make it unnecessary to apply to a court for such interlocutory relief, thereby further minimizing judicial intervention in arbitral references.

#### **4. Singapore Experience**

In short more than fifteen years, Singapore has been a spectacular uptrend as an international arbitration center. The recognition has been increased due to the efforts of the Singapore Government, the Singapore International Arbitration Centre (SIAC) and a pro-arbitration judiciary. The year of 2010 marked an eventful year that saw essential developments of international arbitration in Singapore. There are some major contributing factors, such as substantial legislative changes, the opening of the Maxwell Chambers, and the revision of the SIAC Rules in the fourth edition of the Arbitration Rules. Moreover, the growth of the SIAC has been supported by Singapore's neutrality and impartiality, which are considered as a significant contributing factor by some experts. Singapore is also known as one of champion of

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<sup>38</sup> Articles 71 and 72, Indonesia Arbitration Law.

<sup>39</sup> Article 64, Indonesia Arbitration Law.

<sup>40</sup> Article 32 (1), Indonesia Arbitration Law.



lesser corruption country in the region, it was ranked first in the Corruptions Perception Index 2010 and ranked third in the 2009 index.<sup>41</sup>

Furthermore, Singapore has actively encourage its jurisdiction as the best choice for international arbitrations. In result, the new cases submitted to SIAC has been increased from 160 to 198 in the period of 2009 to 2010. Significantly, the number of international cases administered by the SIAC increased from 114 to 140, an increase of 23 percent.<sup>42</sup> In the 2010 Survey, Singapore has known as the most favored arbitral seat in Asia, placing it ahead of Hong Kong.<sup>43</sup> Moreover, Singapore is a party to the 1958 New York Convention (on enforcement of arbitration awards). Singapore arbitration awards are thus enforceable in all signatories to the convention. In fact, the Singapore International Arbitration Act is very friendly to the international rules, by adopting almost all the UNCITRAL Model Law on International Commercial Arbitration without modification.

## 5. Indonesia Experience

In Indonesia, there are a growing number of cases registered in Indonesia National Board of Arbitration (Badan Arbitrase Nasional Indonesia / BANI) which is in line to the increasing interest of arbitration in Indonesia.<sup>44</sup> As business deals become more sophisticated and complex, there are significantly increasing in contractual documentation calling for arbitration rather than litigation in Indonesia.<sup>45</sup> Moreover, the Indonesian Arbitration Act (Law No. 30 of Year 1999) currently makes it possible

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<sup>41</sup> Transparency Official Website, <[www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results)>, visited 7 February 2019.

<sup>42</sup> SIAC Official Website, <[www.siac.org.sg/index.php?option=com\\_content&view=article&id=287&Itemid=73](http://www.siac.org.sg/index.php?option=com_content&view=article&id=287&Itemid=73)>, visited 7 February 2019.

<sup>43</sup> International Arbitration Survey: Choices in International Arbitration (2010 survey), p. 6.

<sup>44</sup> BANI Quarterly Newsletter, 2007.

<sup>45</sup> Michael J. Moser.( 2009). *Indonesia: Arbitration in Asia*. New York: Huntington, 2nd edition JurisNet, p. 2.

for arbitrators to issue both provisional and interlocutory awards.<sup>46</sup> The most important thing to be borne in mind is the reference to arbitration in Indonesia is the Dutch Code of Civil Procedure and not the UNCITRAL Model Law.<sup>47</sup> To the date of writing, there has been no indicated intention of the Indonesian Government and the Indonesian Parliament to adopt any of the Model Law provisions. There are significant differences between Indonesian Arbitration Law and the Model Law; one of the most essential differences is the Arbitration Law states that the case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas Model Law requires the opposite way.

The Indonesian Judiciary has been criticized for not having the pro-enforcement spirit, even though the country has ratified the New York Convention and the ICSID (The International Centre for the Settlement of Investment Disputes) Convention. In practice, foreign parties have experienced considerable obstacle in enforcing international awards. Firstly, enforcement shall only pursue based on disputes arising from legal relationships that are considered ‘commercial’ under Indonesian law. Secondly, courts have an authority to deny a writ of execution for specious ‘public policy’, also known as public order, reasons that are not considered by an international standard.

The main reason why Indonesia has faced a lack of enforcement of foreign arbitral awards is that two institutions are dealing with the writ of execution of international arbitral awards and it contradicts to the aim of arbitration resolution, which promotes a single and centralized forum.<sup>48</sup> In some, the Central Jakarta District

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<sup>46</sup> Article 32, Indonesia Arbitration Law 1999.

<sup>47</sup> The Indonesian Arbitration Law is not based on the UNCITRAL Model Law (including its 2006 amendments). The Indonesian Arbitration Law is an amalgamation of a number of principles from predecessor legislation (1849 Dutch Code of Civil Procedure)..

<sup>48</sup> G. Born & Miles W.( 2007). *Global Trends in International Arbitration*,. p. 10.

Court<sup>49</sup> had annulled the underlying contract based on the violation of the Indonesian public policy.<sup>50</sup> On the other hand, the Indonesian Supreme Court rendered the *exequatur* (writ of execution) upon this case. However, it was considered unenforceable since the underlying contract was illegitimate. In practice, the Indonesian courts usually disregard an 'agreement to arbitrate'. Even though both Articles 3 and 11 of the Arbitration Act embody 'limited court involvement values' and state the domestic courts have no competency to litigate the case of the contracting parties, but it is not always so in practice.

## 6. Harmonization of Arbitration Laws in ASEAN and Its Effects

Article 33 paragraph (1) of the Indonesian 1945 Constitution clearly states that the national economy is governed based on the principle of a democratic economy with the principle of communal efficiency, justice and sustainability, independence and by considering the balance of improvement and unity of national economy. According to Posner in the economic analysis of law, the economy may act in normative and positive terms to the law and its institutions.<sup>51</sup> In a normative aspect the law regulates economic activities to increase its efficiency level or in other words to spend lower

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<sup>49</sup> case of E.D. & F. Man (Sugar Ltd) v. Yani Haryanto In August 1988, Yani Haryanto filed a case with The District Court of Central Jakarta requesting the annulment of the agreement made by the parties. Judgment of The District Court of central Jakarta No. 499/Pdt/G/VI/1988/PN.Jkt.Pst dated 29 June 1989. Having adjudicated the case, the District Court of Central Jakarta decided that the agreement was null and void since it contained an illegal (consideration under Article 1320 of the Indonesian Civil Code, there are four requirements to make a contract: (1) capability of the Parties, (2) consent of the Parties, (3) specific object, and (4) legal cause. At the same time man Countered by commencing a separate lawsuit against Haryanto, however, The District Court of Central Jakarta later in its judgment rejected Man's Claim, upon counterclaim of Haryanto, the court declared that the contract was illegal on the ground that the contract arose out of an illegal cause. (Judgment of the District Court of Central Jakarta No. 836/Pdt/G/VI/1988 dated 29 June 1988). Beside that the Court Declared Court held that Arbitral Award was not *res judicata* and Indonesia Court was not bound to recognized it because the Award violated Indonesia Public Policy.

<sup>50</sup> When considering public policy, its assumed that the court did not make a distinction between domestic public policy and international public policy, or between fundamental principles of law and mandatory rule of law. It appears that the court has reconsidered the fact underlying the foreign arbitral award to determine whether there has been a violation of public policy.

<sup>51</sup> Richard A Posner.( 1973), *Economic Analysis of Law*, Boston & Toronto: Little, Brown & Compnay, p. 19.

cost for more results, and in a positive perspective, the legal system holds the authority to define economic activity concerning its rules and consequences.<sup>52</sup> The Indonesian legal system was mainly designed as significant demand by the people, a mechanism that may regulate individuals, their social life and life as a citizen.<sup>53</sup> The law and practice of arbitration within the ASEAN countries have been evolving. Various publications have reported the law and practice in the south-east Asian region, in fact, 9 (nine) member countries of ASEAN have ratified the New York Convention. This ratification showed, at any rate, the commitment of these countries to enforce the international arbitration award made in other contracting parties of the Convention.<sup>54</sup> The challenge for the ISDR mechanism is enforcement of arbitral awards. Enforcement of an award against a sovereign state is inherently burdensome.

It is not just in the ASEAN region, but for all investor-state disputes and enforcing an award in a host state poses particular difficulties. An investor would generally have to seek enforcement in a domestic court. The court may be reluctant or legally precluded from enforcing the award against its government. Investors have other options available, but none too favorable. For instance, an investor can try to settle with a government instead of enforcing the award. However, this would almost certainly result in a significantly reduced payment (if a settlement is agreed to at all). Alternatively, an investor can seek enforcement of a host country's assets in a third country.

Additionally, the third country may be reluctant to enter into a diplomatic fray with the host country. It is, however, worth noting that although the majority of arbitration awards are performed willingly,<sup>55</sup> the problem of the enforcement of the

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<sup>52</sup> *Ibid.*

<sup>53</sup> Ilhami Bisri.(2004), *Indonesia Legal System: The Principles and Implementation*, Jakarta: PT. Rajagarfindo Persada, p. 75

<sup>54</sup> Huala Adolf, *Loc Cit.*, p. 4.

<sup>55</sup> Alan Redfern and Martin Hunter. (2004). *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, 4th.ed, p. 511.

award does still exist. This problem is partly due to the imprecise implementation process of the Convention in the home country and partly due to the interpretation of the Arbitration Law, as well as the recalcitrant behavior of the losing party. The function of national (domestic) courts in the enforcement of international arbitration awards is decisive given the position it can play to compel the recalcitrant party. Under the New York Convention, the word national court is termed as ‘competent authority’,<sup>56</sup> in addition to the term ‘Court’.<sup>57</sup> Indeed, these two articles clearly illustrate the vital role of the court in the enforcement of foreign arbitral awards.

The proposals or recommendations to improve the enforcement of international arbitration awards have already been put in the shopping list by experts. They include, among others:

- a. The dissemination of information, technical assistance and training for judges about arbitration, most notably the New York Convention;<sup>58</sup>
- b. The harmonization of national laws on arbitration;<sup>59</sup>
- c. The harmonization of the New York Convention application and interpretation in the domestic court.<sup>60</sup>

The ISDR mechanism can boost investor confidence by making available impartial legal means to resolve disputes. Governments have inherent advantages when dealing with foreign investors. Ministries Governments can deny licenses and justice, as well as seize assets. If an investor complains, they may no longer be

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<sup>56</sup> Article V (a) and (2) of the New York Convention.

<sup>57</sup> Article II (3) of the New York Convention.

<sup>58</sup> Jose Maria Abascal Zamora. (1998). *Enhancing dissemination of information, technical assistance and training*, in: UN, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, New York: UN, in Huala Adolf, *Op Cit.* p. 31.

<sup>59</sup> Cf., Gerold Hermann. (1998). “*Improving the Implementation: A Progress Report on the Joint UNCITRAL/IBA Project*,” in: UN, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, New York: UN., in Huala Adolf, *op.cit.*, p. 37.

<sup>60</sup> Pieter Sanders. (1998) ‘The Making of the Convention,’ in: UN, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, New York: UN., p. 3.

welcome, or even subject to judicial or extrajudicial attention. Requiring governments to explain their actions before a neutral arbitration body is beneficial for the investment environment and the rule of law. It adds to investor confidence and fosters regional investment. Additionally, the ISDR mechanism can expand the pool of investors to small and medium-sized entities. If a foreign investor faces unfair treatment by a host state—and arbitration is not an option—an investor’s only recourse may be to ask their home country to assist through diplomatic channels.

The ISDR mechanism also assists in removing politics from investor-state disputes. Without the arbitration provision, an investor’s home state may have to support a claim by diplomatic or economic pressure. However, the ISDR lessens the risks associated with such “state-to-state” confrontation. It is consistent with the overall ASEAN goal of establishing an integrated economic “community.” As such, political factors may not play a role as to how a dispute is resolved. The idea is reinforced by the use of the third “non-ASEAN” arbitrator. The appearance of neutrality serves to give the tribunal and the ISDR mechanism greater legitimacy.

## **VII. Conclusion**

The ISDR mechanism has the potential to be a useful tool for resolving disputes between investors and ASEAN governments. The availability of impartial legal recourse can foster the confidence that investors need to do business abroad. Such determination would, of course, be further strengthened if a case is brought to show that the mechanism works. As the AEC comes to fruition and investment increases, it may only be a matter of time. The ISDR mechanism can also serve as a model for future investor-state dispute resolution in ASEAN. While the AEC was to become active in 2015, it will take much longer for the “free flow of investment” to become a reality. The AEC is a work in progress, and so is its investor-state dispute resolution mechanism. On balance, the ISDR mechanism is beneficial to ASEAN’s economic development and the rule of law in the region.

The Indonesian Arbitration Law applies to all arbitrations conducted within the territory of Indonesia and to the enforcement and recognition of both domestic and international arbitral awards. There is no distinction between “domestic” and “international” with regard to the nationality of the parties or the location of their project or dispute. The only difference between a domestic arbitration, being one conducted in Indonesia, and international arbitration, being one held outside Indonesia, is the procedure and venue for recognition and enforcement of the award. In addition, as one would expect, provisions of the Arbitration Law governing the conduct of the arbitration proceedings themselves apply only to domestic arbitrations. The next step forward would be to harmonize the ASEAN arbitration systems further so as to increase its accessibility to international parties. However, in achieving complete harmonization and enjoy its positive effects, all parties involved should put an extra effort. Thus, it would be highly desirable for the rest of ASEAN to follow in the footsteps of Singapore so that ASEAN will continue to be recognized internationally as an attractive destination for arbitration.