

CHAPTER I

INTRODUCTION

A. Background of Study

Arbitration proceedings are generally divided into 2 (two) types, namely national arbitration and international arbitration, both of which have 2 (two) types of arbitration, namely fixed arbitration and additional arbitration (ad hoc arbitration).¹ In this decade, international arbitration has been one of the most reputable dispute resolution methods, especially among entrepreneurs. Disputes that have gained a good reputation, especially among entrepreneurs.² This is evidenced by the results of the Queen Mary University of London 2021 (Post-COVID-19) survey which involved the widest set of respondents of ±1,200 written responses and nearly 200 oral interviews with various stakeholders worldwide.³ The results of the survey stated that 90% of respondents among business

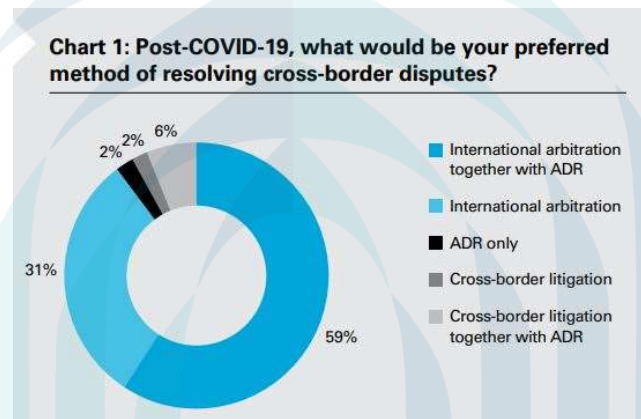
¹ Niken Junika Sari, Ahmad Arif Zulfikar, and Sulaiman Dorlah, "Implementation of International Arbitration Awards in Indonesia from the Perspective of Legal Value Theory," *Jurnal Media Hukum* 31, no. 1 (2024): 167–85, <https://doi.org/10.18196/jmh.v31i1.20026>.

² Indah Sari, "Keunggulan Arbitrase Sebagai Forum Penyelesaian Sengketa Di Luar Pengadilan," *Jurnal Ilmiah Hukum Dirgantara* 9, no. 2 (2019): 47–73, <https://doi.org/10.35968/jh.v9i2.354>.

³ Abby Smutny and Norah Gallagher, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" (London, 2021), https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

people prefer international arbitration as a way of resolving disputes both independently (as many as 31%) and together with ADR (*Alternative Dispute Resolution*) (as many as 59%).⁴

Figure 1. International Arbitration User Survey Results



Source: 2021 *International Arbitration Survey: The Evolution of International Arbitration*

Unsurprisingly, in the framework of trade, international business contracts are a very crucial foundation in maintaining stability and order in cross-border business relations.⁵ Arbitration is chosen as the primary preference of business actors who are considered to be in accordance with the needs of the business environment⁶ and have advantages in flexibility,

⁴ Smutny and Gallagher.

⁵ Raymond Marhehetua Hutahaeen et al., "Implementasi Prinsip Good Faith Dalam Penyelesaian Sengketa Kontrak Bisnis Internasional Melalui Arbitrase," *YUSTISI: Jurnal Hukum & Hukum Islam* 11, no. 3 (2024): 75–90.

⁶ Anik Entriani, "Arbitration in the Indonesian Legal System," *An-Nisbah: Journal of Sharia Economics* 3, no. 2 (2017): 372.

expertise, neutrality, finality, and executability compared to dispute resolution in court.⁷

At the international level, arbitral awards have binding force recognized through various legal instruments such as *the New York Convention 1958* and *the UNCITRAL Arbitration Rule*.⁸ As for Indonesia, the legal basis regulating the arbitration process and the implementation of arbitral awards nationally and internationally is Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.⁹ In addition, Indonesia has also ratified the *1958 New York Convention* through Presidential Decree No. 34 of 1981, which applies to the recognition and enforcement of foreign arbitral awards.¹⁰ According to Githa Bianti's research, Law No. 30 of 1999 has regulated more than 2 decades¹¹ regarding the various procedures for the recognition and enforcement of

⁷ Hutahaean et al., "Implementasi Prinsip Good Faith Dalam Penyelesaian Sengketa Kontrak Bisnis Internasional Melalui Arbitrase."

⁸ Rahayu Hartini et al., "Executorial Principles in International Arbitration Awards in the Indonesian Legal System," *AMCA Journal of Community Development* 3, no. 2 (2023): 65–70, <https://doi.org/10.51773/ajcd.v3i2.232>.

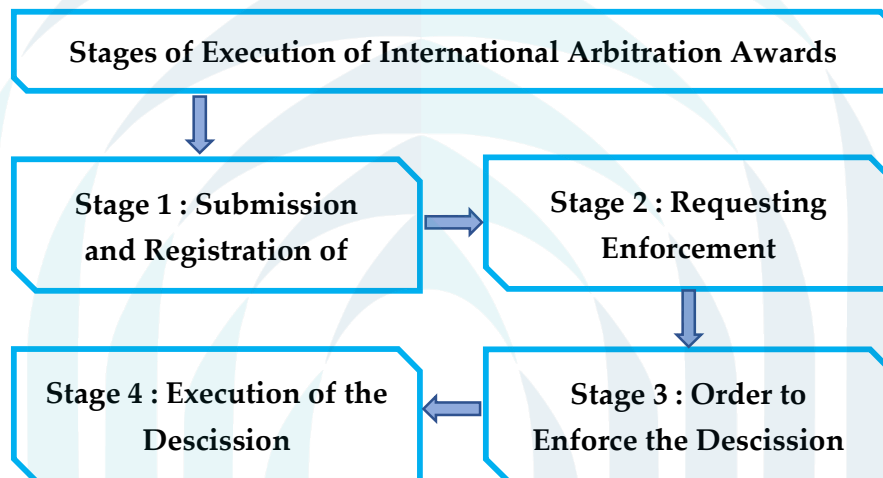
⁹ Huala Adolf, "The Urgency to Form Law on International Commercial Arbitration," *Fiat Justisia Journal of Law* 10, no. 2 (2016): 317–34, <http://jurnal.fh.unila.ac.id/index.php/fiat>.

¹⁰ Suryadi et al., "Laporan Penelitian Alternative Dispute Resolution (Penyelesaian Sengketa Alternatif) Dan Court Conected Dispute Resolution (Penyelesaian Sengketa Yang Terkait Dengan Pengadilan" (Jakarta, 2020). p.436

¹¹ Githa Bianti, "Pelaksanaan Eksekusi Putusan Arbitrase Internasional Yang Berpotensi Menghambat Kegiatan Investasi Asing Di Indonesia," *Crepido* 5, no. 1 (2023): 64–78, <https://doi.org/10.14710/crepido.5.1.64-78>.

International Arbitral Awards, including the formal requirements that must be met,¹² with the following stages:¹³

Figure 2. Stages of Execution of International Arbitration Awards



Source: Susanti Adi Nugroho (2017), *"Penyelesaian Sengketa Arbitrase dan Penerapan Hukumnya"*

Although the interest in arbitration is superior and in great demand by entrepreneurs rather than litigation institutions, implementing the stages of International Arbitral Awards still faces complex challenges as shown in Marvell's research.¹⁴ During the progress of the international arbitration process, Prof. Dr. Huala Adolf, S.H., LL.M., Ph.D as the Vice

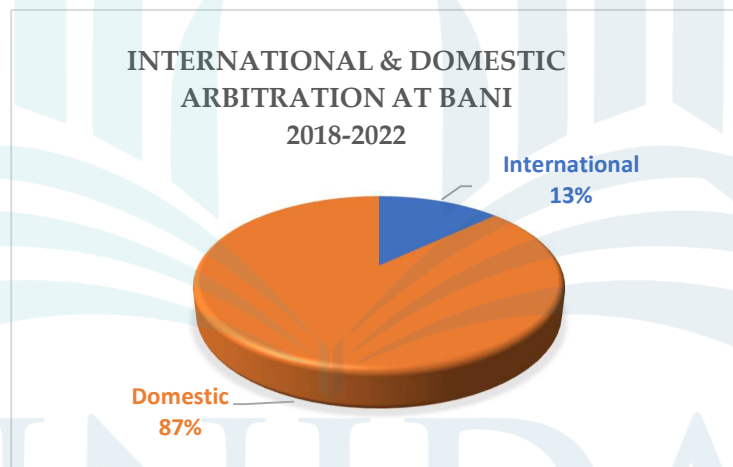
¹² Hendri Jayadi, "Legal Certainty Implementation of Arbitration Decisions in Indonesia," *Proceedings of the Arbitration and Alternative Dispute Resolution International Conference (ADRIC 2019)* 472, no. Adric 2019 (2020): 11–16, <https://doi.org/10.2991/assehr.k.200917.003>.

¹³ Susanti Adi Nugroho, *Penyelesaian Sengketa Arbitrase Dan Penerapan Hukumnya* (Jakarta: Kencana, 2017). p.423

¹⁴ Marvell Limiardo, Frederick Reinhart, and Khanza Octalivia, "Ketidaksesuaian Komitmen Indonesia Dalam Perjanjian Internasional Untuk Mengakui Putusan Arbitrase Asing," *Jurnal Kewarganegaraan* 8, no. 1 (2024): 676–81.

Chairman of BANI revealed that in Indonesia, there are still crucial problems in the requirements for the implementation of arbitral awards, which are considered inefficient and the length of the execution process in court.¹⁵ This is evidenced by the many obstacles occurred in the implementing the International Arbitral Awards in Indonesia,¹⁶ which makes Indonesia known by other countries as an 'unfriendly arbitration state'.¹⁷

Figure 3. Arbitrage Percentage in BANI Period 2018-2022



Source : BANI Arbitration Center

¹⁵ Press Release of the Constitutional Court Decides on the Judicial Review of the Arbitration Law in Jakarta, January 3, 2025, Accessed on February 26, 2025 at 09:30 AM Western Indonesian Time (WIB)

¹⁶ Rohaini and Sepriyadi Adhnan, *Masa Depan Arbitrase Indonesia : Efektivitas Dan Kepastian Hukum*, ed. Galih and Candra, 1st ed. (Ponorogo: Uwais Inspirasi Indonesia, 2024). p.4

¹⁷ Bianti, "Pelaksanaan Eksekusi Putusan Arbitrase Internasional Yang Berpotensi Menghambat Kegiatan Investasi Asing Di Indonesia."

In the chart above, it can be seen that the implementation of international arbitral awards in Indonesia is still lacking interest in the midst of the development of the arbitration process which is increasingly in demand in various other countries. In addition, Indonesia is still reluctant to implement or reject the implementation of International Arbitral Awards because it is considered to be contrary to public order (*public policy*),¹⁸ this is supported by Esther Emmanuella Wijaya's research about the limitation of public order and its effect to the refusal of recognition and execution of International Arbitration Awards.¹⁹ According to some research, there are some cases that have occurred related to the Implementation of International Arbitral Awards in Indonesia, as shown in the following table:

Table 1. The cases of Enforcement of International Arbitration Award

| Case Examples |
|---|
| <p>PT Indiratex Spindo v. Head of Indonesian Representative in London (2014)²⁰</p> <p>In this case, the British Virgin Islands, where the applicant is located, is not a signatory to the 1958 New York Convention, resulting in a conflict in the enforcement of the arbitral award.</p> |

¹⁸ R.M. Gatot.P. Sumartono, *Arbitrase Dan Mediasi Di Indonesia*, ed. Sukoco, 1st ed. (Jakarta: PT Gramedia Pustaka Utama, 2006).

¹⁹ Esther Emmanuella Wijaya, "Penerapan Konsep Public Policy Sebagai Alasan Penolakan Pengakuan Dan Eksekusi Putusan Arbitrase Internasional Di Indonesia Dan Singapura," *Jurnal Hukum Visio Justisia* 1, no. 1 (2021): 6.

²⁰ <https://www.hukumonline.com/berita/a/plus-dan-minus-arbitrase-dalam-perman-3-tahun-2023-lt659789fef3781/?page=2>, Accessed on October 5, 2024, at 08:00 AM Western Indonesian Time (WIB).

First Media (Lippo Group) vs. Astro (2013)²¹

Indonesia refused to enforce the arbitral award because the administrative requirements in Article 66 were not met, even though Astro's arbitral award in Singapore had been in accordance with the 1958 New York Convention.

The business dispute between PT PLN Persero and PT. Pertamina against PT. Karaha Bodas Company (KBC)²²

At the Central Jakarta District Court after the arbitration award was issued in the Geneva Arbitration Switzerland, PT. Pertamina felt aggrieved and filed a lawsuit to cancel the award to the Central Jakarta District Court on the grounds that the Arbitral Tribunal exceeded its authority and did not comply with Indonesian law.

Churchill Mining Plc and Planet Mining Pty Ltd vs. Government of Indonesia (2012-2019)^{23, 24}

Indonesia used the concept of public order to reject Churchill Mining's claims related to the mining dispute in East Kalimantan. The International Center for Settlement of Investment Disputes (ICSID) tribunal rejected Churchill's claim that the documents were considered forgeries, However, the use of public order as a reason was often questioned.

PT Direct Vision dan Astro Nusantara²⁵

SIAC International Arbitration ruled that Astro Nusantara was entitled to receive damages of USD 17.3 million from PT Direct Vision. However, the Indonesian court rejected the implementation of the

²¹ Ning Adiasih and Sam Letare Simanjuntak, "Non-Enforcement of Foreign Arbitration Award in Indonesia," in *Proceedings of the 3rd Borobudur International Symposium on Humanities and Social Science 2021 (BIS-HSS 2021)*, 2023, 981–87, https://doi.org/10.2991/978-2-494069-49-7_164.

²² Rahma Yunita Soviani and Ery Agus Priyono, "The Dispute Settlement through International Arbitration between PT . Karaha Bodas Company against PT . Pertamina And," *Jurnal Daulat Hukum* 5, no. 3 (2022): 184–95.

²³ Elsa Rahmawati, "Penyelesaian Sengketa Penanaman Modal Asing (Studi Kasus Sengketa Churchill Mining PLC Dan Planet Mining PTY LTD Melawan Indonesia)," *Jurnal Panah Keadilan* 2, no. 2 (2023): 28–37.

²⁴ Catur Aji Pamungkas and Hesti Septianita, "Tantangan Dalam Eksekusi Putusan Arbitrase Internasional Studi Kasus Churchill Mining PLC Vs Pemerintah Republik Indonesia," *Jurnal Ilmu Hukum, Humaniora, Dan Politik* 4, no. 5 (2024): 1377–84.

²⁵ King William and Moody Rizqy Syailendra, "Penyelesaian Sengketa Investasi Asing Melalui Arbitrase Internasional," *Journal of Education Research* 4, no. 4 (2023): 1982–90.

decision because that it violated public order, resulting in losses for Astro Nusantara.

Judging from some of these issues, the Law as a reference for implementing International Arbitral Awards has been regulated for over 2 decades and has never undergone revision.²⁶ So that along with the development of technology and the type of problems, the Law is considered to be less than keeping pace with the development of the world of arbitration on an international scale.²⁷

Several parties who are experts in the field of International Arbitration also feel that there is a problem, so in this decade there have been several material tests of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as follows:²⁸

Table 2. List of Material Tests of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

| Decision Number | Applicant | Subject | Application Status |
|-------------------------|---|--|--------------------|
| Number 15/PUU-XXII/2014 | Ir. Dharma Ambier, M.M., DRS. Susanna Suleiman (Kuasa Pemohon: Andy | Arbitration and award - Indonesia; Arbitration and award - Indonesia - Cases; Dispute resolution (Law) - Indonesia; Arbitration (Civil procedure law); | Granting Entirely |

²⁶ Rohaini and Adhnan, *Masa Depan Arbitrase Indonesia: Efektivitas Dan Kepastian Hukum*. p.2

²⁷ Bianti, "Pelaksanaan Eksekusi Putusan Arbitrase Internasional Yang Berpotensi Menghambat Kegiatan Investasi Asing Di Indonesia."

²⁸ <https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=5&cari=arbitra> , Accessed on December 28, 2024, at 08:00 AM Western Indonesian Time (WIB)

| | | | |
|---------------------------------|--|--|----------------------|
| | Siafrani, C.H., MCCL, Duck) | Annulment of Arbitral Award | |
| Number 26/PUU- XV/2017 | Zainal Abdiansyah Siregar (Applicant's Attorney: Ade Kurniawan, S.H., et al) | Testing of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution to the Constitution of the Republic of Indonesia of 1945 | Reject Entirely |
| Number 4/PUU- XXII/2024 | Diding Jalaludin, S.H | Registration and Enforcement of International Arbitral Awards | Unacceptable |
| Number 100/PUU- XXII/2024 | Togi M. P. Pangaribuan, S.H., L.L.M. | International Arbitral Awards | Partially Granted |

This shows that until now, these obstacles still cause legal ambiguity and uncertainty.²⁹ Although the Supreme Court has issued Supreme Court Regulation Number 3 of 2023 concerning Procedures for the Appointment of Arbitrators by Courts, Right of Default, Examination of Applications for Enforcement, and Annulment of Arbitral Awards to complement some of the shortcomings in the provisions of Law No.30 of 1999,³⁰ the Supreme

²⁹ Constitutional Court decision (MKRI)_11361_1735870840, accessed on December 28, 2024 at 08:00 AM Western Indonesian Time (WIB).

³⁰ Copy of the Supreme Court Regulation of the Republic of Indonesia Number 3 of 2023 concerning Procedures for the Appointment of Arbitrators by the Court, Challenge Rights, Examination of Applications for Enforcement and Annulment of Arbitral Awards

Court Regulation has not fully perfected the regulations on the implementation of International Arbitral Awards.³¹

Thus, it is necessary to take concrete steps to minimize this problem and ensure that the parties involved, both legal practitioners and disputing parties, carry out the international arbitration process appropriately from the initial stage to the final stage, are fully responsible, and do not harm one of the parties. It can be seen that this international arbitration is included in contemporary issues,³² which are rooted in the implementation of *tahkim* during the time of the Prophet SAW based on Islamic Law.³³ According to Al-Mawardi, *tahkim* in Islamic Law has an important role in maintaining the goal of reconciling the disputing parties. Even after the development of arbitration to the international realm and experiencing various problems, international arbitration should still pay attention to national interests and

³¹ <https://www.hukumonline.com/berita/a/plus-dan-minus-arbitrase-dalam-perman-3-tahun-2023-lt659789fef3781/> Accessed on October 31, 2024, at 08:00 AM Western Indonesian Time (WIB).

³² <https://www.hukumonline.com/berita/a/arbitrase-komersial-internasional-teori-praktik-memeriksa-kenyataan-lt5a24c9e6a0f9a/?page=2> Accessed on October 31, 2024, at 08:30 AM Western Indonesian Time (WIB).

³³ Nurul Khikmah and Karimatul Khasanah, "Metode Ijtihad Dalam Konstruksi Hukum Tahkim Indonesia," *Wahana Islamika: Jurnal Studi Keislaman* 8, no. 2 (2022): 222–42, <https://doi.org/10.61136/pgents60>.

consider the fairness of the parties individually and as a group, such as the main purpose of establishing *maqashid sharia* in Islamic Law.³⁴

In line with Islamic Law in *his maqashid sharia*, Al-Syathibi revealed that the sharia of the laws is to realize the absolute benefit of beings in this world and the hereafter at the same time".³⁵ This illustrates the close relationship between sharia (law) and benefits. *Maqashid sharia* has also developed by combining legal decisions with the welfare of the wider community, as initiated by Ibn 'Ashur, a contemporary scholar who developed *maqashid sharia*.³⁶ Ibn 'Ashur's thought complements the value of *hifdzu al khamsah* by detailing several principles, including justice, freedom, *saddu dzari'ah*, *maslahah*, and consideration of legal substance as the main goal in realizing benefits in the process of other cases.³⁷

Thus, the presence of *the maqashid sharia* principle is important to improve the implementation of International Arbitral Awards in Indonesia

³⁴ Ayu Atika Dewi, "Problematisasi Pelaksanaan Putusan Arbitrase Internasional Di Indonesia (Kajian Terhadap Konsep Keadilan Dalam Perspektif Filsafat Hukum Dan Filsafat Hukum Islam)," *Jurnal Panorama Hukum* 2, no. 2 (2017): 185–202.

³⁵ Al-Syatibi, *Al-Muwafaqat Fi Usul Al-Ahkam*, Juz 2 (Beirut: Dar al-Fikr, n.d.). p.19

³⁶ Febryan Hidayat et al., "The Use of Midjourney in Design Buying and Selling Business from the Perspective of Ibn Ashur's Maqāṣid Al-Syarī'ah," *Indonesian Journal of Islamic Economic Law* 2, no. 1 (2025): 15–28.

³⁷ Suhaimi, Muhammad Rezi, and Maman Rahman Hakim, "Al-Maqashid Al-Syariah; Teori Dan Implementasi," *SAHAJA : Jurnal Sharia and Humanities* 2, no. 1 (2023): 153–70.

which are often erroneous along with their laws. In this case, the researcher not only provides a view on how International Arbitral Awards should be implemented based on positive law, but also wants to provide a new view that the principle of *maqashid sharia* can be integrated with positive law to overcome contemporary problems, especially in improving the implementation of International Arbitral Awards in Indonesia to be more orderly.

B. Research Scope

Spradley (in Sugiyono) states that the focus of research is a way for researchers to understand more broadly and deeply to obtain a comprehensive overview at the initial stage of the social situation by determining certain domain matters.³⁸ This research will refer to Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, especially in the Articles that regulate International Arbitration in Indonesia, namely Article 1 number 9, Article 34, and Articles 65 – 69. In addition, the scope of this research is the principle of *sharia maqashid* used is *maslahah* in general, which is then detailed on several principles, including justice, freedom, *saddu dzari'ah*, and

³⁸ Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif, Dan R&D* (Bandung: CV. ALFABETA, 2017). p.54

consideration of legal substance as the main objectives,³⁹ to improve the implementation of International Arbitral Awards in Indonesia.

The focus of this research is to present the view that *maqashid sharia* has principles that can be integrated with improving the implementation of International Arbitral Awards in Indonesia, which are often problematic.⁴⁰ This research was conducted to find proposals as the best solution in obtaining legal certainty, accounting for justice in decisions, and minimizing the occurrence of sustainable trade and business cases between countries by considering the principles of *maqashid sharia*.

C. Problem Formulation

Based on the background explanation above, the problems that the researcher will discuss are as follows:

1. How is the Implementation of International Arbitral Awards in Indonesia reviewed from Law Number 30 of 1999?
2. What are the factors that cause multiple interpretations of public order in the Implementation of International Arbitral Awards in Indonesia?

³⁹ Suhaimi, Rezi, and Rahman Hakim, "Al-Maqashid Al-Syariah; Teori Dan Implementasi."

⁴⁰ Sumartono, *Arbitrase Dan Mediasi Di Indonesia*.

3. What are the principles of *maqashid sharia* that can be applied in the Enforcement of International Arbitral Awards in Indonesia?

D. Purpose of Study

In line with the two problem formulations above, the objectives of this research are as follows:

1. To analysis the implementation of International Arbitral Awards in Indonesia with existing problems reviewed from Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.
2. To identify the factors that arise from the multi-interpretation of 'public order' in the Implementation of International Arbitral Awards in Indonesia.
3. To analysis the principles of *maqashid sharia* that can be applied in the implementation of International Arbitral Awards in Indonesia to strengthen legal certainty, account for justice in judgments, and minimize the occurrence of sustainable trade and business cases between countries.

E. Significance of Study

The usefulness or axiological aspect of this research is divided into two, namely practical benefits and theoretical benefits. The practical benefit

of the results of this research is to meet the requirements for obtaining a Master's degree in Sharia Economic Law. The theoretical and practical benefits include the following:

1. Theoretical Benefits

Theoretically, the results of this research are expected to be useful for the development of legal science, namely providing a structural contribution to the development of legal theories related to legal certainty and several *maqashid sharia* theories that complement them in the analysis stage of the Implementation of Arbitral Awards in Indonesia. For the Sharia Economic Law study program, Universitas Islam Gontor (UNIDA) can be used as material for discussion and answering issues related to non-litigation dispute resolution.

2. Practical Benefits

Practically, the results of this study are expected to be useful for the government and non-litigation law institutions, especially arbitration in the process of Enforcement of Arbitral Awards in Indonesia. In addition, it provides knowledge and description to justice seekers in arbitral awards, as well as realizing legal certainty for the parties with policies that lead to justice and welfare in accordance with the principles of *maqashid sharia*.

F. Writings Systematic

For readers to easily understand this research, the research structure is designed in 5 chapters, namely:

CHAPTER 1: Introduction

This chapter is an introduction that contains the background of the problem, the formulation of the problem, the scope of the research, the purpose of the research, the benefits of the research, and the systematics of the discussion.

CHAPTER II: Literature Review and Theoretical Framework

This chapter describes relevant previous research, differences and novelties, and explanations of theories regarding legal certainty and *maqashid sharia*.

CHAPTER III: Research Methodology

This chapter contains the research methods used and how to use the methods, in this case skin-based research with empirical juridical. This chapter explains data sources, data collection techniques, and data analysis techniques using Atlas.ti software.

CHAPTER IV: Result and Discussion

This chapter presents a description of the results of field research with data exposure and data analysis

CHAPTER V: Closing

This chapter contains conclusions and suggestions related to matters relevant to the results of the research.

