



COMPARISON OF PUBLIC POLICY DEFENSES IMPLEMENTATION IN INDONESIA WITH USA AND UK

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ABSTRACT

This article tried to compare the implementation of public policy defenses in the United Kingdom (“UK”) and the United States of America (“USA”). Indonesia has been alleged of being unfriendly to foreign arbitral awards, one of the reason is the implementation of public policy defenses that is interpreted broadly and not restrictively. Even though Indonesia has ratified the New York Convention that supports pro-enforcement bias with Presidential Decree No. 34 of 1981, Indonesia is still far away to be considered a pro-enforcement state compared to the UK and the USA. This article discusses how Indonesia interprets the public policy doctrine from the cases that are provided in this article. The method used in this article was a comparative study, describing the implementation of public policy in the UK and USA. This article concluded that the implementation of public policy in Indonesia is too broad and uncertain, the court can refuse the enforcement of the arbitral awards by only relying on violation of Indonesian laws. Different from the implementation in the UK and USA that established the mere violation of state’s law cannot be considered necessarily as the violation of public policy doctrine. This article is also commenting on how Indonesia modified the implementation of public policy by using the main ground reasons why the arbitral awards were refused by the court.

Keywords: public policy; pro-enforcement; recognition.

I. INTRODUCTION

Arbitration is one of the dispute settlement methods that most companies choose when there is a commercial dispute.¹ Arbitration itself provides a lot of benefits compared to the national court. Not only is arbitration considered neutral compared to the national court of one of the contracting parties states, but arbitration also made the award tend to be more enforceable compared to the national court,² as the enforcement of the arbitral award was supported by the New York Convention, which has more than 140 contracting states. Another advantage that arbitration has, which makes arbitration superior to the national court is confidentiality.³ A lot of companies have concerns about not disclosing their business operation and company disputes that made them have a bad reputation. The other advantage that arbitration can provide is the freedom for the parties to choose their arbitrators and the opportunity to have a final and binding decision so they don't have to face multiple appeals.⁴ As the purpose of arbitration is to give the parties substantial autonomy and control over the process that will be used to resolve their disputes, a lot of companies choose arbitration over the national court.⁵

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¹ Jane L. Volz and Roger S. Haydock, “Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser”, *William Mitchell Law Review*, Vol.21, No. 22, 1996, p. 868.

² Christopher R. Drahozal & Richard W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research*, New York: Kluwer Law International, 2005, p.31.

³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, New York: Cambridge University Press, 2008, p.4.

⁴ *Ibid.*

⁵ *Ibid*, p.1.

Following the conclusion of all proceedings conducted by the Parties, it is important to note that the arbitral award does not automatically possess the status of being final and binding. In order for the arbitral award to acquire the same legal force as a court judgment, it must be formally "recognized" by the court. Once the court acknowledges the arbitral award, the parties are barred from initiating further litigation or arbitration on the same matter.⁶ In many cases, when the arbitral award is recognized by the court, the party that has been unsuccessful in the arbitration process will comply with the award voluntarily, eliminating the need for enforcement measures. However, if the losing party refuses to comply willingly, the winning party can seek enforcement of the arbitral award in the court where the assets of the losing party are situated.⁷ Conversely, the losing party retains the opportunity to challenge the enforcement of the arbitral award by presenting evidence that demonstrates the award's unenforceability in the relevant court jurisdiction where the assets are located.⁸

One of the reasons for challenging the enforcement of an award is to prove that it contradicts the public policy of the country, as outlined in Article V (2) (b) of the New York Convention. Indonesia has formally ratified the New York Convention through Presidential Decree No. 34 of 1981. While the public policy doctrine is intended to protect the fundamental principles of a nation, it is frequently utilized as a means to avoid enforcing arbitral awards. Despite numerous attempts to define the public policy doctrine, arriving at a precise definition for enforcing international arbitral awards remains a challenging task.⁹ Indonesia has received criticism for adopting a broad interpretation of the public policy doctrine, resulting in a weakened influence and effectiveness of the New York Convention, thereby raising doubts about the efficacy of international arbitration.¹⁰

Several articles bring the issue of how Indonesia interpret public policy, one of them was brought by Prof. Huala Adolf, Professor at Universitas Padjadjaran Faculty of Law. In the article that was published on 26 February 2021, he established the meaning of public policy under Indonesian Arbitration Law and the Practice that happens in Indonesia. His main discussion topic was to see how Indonesia interprets public policy, which in two cases out of three cases under the Indonesian Supreme Court, public policy means something that is against the law of Indonesia. Because the two cases were under the decision of the Supreme Court, and the other one was only under Central Jakarta Court, which is a district court, the conclusion of the Supreme Court binds more.¹¹

Different from the article that Prof. Huala Adolf made, the writer wants to compare the implementation of Public Policy in Indonesia with several countries that are constituted as a country that supports pro-enforcement. This issue is important to be brought up by the writer since, even after a lot of criticism from a scholar from Indonesia and other countries, Indonesia has never tried to change the meaning of public policy in Indonesia, which made international arbitral awards hard to be enforced in Indonesia.

In this article, we will examine the application of the public policy doctrine in Indonesia concerning the enforcement of international arbitral awards. The article will be divided into three parts to provide a comprehensive analysis. Part I will delve into the concept of public policy as a basis for

⁶ *Ibid*, p. 203.

⁷ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford: Oxford University Press, 2007, para. 13.01.

⁸ *Ibid* para.13.02.

⁹ Fransisco Blavi, "The Role of Public Policy in International Commercial Arbitration", *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 82, No. 1, 2016, p. 5-6.

¹⁰ Richard A. Cole, "The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards", *Journal on Dispute Resolution*, Vol. 1 No. 2, 1986, p.366.

¹¹ Huala Adolf, "The Meaning of Public Policy Under Indonesia Arbitration Law and Practice", *Transnational Business Law Journal*, Vol. 2, No. 1, 2021, p.28-32.

refusing the enforcement of foreign arbitral awards in international commercial arbitration. Part II will explore the concept of public policy from the specific perspective of Indonesia, shedding light on its interpretation and implications within the country's legal framework. Finally, in Part III, we will discuss how Indonesia should implement the public policy doctrine to align with international standards, ensuring a fair and consistent approach to enforcing arbitral awards.

II. RESEARCH METHODS

This article was written and arranged using comparative study research methodology, normative juridical, and qualitative approaches. Started by raising the issues or phenomenon and collecting the facts.¹² Furthermore, analyze the facts and the data and see what the differences are from how other countries implement it. Legal comparative study research methodology used the research of the implementation of public policy in Indonesia and compared it with how other countries implement the public policy principles in their own countries based on sources, such as; primary law materials which include basic principles, national law, and international conventions, and jurisprudence; secondary sources such as doctrine, books, publication, and journal from imminent researchers.

III. DISCUSSION AND RESULT

A. Public Policy as a Ground for Refusing Enforcement of Foreign Arbitral Awards.

Article V (2) (b) of the New York Convention stated that:

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that : ... (b) the Recognition or enforcement of the award would be contrary to the public policy of that country.”

This concept has been debated for decades because of its unclearness. Prof Karl-Heinz Bockstiefei in his article about public policy explained that the idea of public policy would be different depending on the judgment of the respective legal community. It is because they have different background, such as religious, social, economic, political, and legal systems. Another factor that support it is the time factor, since the value in thirty years ago will be different with today's value. Thus, public policy has been interpreted differently in each jurisdiction by their courts and authors.¹³

Nevertheless, even though the concept remains ambiguous, certain states have frequently exerted control over the arbitration process by employing a broad understanding of the public policy doctrine. Therefore, it is crucial to strike a balance between upholding the principles and domestic laws while also recognizing the increasing necessity to respect arbitral awards in the realm of international commerce.¹⁴

Fortunately, recent developments in many industrialized states have demonstrated a greater level of respect for arbitral decisions when considering Public Policy defenses. Even claims that were previously deemed non-arbitrable in domestic arbitration and often rejected on public policy grounds have now been recognized as arbitrable. As a result, the enforcement of awards addressing such claims has been granted, indicating a more favorable stance towards upholding arbitral awards.

In practice, public policy defenses are often employed as a final recourse to contest the enforcement of an award. Many courts, both in developing and industrialized nations that have ratified

¹²Ali Zainuddin, 2018, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika. p. 24-27.”

¹³Karl-Heinz Bockstiegel, “Public Policy as a Limit to Arbitration and its Enforcement”, *Dispute Resolution International*, Vol. 2 No. 1, 2008, p. 123-125.

¹⁴Anil Changaroth, “International Arbitration – A Consensus on Public Policy Defences?”, *Asian International Arbitration Journal*, 2008, p. 143-144.

the New York Convention, utilize public policy defenses to reject the enforcement of arbitral awards based on both procedural and substantive grounds. However, despite this widespread use, there is still a lack of clear guidance on how courts interpret the exception of public policy. As a result, the interpretation and application of public policy in this context remain largely subjective and open to varying interpretations.

B. The Notion of Public Policy in International Commercial Arbitration

1. The Cases that Accept the Public Policy Defenses in the International Commercial Arbitration

In this section, we would like to discuss cases that accept the public policy defenses. The cases are *Soleimany v. Soleimany*¹⁵ and *Eco Swiss China Time Ltd. v. Benetton International NV* (“*Eco Swiss v. Benetton*”)¹⁶.

a. *Soleimany v. Soleimany*

In the case of *Soleimany v. Soleimany*, a dispute emerged between the plaintiff and defendant concerning the distribution of revenue from the sale of carpets. The plaintiff had purchased the carpets in Iran and illicitly exported them to the UK for the defendant to sell. The arbitral tribunal ruled in favor of the plaintiff. Subsequently, the plaintiff sought recognition and enforcement of the arbitral award by submitting it to the High Court. However, the defendant took a different approach and applied to set aside the arbitral award. Their argument was that enforcing or recognizing the award would go against public policy due to the underlying agreement or transaction being void.

In answering the question, the English court states that:¹⁷

“The court is in our view concerned to preserve the integrity of its process and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”

The English court explained that it would not enforce an arbitral award if the underlying contract was invalid according to English law, even if the contract itself was considered legal under the law applicable to the parties. In such cases, the court takes into account the law that would govern the performance of the arbitral award and refuses enforcement if the contract is deemed invalid under that law.¹⁸

b. *Eco Swiss v. Benetton*

In the case of *Eco Swiss v. Benetton*,¹⁹ the plaintiff, Eco Swiss, raised a question to the European Court of Justice regarding whether a violation of Article 85 of the EC Treaty (now Article 81 EC Treaty) could be considered a breach of public policy. The court responded that such a violation constituted a violation of mandatory public policy, allowing for the setting aside of the arbitral award. The dispute arose between Eco Swiss, a Hong Kong and New York-based retailer, and Benetton, a Dutch company, regarding a licensing agreement for the production and sale of watches and clocks under Dutch law.²⁰ On June 24, 1991, Benetton terminated the contract, leading Eco Swiss to initiate arbitration proceedings in accordance with Article 26A of the licensing agreement. The arbitral award was in favor of Eco Swiss, requiring Benetton to compensate for wrongfully terminating the agreement. Benetton

¹⁵*Soleimany v. Soleimany* [1998] 3 WLR 811, CA.

¹⁶*Eco Swiss China Time Ltd. v. Benetton International NV* [2000] 5 C.M.L.R. 816.

¹⁷*Soleimany*, Op. Cit.

¹⁸Andrew Tweeddale and Keren Tweeddale, Op.Cit., para 13.45.

¹⁹*Eco Swiss* [2000], Op. Cit.

²⁰*Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) [1999] E.C.R. I-3055.

subsequently sought to set aside the arbitral award, citing a violation of public policy based on the competition law outlined in Article 85 of the EC Treaty.²¹ The Court stated that:

The Court concluded that:

“Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.”

The court also added that:

“For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.”

The European Court of Justice explains that Article 85 of the Treaty is essential for the accomplishment of the tasks entrusted to the European Community, particularly, for the functioning of the internal market. Moreover, Article 85 (2) of the Treaty establishes that any agreements or court/arbitration decisions that violate Article 85 are automatically void. Because of Article 85 (2) of the Treaty, the court assesses that the violation of Article 85 may be considered a matter of public policy under the New York Convention. Thus, the court decided that the application made by Benetton for setting aside the arbitral award was justified.²²

2. The Cases that Refuse the Public Policy Defences

In the previous section, we discuss cases that accepted public policy defenses as grounds for refusing the enforcement of foreign arbitral awards. In this section, we will focus on cases that reject public policy defenses. This refusal aligns with the pro-enforcement bias, which aims to fulfill the objectives and purposes of the New York Convention. The pro-enforcement bias, as outlined in Gary B. Born's book "International Arbitration: Law and Practice," necessitates a restrictive and narrow interpretation and application of grounds for refusing the recognition or enforcement of arbitral awards.²³ The following three cases illustrate the stringent application of public policy defenses in jurisdictions that support a pro-enforcement bias.

a. Overseas v. RAKTA

In the case of *Persons & Whitemore Overseas Co., Inc. ("Overseas") v. Societe Generale de L'Industrie du Papier ("RAKTA")*,²⁴ RAKTA initiated arbitration proceedings against Overseas, an American company, at the International Chamber of Commerce ("ICC"). The dispute arose from the abandonment of a construction project that was near completion, prompting RAKTA to file a claim. The arbitral award subsequently favored RAKTA. Overseas then submitted the application to set aside the arbitral awards, contending that enforcing the arbitral award would violate US public policy.²⁵ Overseas argued that complying with the arbitral award would run counter to US public policy since it would require an obedient American citizen, like Overseas, to withdraw financial support from the contract, as mandated by the Agency for International Development ("AID").²⁶

In this particular case, the US Court explained that Public policy doctrine should be interpreted in a limited manner. The court held that public policy defenses can only succeed if enforcing the foreign

²¹ Blavi., Op. Cit p. 14.

²² Andrew Tweeddale and Keren Tweeddale., Op.Cit., para 13.51.

²³ Blavi., Loc. Cit.

²⁴ *Overseas v. RAKTA* 508 F.2d 969 (2nd Cir. 1974).

²⁵ *Ibid.*

²⁶ *Ibid.*

arbitral award would directly contravene the fundamental principles of morality and justice in the forum state.²⁷ Public policy doctrine cannot be utilized as a means to safeguard narrow national political interests.²⁸

b. Westacre Investments Inc. v. Jugimport – SPDR Holding Co Ltd.

In *Westacre Investments Inc. v. Jugimport – SPDR Holding Co. Ltd* (“*Westacre v. Jugimport*”),²⁹ the defendants, Jugimport – SPDR Holding Co. Ltd, argued that their agreement with the plaintiff was against public policy due to its involvement in fraudulent sales practices, including bribery and illicit personal influence. However, it gives nothing to the defendants. Subsequently, the defendants appealed the arbitral award to the Swiss Federal Tribunal, claiming a violation of public policy. However, the appeal was dismissed by the Swiss Federal Tribunal. The defendants then appealed to the English Court, but their appeal was rejected.

The English Court explained that although the arbitral award contradicted domestic English public policy, it did not violate the law applicable to the parties.³⁰ Therefore, the court determined that the award could be enforced. This decision differs from the ruling in the *Soleimany v. Soleimany*³¹ case, where the English court accepted the public policy defense since it violated English law’s public policy.

c. Gater Assets Ltd. v. Nax Naftogaz Ukrainiy

In the case of *Gater Assets Ltd v. Nax Naftogaz Ukrainiy*,³² the English court addressed an arbitral award that was obtained through fraudulent means.³³ The defendant argued that enforcing the award in the UK would go against the country’s public policy, as it was procured by fraud. The defendant specifically claimed that the plaintiff intentionally withheld a crucial document from the Arbitral Tribunal, which would have influenced the tribunal to decide in the defendant’s favor. The defendant contended that this intentional omission rendered the award contrary to UK public policy.³⁴

The English court then explained that for the enforcement of an award to be considered contrary to public policy, the failure to disclose a significant document must have been carried out deliberately by a party with the intention of misleading the arbitration process and securing an award in their favor. Mere innocent or unintentional failure by the plaintiff to provide the document would not be sufficient to establish that enforcing the arbitral award was against public policy.

3. Analysis of the Cases and Concept of International Public Policy.

In the *Soleimany v. Soleimany*,³⁵ the English court explained that the enforcement of the arbitral award would be impossible since it is against the public policy of the English as the country of performance, even though the arbitral award is not contrary to the law applicable to the parties. However, in *Westacre v. Jugimport*,³⁶ the decision is different. As long as the arbitral award is not against the public policy in the law applicable to the parties, the award still can be enforced even though it is against the English domestic public policy. *Westacre v. Jugimport* case decided in the high

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Westacre Investments Inc. v. Jugimport – SPDR Holding Co Ltd.* [2000] QB 288, CA.”

³⁰ Andrew Tweeddale and Keren Tweeddale., *Op.Cit.*, para 7.60.

³¹ *Soleimany.*, *Op. Cit.*

³² *Gater Assests Ltd. v. Nak Naftogaz Ukrainiy* [2008] EWHC 237 (Comm).”

³³ Bartłomiej Orawiec, “The Public Policy Exception under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The UK Perspective)”, *Comparative Law Review*, 2016, p. 53-54.

³⁴ *Ibid*, p. 65.

³⁵ *Soleimany.*, *Op. Cit.*

³⁶ *Westacre.*, *Op Cit.*

standard for public policy defenses. Similar to the previous case, *Gater Assets Ltd. v. Nak Naftogaz Ukrainiy*³⁷ maintains a high standard for public policy defenses. The case stated that the failure to reveal an important document that made the award would be decided in favor of the defendant cannot be considered as contrary to the public policy, the reason is because it was not intentionally withholding the document that mislead the arbitration.

In the US Court, a similar approach was observed in the case of *Overseas v. RAKTA*,³⁸ where the court adopted a restricted interpretation of the public policy defense to enforce foreign arbitral awards, aligning with the pro-enforcement bias.³⁹ In the case document of *Overseas v. RAKTA*, the court emphasized that public policy defenses would only be accepted if they violated the fundamental principles of morality and justice in the state.

In *Eco Swiss v. Benetton*,⁴⁰ the court accepted the public policy defenses because Article 85 was considered a crucial principle for the functioning of the internal market. Violation of this principle justified setting aside the arbitral award.

From these cases, it can be concluded that the grounds for refusing the enforcement of foreign arbitral awards should be interpreted in accordance with the pro-enforcement bias of the New York Convention. The pro-enforcement bias is important to ensure international respect for domestic courts in different countries that enforce foreign arbitral awards, thereby facilitating the effectiveness of international commercial arbitration. As a result, the notion of public policy should be narrowly construed and applied in such cases.

C. The Concept of Public Policy in Indonesia

1. Arbitration in Indonesia

The history of Arbitration in Indonesia itself started in 1977 with the establishment of Badan Arbitrase Nasional Indonesia (“**BANI**”), the National Arbitration Institution in Indonesia. Initially, BANI followed the (Dutch) Code of Civil Procedures of 1847, specifically in book III, articles 615-651.⁴¹ However, as the demand for arbitration increased, the outdated 1847 code was replaced by the promulgation of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (“**Indonesian Arbitration Act**”).⁴²

In 1981, Indonesia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Presidential Decree No. 34/1981. However, as the New York Convention did not provide detailed procedures for the enforcement of foreign arbitral awards, nor did it specify the competent authority responsible for such enforcement, the Supreme Court of Indonesia took the initiative to address these issues. As a result, the Supreme Court issued Regulation No. 1 on the Procedures for the Execution of Foreign Arbitral Awards, which was considered an implementation of the Presidential Decree.⁴³

³⁷ *Gater.*, Op. Cit.

³⁸ *Overseas.*, Op. Cit.

³⁹ Troy L. Harris, “The ‘Public Policy’ Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes”, *Journal of International Arbitration*, 2007, p. 12

⁴⁰ *Eco Swiss.*, Op. Cit.

⁴¹ Fifi Junita, “Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia”, *Macquarie Journal of Business Law*, Vol. 5, 2008, p. 369 & 375.

⁴² Narendra Adiyasa and Charles Ball, ‘Indonesia’, in Michael J. Moser and John Choong, *Asia Arbitration Handbook* (OUP 2011) para 18.07.

⁴³ Fifi Junita, “The Concept of Public Policy Exception to the Enforcement of Foreign Arbitral Awards: The Indonesian Perspective”, *International Arbitration Law Review*, 2013, p. 148 & 157.

In her article titled "The Concept of Public Policy Exception to the Enforcement of Foreign Arbitral Awards Enforcement in Indonesia," Fifi Junita highlights that while Indonesia has ratified the New York Convention, which promotes a pro-enforcement policy, the actual enforcement of foreign arbitral awards in Indonesia has been significantly affected by municipal courts and the domestic application of public policy defenses. This has resulted in challenges to the pro-enforcement policy of foreign arbitration.⁴⁴

In Indonesia, both international and national arbitral awards are considered final and binding, unless they violate specific conditions outlined in Article 66 of the Indonesia Arbitration Act.⁴⁵ One of these conditions is that the award must not contravene Indonesian Public Policy.⁴⁶ It is important to note that these requirements are cumulative, which means all conditions must be met.

However, a challenge faced in Indonesia, particularly concerning the enforcement of arbitral awards, is the absence of a clear definition of Public Policy within the Indonesian Arbitration Act. According to Article 66(d) of the Act, the procedure for enforcing foreign arbitral awards involves submitting the awards to the Central Jakarta District Court (CJDC) to obtain a writ of execution, known as an *exequatur*. The judge at the CJDC assesses whether the enforcement of the foreign arbitral award would go against Indonesian public policy.⁴⁷ Unfortunately, as noted by Fifi Junita, the presence of public policy defenses and court intervention have hindered the effectiveness of arbitration in Indonesia.⁴⁸

2. The Notion of Indonesia Public Policy

The term public policy was often mentioned in various regulations. However, there is no definition on what is public policy, until the Supreme Court Regulation No. 1 of 1990 concerning the Procedure for Enforcing Foreign Arbitration Award. The one and only definition of public policy that is provided in the regulations is The Supreme Court Regulation No 1 of 1990 concerning the Methods for the Execution of the Foreign Arbitral Award. In 1990, the Indonesia Supreme Court issued the Supreme Court Regulation No. 1 of 1990 on the Procedures for the Execution of Foreign Arbitral Awards. This regulation plays a crucial role in guiding the procedures and requirements for executing foreign arbitral awards in Indonesia. Since the Presidential Decree No. 34 of 1981 did not provide detailed explanations on the matter, the Supreme Court regulation helps fill the gap and provides important guidelines for the enforcement of foreign arbitral awards in the country.⁴⁹

The supreme court took the initiative to regulate the procedure for the execution of foreign arbitral awards since the government did not show any intention to issue the procedures for the execution of the New York Convention.⁵⁰ Two important provisions that are included in the Supreme Court Regulation are.

- 1) The appointment of the CJDC as the Competent Authority is stipulated in Article V (1) New York Convention.
- 2) Definition of Public Policy

⁴⁴ *Ibid.*, 152

⁴⁵ Fifi Junita [2008], *Op. Cit* p. 376

⁴⁶ *Ibid.*, 379

⁴⁷ *Ibid.*, 385-386

⁴⁸ *Ibid.*, 384

⁴⁹ *Ibid.*, p. 24.

⁵⁰ MARI, *Kapita Selekta tentang Arbitrase Dilengkapi dengan Putusan yang Telah Berkeputusan Tetap*, Jakarta: MA, 2011, p.47.

Rather than applying the Public Policy doctrine in the international sense, Indonesia applies public policy doctrine in a domestic sense. Article 3 (3) of the Supreme Court Regulation, it was stated that: “foreign arbitral awards cannot be enforced in Indonesia if they violate public order.” Moreover, Article 4 (2) of the Supreme Court Regulation, adds that:

“Exequatur will not be granted if the Foreign Arbitral award is against the basic principles of the entire Indonesian legal system and society (public policy).”

The phrase “... the basic principles of the entire Indonesian legal system and society”, means that Indonesia interprets the concept of public policy as a domestic condition and not an international condition.⁵¹ Fifi Junita in her article opined that Article 4 (2) of the Supreme Court Regulation lead to a great acceptance of the internal concept of public policy based on sovereignty, legal tradition, and culture rather than international public policy. In addition, the meaning of public policy defenses may include all of the public interest or the state’s political interest or even mandatory rules.⁵² The scope and meaning of Public Policy until now become the court’s discretion since Indonesia Arbitration law itself is not regulate the definition and the scope of Public Policy.⁵³

There are several opinions from Indonesian scholars that explain about public policy such as:

1. Prof. Sudargo Gautama

Prof Sudargo Gautama, a renowned expert in private international law, introduced the definition of public policy in Indonesia. He emphasized the need for a narrow and cautious application of the public policy doctrine. According to him, public policy should be viewed as an exceptional provision. He argued that unrestricted use of public policy to invalidate foreign arbitral awards would hinder the development of private international law and favor national law over foreign law.⁵⁴ He also added that public policy should be utilized as an “escape clause” rather than a weapon.⁵⁵

2. Prof. Priyatna Abdurrajsid

Prof. Priyatna Abdurasyid, the former Chair of the BANI Arbitration Centre of Indonesia, provided insights into the concept of public policy. Although he did not offer a specific definition, he acknowledged the need for additional research on public policy.⁵⁶ He also expressed the view that public policy could potentially be utilized to invalidate an award.⁵⁷

3. Prof. Huala Adolf

The other scholar that tried to explain the term of public policy is Prof Huala Adolf. He is the Vice Head of Badan Arbitrase Nasional Indonesia (BANI), he is also one of the Arbitrators that is registered in the BANI Arbitration Center. In his article, he agrees with the opinion of Prof. Sudargo Gautama that Public Policy defenses shall be used cautiously. Public policy cannot be used easily to set aside foreign arbitral awards, since⁵⁸:

- (a) The public policy doctrine should be used carefully because all States must respect the application of the due process of law in other countries. The use of public policy defense

⁵¹ Gede Aditya Pratama, *Public Policy As A Ground For Refusing Enforcement of Foreign Arbitral Awards: Indonesian Notion of Public Policy*, Master Thesis, University of Exeter, p. 29.

⁵² Fifi Junita [2013], *Op. Cit*, p. 158

⁵³ *Ibid.*, p. 159

⁵⁴ Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum dan Konvensi New York 1958*, PT. Citra Aditya Bhakti, Bandung, 1998, p. 24.

⁵⁵ Nigel Blackaby et.al., *Redfern and Hunter on International Arbitration*, Oxford: Oxford U.P., 2009, p. 615

⁵⁶ Priyatna Abdurasyid, *Arbitrase dan Alternative Penyelesaian Sengketa (APS)*, 2nd Rev. Ed., Jakarta: Fikahati, 2nd.rev.ed., 2011, p. 23.

⁵⁷ *Ibid.*

⁵⁸ Huala Adolf., *Op. Cit*, p.27.

in Indonesia with no limitation would endanger the existence and the future of international arbitration in Indonesia.

- (b) The recognized principle of acquired rights under private international law that suggest what has been valid under national law where the awards take place, shall also be recognized in other States.
- (c) International arbitration possesses a universal character that should be acknowledged by all states worldwide. This universality extends to both the substantive and formal aspects of arbitration provisions.
- (d) Indonesia, as a member state, has ratified the New York Convention of 1958, which imposes the obligation to recognize arbitral awards within its territory.

3. Public Policy and Enforcement of Foreign Arbitration Awards in Indonesia Case Laws

There are quite a few case laws for implementing Public Policy in Indonesia and Enforcement of Foreign Arbitration Awards These cases are:

a. *Bakrie Brothers v. Trading Corporation of Pakistan Ltd. (1984)*

In the case of *Bakrie Brothers v. Trading Corporation of Pakistan Ltd. ("Bakrie v. Trading Corporation")*,⁵⁹ the Indonesian court rejected the foreign arbitral awards based on the grounds of public policy. The Claimant (Trading Corporation of Pakistan) enter into a Purchase and Sales Agreement of Palm Oil with the Respondent (Bakrie Brothers). The dispute arose when the Respondent failed to conduct its contractual obligations that made the Claimant submit the dispute to the Federation of Oils, Seed, and Fats Association Limited (FOSFA) Arbitration in London. The results of the arbitral awards were in favor of the Claimant which ordered the Claimant to pay compensation.⁶⁰

Afterward, the Claimant submitted the request to the South Jakarta District Court ("SJDC") to enforce the arbitral awards in Indonesia. However, the Respondent objected to the enforcement, arguing that the arbitration proceedings violated their procedural rights, specifically the principle of *audi et alteram partem* (the right to be heard). The SJDC accepted the Respondent's objection and refused to enforce the arbitral awards, citing the violation of Indonesian law due to the lack of equal opportunity for both parties to present their case.

b. *PT Nizwar v. Navigation Maritime Bulgare (1984)*

PT Nizwar v. Navigation Maritime Bulgare ("Nizwar v. Navigation") case was another example of the Jakarta Court refusing to enforce the foreign arbitral awards. PT Nizwar, entered into a rental of ship agreement with Navigation Maritime Bulgare (NMB). The dispute then be submitted to the arbitration in London and decided in favor of NMB and required PT Nizwar to pay the compensation to NMB. Afterward, NMB submitted the arbitral awards to the Indonesian domestic court to be enforced. The domestic court granted the request to enforce the arbitral awards. However, PT Nizwar appealed to the Indonesia Supreme Court. The Supreme Court had a different opinion from the domestic court and cancel the decision to enforce the foreign arbitral awards.

The Supreme Court in its judgment contended:

⁵⁹South Jakarta District Court Decision No. 64/Pdt/G/1984/PN.Jkt.Sel upheld by the Jakarta High Court Decision No. 512/Pdt/1985/PT.DKI and Indonesian Supreme Court Decision No. 4231 K/Pdt/1986

⁶⁰Erman Radjagukguk, "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy", (2011) *Indonesia Law Review*, No. 1 Volume 1,2011, p.1 & 7-8

- 1) The foreign arbitral awards cannot be enforced in Indonesia if there state where the arbitral awards are released and Indonesia does not have any bilateral or multilateral treaty regarding the enforcement of foreign arbitral awards.
- 2) Indonesia was not bound by international agreements signed by its colonial power during colonization.
- 3) Indonesia in 1981 has ratified the New York Convention in 1958, however, there is no regulation that regulates the implementation of the New York Convention in 1958, including which court that is appointed by the law as the court that is considered the competent authority under Article V (1) of the New York Convention.⁶¹

Based on the deliberation by the Supreme Court, the first contention from the deliberation was actually not quite right. It is because, Indonesia and the UK, the state where the arbitral award was released, had ratified the New York Convention before 1984.

c. *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto (1989)*

Indonesian businessman Yani Haryanto entered into a Sugar Purchase and Sales Agreement with British exporter E.D. & F. Man (Sugar) Ltd. However, Haryanto later discovered that only the Indonesian Bureau of Logistics (“**BULOG**”) was authorized to import sugar into Indonesia, as per Presidential Decree No. 39 of 1978.⁶² Realizing the regulation, Haryanto unilaterally terminated the agreement, which was not accepted by E.D. & F. Man (Sugar) Ltd. Consequently, the dispute was taken to arbitration in London, where an award was made in favor of E.D. & F. Man (Sugar) Ltd, requiring Haryanto to pay compensation.⁶³

E.D. & F. Man (Sugar) Ltd submitted the application to enforce the Arbitral Awards, However, Yani Haryanto opposed the award by relying on the violation of Indonesian Laws. The CJDC refuse the argument from Yani Haryanto and stating that it lacked jurisdiction due to an arbitration clause. E.D. & F. Man (Sugar) Ltd obtained an exequatur from the Supreme Court. E.D. & F. Man (Sugar) Ltd., made an exequatur which then be granted by the Supreme Court. However, the CJDC later refused to enforce the arbitral awards, claiming a violation of Indonesian laws. The Supreme Court upheld the CJDC's decision, invalidating the previously granted exequatur due to contract invalidity.

d. *Bankers Trust Group v. Mayora & Jakarta International Hotels (2000)*

There are two identical cases that are released at almost the same time. Those Cases are *Banker Trust Company and Bankers Trust International Plc v. PT. Jakarta International Hotels & Development and Banker Trust Company and Banker Trust International Plc v. PT. Mayora Indah Tbk. (“Bankers Trust v. Mayora & JIHD”)*, are two identical cases that will be discussed concurrently. PT Mayora and PT JIHD failed to make payments to Bankers Trust Group as stated in the contract. When the negotiation regarding the payments to the Banker Trust Group, both PT Mayora and PT JIHD try to annul the agreement in SJDC on the basis that the agreements pose a form of gambling that is prohibited under Indonesian Laws. Bankers Trust Group also submitted the dispute to the London Court of International Arbitration (“**LCIA**”). Nevertheless, the SJDC decided that the agreement was invalid. Despite the decision made by the SJDC, Bankers Trust Group made a request for an *exequatur* to the

⁶¹ Mutiara Hikmah, *Analisis Hukum Perdata Internasional pada Perkara-perkara Putusan Arbitrase Internasional (Private International Law Analysis on the International Arbitral Awards)*, Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2021, p. 503.

⁶² The Decision of Central Jakarta Court No. 736/PDT.G/VI/1988/PN.JKT/PST; the Decision of the High Court No. 485/Pdt/1989/PT.DKI; Decision of the Supreme Court No. 1205K/Pdt/1990. The case was reported among others in: MARI, *Kapita Selekta tentang Arbitrase Dilengkapi dengan Putusan yang telah Berkekuatan Tetap*, Jakarta: MA, 2011, pp. 503-505 and 921 et. Seq.; Mutiara Hikmah, *Op.cit.*, note 28, p. 226-234.

⁶³ Fifi Junita. *Op.Cit.* p.389

CJDC. Since the SJDC had decided that the agreement was invalid and the enforcement of the arbitral awards would be against Indonesian Public Policy, the CJDC refused the request for *exequatur*.⁶⁴

These decisions have violated the Indonesian Arbitration Act, particularly Article 3 which stated that “*The District Court does not have jurisdiction to settle the dispute between the parties that are bound by the arbitration agreement.*” Article 11 of the Indonesian Arbitration Act is also violated in the issuance of The SJDC regarding the invalidity of the agreements between the parties.

e. *Astro Group v. Lippo Group (2009)*

In the case of *Astro Group v. Lippo Group*,⁶⁵ an arbitration proceeding took place in Singapore due to a defaulted agreement between the parties. Meanwhile, Lippo Group initiated legal proceedings in the SJDC in Indonesia. During this time, the Singapore International Arbitration Centre (“SIAC”) issued an interim award to halt the proceedings in Indonesia. Astro Group sought an *exequatur* from the CJDC to stop the SJDC proceedings. However, the CJDC rejected the *exequatur* request based on public policy grounds. The CJDC considered the order to stop the SJDC proceedings by a Singaporean institution as a violation of Indonesia's principles of sovereignty.

f. *Astro Nusantara Bv et.al., v. PT Ayunda Primamitra (2010)*

The dispute arose from a failed joint venture agreement between the Parties. The Claimant pursued arbitration at SIAC, while the Respondent initiated legal proceedings at SJDC. The arbitrators ruled in favor of the Claimant and ordered the Respondent to halt the court proceedings. The Respondent's actions violated the Indonesian Arbitration Act's Articles 3 and 11, as well as Clause 17.6 of their agreement, which prohibited resorting to court. The Claimant sought enforcement of the arbitral awards at CJDC, but the court accepted the Respondent's petition to reject execution based on Indonesian Public Policy.

The Claimant then appeals to the Supreme Court, however, instead of annulling the decision of the CJDC that refuses the enforcement of SIAC Arbitral awards, the Supreme Court shared the same opinion with the CJDC that the order made by SIAC Arbitration Institution to stop the proceeding in the SJDC was a violation of the principle of Sovereignty. The court argued that foreign powers cannot interfere legal process in Indonesia.⁶⁶ In addition, the court also stated that the subject matter of the arbitral awards was not in the scope of commercial issues since it is considered as a procedural law matter.⁶⁷

g. *PT Sumi Asih v. Vinmar Overseas Ltd and AAA (2010)*

The one and only case that does not reject the enforcement of foreign arbitral awards that is provided in this article is the case of *PT Sumi Asih v. Vinmar Overseas Ltd and AAA* (“***Sumi Asih v. Vinmar & AAA***”).⁶⁸ The Claimant challenge the enforcement of the arbitral award on the basis that the arbitral award was *ultra petita*.⁶⁹ The Respondent argued, that the arbitral award did not breach *ultra petita*, since the amount that the arbitral tribunal decided was in accordance with the Claimant's claim.⁷⁰ The CJDC decided that *ultra petita* is not considered a violation of Indonesia Public Policy since based on the opinion from Professor Sudargo Gautama, public policy meant “... *matters that are considered*

⁶⁴The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000.; Karen Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration*, Paper, February, 2003, revised February, 2005.

⁶⁵Central Jakarta District Court Decision No. 05/Pdt.Arb.Int/2009, that upheld by the Indonesian Supreme Court Decision No. 01 K/Pdt.Sus/2010.

⁶⁶The Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 36.

⁶⁷The Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 37.

⁶⁸Decision of the Central Jakarta Court No. 271 K/Pdt.G/2010/PN.Jkt.Pst

⁶⁹*Ibid.*, p. 9.

⁷⁰Decision of the Central Jakarta Court, *Op.Cit.*, p. 30

*most important principles in society, i.e., Indonesian society, which are economically and socially important which cannot be replaced by the application of foreign law.”*⁷¹ which the judges from the CJDC did not find the concern of the economy, security, and interest of the society as a whole and state in this particular case.⁷²

4. Analysis of the Concept of Domestic Public Policy by Examining Indonesian Cases Regarding the Refusal of The Enforcement of Foreign Arbitral Awards.

From the cases that are mentioned above, we can see that the Indonesian court mostly interprets public policy domestically and broadly.⁷³ According to Erman Radjagukguk, public policy in Indonesia refers to violations of national laws, regulations, or the state's interests. If an agreement violates Indonesian law or if enforcing a foreign arbitral award goes against national interest, it cannot be enforced in Indonesia.⁷⁴

In the case of *Bakrie v. Trading Corporation*,⁷⁵ The court refused to enforce the arbitral awards since the arbitration proceedings violate the principle of *audi et alteram partem* which requires the arbitral tribunals to give the same opportunity to the Parties to present its case. There is no explanation on whether it was proven that the arbitral tribunals did not give the same opportunity to the parties to present their case, however, the determination of this issue to be considered as public policy was a little bit too far.

The case of *Nizwar v. Navigation* highlights a unique situation where the refusal of the arbitral awards was not due to the absence of a treaty that endorsed the recognition and enforcement of Arbitral Awards between Indonesia and the UK, but rather the lack of a regulation implementing the Presidential Decree No. 34 of 1981. It is pretty sad the main reason for the refusal of enforcement of the foreign arbitral award because there is no regulation that regulates the implementation of the Presidential Decree, while on the other hand, Article 14 (1) of Law No. 14 of 1970 regarding Basic Provisions on the Powers of the Judiciary stipulates that “The Court cannot refuse to examine and adjudicate a case with the reason that the law is unclear, but the court obligated to examine and adjudicate it.” The judges' decision to refuse enforcement based on the absence of a regulation contradicted Article 14(1) of Law No. 14 of 1970.

The cases of *E.D. & F. v. Yani*⁷⁶ and *Bankers Trust v. Mayora & JIHD*⁷⁷ are similar regarding the reason why both cases are refused to be enforced in Indonesia. *E.D. & F. v. Yani* case is about the prohibition of a private entity to import sugar that made the agreement become invalid. In *Bankers Trust v. Mayora & JIHD*, the challenge to the enforcement of the arbitral awards was based on the argument that the agreement involved prohibited gambling activities in Indonesia. These cases highlight the reliance on public policy defenses to challenge the enforcement of the arbitral awards due to violations of Indonesian law.

⁷¹ Sudargo Gautama, *Undang-Undang Arbitrase Baru 1999*, Bandung: Citra Aditya Bakti, 1999, p. 134.

⁷² Decision of the Central Jakarta Court, *Op.Cit.*, p. 50.

⁷³ Frans Winarta, ‘Indonesia Country Report on Public Policy for IBA APAG’ <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=35A890AC-0D36-4953-BC10-22E1BF3F89AD>> accessed 6 June 2023, p.8.”

⁷⁴ Erman Radjagukguk, *Op. Cit.*, p. 2.

⁷⁵ South Jakarta District Court, *Op. Cit.*,

⁷⁶ Central Jakarta District Court Decision No. 499/Pdt/G/VI/1988/PN.Jkt.Pst, upheld by the Jakarta High Court Decision No. 486/Pdt/1989/PT.DKI, and subsequently by the Indonesian Supreme Court Decision No. 1205 K/Pdt/1990

⁷⁷ Central Jakarta District Court Decisions No. 01 and 02/Pdt/Arb.Intl/1999/PN.Jkt.Pst in conjunction with No.02/Pdt.P/2000/PN.Jkt.Pst, upheld by the Indonesian Supreme Court Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000, in conjunction with the South Jakarta District Court Decision No. 46/Pdt.G/1999/PN.Jkt.Sel

On the other hand, there are two cases that have the same reason why the court refuses the enforcement of foreign arbitral awards. The case is *Astro Group v. Lippo Group & Astra Nusantara Bv et.al., v. PT Ayunda Primamitra* (“**Astra v. Ayunda**”). The judges from the CJDC argued that the action made by SIAC to stop the proceedings in the SJDC is against the principle that is attached in every state, which is the principle of sovereignty. Moreover, the judges also argue that the arbitral awards do not contain a commercial issue, rather they argue that it was considered as a procedural law issue.

The only good example that this article provides is the case of *Sumi Asih v. Vinmar & AAA*. The Claimant challenges the enforcement of the arbitral award on the basis of public policy since the claim is considered *ultra petita*. Regardless it is proven whether the arbitral awards constitute *ultra petita* or not, the court decided that *ultra petita* is not considered a violation of public policy. Since the judges from the CJDC did not find any concern about Indonesia's economy, security, and interest of the society as a whole and a state not just an individual disadvantage.

D. Modification of the Implementation of Public Policy Doctrine in Indonesia

To modify the notion of public policy in Indonesia, we have to first establish the problem with how Indonesia interprets it. There are several conclusions that can be taken from the previous section. *First*, Indonesian courts tend to interpret public policy in a broad domestic sense. *Second*, there are several conditions that can be categorized as a violation of public policy in Indonesia, which is: (1) when the enforcement of the arbitral awards would be against Indonesian Laws; (2) when the agreement itself violates Indonesian Laws; (3) when there is a parallel proceeding in Indonesia, and the decision in the District Court and the arbitration was different; (4) when the arbitral award violates Indonesia's sovereignty.

1. Enforcement of the Arbitral Awards would be against Indonesian Laws

In the previous section, it was established that the *Bakrie v. Trading Corporation* Case's main argument is that the Bakrie Brothers did not receive the same opportunity to present their case. The clarity of the case whether it is right or not, the writer did not know. However, if we assume that the objection made by Bakrie Brothers is right, the court shall not accept the objection, particularly on the basis of a violation of Public Policy.

It is correct that the arbitral tribunal in that case was violating Indonesian laws by not giving the same opportunity to both parties, however, the mere violation of national laws should not be considered as public policy. In the case of *Overseas v. RAKTA*, to be considered a violation of public policy, the court shall assess whether the award has violated the most basic notions of a state's morality and justice. Moreover, in the case of *Westacre v. Jugoimport.*, even if the arbitral award is violating the public policy in the enforcing state, it does not necessarily lead to the refusal of the enforcement, as long as the arbitral award is not against the law applicable to the parties. The author did not see that the court has assessed these factors.

The author aligns with the approach taken by English and US courts. The court should evaluate whether a violation of the principles mentioned earlier constitutes a breach of the fundamental concepts of morality and justice in Indonesia. If not, the court should enforce the arbitral award. This perspective is consistent with the spirit of The New York Convention, which emphasizes a narrow and restrictive interpretation of public policy defenses.

2. The Agreement violates Indonesian Laws

Another situation in which Indonesian public policy is violated is when the object of the agreement is deemed invalid under Indonesian laws. This can be seen in the case of *E.D. & F. v. Yani*, where the agreement between the parties pertained to the importation of sugar into Indonesia.

The problem with the agreement is, Yani Haryanto did not realize that he had violated the Presidential Decree about BULOG. And because of that the CJDC and the Supreme Court decided to refuse the enforcement of the arbitral awards since it violated Indonesian laws. Similarly, the enforcement of the case of *Bankers Trust v. Mayora and JIHD* is refused on the grounds that the agreement poses a form of gambling that is against Indonesian Laws.

The problem with these cases is that the parties from Indonesia (Mayora, Jakarta International Hotels, and Yani Haryanto) were raising the objection when the dispute has arose. It makes the assumption that the Indonesian Parties just use the public policy doctrine to avoid their assets to be executed. Moreover, in the *E.D. & F. v. Yani* case, Yani Haryanto is the one who is careless and did not conduct any due diligence to see whether the agreement is against Indonesian laws or not.

Moreover, in the international standard, there is a doctrine that is well known regarding the arbitration clause in the agreement. It is called the separability doctrine, where the Arbitration Clause that is within the agreement will remain valid even though the agreement itself is not valid. In the Indonesian Arbitration Act, particularly Article 10 (h), it is stated that the arbitration agreement will not become void even if the main contract expires or is nullified. In that case, the district court was re-examining the merits of the issue, about the validity of the contract, while it has been discussed in the arbitration, the district court shall not re-examine the case since the choice of forum of the parties is arbitration, not court. The court in the case of *E.D. & F. v. Yani* and *Bankers Trust v. Mayora & JIHD* had violated the separability doctrine. Even though *E.D. & F. v. Yani* case was released before Indonesian Arbitration Act entered into force, the doctrine of separability has been known widely. Thus, regardless of whether the main agreement violated Indonesian Law or not, that kind of discussion shall be discussed in the arbitration proceedings not in the enforcement stage by the enforcing court.

3. There is a Parallel Proceeding in Indonesia, and There is a Difference in the Decision Between the Court and Arbitration

There are several cases that are mentioned in the article that conduct a parallel proceeding in Indonesia and the decision between the court and arbitration are different. The cases are *Banker Trust v. Mayora & JIHD*, *Astro v. Ayunda*, and *Astro Group v. Lippo Group*. The issue that should be highlighted is how can there is a parallel proceeding regarding the same subject matter that is submitted in a different forum, with one party submitting to the court and the other submitting to the arbitration.

All the cases that are mentioned above is a case that has an arbitration clause or arbitration agreement included in the contract. Moreover, all the cases that are mentioned in the previous paragraph were conducted after the promulgation of the Indonesian Arbitration Act, which means that Article 3 and 11 of the Indonesian Arbitration Act was violated by the Judges. If the court still accepts the case where their agreement contains an arbitration clause, then what is the point of making and including an arbitration clause in the agreement. Arbitration would be deemed as a useless means to settle the dispute.

4. The arbitral award violates Indonesia's sovereignty

Astro Group v. Lippo Group and *Astro v. Ayunda*, the Indonesian Party submitted the dispute to the SJDC. The agreement contains an arbitration clause. In the first place, *Astro Group v. Lippo Group* and *Astro v. Ayunda*, has violated their arbitration agreement. Even, in the case of *Astro v. Ayunda*, there is a specific clause where it prohibits the parties to submit the case to the court. The district court also has to refuse when the parties submitted the case. Since the acceptance of the case that contains an arbitration clause is a violation of Indonesian law. And if we use the same logic, as in the previous paragraph, the court itself has violated Indonesian Public Policy.

Indonesia has ratified the New York Convention of 1958. Article II of the New York Convention requires that all states uphold the arbitration agreements, which means that where the court proceedings

have breached the arbitration agreement, the national courts have to stay those proceedings.⁷⁸ The order from SIAC to stop the court proceedings is not violated Indonesian sovereign rights since Indonesia has consented to fulfill the obligations to uphold the arbitration agreement.

Indonesia has ratified the New York Convention, the convention that endorsed the pro-enforcement bias. Because of that, Indonesia has to strictly uphold the arbitration agreement. The first thing that Indonesia has to do is ensure that the court will refuse any kind of case that contains an arbitration clause in their agreement. Moreover, Indonesia has to establish the UK and US approach regarding the public policy defenses, to prevent the terms public policy can be interpreted widely and freely. In the UK and US approaches, it was stated that public policy defenses will be accepted if they violate the most basic notions of the state's morality and justice. Indonesia has to establish first what are the most basic notions of Indonesia's morality and justice in their regulation with reasonable grounds. It can be mentioned in the new Arbitration Act since we know that Indonesian Arbitration Act has been entered into force for so long, and there are some provisions that need to be amended.

IV. CONCLUSIONS

Arbitration is one of the dispute settlements that is chosen by the parties because the parties deemed that Arbitration is more advantageous compared to the court. The parties can only submit the dispute to the arbitration only if they have made an arbitration agreement, within or outside of their main agreement. However, even if the Parties have agreed on settling the dispute through arbitration, there is a stage where the arbitral award has been released and only needs to be enforced, the competent authority refuses the enforcement of the arbitral award on the grounds of violation of the state public policy. It happens in Indonesia. Indonesia interprets public policy doctrine in a broad way. Because of that, Indonesia has been accused of being unfriendly to the international arbitral award.

In the UK and the US, the states interpret the violation of public policy as the violation of the state's most basic notions of morality and justice. However, in many cases in Indonesia, the mere violation of Indonesian law is considered a violation of public policy. Moreover, Indonesia also classified the order from another institution outside Indonesia to stop the court proceedings in Indonesia as a violation of Indonesia's Sovereign Rights. While in the first place, Indonesia has ratified the New York Convention and has violated Article II of the New York Convention. In order to make Indonesia a country that is arbitration-friendly and pro-enforcement pursuant to the spirit of the New York Convention, Indonesia has to interpret public policy doctrine narrowly and in a restrictive way. One of the ways to establish the interpretation narrowly and in a restrictive way of public policy, Indonesia can include what kind of violation that is constituted a violation of public policy in the arbitration act followed by reasonable grounds on why it is considered the most basic notion of Indonesia's morality and justice in their regulation with reasonable grounds.

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