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Inconsistency in Recognition and Enforcement of Foreign Arbitral Awards: Non-Compliance or Normative Factors?

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ABSTRACT

Recognizing and enforcing a foreign arbitral award has been becoming a global issue. To solve such an issue, the New York Convention 1958 turns out to be an important international legal product regarding the recognition and enforcement of foreign arbitral awards worldwide. States ratifying the convention are internationally bound to respect and assist in the execution of a foreign arbitration award in their respective countries; Indonesia is one of them. It ratified the convention by Presidential Decree Number 34 of 1981. Nonetheless, there is an impression that Indonesia has not implemented the convention consistently, compared to countries that are, considered, friendly to foreign arbitration awards due to the facts that there are several foreign arbitral awards that have been rejected by the District Court. This impression, however, needs to be re-examined by understanding textually the norm formula in the 1958 New York Convention and comparing its implementation among Indonesia and several countries that are considered friendly to foreign arbitration awards. This paper finds that there is a norm formula in the 1958 New York Convention that opens space for ratification countries not to always recognize and enforce foreign arbitral awards in the executing country of the award.

Keywords: arbitration; arbitral award; enforcement; international civil law; recognition.

INTRODUCTION

Trade dispute may involve the relationship between legal subjects from two or more different countries.[1] In addition to differences in nationality, an object or legal action subject to cross-border legal obligations therein can also be a factor in the occurrence of international trade disputes.[2] In the context of such a trade dispute, arbitration can be chosen as a forum for resolution as long as the parties agree and include an arbitration clause.

Not all types of civil disputes can be resolved through arbitration. In the context of Indonesia, based on Article 5 paragraph 1 in conjunction with the Explanation of Article 66 letter b of Law No. 30 of 1999, arbitration can be chosen as a mechanism for settling disputes in the field of trade, such as banking, commerce, finance, investment, industry, and intellectual property rights. Additionally, arbitration can also be chosen for disputes that, according to prevailing regulations, are entirely entrusted to the disputing parties. As an exception, any disputes that cannot be settled amicably cannot be resolved through arbitration, such as inheritance disputes.

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[1] R.C. Van Caenegem, *An Historical Introduction to Private Law,* Cambridge University Press, Cambridge: 1996, p.vii.
[2] Ronald Saija, *Buku Ajar Hukum Perdata Internasional*, Deepublish, Yogyakarta: 2019, p.4.

Some of its advantages can fill the shortcomings of conventional courts, such as confidentiality, professionalism, and the credibility of the arbitrators, as well as transparency in all arbitration processes.[3]

However, the resolution of international civil disputes through arbitration is not without problems. The issue that arises after the arbitral award is pronounced concerns the recognition and enforcement when both activities are carried out in different countries; there is an element of sovereignty that complicates this reality.[4] Despite international efforts through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention 1958 ("**NYC 1958**"), there are still incidents where foreign arbitral awards are not recognized and enforced in a country. One example is the case of P vs. KBC, which was rejected by the Central Jakarta District Court for recognition and enforcement in Indonesia.[5] The issue of effectiveness comes to the surface.

This paper aims to address the research question: are there normative factors that contribute to this reality despite the ratification of the NYC 1958 in Indonesia? There are several writings discussing the implementation reality of the NYC 1958 in Indonesia.[6] However, most of them conclude that the legal-political factors in Indonesia are the main reasons for the ineffectiveness of the NYC 1958 in the country. This issue often arises due to reasons in international arbitral awards that are deemed to be contrary to public policy principles, rendering the foreign arbitral awards unable to obtain enforcement power in Indonesia.[7] Indonesian courts are often influenced by various domestic political dynamics, resulting in many interpretations regarding what constitutes public policy per se. This makes it difficult for Indonesian courts to accept and enforce foreign arbitral awards. The analogy of public policy is like a wild horse that can run amok due to political interests, especially in the recognition and enforcement of foreign arbitral awards.[8] However, alleging a violation of public policy implies that it contains something or a condition that goes against the fundamental principles and values of a nation.[9]

One important normative factor to examine is the provision on refusal in the NYC 1958. Furthermore, the implementation of the NYC 1958 in Indonesia is compared with several countries

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[3] Gatot Soemartono, Arbitrase dan Mediasi di Indonesia, PT Gramedia Pustaka Utama, Jakarta: 2006, p.12. See also Ellucidation of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

[4] Latief, A. M. I., Sumardi, J., & Sakharina, I. K. Kedaulatan Hukum Nasional dalam Putusan Arbitrase Internasional: Sengketa Negara Versus Pihak Swasta. *Amanna Gappa*, Vol. 31, No.1, 57-69, p.58, Retrieved from http://journal.unhas.ac.id/index.php/agjl/article/view/26139.

[5] Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia," *American University International Law Review,* Vol.20, 2005, p. 374.

[6] Suleman Batubara dan Orinton Purba, *Arbitrase Internasional: Penyelesaian Sengketa Investasi Asing Melalui ICSID, UNCITRAL, dan SIAC Raih Asa Sukses*, Jakarta: 2013, pp. 151–152.

[7] Ayu Atika Dewi, "Problematika Pelaksanaan Putusan Arbitrase Internasional di Indonesia," *Jurnal Panorama Hukum,* Vol. 2, No. 2, 2017, p. 193

[8] Sudargo Gautama, *Pengantar Hukum Perdata Internasional*, Binacipta–Badan Pembinaan Hukum Nasional, Bandung: 1987, p.103

[9] *Ibid.*

considered friendly towards foreign arbitral awards, such as England, Singapore, Hong Kong, France, and Switzerland.[10] Based on our findings, the refusal provision in the NYC 1958 opens up the possibility of non-enforcement of foreign arbitral awards, as observed in Indonesia and various other countries. In other words, the occurrence of foreign arbitral awards that fail to be recognized and enforced in Indonesia does not necessarily signify Indonesia's non-compliance with the NYC 1958 but rather something that is open to the possibility of happening.

DISCUSSION

NYC 1958 and Law No. 30 of 1999: Comparison of Relevant Norms

Indonesia ratified the NYC 1958 through Presidential Decree No. 34 of 1981. This decree was then followed by Supreme Court Regulation No. 1 of 1990 regarding the Procedures for Implementing Arbitration Awards. After the issuance of this Supreme Court Regulation, the government enacted Law No. 30/1999 in 1999, which contains provisions related to the enforcement of foreign arbitral awards. The provisions of the NYC 1958 and those of Law No. 30/1999 need to be compared to examine their alignment.

The relevant articles being compared are Article 5 of the New York Convention 1958 and Article 66 of Law No. 30/1999. These articles contain significantly different provisions from each other. The provisions of Article 66 of Law No. 30/1999 are made cumulatively, while Article 5 of the NYC 1958 contains alternative provisions. The term “cumulative” means that all conditions must be met with the use of the word “and”, while the term “alternative” means that one of the bases can be used as a reason for refusal with the use of the word "or." Each provision can be presented in a table as follows.

In the context of Article 66 of Law No. 30/1999, the burden of proof lies with the party seeking recognition and enforcement of the award because the wording used is "... shall only be recognized and enforceable ..., if it meets the requirements ...". In contrast, under Article 5 of the New York Convention 1958, the burden of proof lies with the party seeking to challenge the award because the wording used is "recognition and enforcement of the award may be refused ... if the party against whom it is invoked proves that ...".

The legal status of foreign arbitral awards, as implied by Article 5 of the NYC 1958, has also been affirmed in Article 3 of the NYC 1958. Every country that has ratified the NYC 1958 must consider foreign arbitral awards as binding and therefore must be enforced.[11] This provision differs significantly from the Geneva Convention of 1927, as a convention predating the NYC 1958. Article 1 of the Geneva Convention of 1927 sets out cumulative conditions for a foreign arbitral award to be recognized and enforced. Furthermore, Articles 2 and 3 emphasize that even if Article 1 is fulfilled, competent courts may still refuse to recognize and enforce foreign arbitral awards.[12]

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[10] Queen Mary University, “2021 International Arbitration Survey: Adapting Arbitration to a Changing World,” https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/#:~:text=The%20five%20most%20preferred%20seats,Hong%20Kong%2C%20Paris%20and%20Geneva.&text=The%20five%20most%20preferred%20arbitral,%2C%20HKIAC%2C%20LCIA%20and%20CIETAC. Accessed on 23 Januari 2024.

[11] Geneva Convention 1927 regarding the Convention on the Execution of Foreign Arbitral Awards, Art. 1.

[12] *Ibid.,* Art. 2 dan Art. 3.

The nuances arising from the provisions of the Geneva Convention of 1927 are actually quite similar to the regime of Article 66 of Law No. 30/1999, which emphasizes respect for state sovereignty. Therefore, in terms of the burden of proof and the legal status of foreign arbitral awards, the enforcement and recognition of foreign arbitral awards can be said to be relatively more burdensome under the regime of Article 66 of Law No. 30/1999 compared to the regime of Article 5 of the NYC 1958. The factors contributing to this tendency can be examined against the backdrop of the enactment of the relevant law during Indonesia's monetary crisis. One example is the case of P vs. KBC.[13]

Practical Implementation of the NYC 1958 in Indonesia

In the current context, there are also various cases where foreign arbitral awards are not recognized and enforced. A notable example is found in the case of PT APM, PT FM Tbk, and PT DV (domiciled in Indonesia) v. ANI B.V, ANH B.V, AMC N.V, AM N.V (limited liability companies domiciled in the Netherlands), AOL (a limited liability company domiciled in Bermuda), AAAN PLC (a limited liability company domiciled in the United Kingdom), MBNS Sdn Bhd (a limited liability company domiciled in Malaysia), and AAMN FZ-LLC (a limited liability company domiciled in the United Arab Emirates) in 2008. As a long-standing television station, AN was one of the television stations operated by PT DV from 2006 to 2008, with 49% of its shares owned by PT APM and 51% by Silver Concord Holding Ltd.[14] In its operational activities, PT DV obtained broadcast supplies from AAAN PLC, a subscription television operator Astro, domiciled in Malaysia and Brunei Darussalam, which was entitled to use a name under a Trademark License Agreement. Both parties also agreed to a Subscription and Shareholder Agreement (SSA) whereby AAAN PLC would become a shareholder in PT DV.[15]

In 2005, the SSA was terminated, requiring Astro to make a capital injection of US$39,000,000 along with technical support of US$136,000,000 to PT DV. Concurrently, Indonesia decided to enact Broadcasting Law, mandating all operators to possess multimedia licenses and limiting foreign ownership to 20%. The Investment Coordinating Board (BKPM) then allowed Astro to hold shares up to 51% until 2010. In 2007, Astro declared its cessation of financial support and services to PT DV, issuing invoices to PT DV for services rendered and requesting the return of the funds provided. AAAN subsequently filed a lawsuit regarding the SSA with SIAC in 2008.

After the SIAC Arbitration Award was issued, Astro promptly registered the award with the Central Jakarta District Court to seek enforcement in Indonesia (Chairman's Decision of the Central

[13] Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia," *American University International Law Review* Vol.20, 2005, p. 374.
[14] Mutiara Hikmah, "Penolakan Putusan Arbitrase Internasional dalam Kasus Astro ALL Asia Network PLC," *Jurnal Yudisial,* Vol. 5, No. 1, 2012, p. 72.
[15] *Ibid,* p. 72.

Jakarta District Court No. 05/Pdt/ARB-INT/2009).[16] However, the enforcement of the foreign arbitral award from SIAC was rejected by the Central Jakarta District Court. Astro appealed against the decision of the Central Jakarta District Court to the Supreme Court in Decision No. 01 K/Pdt.Sus/2010, where once again, the Supreme Court refused to grant enforcement and deemed the decision of the Central Jakarta District Court to be correct and appropriate.[17] This was because the Supreme Court considered that the provision in the SIAC Arbitration Award to cease proceedings in Indonesia had violated Indonesia's sovereignty principle, which the Supreme Court viewed as contravening public order in Indonesia.

Nevertheless, there have also been cases of refusal to recognize and enforce foreign arbitral awards deemed by the courts to have violated Indonesia's sovereignty, and we have observed that these decisions have failed to respect the legal enforcement process in Indonesia. One such example is another case involving AAAN PLC against PT APM. The arbitral award ordered the termination of the proceedings in case No. 1100/Pdt.G/2008/PN.JKT.Sel. so that PT APM could compensate AAAN. The question arises: on what hierarchical basis can the Singapore International Arbitration Centre (SIAC) issue orders to the South Jakarta District Court even though it is necessary to ensure the enforcement of the arbitral award it has rendered.

However, the fact remains that there have been foreign arbitral awards recognized and enforced in Indonesia. From 2000 to September 2018, according to a report by Idwan Ganie in his presentation, there have been 69 international arbitral awards that have been recognized and enforced by Indonesian courts.[18] In other words, the courts will not automatically reject the recognition and enforcement of foreign arbitral awards.

Implementation of the NYC 1958 in Arbitration-Friendly Countries

Singapore

On August 21, 1986, Singapore officially became one of the signatory states to the NYC 1958. According to S. Jayakumar, the convention sets an international standard for enforcing arbitration agreements and awards by simplifying regulatory procedures, including: (1) recognition of arbitration agreements and the consequence of delaying court proceedings related to disputes subject to arbitration; (2) recognition and enforcement of foreign arbitral awards made in Convention countries without the need for initiating new legal proceedings.[19]Furthermore, Singapore enacted the

[16] Central Jakarta District Court, Ruling of Central Jakarta District Court No. 05/Pdt/ARB-INT/2009, ASTRO NUSANTARA INTERNATIONAL B.V, et al., against PT. AYUNDA PRIMA MITRA, et al.

[17] Supreme Court, Cassation Decision No. 01 K/Pdt.Sus/2010, PT. ASTRO NUSANTARA INTERNATIONAL B.V, et al., against PT. AYUNDA PRIMAMITRA.

[18] Idwan Ganie, "Enforcement of Foreign Arbitral Awards in Indonesia", as delivered at Joint Seminar of BANI and IArbI Regional Arbitral Institutes Forum Enhancing Regional Arbitration Cooperation: Emerging and Current Issues (2018), p. 7.
These decisions are not further examined in this paper to uphold the principle of confidentiality in arbitration. Based on the principle of confidentiality and the limited definition of foreign arbitral awards, various examples that can be provided here include PMA vs. Ind (2017), CMP & PMP vs. Ind. (2012), NNT vs. Ind (2014), BP vs. BPM (2013), and KPC vs. PLN (2012).

[19] The Parliement of Singapore, "Arbitration (Foreign Awards) Bill," *Singapore Parliamentary Reports (Hansard) Vol. 48* (Agustus 1986), p. 615-616.

Arbitration (Foreign Awards) Act 1986. Several years later, this regulation was replaced by the International Arbitration Act 1994 concerning International Arbitration ("**IAA**"). According to the IAA, an international award is defined as an arbitral award based on an arbitration agreement made in a territory of a country that recognizes the NYC 1958 ("**NYC 1958 country**") other than Singapore.[20] This indicates that the implementation of the NYC 1958 considers whether the international award was rendered by a ratifying state of the NYC 1958.

The Substance of the NYC 1958 is applied to the provisions contained in the IAA. As regulated in Part 6, the Singapore Courts have jurisdiction to enforce arbitral awards.[21] According to Article 29 of the IAA, foreign arbitral awards may be recognized in court through the same procedures as awards made by arbitrators in Singapore can be enforced. Furthermore, Paragraph (2) states that any foreign arbitral award that may be enforced under Paragraph (1) shall be binding on all parties who made it and therefore can be relied upon by way of defense, set-off, or otherwise in any legal proceedings in Singapore.[22] Meanwhile, according to Article 31 Paragraph (2) of the IAA, the Court may refuse enforcement of the award if: (a) the party concerned was under some incapacity; (b) the arbitration agreement is not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; (c) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (f) 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, the award was made.[23]

Furthermore, Article 31 Paragraph (4) also states that the Court may refuse enforcement of the award if: (1) the subject matter of the dispute is not capable of settlement by arbitration under Singapore law; or (2) the enforcement of the award would be contrary to the public policy of Singapore.[24] Additionally, in Part 11 of the IAA, it is stated that 'any disputes arising out of parties who have agreed to arbitrate can be adjudicated by the court unless contrary to public policy.[25]

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[20] Singapore, International Arbitration Act, Act No. 23 of 1994, Section 27(1).
[21] Erman Rajagukguk, "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy," *Indonesian Journal of International Law Vol. 5 No. 2* (Januari 2008), p. 194.
[22] *Ibid.,* Art. 29.
[23] *Ibid.,* Art. 31 Paragraph (2).
[24] *Ibid.,* Art. 31 Paragraph (4).
[25] World Arbitration and Mediation Report, "Arbitration in Singapore: The Establishment of a Legal Framework to Support International Arbitration," *JURIS Arbitration Law, Vol. 10,* 1999.

Therefore, the Singapore Court has provisions in the IAA that enable it to refuse enforcement and execution of a foreign arbitral award.

There is a case of refusal of a foreign arbitral award by the Singapore High Court. In the case of PT PN (Persero) Tbk. vs. CRW Joint Operation, a contract was made for the construction of a fiber optic pipeline network in Indonesia.[26] A technical dispute arose between the parties and was resolved with CRW winning, one of which required Persero to pay USD 17 million to CRW. Persero refused to comply with the decision. Subsequently, CRW initiated arbitration proceedings against Persero through the ICC. In its submission, the ICC stated that Persero was obliged to pay immediately to CRW. Persero then filed a lawsuit against the execution of the award on the grounds that the payment dispute with CRW was not within the scope of arbitration as stipulated in Article 31 Paragraph (2) subparagraph (d). The Singapore High Court agreed with Persero's statement and set aside the award.

United Kingdom

On September 24, 1975, the United Kingdom ratified the NYC 1958. Three months later, precisely on December 23, 1975, it was formally enacted through the Arbitration Act ("**AA**") of 1975.[27] Lord Mustill, a prominent expert in international commercial arbitration, has praised the NYC 1958 as the "most important pillar supporting the edifice of international arbitration."[28]

Several years later, the provisions of the AA in the UK underwent changes, leading to the enactment of its latest provisions in 1996 known as "The Arbitration Act 1996." The implications of the NYC 1958 provisions in English law are found in Sections 100–105 of the AA.[29] Terminologically, the concept of foreign arbitral awards is divided into two categories. First, the term "NYC 1958 award," which refers to awards from NYC 1958 countries, the recognition and enforcement of which are governed by Sections 100-104 of the AA.[30] Second, the term "foreign arbitral award", which encompasses awards other than those covered by the NYC 1958.[31] Specifically, Section 101 of the AA regulates the recognition and enforcement of foreign arbitral awards in the UK. Under paragraph 1 of Section 101, it is stipulated that NYC 1958 awards must be binding on the parties who made them.[32] Subsequently, paragraph 2 explains that NYC 1958 awards may, with the court's permission, be enforced with the same legal force as court judgments.[33]

According to Section 101(2), the enforcement of foreign arbitral awards is carried out through the same procedures as the English court system, i.e., through a Court. Furthermore, under Section 105(1), it is clarified that "The Court" authorized to enforce these provisions is the High Court or the County Court.[34]

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[26] PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 2022.
[27] New York Convention Guide, "United Kingdom: Date of Accession and Date of Entry into Force," https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1742, accessed on27 Februari 2023.
[28] M Mustill, "Arbitration: History and Background" *Journal of International Arbitration 6,* 1989, p. 43.
[29] Inggris, *Arbitration Act,* The 1996 Arbitration Act, Art. 100-104.
[30] *Ibid.*
[31] *Ibid.*
[32] Inggris, *Arbitration Act,* The 1996 Arbitration Act, Pasal 101 Paragraph (1).
[33] *Ibid.*, Pasal 101 Paragraph (2).
[34] *Ibid.,* Pasal 105 Paragraph (1).

Meanwhile, provisions regarding the refusal of recognition and enforcement of foreign arbitral awards are found in Section 103 of the AA. Paragraph (2) explains that recognition or enforcement of awards may be refused if the party resisting it proves that: (a) one of the parties was incapable; (b) the arbitration agreement is invalid under the law applicable to it; (c) they were not given proper notice of the appointment of the arbitrator; (d) it deals with matters beyond the scope of the submission to arbitration; (e) the composition of the arbitral tribunal was not in accordance with the agreement of the parties; and (f) the award is not binding, has been set aside, or suspended by a competent authority of the country where it was made or under the law of that country.[35] Furthermore, paragraph (3) states that recognition or enforcement may also be refused if it is contrary to public policy.[36] Reflecting on these provisions, the English Courts have the authority to refuse certain foreign arbitral awards if they meet any of these criteria.

One example of a case related to the refusal of recognition and enforcement of a foreign arbitral award by the English Courts is the case of Dowans Holding SA v. Tanzania Electric Supply Co Ltd. Dowans entered into a power supply agreement with Tanzania Electric Supply Co Ltd (Tanesco), a state-owned utility company. The contract formed by both parties stipulated that disputes would be resolved through arbitration and subject to Tanzanian law.

Over time, Tanesco intended to terminate the agreement on the grounds of nullity or *ab initio* due to violations of the Tanzanian Public Procurement Act of 2004 before the Tanzanian Courts. Meanwhile, Dowans obtained enforcement of the decision by the English Courts based on Section 101(2) of the AA. On the other hand, Tanesco applied to the High Court of England to set aside the decision based on Section 103(2)(f), arguing for refusal to recognize and enforce the decision because it was not binding, had been set aside, or suspended by a competent authority of the country where it was made or under the law of that country. Ultimately, the High Court of England granted Tanesco's application and set aside the decision.

France

France ratified the NYC 1958 on June 26, 1959, through Decree No. 59-1039 of September 1, 1959.[37] However, in 1980–1981, two revolutionary decrees were enacted to introduce progressive arbitration provisions into the *Nouveau Code de Procédure Civile*, known as the *Code de Procédure Civile* ("**CPC**").[38] These two revolutionary decrees are divided into two types: Decree No. 80-354 of May 14, 1980, concerning domestic arbitration, and Decree No. 81-500 of May 12, 1981, concerning

[35] *Ibid.,* Pasal 103 Paragraph (2).
[36] *Ibid.,* Paragraph (3).
[37] New York Convention Guide, "France - Jurisdictions", "https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=575&opac_view=-1, accessed on14 April 2023.
[38] CMS Law, "International Arbitration and Rules in France," https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/france, accessed on 14 April 2023.

international arbitration.[39] In 2011, France amended the CPC through Decree No. 2011-48 of January 13, 2011, known as the French Law on Arbitration, which remains effective to date.

Regarding Article 5 of the NYC 1958 concerning the mechanism for recognition and enforcement of foreign arbitral awards, France has a mechanism regulated in Chapter III on the Recognition and Enforcement of Arbitral Awards Made Abroad or in International Arbitration. Article 1514 of the FLA states that a foreign arbitral award may be recognized and enforced if its existence is proven and it does not violate French international public policy.[40] Additionally, Article 1515 of the FLA states that the existence of an award may be proven and recognized if the award and arbitration clause are original, or copies authenticated by a competent court. According to Article 1516 of the FLA, an international arbitral award may be recognized and enforced if it is decided by the High Court of France, namely the Tribunal de Grande Instance (TGI). This means that the recognition and enforcement of international awards rendered abroad must be systematically recognized before the TGI Paris.[41]

In addition, other provisions are stipulated in Articles 1518–1520 of the French Law on Arbitration. Pursuant to the aforementioned provision, international awards rendered in France may be subject to 'set aside'.[42] All types of awards, including interim or partial awards, may be subject to 'set aside' immediately after being rendered. The mechanism for filing a set-aside petition must be submitted to the High Court in the place where the arbitral award was rendered within one month after notification of the award.[43] France also establishes five grounds for setting aside or refusing a foreign arbitral award.

Firstly, the arbitral tribunal erroneously asserted or rejected jurisdiction. There are two grounds for objection in arbitration, namely those termed as "*fins de non-recevoir*" and "*exceptions de competence*" jurisdictional objections.[44] Secondly, the arbitral tribunal was not properly constituted due to simultaneous replacement of the entire arbitral tribunal or one of its members, and the will of one party or the agreement of the parties may not have been respected.[45] Thirdly, the arbitral tribunal decided without adhering to the mandate given to it. Fourthly, procedural violations such as the absence of access for each party regarding timeframes for all correspondence and documents in arbitration, including language accessibility.[46] Fifthly, the recognition or enforcement of the award contradicts international public policy.[47]

France is internationally recognized as a jurisdiction friendly to foreign arbitral awards, hence most cases where arbitration awards are rejected in one country will choose to seek justice in France. One such case rejected by France is DAC v. Bechtel because the award conflicted with the law or public policy prevailing in France itself. Therefore, the TGI in French declared that a court decision at

[39] *Ibid.*
[40] Perancis, *Code de Procédure Civile,* The 2019 French Law Arbitration, Art. 1514.
[41] *Ibid*, Art. 1516.
[42] *Ibid,* Art. 1517.
[43] *Ibid,* Art. 1518.
[44] CA Paris 19 March 2013, *Rev.arb.* 2013, 449.
[45] Detlev Kühner, "Annulment and Enforcement of Arbitral Awards in France," p. 5.
[46] Detlev Kühner, "Annulment and Enforcement of Arbitral Awards in France, p.6.
[47] *Ibid.*

the place of arbitration that set aside the arbitral award has no international effect, as the decision is limited to the exercise of sovereign power in the country of the arbitration.[48]

One of the foreign arbitral awards upheld and recognized in France is the case of Maximov v. NLMK.[49] This award stems from a Russian arbitration where Maximov sought enforcement of an arbitral award that would grant him nearly US$300 million against Novolipetsk Steel Mill ("**NLMK**"). The award was issued by the Chamber of Commerce and Industry of the Russian Federation ("**ICAC**") pursuant to a share purchase agreement between Maximov and NLMK.

However, the award was subsequently set aside by the Moscow Arbitration Court on the grounds that disputes arising from agreements aimed at the transfer of shares cannot be resolved through arbitration because corporate disputes cannot be arbitrated under Russian law. Nevertheless, despite the controversial nature of the Russian court's decision, Maximov sought enforcement of his award in France. Ultimately, on May 16, 2012, the TGI in Paris concluded that the fact that the award had been set aside by the Russian court was not sufficient to deny recognition in France. The TGI stated that the ICAC award was a valid arbitral award obtained in accordance with the contractual method agreed upon by the parties and therefore should be recognized and enforced.

China

On April 22, 1987, the NYC 1958 came into effect in China following its ratification three months earlier. Regulations in China affecting the implementation of the NYC 1958 are found in the Civil Procedure Law ("**CPL**"), which governs the recognition and enforcement of foreign arbitral awards.[50] Article 260 of the CPL stipulates that if the ratification agreement made by China differs from the rules of civil procedure, the relevant regulations apply unless reservations have been made by China. This provision applies to all cases involving foreign elements. If there are no jurisdictional differences in recognition and enforcement, the courts usually combine the two processes into one case. [51] Generally, the implications of the NYC 1958 on the CPL include: (1) Article 2 of the NYC 1958 regarding referral to arbitration and the validity of arbitration agreements; and (2) Article 5 of the NYC 1958 concerning the recognition, enforcement, setting aside, and refusal of arbitral awards.

The application of Article 5 of the NYC 1958 regarding the grounds for refusal, recognition, and enforcement of foreign arbitral awards reflects its implications in the Chinese judicial system. Chinese courts have recognized and enforced NYC 1958 awards even though there may be grounds for refusal

[48] Philippe Pinsolle dan Alexis Mourre, "DIRECTION GÉNÉRALE DE L'AVIATION CIVILE DE L'EMIRAT DE DUBAÏ v. INTERNATIONAL BECHTEL CO., LLP (The "DAC Dubai v. Bechtel" Case)," *International Arbitration Court Decisions - 3rd Edition,* https://arbitrationlaw.com/library/france-la-direction-g%C3%A9n%C3%A9rale-de-l%E2%80%99aviation-civile-de-l%E2%80%99emirat-de-duba%C3%AF-v-international, accessed on 14 April 2023.

[49] Jus Mundi, *Maximov v. Novolipetsky (NLMK*), https://jusmundi.com/fr/document/decision/en-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-judgment-of-the-hight-court-of-justice-of-england-and-wales-2017-ewhc-1911-thursday-27th-july-2017, accessed on 14 April 2023.

[50] China, Civil Procedure Law of the People's Republic of China, 1991.

[51] John Shijian Mo, "Interpretation and Application of the New York Convention in China," *Recognition and Enforcement of Foreign Arbitral Awards,* p. 184.

under domestic law. Conversely, Chinese courts have not recognized and enforced NYC 1958 awards even though there may be grounds for refusal under the NYC 1958 itself.[52] An example illustrating the differing standards between recognition and enforcement based on domestic law and the provisions of the NYC 1958 is the case of Duferco S.A vs. Ningbo Arts & Craft Import & Export Co., Ltd ("**Duferco Case**").[53]

The parties involved are subject to an arbitration clause stipulating that all disputes will be submitted to the Arbitration of the International Chamber of Commerce in China. The foreign party acknowledges that the clause is an arbitration clause of the International Chamber of Commerce ("**ICC**"), while the Chinese party asserts that the clause is bound to the International Chamber of Commerce in China. China's stance is based on claiming the invalidity of the clause due to the non-existence of the International Chamber of Commerce in China. Thus, the Chinese party refers to Article 16 of the Arbitration Law, which requires the identification of a specific arbitration commission as a crucial factor in determining the validity of an arbitration agreement.[54] However, when the foreign party applies this award to the Chinese court, they assert that the clause is valid under Chinese law. Furthermore, the Chinese court recognizes and enforces the award, believing that there is no basis under the Convention for any rejection to be established.[55]

On the contrary, the case of Zublin International vs. Wuxi Woco-Tongyong ("**Zublin Case**") illustrates a contrasting nature compared to the Duferco Case. When Zublin filed an application with the Chinese court to recognize and enforce the award, the Chinese court instead declared the clause invalid based on Article 16 of the Arbitration Law due to the lack of specific reference to the arbitration institution. Therefore, the Chinese court rejected its recognition. According to J.S. Mo, the Duferco case reflects the current judicial practice in China, while the Zublin case represents an exception.[56]

The National Supreme Court ("**NSC**") courts have adopted a conventional approach to the recognition and enforcement of NYC 1958 awards. This is evident not only in the 1987 Notice on the Implementation of the New York Convention but also in the 2003 Draft Rules on Handling Cases of Foreign Arbitration by the Courts (for consultation) [57] This implies that Chinese courts will not enforce foreign arbitration awards that are not binding on the parties or have been set aside by a competent court.

Based on the cases that have occurred, Chinese courts generally support the recognition and enforcement of NYC 1958 within the Chinese jurisdictional system. Most court decisions in China

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[52] Ningbo Intermediate Court of Zhejiang Province, "Decision of 22 April 2009, 4, 2008 *Yong Zhong Jian Zi*," https://newyorkconvention1958.org/index.php?lvl=concept_see&id=60&page=9&nbr_lignes=399&l_typdoc=, accessed on 19 August 2022.

[53] John Shijian Mo, *Op. Cit.,* p. 193

[54] Ningbo Intermediate Court of Zhejiang Province, *Op. Cit.*

[55] *Ibid.*

[56] John Shijian Mo, *Op. Cit.,* p. 194.

[57] Article 4 of the 1987 Notification on the Implementation of the New York Convention of 1958 states that the Court must refuse to recognize and enforce a foreign arbitral award if the court determines a situation as stipulated in Article 5. Furthermore, Article 36 of the 2003 Draft Rules on the Handling of Foreign Arbitration Cases states that upon the request of either party, the court must refuse to recognize and enforce a foreign arbitral award that is not binding or has been set aside.

follow similar practices to foreign courts. It appears that Chinese courts are reluctant to take a liberal or activist stance when enforcing NYC 1958.[58] This position largely aligns with the overall international law practices of Chinese courts.[59] Although the Chinese Arbitration Law does not recognize ad hoc arbitration, Chinese courts still recognize and enforce awards made in ad hoc arbitration in accordance with NYC 1958.[60] This indicates that Chinese courts prioritize compliance with the provisions of NYC 1958 and are in line with the principles of the Civil Procedure Law ("**CPL**") and the General Principles of the Civil Law ("**GPCL**") regarding China's international obligations.

Switzerland

Switzerland formally ratified and adopted the NYC 1958 on June 1, 1965, through Federal Decision 17 December 1992.[61] The legislation governing international arbitration in Switzerland is found in Chapter 12 of the Swiss Private International Law Act ("**PILA**") of December 18, 1987, specifically Articles 176-194 PILA.[62] It is important to note that Chapter 12 PILA is not based on the UNCITRAL Model Law, but there are no fundamental substantive differences between the two laws.

According to Article 176 PILA, Swiss arbitration law is based on the "seat principle," meaning it applies only if the place of arbitration is in Switzerland and at least one party does not have domicile or residence in Switzerland. Article 194 PILA states that a foreign arbitral award can be recognized and enforced in Switzerland as a foreign arbitral award under the NYC 1958. Awards rendered outside Switzerland, even if the process is subject to Swiss law, are considered foreign awards and can be enforced in Switzerland under the NYC 1958. The implications of Article 5 NYC 1958 in Switzerland are found in Article 177 PILA, which states that all disputes concerning economic interests can be subject to arbitration. The term "economic interests" is interpreted broadly here to open up arbitration access widely for international disputes.[63] The rule encompasses all disputes with financial value for at least one party, such as antitrust law, intellectual property rights, employment contracts, succession law, and even some family law disputes involving economic interests, which can be enforced and recognized through international arbitration.[64] It is important to underline that Switzerland only recognizes a foreign arbitral award if the case involves economic interests as defined above; otherwise, Switzerland may reject the recognition of that foreign arbitration.

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[58] John Shijian Mo, *Op. Cit.,* p. 215.
[59] *Ibid.*
[60] *Ibid.*
[61] New York Convention Guide, "Switzerland - Jurisdiction," https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=611&opac_view=-1, accessed on 14 April 2023.
[62] Thomson Reuters, "Arbitration Procedures and Practice in Switzerland," https://uk.practicallaw.thomsonreuters.com/5-502-1047?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a444248, accessed on 14 April 2023.
[63] A. Bonomi dan E. Reymond-Eniaeva, "Interpretation and Application of the New York Convention in Switzerland in Recognition and Enforcement of Foreign Arbitral Awards," *Ius Comparatum-Global Studies in Comparative Law* 23, 2017, p. 934
[64] *Ibid,* p. 935.

Based on further explanation of Article 190(2) PILA, Switzerland expressly acknowledges that a foreign arbitral award may be refused recognition and enforcement within its jurisdiction. There are two indications of reasons for refusal that Switzerland establishes for recognizing foreign arbitral awards. Firstly, if there are clear facts indicating that the disputing parties have the right to set aside, disregard, or refuse all or part of the arbitral award that would be issued by Switzerland in the future. In this case, Switzerland interprets that there is no point in issuing an arbitral award again if one or both parties can subsequently annul the new exequatur. Secondly, Switzerland will only be willing to recognize and examine a foreign arbitral award at the request of the party opposing recognition and/or enforcement on grounds of refusal under the NYC 1958. If the application is made by a party other than the one opposing the award, Switzerland will not recognize such an award, or if the grounds for refusal do not comply with the NYC 1958, Switzerland may also refuse recognition.[65]

Furthermore, concerning particular grounds, Switzerland also establishes two reasons related to the refusal of recognition and enforcement of foreign arbitral awards, namely incapacity and invalidity. According to the NYC 1958, incapacity is defined as an individual's inability to be a party to an arbitration agreement or to enter into such an agreement.[66] However, this is not explicitly clarified in the Convention, thereby granting Switzerland the freedom to determine the applicable law for the recognition of a foreign arbitral award. In this regard, Switzerland agrees to use national law as the law of the seat, so if an award is found to be contrary to Swiss national law, its recognition and enforcement may be refused. This is explicitly stated in Article 177(2) PILA, where a state/company/organization controlled by a state cannot rely on its own law to challenge its capacity and become a party in arbitration. This provision was then adopted by Switzerland as an analogy for the recognition and enforcement of foreign awards. Additionally, concerning invalidity, it can be seen from Article 178(2) PILA. This provision embodies the concept of *favorem validitatis,* stating that a foreign arbitral award is valid and enforceable if it meets the validity requirements set forth by at least one of the laws referred to in the aforementioned article.[67]

Furthermore, the implications of Article 5 of the NYC 1958 are also reflected in Article 183(3) PILA, which emphasizes that an award can be recognized and enforced if the parties were treated equally and had the right to be heard during the proceedings.[68] In other words, if discriminatory treatment is found during the proceedings, an award is deemed invalid and subject to refusal. However, we have not found any instances of a foreign arbitral award being refused recognition and enforcement in Switzerland.

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[65] A. Bonomi dan E. Reymond-Eniaeva, "Interpretation and Application of the New York Convention in Switzerland in Recognition and Enforcement of Foreign Arbitral Awards," p. 922.

[66] *Ibid*, p.925

[67] *Ibid*, p.926.

[68] Girsberger/Voser, at N 1152; Berger B, Kellerhals, F, *International and Domestic Arbitration in Switzerland* (2nd ed, Stämpfli, Berne 2010), at N 1895 (hereinafter "Berger/Kellerhals") in Girsberger, D. & Voser, N., International Arbitration in Switzerland, 2nd ed., Zurich 2012.

Main Findings

Based on the findings above, the assessment that Indonesia is unfriendly towards foreign arbitral awards and inconsistent in its adherence to the NYC 1958 needs to be corrected. In the context of assessing unfriendliness, there is a tendency to selectively choose cases for generalization. Meanwhile, in the context of assessing Indonesia's lack of consistency regarding the NYC 1958 compared to other countries, aside from the lack of comparative data, there is also an element of carelessness in interpreting the NYC 1958.

In terms of norms, Article 5 of the NYC 1958 does indeed have a different formulation compared to Article 66 of Law No. 30/1999; however, fundamentally, the NYC 1958 does not entirely preclude the possibility of rejecting the recognition and enforcement of foreign arbitral awards. Unlike if the NYC 1958 completely closed off the possibility of rejection. In fact, there are 7 alternative grounds that can be used to reject the recognition and enforcement of foreign arbitral awards. 6 of these grounds are formal in nature, such as absolute jurisdiction, while 1 is substantive, namely concerning conflicts with public policy.

Moreover, considering the significant similarities between the Arbitration Law and the New York Convention 1958, Indonesia is considered not to apply a pro-enforcement bias.[69] One indication of this is the hesitancy to automatically consider a foreign arbitral award as binding. However, evaluating a country's paradigm towards foreign arbitral awards cannot be done solely based on whether or not there are binding provisions for foreign arbitral awards. If evaluated solely in terms of practical implementation, it is evident that such an assessment is not entirely accurate. If it were, there would be no foreign arbitral awards recognized and enforced in Indonesia.

Even countries considered friendly towards arbitral awards also open up the possibility of rejection based on formal or substantive grounds such as contravention of public policy. Although there are variations in strictness or leniency and court interpretations in accepting or rejecting, norms still allow for such possibilities. Moreover, there are cases where foreign arbitral awards have been rejected for enforcement in these countries, such as Singapore, England, and China. In other words, the reality of rejecting the recognition and enforcement of foreign arbitral awards is a legitimate practice and has indeed been carried out in countries deemed friendly towards such awards.

Taking one case of rejecting a foreign arbitral award in Indonesia as an example is akin to deliberately disregarding the fundamental context of rejection. For instance, in the case of P vs. KBC, based on our assessment considering the context, it is challenging not to protect P as a state-owned enterprise when losing against KBC. The discontinuation of the contract between P and KBC was not due to a void or intentional act by P, but rather it was the monetary crisis that forced it.[70] The

[69] Fifi Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview", 2015, 2 *Indonesian Law Review,* 140-164, p. 153-155.

[70] Indonesia, Presidential Decree Regarding the Suspension/Review of Government Projects, State-Owned Enterprises, and Private Projects Related to the Government/State-Owned Enterprises, Presidential Decree No. 39/1997, and Presidential Decree Regarding the Revocation of Presidential Decree No. 47/1997 on the Change of Status of Implementation of

judgment favoring KBC only looked at the contractual aspect without considering the public ripple effect when P had to compensate or when the state had to bear the compensation burden.

Indeed, there have been various foreign arbitral awards successfully recognized and enforced by the District Court and/or higher courts. As comparative data presented by Idwan Ganie indicates, there are more than 50 foreign arbitral awards that have been recognized and enforced in Indonesia.[71] As long as there are no formal and/or substantial reasons that can be used to reject the recognition and enforcement of a foreign arbitral award in Indonesia, there is no urgency or interest for the District Court to reject it.

Nevertheless, a balance between sovereignty and the implementation of international business must be achieved. Sovereignty, under the pretext of public policy, cannot always justify the non-recognition and non-enforcement of a foreign arbitral award in a country. Failure to recognize and enforce a foreign arbitral award by one party originating from Indonesia due to a breach of an international agreement may set a bad precedent for international business actors to refrain from investing or conducting transactions in Indonesia (loss of confidence).[72]

One thing to consider is how to interpret "contrary to public policy" correctly. On one hand, normative ambiguity is necessary to provide room for judges to assess reality and its context extensively.[73] On the other hand, such normative ambiguity may create uncertainty, which is a crucial factor in business.[74] However, the interpretation of public policy resulting in the rejection of some foreign arbitral awards does not imply that Indonesia fails to implement the provisions of the NYC 1958.

CLOSING

The statement that Indonesia is inconsistent with the NYC 1958 is erroneous. Normatively, both the provisions of the NYC 1958 and Law No. 30/1999 on Arbitration and the Arbitration Rules (APS) provide the possibility of rejecting the recognition and enforcement of foreign arbitral awards, despite differences in paradigms and the legal status of binding decisions. Moreover, no other countries considered friendly to foreign arbitration exclude this possibility. Furthermore, in practice, there have been foreign arbitral awards successfully recognized and enforced in Indonesia, while many comparative countries have also rejected the recognition and enforcement of foreign arbitral awards. The aspect that needs further attention is how the interpretation of refusal provisions is applied in specific international arbitration cases. The aspects of sovereignty and the confidence of foreign parties to invest and transact in Indonesia must be balanced proportionally.

Several Government Projects, State-Owned Enterprises, and Private Projects Related to the Government/State-Owned Enterprises Previously Suspended or Under Review, Presidential Decree No. 5/1998.

[71] Idwan Ganie, "Enforcement of Foreign Arbitral Awards in Indonesia", as delivered at Joint Seminar of BANI and IArbI Regional Arbitral Institutes Forum Enhancing Regional Arbitration Cooperation: Emerging and Current Issues, 2018, p. 7.

[72] Dhaniswara K. Harjono, *Hukum Penanaman Modal,* (Jakarta: PT. Rajagrafindo Persada, 2007), pp. 9-10.

[73] Hrafn Asgeirsson, *The Nature and Value of Vagueness iIn the Law,* (Oxford: Hart Publishing, 2020), p. 1.

[74] George C. Christie, "Vagueness and Legal Language," *Minnesota Law Review* 48 (1964), p. 891.

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