

7-31-2017

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Recommended Citation

Sitorus, Winner (2017) "JUDICIAL CONTROL OF FOREIGN ARBITRAL AWARDS IN INDONESIA," *Indonesian Journal of International Law*. Vol. 14: No. 4, Article 6.

DOI: 10.17304/ijil.vol14.4.706

Available at: <https://scholarhub.ui.ac.id/ijil/vol14/iss4/6>

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JUDICIAL CONTROL OF FOREIGN ARBITRAL AWARDS IN INDONESIA

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Abstract

The enforcement of foreign arbitral awards has been recognized and accepted internationally through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, the Convention also allows the court where the enforcement is sought to refuse the enforcement of an award. However, it should be conducted in accordance with the refusal grounds stipulated in the Convention. The refusal grounds are restrictive and should be interpreted narrowly, overly broad interpretation of the refusal grounds provided by the Convention will make it inefficient. This paper discusses the implementation of judicial control of foreign arbitral awards in Indonesia. It seeks to find out whether the judicial control of foreign arbitral awards in Indonesia has been in line with the requirements of the New York Convention. It finds that judicial control of foreign arbitral awards made by Indonesia's judiciary sometimes could be considered not in line with the requirements of the New York Convention.

Keywords: *Judicial Control, Recognition, Enforcement, Foreign Arbitral Awards, New York Convention, Indonesia.*

Submitted: 25 June 2016 | Revised: 14 October 2016 | Accepted: 14 June 2017

I. INTRODUCTION

Arbitration is the favorite method for settling disputes among private parties with respect to international business transactions.¹ Commercial arbitration has been practiced in both international and domestic contexts. Indeed, commercial arbitration has witnessed dramatic growth over the last twenty years, especially with respect to ICC arbitration.² Arbitration is popular as a method for

¹ Jane L. Volz and Roger S. Haydock, *Foreign Arbitral Awards: Enforcing The Award Against The Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867 at 868 (Spring, 1996). There is a parallel increase in the number of civil and commercial suits involving foreign defendant with the increase in the economic interaction among the countries of the world.

² See Fouchard Gaillard Goldman on *International Commercial Arbitration*, p.1, (Emmanuel Gaillard and John Savage eds., Kluwer Law International, 1999). Also see Garry B. Born, *International Commercial Arbitration*, p.7 (2d ed., Transnational Publishers and Kluwer Law International 2001).

resolving international commercial disputes because it has several advantages. Among others:³ each party has an opportunity to select an arbitrator for the arbitral tribunal; the parties may entrust their disputes to people with relevant expertise; the arbitration process may be less formal than judicial proceedings; the arbitration process is confidential; in the international context, arbitration is frequently considered as a way to avoid the uncertainties of transnational litigation; the arbitration process is considered relatively fast compared to litigation processes in a court.

Ideally, an arbitration award should be able to be enforced without judicial interference because it is final and binding. However, it may be possible that an arbitral proceeding fails to provide fairness or to be perceived as fair, thus resulting in a defective decision or award. Therefore, a control system, through judicial interference, is necessary to balance the interests of parties in an arbitral award. The question is to what extent judicial control could be conducted by a national court.

This paper will discuss the importance of judicial control over the recognition and enforcement of foreign arbitral awards under New York Convention and its implementation in Indonesia. This paper is organized into five parts: Part I will briefly discuss the growth of arbitration in international commercial dispute settlement; Part II will discuss the importance of judicial enforcement and control in arbitration; Part III will discuss the grounds for refusal of recognition and enforcement of foreign arbitral awards under New York Convention; Part IV focuses on the enforcement of foreign arbitral awards in Indonesia; finally, Part V concludes the discussion.

see Garry B. Born, *International Commercial Arbitration*, p.7 (2d ed., Transnational Publishers and Kluwer Law International 2001).

³ Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice*, p.3 (Kluwer Law International, 1999). Also see, A. Redfren and M. Hunter, *Law and Practice of International Commercial Arbitration*, 23 (3d ed., Sweet& Maxwell 1999). Garry B. Born, *International Commercial Arbitration*, p.3 (2d ed., Transnational Publishers and Kluwer Law International 2001). Julian D.M. Lew, et al., *Comparative International Commercial Arbitration*, p.8 (Kluwer Law International, 2003).

II. THE IMPORTANCE OF JUDICIAL ENFORCEMENT AND CONTROL IN ARBITRATION

The decision of an arbitration tribunal usually is final and binding. It is not, however, immediately enforceable in the losing party's country. An arbitration tribunal does not have authority to enforce its decision in designated country. The decision of an arbitration tribunal is not self-enforcing, like a court decision. It needs, however, a support of national court where the enforcement sought. National court has sovereignty to enforce a decision within its jurisdiction.⁴ Therefore, the recognition and enforcement of foreign arbitral award by national courts are very important, otherwise, the efforts and sacrifices of the winning party would be meaningless. It is important for a business to consider the availability of the recognition and enforcement of foreign arbitral awards in its counterpart country before drafting arbitration agreement in its contract. Otherwise, it will end up in the uncertain result.

Considering the final and binding nature of an arbitration award, it should be enforceable without judicial interference. As Delaume stresses that "It is generally recognized that, in order to be fully effective, transnational arbitration must be freed from judicial interference."⁵ However, it may be possible that an arbitral proceeding fails to provide fairness so resulting in a defective decision or award. Therefore, a control system through judicial interference is necessary to balance the interested parties of an arbitral award.

Control over an arbitral award is necessary because arbitration is the designated and limited power to make certain types of decision in certain set ways by a contract. Any limited designation of power must have some system of control.⁶ An arbitral award rendered within the framework designated by the parties is by itself part of the contract and

⁴ For more comprehensive explanations, see W. Michael Reisman, *System of Control In International Adjudication and Arbitration*, p. 107 (Duke University Press, 1992).

⁵ Tibor Varady, et.al., *International Commercial Arbitration A Transnational Perspective*, p.41 (2d. ed., Thomson West 2003). For more depth explanation of Delaume's opinion on Court Intervention in Arbitral Proceeding, see *Resolving Transnational Disputes Through International Arbitration*, pp. 195-223 (Carbonneued, University Press of Virginia, 1984).

⁶ *Supra*, note 4 at 1

hence binding on them.⁷ However, it might be that an award is produced in ways inconsistent with what the parties have agreed, hence the arbitrator has exceeded his power or committed what the French Law and International calls an *exce`s de pouvoir*.⁸ Theoretically, if a contention of nullity can be continued, the alleged award is null and may be denied by the “losing” party.⁹ The doctrine of *exce`s de pouvoir* is supposed to function as a control mechanism so that the arbitrator does not exceed his authority. As Reisman states:¹⁰

Without it, whatever an arbitrator did, no matter how inconsistent it might have been with his instructions, would have produced a binding award. The arbitrator would become an absolute decision-maker and arbitration would lose its character of restrictive delegation.

The *exce`s de pouvoir* mechanism control can work well in an organized political-legal system, which a hierarchical control system equipped with an effective compulsory jurisdiction to review allegations of excessive jurisdiction and to decide impartiality the alleged nullity of the award.¹¹ Unfortunately, in the international context, there is no such permanent and effective hierarchical structure. International arbitration lacks set of bureaucratic institutions to perform its control functions.¹² Therefore, national judiciary might conduct such control mechanism.

The idea of judicial control, as a control mechanism, over arbitral award derives from a different approach between finality and fairness goals. Freeing awards from judicial challenge promotes finality while enhancing fairness calls for some measure of court supervision.¹³ Arbitration’s winner looks for finality, while the loser wants careful judicial

⁷ *Id.* at 6

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.* at 5

¹³ William W. Park, *Why Courts Review Arbitral Awards*, 16-11 Mealey’s Intl. Arb. Rep.12 (November 2001); As a comparison, see Edward ChukwuemekeOkeke, *Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondogle?*, 10 N.Y. Int’l L. Rev. 29 at 33

scrutiny of doubtful decision.¹⁴ Both approaches are important in order to establish an efficient arbitration.

Judicial control over arbitral award might be in form of recognition and enforcement as well as judicial review or set aside.¹⁵ Judicial control in form of recognition and enforcement of arbitral awards means that a court can refuse to recognize and enforce an arbitral award (not to vacate).¹⁶ The award is still recognized exist even though it could not be enforced. Whereas judicial control in form of set aside means a court can set aside or vacate an arbitral award. The legal consequence is that existence of the award is entirely not recognized or the award is null and void.

Judicial control over foreign arbitral awards is subject to the United Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The convention provides a standard for a control system that balancing arbitral autonomy and national judicial review. It establishes two tiers of review competence, namely primary and secondary jurisdiction.¹⁷ Primary jurisdiction will refer to those in which the arbitration was sited and the award rendered or the state whose law governed the arbitration.¹⁸ Secondary jurisdiction will include any other jurisdiction, subject to the convention, in which enforcement is sought.¹⁹

The convention gives authority to primary jurisdiction to review the validity of an award that results in annulment or suspension of the award.²⁰ In another hand, it provides authority to secondary jurisdiction to refuse enforcement of an award based on limited grounds.²¹ Therefore, the compliance of the contracting parties' courts to the control mechanism of New York Convention will determine the efficacy of the

¹⁴ *Ibid.*

¹⁵ For detailed explanation, see Tibor Varady, et.al., *supra*, note 5 at 643-837. Also see, William W. Park, *International Forum Selection*, p. 122 (Kluwer International, 1995)

¹⁶ For discussion on recognition and enforcement, see Redfern, *supra*, note 3 at 448-9 and Julian D.M. Lew, *supra*, note 3 at 690

¹⁷ *Supra*, note 4 at 113

¹⁸ *Ibid.* at 114

¹⁹ *Ibid.*

²⁰ *Ibid.* Also see Article V (1) (e) of the New York Convention

²¹ *Ibid.* Also, see Article V (1) and (2) of the New York Convention

convention itself. This paper will only focus on the authority of the secondary jurisdiction to refuse recognition and enforcement of foreign arbitral awards under the convention.

III. GROUNDS FOR REFUSAL OVER THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD UNDER NEW YORK CONVENTION

New York Convention provides several grounds for a national court to refuse recognition and enforcement of foreign arbitral awards. Article V (1) provides the grounds for resisting party to ask enforcing court for refusing recognition and enforcement of an award. Whereas Article V (2) provides ground for the enforcing court on its own motion or on application by the resisting party to refuse recognition and enforcement.²² New York Convention provides grounds based on its stipulation (Article V (1)) and enforcing court's law (Article V (2)). The grounds for refusal stipulated in Article V is exhaustive, therefore no other grounds except those listed in that article may be considered for determining whether the enforcement should be granted.²³ Since the defense to refuse is exhaustive and exclusive, the New York Convention places the burden of proving the invalidity of the award on the defendant.²⁴

Under Article V of the Convention, the resisting party can invoke enforcing court to refuse recognition and enforcement of an award it can prove one of the following bases.

1. Party's Incapacity and Invalid Agreement (Article V (1)(a))
2. Improper Notice of Appointment, Proceeding, and Unable to present case (Article V (1)(b))
3. Award on unsubmitted matter (Article V (1)(c))
4. Improper Panel Composition and Arbitral Procedure (Article V (1)(d))
5. Non-Binding or Vacated Award (Article V (1)(e))
6. Non-Arbitrable Dispute (Article V (2)(a))
7. Contrary to Public Policy (Article V (2)(b))

²² *Ibid.* at 133

²³ Albert Jan van den Berg, *The New York Arbitration Convention Towards a Uniform Judicial Interpretation*, p.12 (Kluwer Law and Taxation Publishers, 1981).

²⁴ *See, Parsons &Whittemore Overseas Co. v. SocieteGenerale de L'Industrie du Papier (RAKTA)*, 580 F. 2d 969 (2d Cir. 1974).

1. Party's Incapacity and Invalid Agreement

Article V (1) (a) provides that “The parties to the agreement ... were, under the law applicable to them, under some incapacity.... This article speaks as to the capability of a party to conclude the arbitration agreement. The problem of this article is what the law will determine the capacity of the party. According to van den Berg the law that applicable is the conflict of laws of the forum in which the award invoked.”²⁵

This article also encompasses the broad meaning of “party”. The party here could mean a natural person, a legal person (corporation), and state.²⁶ There were some cases that defend to enforcement based on incapacity. An example of a successful defense under incapacity ground is *Fougerolle S.A. (France) v. Ministry of Defense of the Syrian Arab Republic*.²⁷ In this case, the Administrative Tribunal of Damascus refused enforcement of two ICC awards. It found that they were “non-existent” because the Syrian Council of State had not advised on the arbitration agreement.²⁸ An example of an unsuccessful defense under incapacity ground is *SAEPA-SIAPE (Tunisia) v. Gemancosrl (Italy)*.²⁹ In this case, the Italian Supreme Court refused incapacity defense by invoking sovereign immunity. The public entity is considered waiving its immunity by entering into an arbitration agreement. It reasoned that in international commercial matters legal persons of public law may, unless the parties have explicitly agreed otherwise, undoubtedly agree to arbitration, independent of domestic prohibitions, by expressing their consent and sharing, the conditions common to all operators.³⁰

Another part of this article states “... or the said agreement is not valid to which the parties have subjected...”. Invalid agreement is very often used to refuse enforcement of an arbitral award.³¹ The invalid agreement might be in form of ambiguous, not validly assigned, or non-written agreement. An example of ambiguous defense case is *Eastern Mediterranean Maritime Ltd v. SpA Cerealtoscana that decided by*

²⁵ *Supra*, note 23 at 277 and at 296

²⁶ Redfren and M. Hunter, *supra*, note 3 at 145

²⁷ *Ibid.* at 463

²⁸ *Ibid.* Also see, Julian D.M. Lew, et al, *supra*, note 3 at 708

²⁹ Julian D.M. Lew, et.al., *Ibid*

³⁰ *Ibid*

³¹ *Ibid* at 709

Court of Appeal Florence.³² In this case, an Italian company argued that the agreement to arbitrate provided on the backside of the purchase order was invalid under the law to which the parties had subjected it.³³ An example of not validly assigned defense case is *IMP Group (Cyprus) Ltd. v. Aeroimp* that decided by District Court Moscow.³⁴

2. Improper Notice of Appointment, Proceeding, and Unable to present case

Article V (1) (b) provides that “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present this case”. This article is ensuring the due process of the arbitration. Therefore, proper notice and fair procedure are very important.

In term of proper notice, the important issue here is whether the notice is timely and appropriate. Claims grounded on lack of notice are most likely to succeed.³⁵ In the matter of proceeding notice, basically, this entails both the right to have the arbitration conducted in accordance with the arbitration agreement and the right to have a reasonable chance to present the case.³⁶ Lack of proper appointment of arbitrator and proceeding of arbitration, in turn, will cause one party unable present his case.

A court generally considers the whole results (whether the defendant had a fair hearing) and do not overturn awards because the defendant was unable to present some part of his case, such as witness, or could not cross-examine the other party’s witness or if he had notice of the hearing and failed to attend.³⁷

It is possible that the court of the forum has its own concept to deter-

³² *Ibid.*

³³ Redfren, *supra*, note 3 at 463

³⁴ *Supra*, note 32, *Ibid.*

³⁵ Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards the New York Convention of 1958*, p. 149 (Cameron May International Law & Policy, 2001); Also See Danish Buyer v. German Seller, note 5 at 769

³⁶ *Ibid.*

³⁷ *Parson & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier*, 508 F.2d 975 (2d Cir. 1974)

mine whether there is due process or not. However, it has a limited role. Its function is not to decide whether or not the award is correct, based on fact and law. Its function is simply to decide whether there has been a fair hearing or not.³⁸

3. Award on Unsubmitted Matters (Article V (1) (c))

This article is concerned with situations where the arbitrators alleged to have granted a claim, which parties did not want to refer to arbitration or believed to have ruled on a case beyond the boundaries that the parties intended to impose on arbitrator's power.³⁹ It deals with the activity of the arbitral tribunal that exceeds its mandate. It also deals with the possibility of a partial enforcement of an award that contains decisions under the arbitrator's power and decisions outside that power.⁴⁰

An example of defense based on an allegation that the arbitrator has decided the matters outside the jurisdiction conferred upon it by the parties is *Gotaverken v. GNMTC* case.⁴¹ In this case, respondent (GNMTC) claimed that the declaration of the arbitrators stating that "with this the performance of this award, both parties would be deemed have fulfilled all their obligations over three agreements" is outside of the arbitrator's authority, which should be limited to matters submitted to them. The Svea Court of Appeal in Stockholm held that general nature of the statement is not subject to enforcement.⁴² Therefore, it is not relevant to the question whether the enforcement should be granted.⁴³

Arbitration agreement should be clear and firm. It might be that an agreement stating "any disputes" which could not be settled amicably without strong limiting or excepting language immediately following it, logically includes not only the dispute but also the consequences naturally flowing from it.⁴⁴

³⁸ Redfern, *supra*, note 3 at 465

³⁹ Domecico Di Pietro & Marthin Platte, *supra*, note 35 at 159;

⁴⁰ van den Berg, *supra*, note 23 at 311-312

⁴¹ *Ibid.* at 316

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Management and Technical Consultants S.A. v. Parson Jurdin International Corp.*,

This article may raise different interpretation amongst national courts. However, the question whether an arbitrator has exceeded his power should not cause a re-examination of the standing of the award.⁴⁵

4. Improper Panel Composition and Arbitral Procedure (Article V (1) (d))

This article lies down two separate grounds to refuse recognition and enforcement of an award. First, the enforcing court may refuse recognition and enforcement if the composition of the arbitral tribunal was not in accordance with the agreement of the parties or the law of the arbitral seat if there was no such agreement. Second, the enforcing court may refuse if the arbitral procedure was not in accordance with the agreement of the parties or the law of the arbitral seat if there was no such agreement.

This article clearly supports the party autonomy principle, because only in the absence of the party agreement the law of the arbitral seat may be consulted. This article also constitutes an improvement of the Geneva Convention. Geneva Convention requires that the composition of the arbitral and arbitral procedure should be both in accordance with the parties' agreement and the law of the arbitral seat.⁴⁶

In practice, claims under this article rarely occur.⁴⁷ In *Imperial Ethiopian Government v. Baruch-Foster Corp*, Baruch-Foster challenged that the selection violated the arbitration agreement, which provided that the third arbitrator should have no direct or indirect relationship with either party. The district court confirmed enforcement of the award, finding that Baruch-Foster had waived any objection to the composition of the panel and was estopped from contesting the composition of the board.⁴⁸ Impliedly, the district court reasoned that the defense alleging

820 F.2d 1531,1535 (9th Cir 1987).

⁴⁵ *Supra*, note 23 at 313

⁴⁶ Van den Berg, *supra*, note 23 at 323; Domenico Di Pietro & Martin Platte, *supra*, note 35 at 163

⁴⁷ Van den Berg, *supra*, note 45, *Ibid*. See *Imperial Ethiopian Government v. Baruch-Foster Corp*, 535 F.2d 334 (5th Cir.1976); *Al Haddad Bros Enterprises v. M/S Agapi*, 635 F.Supp.205 (D.Del 1986), *aff'd*, 813 F.2d 396 (3d Cir.1987); *PT.ReasuransiUmum Indonesia v. Evanston Ins. Co.*, 1992 WL 400733 (S.D.N.Y. 1992)

⁴⁸ 535 F.2d at 335

disqualification of the panel composition (Professor David) was belatedly raised, namely more than six months after respondent (BFC) was notified of the award and more than three months after Ethiopia had petitioned for confirmation.⁴⁹ The Court of Appeal affirmed the district court judgment.

In *Al Haddad Bros Enterprises v. M/S Agapi*, in invoking the defense under this article, Al Haddad claimed the arbitration provision required an arbitration panel composed of one arbitrator appointed by each party, and if two arbitrators did not agree, an umpire appointed by the two arbitrators would render the decision.⁵⁰ In this case, a sole arbitrator, who appointed by the owner of Agapi vessel, made the award. The court in opinion that the award rendered not in accordance with the parties' agreement, but that is not fatal to its validity. According to the court, the Convention allows recognition of an award that, although not in accordance with the parties' agreement, complied with the laws of the country where the arbitration occurred.⁵¹ Under the British Arbitration statute, the place of arbitration conducted, a sole arbitrator appointed by one of the parties may decide a dispute when the other party fails to appoint an arbitrator under the agreement, after being called upon to do so.⁵² Therefore, the London award is entitled to recognition and enforcement under the Convention.

In *PT. Reasuransi* case, the plaintiff (PTR) claimed that the arbitration panel was biased in that it refused to grant PTR an extension, did not send documents filed in the proceeding to PTR' counsel, and adopted verbatim respondent' (Evanston) proposed award.⁵³ The District Court of the Southern District of New York, in addressing the claim, reasoned that the Panel's refusal to grant an extension was reasonable because PTR did not request an extension until four days before the hearing was scheduled to begin, whereas PTR has been noticed as to arbitration proceeding properly.⁵⁴ The court reasoned that Panel did not need to provide PTR's counsel with copies of documents filed in the

⁴⁹ *Ibid.* at 336

⁵⁰ 635 F.Supp. at 207

⁵¹ *Ibid.* at 210

⁵² *Ibid.*

⁵³ 1992 WL 400733

⁵⁴ *Ibid.*

arbitration proceeding because it did send to PTR directly. The court also reasoned that if there was similarity between adopted and proposed award, there was no bias. The court refused the claim of the plaintiff because PTR does not allege that any of the arbitrators had any prior or current dealing or relationship with the respondent (Evaston). Thus PTR does not show that arbitrators had the personal interest required for a showing of partiality.

5. Non-Binding or Vacated Award (Article V (1) (e))

This article is concerned with two grounds for refusal, namely the award that has not become binding and the award has been vacated or suspended. The legislative history of the Convention showed that there was a problem with the interpretation of “binding” word. The problem is concerned with the determination of when an award deemed as binding.⁵⁵ In determining when an award considered as binding, most of the courts held that the law of the country of origin would resolve it.⁵⁶ However, this can require the obligation to obtain leave for enforcement under the law which in turn will oblige the enforcing party to get double exequatur. This will lead to the same rules under Geneva Convention that requires double exequatur to determine “final” award, which is avoided by New York Convention.⁵⁷ The solution of this problem might be resolved independently. According to this independent interpretation, the award would be considered to have become “binding” for the purpose of Article V (1) (e) at the moment on which there is no opportunity to appeal to a second arbitral instance or competent court in those cases where such opportunity to appeal is available.⁵⁸

The ground that the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made also possible to raise interpretation problem. For example, U.S. courts have different approach in judging petition to enforce foreign vacated award. In *Chromalloy Aeroservices, a Division of Chromalloy*

⁵⁵ *Supra*, note 23 at 338; *Supra*, note 35 at 166

⁵⁶ *Supra*, note 23 at 357

⁵⁷ *Supra* note 23 at 341; *Supra*, note 35, *Ibid.*

⁵⁸ *Supra*, note 23 at p.357; *Supra*, note 23 at 166

Gas Turbine Corp. (U.S) v. The Arab Republic of Egypt,⁵⁹ the District Court of Columbia enforced the arbitral award that had been set aside in Egypt. The court reasoned that under New York Convention Article (V) the court is not obliged to refuse enforcement of an award that has been vacated. However, the Convention gives optional word “may” to the court, whether to enforce or not. Thus, the Court may, at its discretion, decline to enforce the award.⁶⁰ The court also relied on Article VII implying that the power to review the award belongs to the court where enforcement is sought.⁶¹

The different approach provided in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*⁶² In this case, Barge Company brought suits to enforce award (obtained in Nigeria) that was set aside by Nigerian court. The Court of Appeal (Second Circuit) held that because competent authority of country in which they were made, United States court could properly decline to enforce them under the New York Convention, had set awards aside.⁶³

In order to refuse enforcement based on the award has been adjourned; the respondent has to apply for the suspension of the award in the country of origin. The respondent also must prove that the suspension of the award has been effectively ordered by a court in the arbitral seat.

6. Non-Arbitrable Dispute (Article V (2) (a))

New York Convention only applies to disputes that are capable of settlement by arbitration.⁶⁴ Generally, any dispute should be capable of being resolved by private tribunal as by the judge of national court. However, it is precise because arbitration is private proceeding with public consequences that some types of dispute are reserved for na-

⁵⁹ 939 F.Supp.907 (D.D.C. 1996).

⁶⁰ *Ibid.* at 909. For further discussion on this case, see Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. Int'l L.J. 141, Spring 1999.

⁶¹ 939 F.Supp. at 907, 909, 914

⁶² 191 F.3d 194 (1999)

⁶³ *Ibid.*

⁶⁴ Article II (1) of the New York Convention

tional courts, whose proceedings are generally in the public domain. It is in this sense that they are not “capable of settlement by arbitration.”⁶⁵

Under this article of the Convention, the enforcing court may refuse the recognition and enforcement of an arbitral award if it finds that the case is not subject to arbitration under its own law. Therefore, the validity of subject matters to arbitration might be different amongst countries.⁶⁶ National laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration.⁶⁷ A state may require that its entity is not allowed to enter into arbitration at all or may require a special authorization to do so. A state also may require only particular subject matters are arbitrable.⁶⁸

Since the arbitrability of subject matters are influenced by each state’s policy, social, and economic, it might be that disputes which are not arbitrable under the law of one country are arbitrable in another country where the interest involved are considered to be less important.⁶⁹ Since states’ policy, social, and economy are dynamic, the arbitrability of subject matters is also dynamic.⁷⁰

The areas where traditionally problems of arbitrability have arisen are anti-trust and competition, securities transaction, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investment in natural resources.⁷¹ There are very few cases in which

⁶⁵ See Alan Redfern and Martin Hunter, *supra*, note 3 at 148. Disputes reserved for public domain are not capable of settlement by arbitration.

⁶⁶ The scope of subject matter to arbitration might be depending on political, social, and economical aspects of a state. See *Ibid.*

⁶⁷ Julian D.M. Lew, et al., *supra*, note 3 at 187

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 188-89

⁷⁰ See *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc.*, 473 U.S 614, 105 S.Ct. 3346 (1985); *Scherk v. Alberto-Culver Co.*, 417 US 596 (1974); *Shearson/American Express Inc. et al v. McMahon et al*, 482 US 220 (1987); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 US 477 (1989). These cases show that subject matters previously are not arbitrable in domestic context become arbitrable not only international context but also in domestic context.

⁷¹ Julian D.M. Lew, et al. *supra*, note 3 at 201; Redfern, *supra*, note 3 at 149-153; Also see *Comparative Arbitration Practice and Public Policy in Arbitration*, International Council For Commercial Arbitration Congress Series No. 3, p.194-203 (Pieter Sanders, general editor, Kluwer, 1986).

enforcement of an award has been refused based on non-arbitrability of the underlying dispute.⁷²

7. Contrary to Public Policy (Article V (2) (b))

Article V (2) (b) of the New York Convention provides that enforcement may be refused where such enforcement would be contrary to the public policy of the law of the place of enforcement. The resisting parties are very often to invoke public policy defense to refuse enforcement of foreign arbitral awards. However, it is rarely successful.⁷³ Even though litigants to dismiss enforcement of an arbitral award very often invoke it, the concept of public policy itself is not uniform. It is difficult, if not impossible, to define the concept of public policy.⁷⁴ The public policy meaning might be different in international context and domestic context. The scope of domestic or national public policy may be broader than international public policy.⁷⁵ Therefore, the results of defense using this ground would be different from state to state. However, Article V (2) (b) can be considered tend to international public policy. This tendency has been affirmed by a large number of courts, whether expressly or implicitly.⁷⁶

Even though there is no certainty as to the scope of public policy, the general practice in some jurisdictions has construed the application of this defense narrowly.⁷⁷ The defense is only applicable where the enforcement would violate the most basic notions of morality and justice of the forum state.⁷⁸ Not all Procedural defects in the course of foreign

⁷² For detail, see Julian D.M. Lew, *supra*, note 3 at 721(note 171)

⁷³ Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under The United Nations Convention of 1958: The "Refusal" Provisions*, 24 Int'l Law 487 at 508 (Summer 1990)

⁷⁴ *Supra*, note 72 at 722. The author quoted English and India judges's statement as to the concept of public policy.

⁷⁵ See Born, *supra*, note 3 at 816

⁷⁶ *Supra*, note 23 at 382; *supra*, note 72 at 721 (note 173)

⁷⁷ See, Michael Hwang and Andrew Chan, *Enforcement and Setting Side of International Arbitral Awards-The Perspective of Common Law Countries*, in *International Arbitration and National Courts: The Never Ending Story*, International Council for Commercial Arbitration Congress Series No.10 (Albert Jan van den Berg eds, Kluwer Law International, 2001) pp. 156-159

⁷⁸ See *Parsons and Whittemore Overseas Co., Inc. v Societegenerale de l'industrie du*

arbitration process necessarily lead to refusing enforcement.⁷⁹

These cases approach on public policy scope are in line with historical purpose of the New York Convention on the application of the public policy exception, which limit to cases in which the recognition or enforcement of foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award was invoked.⁸⁰

IV. THE ENFORCEMENT AND REFUSAL OF FOREIGN ARBITRAL AWARDS UNDER INDONESIAN ARBITRATION LAW

A. THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER INDONESIAN ARBITRATION LAW

1. The Enforcement of Foreign Arbitral Award under Presidential Decree No. 34 of 1981 and Supreme Court Regulation No. 1 of 1990

Indonesia ratified the New York Convention in 1981.⁸¹ However, the Presidential Decree does not contain any provision as to the enforcement of foreign arbitral awards. Until Supreme Court Regulation No. 1 of 1990 enacted, there was no certainty whether foreign arbitral awards

papier (RAKTA), 508 F. 2d 969, 974 (2d Cir. 1974); Almost with similar reason, *see-Adviso N.V (Netherlands Antilles) v. Korea Overseas Construction Corp.*, XXI Year Book Commercial Arbitration 612 (1996) as quoted in Julian D.M. Lew, *supra*, note 72 at 726; *Camera di Esecuzione e Fallimenti Canton Tessin*, 19 June 1990, XX Year Book Commercial Arbitration 762 (1995) as quoted in *supra*, note 72, at 727; *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd* (1999) 1 HKLRD 552 as quoted in *supra*, note 72 at 728; *Kersa Holding Company Luxemburg v. Infancourtage and Famajuk Investment and Isny*, XXI Year Book Commercial Arbitration 617 (1996) 625 as quoted in *supra*, note 72 at 729.

⁷⁹ *K.S. A.G. v. C.C.SA*, XX Year Book Commercial Arbitration 762 (1995) as quoted in *supra*, note 72 at 473

⁸⁰ *Supra*, note 73 at 509

⁸¹ Indonesia ratified and became a Contracting State by Presidential Decree No. 34 of 1981. State Gazette 1999 Number 138. When ratified the Convention, Indonesia made reservation that it will apply the Convention on the reciprocity basis, to the recognition and enforcement of awards made only in the territory of another Contracting State and that it will apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the Indonesian Law.

could or could not be enforced in Indonesia. There was sharp debate between a prominent legal scholar and a Justice as to the enforcement of foreign arbitral award under Presidential Decree No. 34 of 1981. According to Prof. Gautama, since Indonesia ratified the Convention through the Presidential Decree, it bound to recognize and enforce the awards under the Convention; it does not need an implementing regulation.⁸² In another hand, Justice Asikin reasoned that the Convention is not self-executing treaty; it still needs an implementing regulation.⁸³ Presidential Decree No. 34 of 1981 does not provide rules of procedure to enforce an award. Therefore, a foreign arbitral award could not be enforced so long as the implementing regulation does not exist.⁸⁴

The finding of the Supreme Court in this matter was shown its judgment in *P.T. Nizwar, Jakarta v. Navigation Maritime Bulgare (Bulgaria)*.⁸⁵ In this case, the Supreme Court (Mahkamah Agung) headed by Justice Asikin overruled the judgment of the District Court of Central Jakarta that confirmed the arbitral award rendered in London. The Supreme Court reasoned that according to the existing legal practice there must be an implementing regulation in regard to petition to enforce an arbitral award; whether it could be directly requested to district court, to which district court or it requested to the Supreme Court so that it could consider whether the award contains things that are against legal order of Indonesia.⁸⁶ This case was controversial because the Court considered the appellant (P.T. Nizwar) failed to fulfill the civil procedure of cassation, in which an appellant should submit cassation brief, and refused cassation petition.⁸⁷ Nevertheless, the Court refused to enforce the award because of the absence of implementing regulation. It raised broad criticism from both parties in Indonesia and abroad.⁸⁸

⁸² See Huala Adolf, *Arbitrase Komersial Internasional (International Commercial Arbitration)* p. 120-121 (3d edition, RajawaliPers, 2002); Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum & Konvensi New York 1958 (Public Policy Principle and New York Convention 1958)* p. 175 (PT. Citra Aditya Bakti, 1998); M. Yahya Harahap, *Arbitrase (Arbitration)*, p.59 (Pustaka Kartini, 1991)

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Supreme Court Decision No. 2944 K/Pdt/ 1983 (September 29, 1984).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ M. Yahya Harahap, *supra*, note 82, at 436

The Supreme Court ransomed its controversial judgment by enacting Supreme Court Regulation (Perma) No. 1 of 1990. It constitutes the implementing regulation of Presidential Decree No. 34 of 1981. By this enactment, there is legal certainty as to the procedural rules of the enforcement of foreign arbitral awards. In the consideration section, the Court reasoned that rules of procedure contained in HIR and Rv (Civil Rules of Procedure left by Dutch Colonial Government) does not have provisions as to enforcement of foreign arbitral award, therefore the implementing regulation is necessary.⁸⁹

The Supreme Court Regulation contains several rules as to the enforcement of foreign arbitral awards, among others:

a. Binding Award and Foreign Award

Under article 2 of the Supreme Court Regulation, foreign arbitral award is equal with the binding judgment of a court. Therefore, it will be recognized and enforced as binding judgment.

This article also defines the meaning of foreign arbitral award. It states that foreign arbitral award is an award rendered by institutional arbitration or ad hoc arbitration outside of the legal jurisdiction of the Republic of Indonesia. An award is considered as a foreign arbitral award if it is an award of institutional or ad hoc arbitration that under Indonesia Law considered as foreign arbitral award. The latter sentence of this article seems to refer to the article 1 of the Convention as to “non-domestic awards”.⁹⁰ Unfortunately, there was no case as to implementation of this article.

2. Reciprocity

Indonesia made reciprocity reservation when ratified the convention. Therefore the Supreme Court Regulation also contains reciprocity requirement. Under article 3 (1), a foreign arbitral award would be recognized and enforced if it is rendered by institutional or ad hoc arbitration in a state in which with Indonesia or together with Indonesia bound in Convention of Recognition and Enforcement of Foreign Arbi-

⁸⁹ Consideration section of the Supreme Court Regulation No. 1 of 1990.

⁹⁰ M. YahyaHarahap, *supra*, note 88, at 63

tral Award. The enforcement based on reciprocity principle.

There was one case as reciprocity principle. It was decided after Indonesia ratified the Convention but before the enactment of the Supreme Court Regulation. In *Trading Corporation of Pakistan Limited v. P.T. Bakri & Brothers*, the Supreme Court affirmed the judgment of the District Court of South Jakarta and Jakarta Court of Appeal, which refused to enforce an arbitral award rendered by Federation of Oils, Seeds and Fats Association in London.⁹¹ In the case involving Indonesia and Pakistan parties, the district court refused to enforce the award based on reciprocity principle made by Indonesia when ratified the Convention. However, the court applied reciprocity principle differently as the Convention means.⁹² The court interpreted the principle that the contracting parties also must be the parties in the dispute. The court reasoned that the parties in the case are Pakistan and Indonesia, not England.⁹³ Therefore, even though the award rendered in England, a Contracting State, the award could not be enforced in Indonesia. The award might be enforceable if it was rendered in Pakistan. The district court interpreted the “territory of another Contracting State, in this case, should be Pakistan. Reciprocity principle here applies between Pakistan and Indonesia, and not Indonesia and England.”⁹⁴

This decision is hard to be justified if the court follows the interpretation of “another territory of Contracting States” as generally practiced in international commercial arbitration.⁹⁵

3. Commercial Disputes

This regulation requires that the arbitral award should arise from disputes, in which considered in the scope of commercial law under Indonesia law.⁹⁶ This article is in line with Presidential Decree No. 34 of 1981(in the reservation declaration) and Article 1 (3) of the Conven-

⁹¹ Supreme Court Decision No. 4231 K/Pdt/1986 (May 11, 1988)

⁹² Under the New York Convention, the reciprocity principle is that the awards should be rendered in Contracting States.

⁹³ District Court of South Jakarta Decision No. 64/Pdt/G/1984/PN.Jkt. Sel at point 4

⁹⁴ *Ibid.* at point 5

⁹⁵ See, Albert Jan van den Berg, *supra*, note 45

⁹⁶ Article 3 (2) of the Supreme Court Regulation

tion. What commercial law under Indonesia law is what contained in book I and II of Indonesia Commerce Code.⁹⁷ This scope is narrower than what defined by article 65 of Arbitration and Alternative Dispute Resolution Act No. 30 of 1999.⁹⁸

4. Public Policy

This principle of public policy is considered very important, so it is stipulated in two articles. Article 3 (3) of the Regulation stipulates that only arbitral awards that are not against public policy could be recognized and enforced in Indonesia. This provision is also in line with Article V (2) (b) of the Convention. Indonesia's courts have applied public policy ground to refuse the enforcement of foreign arbitral award.⁹⁹ Exequatur order would not be granted if foreign arbitral awards are apparently against the fundamental principles of the whole legal system and society in Indonesia (public policy).¹⁰⁰

5. Jurisdictional and Procedural Requirements

A creditor of foreign award can request enforcement to District Court of Central Jakarta.¹⁰¹ The district court will enforce the award after having execution order from the Supreme Court.¹⁰² A creditor award also should submit some documents in order to have recognition and enforcement of the award. Documents should be submitted are:¹⁰³

1. The duly authenticated original award or a duly certificated copy thereof and its official translation in Bahasa Indonesia (Indonesian official language).

⁹⁷ The book I and II of Indonesia Commerce Code contains general regulations on sorts of corporations, trade exchange, broker, commissioner, shipping agent, carriage, money order, check, promissory note, and bankruptcy.

⁹⁸ See, *infra*, IV.1.b.

⁹⁹ See, *infra*, IV.2

¹⁰⁰ Article 3 (3) of Supreme Court Regulation

¹⁰¹ Article 1 of the Supreme Court Regulation states that the District Court of Central Jakarta is the only court authorized to handle matters pertaining to the recognition and enforcement of foreign arbitral award.

¹⁰² Article 4 (1) of Supreme Court Regulation

¹⁰³ Article 5 (4) of Supreme Court Regulation

2. The original document or certified copy of arbitration agreement and its official translation in Bahasa.
3. The statement from the Indonesian mission in the country where the award is made that the applicant's request is bound by bilateral or multilateral agreement on the recognition and enforcement of foreign arbitral awards in which Indonesia is a party to it.

b. Under Arbitration and ADR Act No.30 of 1999

This Act enacted in August 1999. This Act regulates both domestic and foreign arbitration.¹⁰⁴ Before this Act was passed, the Indonesia arbitration law was prescribed in the Code of Civil Procedure of 1847, articles 615-651. After this enactment, those articles of the Code of Civil Procedure stated are not taking into force. However, the Act of 1999 does not officially invalidate and overrule the Supreme Court Regulation. Therefore, based on legislation interpretation the Regulation still takes into force. However, because legislation hierarchy of the Act is higher than the Supreme Court Regulation, the Act will preempt the Regulation if there is conflicting provision between them.

The provisions as to the enforcement of foreign arbitral award in the Act of 1999 basically are similar with those contained in the Supreme Court Regulation. They are similar in terms of reciprocity principle, foreign award definition, and public policy principle. However, the Act contains a different provision of execution order and appeal proceeding that is not stipulated in the Supreme Court Regulation. This section will discuss those matters and time period to request enforcement which is not stipulated either in the Supreme Court Regulation or the Act of 1999.

1. Time period to request enforcement

It is questionable why the Supreme Court Regulation and the Act of 1999 does not contain time period to request enforcement. Both the Regulation and the Act only requires that the arbitrator or her representative, to submit and register the award to the registrar the District

¹⁰⁴ It contains five articles as to the recognition and enforcement of foreign arbitral awards (Articles 65-69)

Court of Central Jakarta (Pengadilan Negeri Jakarta Pusat).¹⁰⁵ They do not mention when the award should be submitted and registered. From the sentence of the article, it may be assumed that there is no time limit for arbitrator or her representative to submit and register the award. It is different with the U.S. Federal Arbitration Act that stipulates that the application to enforce an award must be submitted within three years after it is made.¹⁰⁶

The non-existence provision of time period to request enforcement may raise a problem in the future if the resisting party request to dismiss the enforcement because it passes time limit provided for domestic award.¹⁰⁷ If this situation occurs the court may face difficulty what provision it will apply because article 59 is aimed for domestic awards, whereas there is no such provision for foreign arbitral awards. In order to assure legal certainty, it is necessary to add additional provision as to time limit to request enforcement of an award in Act of 1999.

2. Appeal Proceeding

The Supreme Court does not provide appeal proceeding provision. It relied on the Code of Civil Procedure, which stipulated that the judgment to grant or refuse enforcement of an award could not be appealed.¹⁰⁸ The Act of 1999 stipulates slightly different. For the granting of the request to enforce an arbitral award, it could not be appealed,¹⁰⁹ whereas for the refusal to enforce an arbitral award could be appealed to the Supreme Court.¹¹⁰ This provision is different with the legal practice in the United States, which allowing appeal to confirming or denying confirmation of an award.¹¹¹

¹⁰⁵ See, Article 5 (1) of the Regulation and Article 67 of the Act. Submission and registration of the award must be accompanied by the necessary documents. See, Article 5 (4) of Supreme Court Regulation.

¹⁰⁶ Section 207

¹⁰⁷ Article 59 (1) of the Act of 1999 provides that the original or authentic copy of the arbitral award must be submitted within 30 days since the award is made. And failure to do so may result the award could not be enforced (2).

¹⁰⁸ Article 630 of the Code of Civil Procedure

¹⁰⁹ Article 68 (1) of the Act of 1999

¹¹⁰ Article 68 (2) of the Act of 1999

¹¹¹ Section 16 of Federal Arbitration Act

3. Execution Order

The Act of 1999 governs execution order slightly different with the Supreme Court Regulation. It stipulates that the enforcement of an award could be conducted after having execution order from the Chairman of the District Court of Central Jakarta.¹¹² However, if the award involving the Republic of Indonesia as a party, the execution order would be provided by the Supreme Court, which then will delegate to the Chairman of the District Court of Central Jakarta.¹¹³ In contrast, the Supreme Court Regulation governs that the foreign arbitral award could be enforced after having execution from the Supreme Court, no matter when it involves the Republic of Indonesia as party.¹¹⁴ The Chairman of the District Court of Central Jakarta will delegate the further execution to chairman of the district court where a debtor award domiciles or has assets.¹¹⁵

Both provisions of the Supreme Court Regulation and the Act of 1999 are different with the provision of U.S. Federal Arbitration Act. Under Federal Arbitration Act, a creditor award could request enforcement to district courts in the United States.¹¹⁶

4. Commercial Award

As discussed above, the Supreme Court does not define the scope of commercial disputes. The Act of 1999 provides additional explanation as to what constitute commercial disputes. It defines commercial disputes as disputes over, among others, trade, banking, finance, investment, industrial and intellectual property rights.¹¹⁷ However, this scope is not limitative because it does not define the scope definitely. In the contrary, it uses “among others” words. Therefore, it is possible that the commercial scope is broader than what defined in this article.

¹¹² Article 66 (d) of the Act of 1999

¹¹³ Article 66 (3) of the Act of 1999

¹¹⁴ Article 4 of the Supreme Court Regulation

¹¹⁵ Article 69 of the Act of 1999

¹¹⁶ See Section 203 and 207 of the Federal Arbitration Act

¹¹⁷ See, official comment of Article 66 (b)

B. REFUSAL OF FOREIGN ARBITRAL AWARD UNDER INDO- NESIAN ARBITRATION LAW

Since Indonesia has ratified the New York Convention, it is embodied in Indonesia law.¹¹⁸ Consequently, all grounds for refusing to recognize and enforce foreign arbitral award available under the Convention are also available under Indonesia Arbitration Law. Indonesia courts have decided few cases pertaining to the recognition and enforcement of foreign arbitral awards. This section will discuss only grounds that Indonesia courts have applied to refuse enforcement.

a. Invalid Agreement (Article V (1)(a))

There was a case where presumably the Supreme Court applied invalid agreement defense improperly. Impliedly, the Court interpreted that invalid agreement defense not only encompasses the validity of the arbitration agreement but also the validity of the underlying contract.

In *Sikinos Maritime Ltd (Malta) v. P.D. Perdata Laot (Indonesia)*, the Supreme Court has refused to enforce foreign arbitral award based on invalid contract.¹¹⁹ In this case, the London Maritime Arbitrators Association has rendered award in favor of Sikinos Maritime Ltd, a Malta company. This case has arisen from the alleged contract of ship sale purchase between buyer (Sikinos) and seller (Perdata Laot). In arbitration proceeding, the claimant (buyer) contended that they had agreed to buy and that the respondent (seller) had agreed to sell the ship "BUMEUGAH" on terms and conditions more particularly set out in exchanges leading to alleged agreement.¹²⁰ Whereas the seller contended that they had never signed a Memorandum of Agreements and that no contract between them and the buyers had been concluded.

The arbitrators concluded that in the negotiations and exchanges leading to the alleged agreement had not contained any mention of a requirement that the parties should not be considered as bound until a

¹¹⁸ See the Consideration of Presidential Decree No. 34 of 1981

¹¹⁹ Supreme Court Decree No.3 Pen.Ex'r/Arb.Int/Pdt/1992 (April 6, 1994)

¹²⁰ In the Matter of The Arbitration Act 1950-1979 and In The Matter of An Arbitration Between Sikinos Maritime Ltd. and P.D. Perdata Laot, "Bumeugah" – MoA dd. 20.9.91, Final Award, point A.

contract was signed.¹²¹ In English law, in the absence of agreement upon such requirement, a fully binding contract is concluded once the parties become *ad idem*, and there are not outstanding points to be agreed or conditions to be satisfied. The fact that the seller never signed the Memorandum of Agreement is neither here nor there.¹²² Therefore, the arbitrators held that there was a binding contract.¹²³

The Supreme Court accepted argument of the respondent that there was no binding contract. It held that the Memorandum of Agreement unsigned by the parties constitutes no binding agreement between them.¹²⁴ There was no additional reason why it is not binding agreement. It did not refer to any grounds of refusal under the New York Convention.

This case did not raise issue of “agreement in writing” under the New York Convention,¹²⁵ whether an unsigned memorandum qualifies as an agreement in writing. If the respondent has raised this issue, it might fail because the negotiations and exchanges leading to the alleged agreement purported to contain provisions (in the clause 15 of the Norwegian Sale form) to the effect that any dispute arising should be referred to arbitration in London.¹²⁶

b. Improper Notice of Appointment, Proceeding, and Unable to present case (Article V (1)(b))

The Supreme Court has refused to enforce foreign arbitral award based on unable to present case in *Trading Corporation of Pakistan Limited (Pakistan) v. P.T. Bakri and Brothers (Indonesia)* case.¹²⁷ The Supreme Court affirmed the judgment of the district court and the high court, which refused to enforce an arbitral award rendered in London.

¹²¹ *Ibid.* at Reasons part point 3

¹²² *Ibid.*

¹²³ *Ibid.* at point 10

¹²⁴ *Supra*, note 120, at 2

¹²⁵ Article II (2) of the New York Convention requires an arbitral clause or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

¹²⁶ In the Matter of The Arbitration Act 1950-1979, *supra*, note 120 at point C

¹²⁷ Supreme Court Decision No. 4231 K/Pdt/1986 (May 11, 1988). This case also pertains to the implementation of reciprocity principle. *Supra*, IV.1.a. 2

In this case, the District Court of South Jakarta refused enforcement based on several reasons; one of them is that the arbitrators did not sufficiently hear the respondent's (P.T. Bakri and Brothers) evidences.¹²⁸ The district court considered that the rejection of the arbitrators over the evidence furnished by the respondent, as to the conditions resulting the respondent failed to perform the obligation under the agreement, is against justice and equity.¹²⁹ One of the evidences the respondent provided is that he guaranteed the contract performance with "Performance Bond". Therefore, if the respondent failed to perform the contract, the claimant can cash the "Performance Bond." The fact provided that the claimant received the payment of the "Performance Bond" after the respondent failed to perform the contract.¹³⁰ The district court concluded that there was not any obligation for the respondent after he paid the "Performance Bond". It concluded that the arbitrator should have considered the evidences furnished by the respondent. Therefore, the enforcement could not be granted.

It seems that the district court and high court not only examined whether the respondent sufficiently to be heard by the arbitrators, but also the merits of the award. Regrettably, even though, the Supreme Court reasoned that the district court and high court should not have examined the award merits and were wrong by doing so, it did affirm the judgment without sufficient legal reasoning.¹³¹

This case is also interesting because the Supreme Court did not apply the absence of implementing regulation to refuse the enforcement as it did in P.T. Nizwar, *Jakarta v. Navigation Maritime Bulgare (Bulgaria)*,¹³² whereas both cases were decided before the Supreme Court Regulation took into force. It showed that the Supreme Court was inconsistent in dealing with enforcement of foreign arbitral awards.

¹²⁸ District Court of South Jakarta Decision No. 64/Pdt/G/1984/PN.Jkt. Sel (November 1, 1984) at point 6

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* at point 6.9

¹³¹ The Supreme Court held that the judgment of the *judex facti* was not apparently against the law and/or Acts. Therefore the appeal of the claimant must be dismissed.

¹³² Supreme Court Decision No. 2944 K/Pdt/ 1983 (September 29, 1984).

c. Non-Binding /Set Aside Award (Article V (1)(e))

The Supreme Court refused to enforce foreign arbitral award based on “non-binding” ground in *Bankers Trust Company v. P.T Mayora Indah Tbk. case*.¹³³ It affirmed the district court judgment that refused the enforcement, because before the arbitral award rendered in London the claimant and respondent were the parties in disputes judged in the District Court of South Jakarta.¹³⁴ The district court refused to enforce the award because the claimant was defendant and the respondent was plaintiff on the disputes over the International Swaps & Derivates Association, Inc (ISDA) as the Master Agreement, which serves as a basis for arbitration clause. In this case, the District Court of South Jakarta rendered judgment for the favor of the respondent, which annulled the ISDA Master Agreement and ordered that the claimant do not take legal action based on or derives from the ISDA Master Agreement.¹³⁵ This decision has not bound yet, because the claimant (defendant) appealed.

The District Court of Central Jakarta considered whether an arbitral award could be enforced, whereas another decision existed on the same subject matter and parties involved in arbitration. The court considered that the award rendered in London occurred after the interim judgment of the District Court of South Jakarta existed.¹³⁶ Under the existing judicial practice in Indonesia, the enforcement of the arbitral award could not be granted and should wait until the decision over the ISDA Master Agreement dispute has bound.¹³⁷ Therefore, the request to enforce the arbitral award rendered in London must be dismissed.¹³⁸

This case may be is not dealing with the non-binding award as aimed in Article V (1)(e) of the Convention.¹³⁹ Under that article, non-binding award means if there is appeal to the award in the country of origin.¹⁴⁰

¹³³ Supreme Court Decision No. 02 K/Ex'r/Arb.Int./Pdt/2000 (January 23, 2001)

¹³⁴ District Court of Central Jakarta Decree No. 001/Pdt/Arb.Int/1999/PN.JKT.PST.jo. 002/Pdt/Arb.Int/1999/PN.JKT.PST.jo 02/Pdt.P/2000/PN.JKT. PST.

¹³⁵ *Ibid.* at p.6

¹³⁶ *Ibid.* at p.7

¹³⁷ *Ibid.* at p.9

¹³⁸ *Ibid.*

¹³⁹ Perhaps the award could be non-binding in the sense that prior judgment on the same subject deprives the subsequent award of any legal force

¹⁴⁰ van den Berg, *supra*, note 95

So, in this case, the award is not binding if there is appeal to the arbitral tribunal or a court in London. This case is more dealing with the *separability* principle, in which the arbitration agreement is not void even if the main agreement is void. It is questionable why the District Court and Supreme Court did not apply Article 10 of the Act 1999, which recognize and adopt the *separability* principle, whereas when the case decided the Act of 1999 has taken into force.

This case is interesting, because it is questionable whether the District Court of South Jakarta had considered whether there was arbitration agreement or not in the ISDA Master Agreement. If there was arbitration agreement, the court should have declared that it is not competent to hear the dispute. Parties' participation in litigation does not waive the right to arbitrate.¹⁴¹

There was also a case where the court presumably applied set aside award defense improperly. As discussed in chapter II, authority to set aside an arbitral award as judicial control is on primary jurisdiction, namely in the country of originating award.¹⁴² In this case, the court presumably interpreted that the secondary jurisdiction also can set aside an arbitral award.

In *Perusahaan Pertambangan Minyak dan Gas Bumi Negara ("Pertamina") v. KarahaBodas Company L.L.C ("KBC")*, the District Court of Central Jakarta annulled an arbitral award rendered in Geneva, Swiss.¹⁴³ In consideration part, the court concluded that it has authority to annul the award because the governing law of the Joint Operation Contract (JOC) and Energy Supply Contract (ESC) is Indonesia law, therefore the effort of the Plaintiff (Pertamina) to request annulment of foreign arbitral award in Indonesia court is appropriate.¹⁴⁴ From the consideration, it is presumably that the judge panel has interpreted, even though not explicitly in the decision, Article V (1)(e) of the New York

¹⁴¹ *Dato Wong Guong and P.T.Metropolitan Timbers Ltd.v. AndriesGerardusPangemanan*, Supreme Court Decision No.225 K/Sip/1976 (1983) at point 8 of considerations section. In this case, the Supreme Court reversed the High Court judgment that the absence of jurisdictional complains by the parties creating jurisdiction of the High Court over the case, even though there is agreement to arbitrate.

¹⁴² See section II

¹⁴³ District Court of Central Jakarta Decision No. 86/PDT.G/2002/PN.JKT.PST

¹⁴⁴ *Ibid.* at 101

Convention, especially on “competent authority” term.¹⁴⁵ It is presumably that the panel considered that it has authority to set aside the award based on the term “competent authority of the country. ...under the law of which that award was made”. However, the interpretation of the court in respect with the term is different with the common interpretation of the article.¹⁴⁶

The annulment of the award by Indonesia court shows that the enforcement of an arbitral award depends on the willingness of a national court to recognize and enforce it, by narrowly construe the interpretation of New York provision. This annulment has caused KBC request enforcement in other countries, where alleged that Pertamina has assets.¹⁴⁷

d. Contrary to Public Policy (Article V (2)(b))

Indonesia courts have applied the public policy ground to refuse enforcement in some cases, among others are in *E.D & Mann (Sugar) Ltd. (England) v. Yani Haryanto (Indonesia)*,¹⁴⁸ *Bankers Trust Company v. P.T Mayora Indah Tbk. Case*,¹⁴⁹ and *Astro Nusantara Internatioal B.V., et.al. v. PT. Ayunda Prima Mitra, et.al.*¹⁵⁰

E.D. & Mann (Sugar) case constitutes the first case where the enforcement of foreign arbitral award was dismissed based on public policy.¹⁵¹ In this case, the Supreme Court affirmed the judgment of the district court and high court, which refused to enforce an arbitral award rendered by “The Council of The Refined Sugar Association” in Lon-

¹⁴⁵ Article V (1)(e) of the Convention states that “The award has not yet become binding on the parties, or has been set aside or suspended by a *competent authority* of the country in which, or under the law of which, that award was made.

¹⁴⁶ See, Fali S. Nariman, *Some Thoughts on The Fortieth Anniversary of The New York Convention 1958*, Int. A.L.R. 1998, 1(5), 163-165, at 165.

¹⁴⁷ In United States, see 264 F.Supp.2d 484, 313 F.3d 70, 123 S.Ct. 2256; In Hong-kong, see (2003) 2 HKLRD 381, (2003) HKEC 511; In Canada, see 2003 ABQB 168, 13 Alta. L.R. (4th) 299, 34 C.P.C. (5th) 138.

¹⁴⁸ Supreme Court Decision No.1205K/Pdt/1990 (December 14, 1991)

¹⁴⁹ *Supra*, note 133 and 134

¹⁵⁰ Supreme Court Decision No.877 K/Pdt.Sus/2012(16 March 2013)

¹⁵¹ ErmanRajagukguk, *Arbitrase Dalam Putusan Pengadilan* (Arbitration in Court Decision), p. 77 (Chandra Pratama, 2000).

don. The Supreme Court considered that sugar-purchasing contract between E.D. & Man and Yani Haryanto was void, because it was against the law as prescribed in Article 1337 of Civil Code. The law defined that the cause (object) of the agreement is prohibited if it is banned by Acts.¹⁵² When the sugar-purchasing contract concluded, there was Presidential Decree No. 39 of 1978 that authorized only “BULOG” (a government agency) could conduct sale-purchase of sugar by importing to Republic of Indonesia and prohibited individual importing sugar. In this case, the sugar-purchasing agreement involved individual importer (Yani Haryanto). Therefore, the Court refused to enforce the award because it was against law or public policy.¹⁵³

In *Bankers Trust Company*,¹⁵⁴ the Supreme Court affirmed the judgment of the district court and high court. The Court reasoned that the enforcement of an arbitral award, whereas another decision existed on the same subject matter and parties involved in arbitration, is against the procedural rules order.¹⁵⁵ The Court concluded that granting enforcement to such award is in contrast with the public policy, including the existing legal order.¹⁵⁶

In both cases, the Supreme Court and the lower courts have interpreted in contrast with laws as against the public policy. The approach of Bankers Trust Company might be justifiable if the decision of the District Court of South Jakarta is final and binding. Because it is concerned with the procedural justice, in which a final judgment by a court of competent jurisdiction is conclusive upon the parties in any subsequent litigation involving the same cause of action. However, the approach of the courts in *E.D & Mann (Sugar) Ltd. (England) v. Yani Haryanto (Indonesia)*, that merely refuses the enforcement because it is against Presidential Decree, is arguable. An award that is against the laws does not automatically against public policy.¹⁵⁷ Public policy will apply if the enforcement of an award “would violate the most basic no-

¹⁵² *Supra*, note 148

¹⁵³ *Ibid.*

¹⁵⁴ *See, supra*, note 133 and 134

¹⁵⁵ *Ibid.* at p.11

¹⁵⁶ *Ibid.*

¹⁵⁷ *Antco Shipping Company, Ltd. v. Sidemar S.P.A.*, 417 F. Supp. 207 (1976)

tions of morality and justice.¹⁵⁸

In the more recent case,¹⁵⁹ the Supreme Court affirmed the judgment of the Central District Court. The Central District Court decided that the Further Partial Award of and Interim Final Award of Singapore International Arbitration Centre (SIAC) which are corrected by Memorandum Correction dated March 23, 2010 are against public policy.¹⁶⁰ The District Court reasoned that the award constitutes an intervention on judicial process in Indonesia, which is firmly prohibited under the existing laws in Indonesia (Law Number 48 of 2009 regarding Judicial Power). Moreover, there is a civil case No.1100/Pdt. G/2008/PN.JKT. SEL, involving both parties, that is still running and not binding yet. The reason of the District Court and Supreme Court might be able to be accepted if it is seen only in terms of the order itself. However, it should be also seen in terms of arbitration agreement. If there is an arbitration agreement between the disputing parties, the parties should settle their dispute by arbitration and they could not bring their case to the court. This is in line with what Supreme Court have decided in previous case involving the same parties.¹⁶¹ Unfortunately, the reason in previous Supreme Court decision is not considered by the later Supreme Court Justices.

Based on the discussion above, it is presumably that Indonesian courts have construed the grounds for refusal enforcement of foreign arbitral awards broadly in some decisions. They construed that signatures of both parties will determine the validity of an agreement.¹⁶² Whereas, Article II (2) of the Convention recognize the existence of unsigned agreement, as long as the parties' intention can be seen in exchange

¹⁵⁸ *Parsons & Whittemore Overseas Co., v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974)

¹⁵⁹ *Supra*, note 150

¹⁶⁰ The Arbitral Tribunal ordered that PT Ayunda Prima Mitra and/or PT First Media Tbk to stop trial process in Indonesia and to prohibit it to initiate another trial process in Indonesia.

¹⁶¹ *PT. Direct Vision v. Astro Nusantara International B.V.*, Supreme Court Decision No.808 K/Pdt.Sus/2011. In this case the Court held that the Plaintiff (PT. Direct Vision) should not bring the dispute with Astro Nusantara International B.V to South District Court, because there is an arbitration agreement between them that if there is disputes arising from their contract. See the Decision at p.49-50

¹⁶² *Sikinos Maritime Ltd (Malta) v. P.D. PerdataLaot (Indonesia)*

letters or telegrams. They construed the reciprocity principle means the award must be rendered in parties' states.¹⁶³ In other hand, under the Convention, the reciprocity means the award could be rendered wherever in the territory of another contracting state. The courts construed binding award when there is no judicial process both in the place the award rendered and the award sought to be enforced.¹⁶⁴ Whereas, under the New York Convention, the award is binding when there was no appeal in the place where the award rendered. They construed against the laws is equal with against public policy.¹⁶⁵

Even though in the past time Indonesian courts have refused some requests to enforce foreign arbitral awards, however, after Supreme Court Regulation takes into force they have also enforced some foreign arbitral awards.¹⁶⁶ However, percentage of decisions granting and refusing enforcement show that Indonesia courts lack of enforcement.¹⁶⁷ There is strong opinion that Indonesian court is unfriendly to foreign arbitral award.¹⁶⁸

¹⁶³ *Trading Corporation of Pakistan Limited v. P.T. Bakri & Brothers*

¹⁶⁴ *Bankers Trust Company v. P.T. Mayora Indah Tbk.*

¹⁶⁵ *E.D & Mann (Sugar) Ltd. (England) and Bankers Trust Company v. P.T. Mayora Indah Tbk.*

¹⁶⁶ *Safic-Alcan & Cie (France) v. P.T. Foursa Tani Nusa (Indonesia)*, Supreme Court Decree No. 2 Pen.Ex'r/Arb.Int/Pdt/1991 (April 21, 1992); *P.T. Tripatria Citra Pratama (Indonesia) v. Abdulelah Jamal Al Zamzami Est. and Abdulelah Jamal Al Zamzami Holdings Pte.Ptd.*, Supreme Court Decree No.1 Pen.Ex'r/Arb.Int/Pdt/1993 (June 3, 1993); *Ecom USA, Inc. (United States) v. P.T. Mahameru Centratama Mill (Indonesia)*, Supreme Court Decree No. 4 Pen.Ex'r/Arb.Int/Pdt/1992 (April 6, 1994); *Noble Americas Corp. (USA) v. P.T. Wahana Adhireksa Wiraswasta (Indonesia)*, District Court of Central Jakarta Decree No. 002/PDT/Arb.Int/2002/PN.JKT.PST (September 4, 2000).

¹⁶⁷ According to a research conducted by Mutiara Hikmah there are 29 requests to enforce foreign arbitral award. Not all petitions are accepted and enforced, indeed there are 7 requests that their status are uncertain. See Mutiara Hikmah statement in <http://www.hukumonline.com/berita/baca/lt4ec6586f1bece/ada-kelemahan-uu-arbitrase> (last accessed at July 27, 2015).

¹⁶⁸ A scholar, Herliana, said that the enforcement of foreign arbitral award in Indonesia is still hard because it takes long time and the award can be annulled by a court. The nature and the effectiveness and efficiency of arbitration process is denied. In line with Herliana, Hikmahanto Juwana said that legal certainty of arbitral award in Indonesia is still controversial, even though its process is conducted in foreign country. Another scholar, Rahayu Ningsih Hoed, said that there is no enforcement guarantee of international arbitral award in Indonesia. "The losing party in arbitral award can

CONCLUSION

The New York Convention recognizes judicial control over an arbitral award, which provides grounds for refusal enforcement and procedural requirements to enforce an award. Grounds for refusal enforcement under the Convention are limitative and exclusive. Therefore, the court where the award sought may not refused enforcement based on other grounds.

The successful of arbitration as an international commercial disputes settlement would be depending on Contracting States' courts of the New York Convention in conducting judicial control over the recognition and enforcement of foreign arbitral awards. Over control to the recognition and enforcement foreign arbitral awards may diminish the efficacy of arbitration as international commercial disputes settlement method and the New York Convention as international treaty, which facilitates recognition and enforcement of foreign arbitral awards.

Some Indonesia's court decisions refusing the enforcement of foreign arbitral awards are considered not in line with the grounds of refusing under New York Convention. Therefore, there is strong impression that it is hard to enforce foreign arbitral award.

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do defense in Indonesian court to annul it. In its practice, all of this kind of defense are always accomodated by Indonesian court. All these opinion are avalaible in <http://www.hukumonline.com/berita/baca/lt4db5fe3a36e15/indonesia-tidak-ramah-terhadap-arbitrase-internasional> (last accessed at July 27, 2015). An Indonesian arbitrator, Husseyn Umar, said that the general impression in international world is that Indonesia consitutes "an arbitration unfriendly country," where it is hard to enforce international arbitral award. See in <http://www.hukumonline.com/berita/baca/lt4bbd785494fc7/pokokpokok-masalah-pelaksanaan-putusan-arbitrase-internasional-di-indonesia-br-oleh-m-husseyn-umar-> (last accessed at July 27, 2015)

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