

THE MEANING OF PUBLIC POLICY UNDER INDONESIAN ARBITRATION LAW AND PRACTICE

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ABSTRACT

This article tried to see the meaning of public policy under Indonesian arbitration law. The arbitration law examined was the arbitration law in the Code of Civil Procedures of 1847, the Presidential Decree No 34 of 1981, the Supreme Court Regulation No 1 of 1990 and the Arbitration law No 30 of 1999. The article also took a closer look on Indonesian court in interpreting the term public policy in its decisions. The method used in this article was descriptive-analytical. The data was in particular the decisions of the courts of Indonesia including Domestic Court, High Court and Supreme Court. A comparative study was taken, describing the arbitration acts of certain countries in particular New Zealand, Malaysia and Fiji. This article concluded, as cases developed, the approach toward public policy was the strict application of it. This article also recommended the amendment of the arbitration law by including the indicators as to what the public policy would cover as found in arbitration acts of states being studied.

Keywords: public policy; arbitration law.

I. INTRODUCTION

One of the problems with the request for the enforcement of foreign arbitration awards is the rejection of the request by the national court on the ground that the award violates public policy. This problem arose because as what Hunter and Redfern put it: "... different states have different concept of their public policy".¹

This problem also happens in Indonesia. This issue appeared for the first time in 1979 when the Supreme Court rejected the request for execution of the London arbitration award in the *E.D. & F. Man (sugar) Ltd v. Haryanto*. The Court argued, the London arbitration award was in violation of the public policy of Indonesia. The Court argued, the only institution that had the authority to export and import sugar was the government owned logistic body namely *Badan Usaha Logistik*. The sugar transaction made by a private company was a violation of Indonesian law. This, according to the Court, was a violation of public policy.

The ground of public policy for the annulment of foreign arbitration award is recognized under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Article V para. 2 (b) of the Convention provides 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 the recognition or enforcement of the award would be contrary to the public policy of that country."²

The main difficulty with the issue of the set aside or the annulment of foreign arbitral awards based on violation of public policy was that there is no clear meaning under the Indonesian arbitration

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¹ Nigel Blackaby et.al., *Redfern and Hunter on International Arbitration*, Oxford: Oxford U.P., 2009, p. 615.

² For discussion on Article 5 para. 2 (b) of the Convention, see: Albert Jan van den Berg, *The New York Convention of 1958*, The Netherlands: Kluwer, 1981.

laws.³ Since the Court's decision in the *E.D. & F. Man (sugar) Ltd v. Haryanto*, various laws on arbitration have been promulgated. The main problem with these laws is that they do not give satisfactorily the meaning of public policy. This issue has also become interesting to see as the main regulations on arbitration law do not provide satisfactory meaning on public policy. These include the old-Dutch 'arbitration law' as regulated in articles 615-651 of the Code of Civil Procedure, the Supreme Court Regulation No. 1 of 1999 on the Procedure for the Execution of Foreign Arbitral Awards, and Law no 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Besides discussing the statutory laws above, this article will also look the opinion of Indonesian scholars specializing in arbitration. Their opinions about public policy with regard to the arbitration awards would help to understand this term. The scholars' opinions were put forward.

The decisions of the Courts concerning arbitration and public policy will as well be specifically mentioned in this article. The decisions would be reviewed in accordance with the arbitration applicable law when the court made the decisions.

II. DISCUSSION

A. Public Policy under Arbitration Law

It is almost impossible to provide definition of public policy. The difficulty to try to define it is apparent. The term is abstract and offer different interpretations. It consists of public and policy, the terms that would cover broad meaning. Public policy would cover the interest of public, state and its institutions, including the legislature, executive or judiciary covering the subject matters of economic, social, security, economic, law, etc. Scholars and institutions have merely tried to give a number of pointers what would constitute public policy.

In term of law, Black's Law Dictionary provides two broad meaning of public policy. It states:
public policy. (16c)

1. Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. • Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy."
2. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.⁴

UNCITRAL Secretariat provides the interpretation of public policy as "those fundamental rules of the State where the recognition and enforcement of an award is sought from which no derogation can be allowed."⁵

As shown above, Article V (2) (b) New York Convention provides ground of public policy to set aside foreign arbitral awards. This article does not specify the meaning and its sphere (scope) of application. It does not explain whether the term public policy should refer to international concept of public policy or to national concept.⁶

³ Cf., Jan Paulsson has rightly stated that "it is important to consider not only how judges should uphold national public policy without undermining international arbitration, but also the *responsibility that international arbitrators have for taking respectful account of it.*" (Italics added) (Jan Paulsson, *The Idea of Arbitration*, Oxford: Oxford U.P., 2013, p. 200).

⁴ Bryan A. Garner (ed.), *Black's Law Dictionary*, MN: Thomson Reuters, 9th.ed., p. 1351.

⁵ UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)*, Vienna" U.N., 2016, p. 244.

⁶ ICCA, *ICC's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, The Hague: ICCA, 2011, p. 107.

The concept of public policy had been incorporated in the arbitration convention notably in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.⁷ Article 1 (e) of this Convention provides:⁸

“To obtain such recognition or enforcement, it shall, further, be necessary: ...

(e) That the recognition or enforcement of *the award is not contrary to the public policy* or to the principles of the law of the country in which it is sought to be relied upon. (italics added).

The concept of public policy is necessary to be present in the New York Convention. The concept was included as the recognition of the existence of mandatory rules of the Members. The UNCITRAL Secretariat noted:⁹

“...public policy forms part of a wider range of tools, such as the mandatory rules of the forum that override private autonomy, that allows a court to protect the integrity of the legal order to which it belongs....”

In addition, the UNCITRAL Secretariat also opined, the concept of public policy was necessary. This concept is a “safety valve” the national court could invoke when its national legal system would consider it impossible, ‘in exceptional circumstances’ to recognize and enforce a foreign arbitral award without ‘abandoning the very fundamentals on which it based’.¹⁰

The literature on arbitration recognized the two meaning of public policy including international (or transnational) and national public policy.¹¹ The literature did not specify the meaning or definition of public policy. The absence of the definition has made this term be construed according to the national laws or the national courts.¹²

1. International Concept

The international concept of public policy is more restrictive than the national public policy.” The application of public policy would be made in “exceptional circumstances.”¹³ The term exceptional circumstances would mean that the court would apply public policy only when it finds this ground applied in the ‘last resort’. Borrowing the term in criminal law, public policy is only the “*ultimum remedium*” (or the last resort) where the court would only apply when all the measures that would prevent the application of it would fail or have been exhausted.

The adherence to international concept in relation to or in the light of an international agreement or convention has been one of approaches that States prefer. For instance, on the issue of interpretation, the Rome Convention on the Law Applicable to Contractual Obligations of 1980 takes this approach. Article 18 of the Convention provides: “In the interpretation and application of the

⁷ https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/

⁸ UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 239. (UNCITRAL Secretariat noted that the omission of the words “the principles of the law of the country in which it is sought to be relied upon” (article 1 (e) of the Convention above) indicated “the strong pro-enforcement bias of the Conventin” (p. 239).

⁹ UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 239.

¹⁰ UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 240.

¹¹ For example, Mauro Rubino Sammartano, *International Arbitration: Law and Practice*, The Hague: Kluwer, 200, p. 505-506; Emmanuel Gaillard and John Savage (eds.), *International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 953 et.seqq.

¹² Mauro Rubino-Sammartano, *Op.Cit.*, note 11, p. 505-506.

¹³ ICCA, *Op.Cit.*, note 6, p. 107.

preceding uniform rules, regard shall be had to their *international character and to the desirability of achieving uniformity in their interpretation and application.*" (Italics added)

Another instrument that promotes the international approach in interpretation to the text of the instrument is the United Nations Convention on Contracts for the International Sale of Goods. Article 7 (1) of the Convention provides:

"In the interpretation of this Convention, *regard is to be had to its international character and to the need to promote uniformity* in its application and the observance of good faith in international trade." (Italics added).

International Law Association (ILA) is one of the international organizations that is concerned with the development of international law. One of the project that ILA had developed was to provide recommendation on the meaning of public policy. In its recommendation in 2002, ILA released the indicators that are regarded violation of international public policy. These include:¹⁴

- (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
- (ii) rules designed to serve the essential political, social or economic interest of the State, these being known as "*lois de policy*" or "public policy rules"; and
- (iii) the duty of the State to respect its obligations towards other States or international organizations.

In addition to ILA, ILC (International Law Commission) has also talked about the term international public policy in their work. According to ILC, this term includes "*the fundamental principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravene these principles can have no legal force.*"¹⁵

2. National Concept

The absence of definition forced Members of New York Convention to apply their own national concept of public policy.¹⁶ This would mean, the term of public policy would depend on each court (in the Members' territory) interpretation of public policy. Or, if they define public policy in their laws, the court will rely on these legislations. The problem is, most state do not have their definition or own an accepted interpretation on public policy. As such, the court's interpretation would be different from one Member to others.¹⁷ This would mean two possibilities: the broad

¹⁴ICCA, *Op.cit.*, note 6, p. 108. In addition to ILA, ILC (International Law Commission) has also debated the term international public policy in their work. According to ILC, this term includes "*the fundamental principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravene these principles can have no legal force*" (Hermann Mosler, "International Legal Community," in: R. Bernardt (ed.), *Encyclopedia of Public International Law*, Installment 7 (1984), p. 311.

¹⁵Hermann Mosler, *Ibid.*

¹⁶See generally, UNCITRAL Secretariat, *Op.cit.*, note 5, pp 240 et.seq., (describing practices of national courts in some jurisdictions that applied their own concept of public policy. They included the courts of USA, Australia, Swiss, German, India, etc). Probably, one exception of national arbitration law that refers the meaning of public policy to international public law is French arbitration law. The French arbitration law as embodied in the New Code of Civil Procedure (Art 1502 5) states that the international public policy as the standard for determining the public policy (before French court). (See Emmanuel Gaillard and John Savage (eds.), *Op.cit.*, note 11, p. 953.

¹⁷See the opinion of Hunter and Redfern above in: Nigel Blackaby et.al., *Redfern and Hunter on International Arbitration*, *Op.cit.*, note. 1. The national courts to refer to their national approach would be plausible. The term used in the New York Convention of 1958 as provided in Article V (2) (b) states: ""The recognition or enforcement of the award would be contrary to the *public policy of that country.*" (Emphasis provided). Also, Mauro Rubino Sammartano, citing the decision

interpretation of public policy where the courts would be free to interpret the concept of public policy according to their “free-will” interpretation.

Second possibilities, the courts would interpret narrowly the concept of public policy. This would mean, the courts would only consider the application of annulment of foreign awards in an exceptional situation.

The conclusion of the UNCITRAL Secretariat on the practices of courts in the world shows that the majority of courts gave a narrow interpretation to public policy. The request of a party to refuse recognition and enforcement of a foreign arbitral award made under article V (2) (b) of the New York Convention have been hardly successful.¹⁸

Members of the New York Convention and in particularly those that adopt UNCITRAL Model Law on International Commercial Arbitration, tried to create a common meaning or approach to public policy. Public policy as a ground for the setting aside of arbitral awards is to be ‘defined’ narrowly or at least given its ‘limited application.’ Three arbitration acts have been studied. Quite surprisingly, they contained a common meaning of public policy. They included New Zealand Arbitration Act of 1996, Malaysia Arbitration Act of 2005 and Fiji Arbitration Act No 44 of 2017.

New Zealand Arbitration Act of 1996 provides recognizes that public policy is a general term. However, to avoid the doubt of its application, the Act provides a ‘guidance’ as to what the meaning or interpretation of public policy under this Act. Article 34 (6) provides:

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—

- (a) the making of the award was induced or affected by fraud or corruption;
or
- (b) a breach of the rules of natural justice occurred—
 - (i) during the arbitral proceedings; or
 - (ii) in connection with the making of the award

Malaysia Arbitration Act of 2005¹⁹ and Fiji Arbitration Act of 2017²⁰ have similar provisions with the New Zealand Act of 1996. Since the wordings are similar, I found it that the two acts adopted the New Zealand approach to the meaning of the meaning of public policy.

of the Supreme Court of India in *Renusagar*: “In view of the absence of a workable definition of ‘international public policy’ it would be difficult to construe public policy as used in Article V of the New York Convention to mean international public policy. Hence, as used in the Indian Foreign Award Act, the expression means the doctrine of public policy as applied by the courts of India, and must be construed narrowly.” (Sammartano, *Op.Cit.*, note 11, p. 506); also UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 243 (citing the decision of the Supreme Court in *Rusnagar* which deemed it “unworkable and accepted” in providing a transnational definition of the concept of public policy.” The Supreme Court also held, the concept of public policy should be “taken to mean the public policy of the enforcement forum”) (*Rusnagar Power Co. Ltd v. General Electric Company & anor.*, Supreme Court, India 7 October 1993) (UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 243).

¹⁸UNCITRAL Secretariat, *Op.Cit.*, note 5, p. 248.

¹⁹Section 39 (2) Malaysia Arbitration Act of 2005 states:

- (a) the making of an award induced by fraud or corruption; or
- (b) a breach of natural justice occurring in the arbitral proceedings or in the making of an award are declared to be in conflict with the public policy of Malaysia.”

²⁰Section 55 Fiji Arbitration Act of 2017 provides:

- (1) Without limiting the generality of sections 32(1)(b)(ii), 52(2)(b)(ii) and 54(1) (b)(ii) of this Act, it is declared, for the avoidance of any doubt, that, for the purposes of those sections, an interim measure or award is in conflict with, or is contrary to, the public policy of Fiji if—
 - (a) the making of the interim measure or award was induced or affected by fraud or corruption; or
 - (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

B. Public Policy under Indonesian Arbitration Law

Indonesian laws in general contain the term public policy in it. The term public policy for example is found in the Law No 9 of 2004 amending the Law No 5 of 1986 concerning the Administrative Court. According to this Law, the public policy is the interest of the nations and State and or the interest of the people and/or the interest of the development in accordance with the existing regulations.²¹ As seen from its definition, the term public policy under this Law is exceedingly broad. The public policy is connected not only with the interest of the State or nation but also with the people and (national) development.

The other laws contained the term public policy may also be found in Law No 48 of 2009 concerning the Power of Judiciary²²; or Law No 5 of 1999 concerning the Prohibition of Monopoly and Unfair Competition.²³ All of these Laws provide also a very broad definition with regard to the meaning of public policy.

The Indonesian statutory laws on arbitration include:

1. Articles 615-651 (Dutch)-old Code of Civil Procedures (CCP);
2. The Government Regulation No 34 of 1981 concerning the Ratification of the New York Convention of 1958;
3. The Supreme Court Regulation No 1 of 1990 concerning the Methods for the Execution of the Foreign Arbitral Awards;
4. The Law No 30 of 1999 concerning the Arbitration and Alternative Dispute Resolution.

1. Articles 615-651 (Dutch)-old Code of Civil Procedures (CCP)

The Code of Civil Procedure of 1847 ("CCP") provided arbitration rules as embodied in Book III, Article 615-651. The CCP contained old provisions on arbitration.²⁴ For instance, women were not eligible to be arbitrators (Article 617).

CCP on arbitration was a purely national or domestic arbitration, settling domestic disputes. It was divided into five parts. Part I regulated the agreement and the appointment of arbitrator (Articles 615 – 623). Part II was the proceedings of arbitrators (Articles 624 – 630). Part III regulated the decision of the arbitrator (Articles 631 – 640). Part IV laid down the provisions concerning the arbitrators (Articles 641 – 647). This part also regulated the annulment of arbitration decision (Article 643). Part V regulated the termination of disputes before the arbitrator (Articles 648 – 651).

CCP did not have provisions on public policy as ground for annulment of arbitration awards. No reported cases on this issue where the parties requested the courts to annul the (domestic) arbitration awards. CCP recognized 10 (ten) grounds for the annulment of arbitration awards on the following reasons:

- (1) the decision is outside the agreement of the parties;
- (2) the award is based on the invalid agreement;
- (3) the decision was made by unauthorized arbitrators;
- (4) the decision is on the issues not claimed or beyond the claim;
- (5) if the decision contains contradictory provisions;
- (6) if the arbitrators are negligent in deciding one or more issues as contained in the agreement;

²¹ Explanatory to Article 49 of the Law. Article 49 says that the Administrative Court shall not have the power to adjudicate and decide the disputes concerning the decisions made by the authorities where the decisions are made in the interest of public policy based on the applicable laws.

²² Explanatory to Article 16 of the Law No 48 of 2009.

²³ For example Article 1 (b) of the Law No 5 of 1999.

²⁴ As shown below, with the promulgation of Arbitration Law No 30 of 1999, the CCP was revoked.

- (7) if the procedure is breached;
- (8) the decision was based on the false or forged documents or are declared to be forgeries after the decision has been rendered;
- (9) after the award has been rendered documents are founded which are decisive in nature and which were deliberately concealed by the opposing party; or
- (10) the award was rendered as a result of fraud committed by one of the parties to the dispute.

2. Government Regulation No 34 of 1981 Concerning the Ratification of New York Convention 1958

a. *The Government Regulation*

The Government Regulation No. 34 of 1981 on the Ratification of the New York Convention of 1958 is to apply the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards in Indonesia. It has two paragraphs. Firstly, a confirmation or a statement that Indonesia ratified the New York Convention. It also affirmed that the text of the Convention was attached to this Presidential Regulation. Secondly, it set the date of the entry of force of the Presidential Regulation, namely the date of the promulgation of the Presidential Regulation, that was 5 August 1981.

This Regulation for the first time introduced the concept of foreign arbitral awards. The existing regulation, the CCP (above) did not have any provisions on foreign arbitration or foreign arbitration awards. The Regulation also introduced the concept of public policy into arbitration law in Indonesia as contained in Article V (2) of the New York Convention.

The problem with this Presidential Regulation is that it does not, for example, provide the translation of the text of the Convention into Indonesian language.²⁵ It does not either mention which court is given the authority to deal with the request of “*exequatur*” (writ of execution) for the enforcement of foreign arbitral awards in Indonesia. And, it is silent about the application of public policy as embodied in article 5 of the New York Convention, including as stated above, which competent court that would determine whether a foreign arbitral awards violated public policy in Indonesia and whether the dispute under the arbitration awards is arbitrable according to Indonesian law.

b. *The Case Law*

1) *PT Bakrie Brothers v. Trading Corporation of Pakistan Ltd.*²⁶

This was the first case before the Indonesian courts where the issue of violation of public policy arose. Trading corporation of Pakistan Ltd, a company based in Pakistan, had applied for the request of execution of the arbitration award of the Federation of Oils, Seed and Fats Association Limited (FOSFA) to the South Jakarta court against PT. Bakrie Brothers, an Indonesian company.

²⁵The issue of foreign language might become an issue in Indonesian courts. The main issue is, under the Indonesian constitution, the state or official language is Indonesian language. The language of the courts is Indonesian language. Sometimes the courts, depend upon the arguments of the representative of the parties, bring this issue to for instance, defeat the claim. Later on, the translation into Indonesian language of the text of the convention or international agreements is later a mandatory according to Article 31 the Law No. 24 of 2009 concerning Flag, Language and State's Coat of Arms.

²⁶Decision of the Supreme Court No. 4231 K/Pdt/ 1986. The case was reported in a.o., Mutiara Hikmah, *Analisis Hukum Perdata Internasional pada Perkara-perkara Putusan Arbitrase Internasional (transl.: Analisis of Private International Law on the Cases on the Decisions of International Arbitration)*, Depok: Universitas Indonesia, 2021; 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 Law Journal* No 1 of 1 (2011), p. 7 et.seqq.

In 1979, the two parties signed an agreement for the sale of crude palm oil with FOSFA Arbitration clause in it.

The contract did not work well, a dispute arose between the parties. The Pakistan company argued, PT Bakrie Brothers failed in fulfillment of its obligation to the Pakistan company. The Pakistan Company brought the dispute to the arbitration under FOSFA Arbitration based in London.

In its decision on 8 September 1981, the FOSFA Arbitration ruled, the Indonesian company was to pay compensation to Pakistan company. The Indonesian company refused to pay. The Pakistan company requested the enforcement of arbitration award to the South Jakarta Court. It argued, first, Indonesia had the obligation to enforce the arbitration awards since it had ratified the New York Convention of 1958 on 5 August 1981. Second, the Indonesian law on the ratification of the New York Convention, the Presidential Decree no 34 of 1981 imposed reciprocity requirement between the countries that ratified the New York Convention. England where the seat of arbitration was member of the New York Convention since 1975. therefore, the arbitration award of FOSA based in London, was enforceable in Indonesia.

PT Bakrie requested the South Jakarta Court for refusing the enforcement of the arbitration award. PT Bakrie argued, the parties in the dispute were between Pakistan company and Indonesian company, not between Indonesian company and an England company. Pakistan then was not a member of the New York Convention. Second, the arbitration award violated Article V (10) (b) New York Convention. PT Bakrie argued, the parties ought to be notified on the appointment of arbitrator or given the opportunity the right to defence. Third, the non-fulfilment of its obligation under the contract was due to the *force majeure*.

In its defence, the Pakistan company argued, Indonesian court did not have the competency to examine the content of the arbitration award. Under the New York Convention, the Member is only obliged to recognize the award and to enforce it.

The South Jakarta Court agreed with the claimant, PT Bakrie, and ruled, that the FOSFA Arbitration Award was refused of execution on the ground of violation of public policy. The court argued, the FOSA arbitration award was not valid because the award was made in England while according to the principle of reciprocity as embodied in the Presidential Decree No 3 of 1981, England did not have the right to hear the dispute. The court agreed with the claimant, that the parties in dispute were Indonesian company and Pakistan company. Also, the court argued, the arbitration award had violated the due process where the arbitration tribunal had not given the opportunity to the Indonesian company the right to defence.

The South Jakarta court also refused the argument of the Pakistan company that it did not have the competency to examine the arbitration award. The court argued, article V:1 New Convention gives the right to a party to request for the refusal of the enforcement of foreign arbitration award. Based on this article, it was the national court that would enforce it and to enforce or to refuse the enforcement gives the right to the court to value (examine) whether the arbitration award was in accordance with the spirit of the New York Convention. The Respondent appealed. The High court and the Supreme Court affirmed the decision of South Jakarta Court.

2) *E.D. & F. Man (Sugar) Ltd. v. Haryanto (1984)*

Not long after the ratification was announced in 1981, the Decree was tested when in 1984 the Jakarta courts annulled the London based arbitration award in *E.D. & F. Man (Sugar) Ltd. v.*

Haryanto.²⁷ Haryanto was an Indonesian company doing business in selling sugar in Indonesia. He imported sugar from *E.D. & F. Man (Sugar) Ltd.*, a London company. The transaction did not work. The dispute arose. E.D & F.Man (Sugar) Ltd brought the case to arbitration in London. The Arbitration was in favour of the claimant and ordered Haryatno to pay compensation. Haryanto brought the arbitration award to Jakarta court for annulment. He argued the transaction of exporting and importing sugar under Indonesian law could only be undertaken by appointed state owned company. The Jakarta court affirmed the argument and annulled the arbitration award.

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

PT Nizwar v. Navigation Maritime Bulgare case was another example where the Jakarta court refused to enforce the foreign arbitral award. PT Nizwar, an Indonesian company, entered into a rental of ship agreement with Navigation Maritime Bulgare (NMB), a Bulgarian shipping company. A dispute arose in the performance of the agreement. The dispute was submitted to the arbitration in London. The arbitration tribunal issued an award ordering PT Nizwar to pay compensation to NMB. NMB requested the Jakarta courts to enforce the arbitral awards. The domestic court granted the request. PT Nizwar appealed.

The Supreme Court in its deliberation opined:

- (1) It has been an accepted rule in Indonesia, the foreign court decision and international arbitration awards cannot be enforced except Indonesia and the foreign state are together bound by a treaty on the enforcement of foreign arbitral awards;
- (2) Indonesia was not bound by international agreement signed by its colonial power during the occupation;
- (3) In relation to the Presidential Decree No. 34 of 1981 on the ratification of the New York Convention, in accordance with the applicable law and practices, there needed an implementing legislation of the Decree, including whether the request of the enforcement of foreign arbitral awards might be directed submitted to the domestic court; which domestic courts was capable to enforce the awards; or whether the request should be submitted to Supreme Court to consider whether the award would be contrary with the public policy in Indonesia.²⁸

Based on the consideration, the Supreme Court concluded, it corrected the decision of the Jakarta domestic court and rejected the request of the enforcement.

Both decisions of the Indonesian court attracted strong criticism from many commentators abroad and home.²⁹ The main reason for the annulment in the *E.D. & F Man case* was that the object matter of the dispute violated public policy in Indonesia. The decision on *PT Nizwar* case also raised debates on this issue and compelled the Supreme Court to issue the Supreme Court Regulation No 1 of 1990 on the Procedure for the Execution of Foreign Arbitral Awards to clarify these issues.

²⁷The 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 Selektta 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.

²⁸Mutiara 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.

²⁹See for example, Laina Chan, "International Disputes, The Execution of Foreign Arbitral Awards in the Asia Pacific and Two Case Studies", *N.Y. Int'l L. Rev.* 28:2 (2015), p. 7 et.seqq.; Mutiara Hikmah, *Analisis Hukum, Op.Cit.*, Note. 28, pp. 5 et.seqq.

3. The Supreme Court Regulation No 1 of 1990 on the Procedures for the Execution of Foreign Arbitral Awards

In 1990, the Supreme Court issued the Supreme Court Regulation No 1 on the Procedures for the Execution of Foreign Arbitral Awards (“SC Regulation”). The Regulation is probably the most important and influential legislation affecting the enforcement of foreign arbitral awards in Indonesia. It is important because it remedied the legal lacunae left behind by the Presidential Decree No 34 of 1981.

The Supreme Court took the initiative to issue the Regulation on the following considerations. First, since the government issued the Presidential Decree of 1981, the government did not show any intention to issue the implementing legislation of the short provisions of the Presidential Regulation of 1981.³⁰

The SC Regulation also tried to clarify some issues that hindered the courts to hear the request of enforcement. The clarification was as well needed mainly because the Presidential Decree of 1981 suffered from a number of provisions concerning the procedure for enforcement of foreign arbitral awards, the competent court (authority) to deal with the enforcement of foreign arbitral awards, and the meaning of public policy.³¹

The SC Regulation consists of a preamble and 7 articles. The preamble contains the background of the issuances of the SC Regulation, namely among others:

- (1) the ratification of the New York Convention needs a procedure for the execution of foreign arbitral awards;
- (2) that the CCP does not have any provisions concerning the enforcement of foreign arbitral awards.

The SC Regulation contains at least 2 (two) important provisions:

- (1) *Central Jakarta Court as the Competent Authority*

The SC Regulation appoints central Jakarta court as the competent authority to deal with the request for the recognition and enforcement of foreign arbitral awards (Article 1). For the first time since the Presidential Decree was issued, the competent authority as mandated by the New York Convention (as found in Article III of the Convention) is appointed. With the clear and appointment of the competent authority in dealing with the enforcement of foreign arbitral awards, the absence of the competent court in dealing with the enforcement matters was solved.

³⁰MARI, *Op.cit.*, note. 27, p. 47. The power of the Supreme Court to issue such Regulation was based on Article 10:4 Law No. 14 of 1970, amended by Article 34 of Law No. 14 of 1985 on Basic Provisions on the Power of Judiciary.

³¹The author was quite surprised to read the ‘confession’ of the position of the Supreme court as stated in the *Kapita Selecta* which read (in Indonesian language): “*Namun demikian permintaan pengakuan dan pelaksanaan putusan arbitrase asing yang diajukan sebelum berlakunya Peraturan Mahkamah Agung (Perma) No. 1 Tahun 1990 selalu kandas atas alasan: walaupun Keppres No. 34 Tahun 1981 sudah ada (telah meratifikasi Konvensi New York 1958), putusan arbitrase asing (di Indonesia) tidak dapat dieksekusi oleh Pengadilan Indonesia, karena belum ada peraturan pelaksanaannya.*” (Translation: “However, the request for the recognition and enforcement of foreign arbitral submitted prior to the Supreme Court Regulation No. 1 of 1990, was always rejected because: although the Presidential Decree No. 34 of 1981 has been issued, the foreign arbitral awards (in Indonesia) cannot be executed by Indonesian courts, due to the lack of the implementation legislation”). The same ‘confession’ was repeated in MARI, *Kapita Selektta, Op.cit.*, note. 27, p. 45. The seemingly convincing reason for the need of implementing legislation as the Supreme Court argued was as follows: “The Indonesian court cannot weigh or consider whether the foreign arbitral award contain things that are contrary with the Law and public policy in Indonesia”) (MARI, *Kapita Selektta, Op.cit.*, note. 27, p. 45).

(2) Definition of Public Policy

The Supreme Court Regulation defines public policy as “*explicit violation of principles and all legal system and society in Indonesia.*”³² The definition is broad. The violation of public policy covers two conditions: 1) the existence of explicit violation of (principles) all legal system; and 2) violation of (principles of) society.³³

Although the definition of public policy is not clear, or far from clear, the definition in the Regulation at least provides a “legal” guidance on what constitutes a violation of public policy. The two ‘meanings’ laid down by the Regulation also gives a ‘light house’ on what constitutes a violation of public policy, i.e., the violation of all legal system and principles of society. Although the expression is still broad, it de-lists a number of matters in particular the economic matter.

After the issuance of the Supreme Court Regulation, enforcement of arbitral awards in Indonesia has been gradually better. The Supreme Court has provided necessary procedures for the enforcement by the court (i.e., Central Court of Jakarta). A number of landmark decisions post the Supreme Court Regulation include *Ecom USA Inc., v. PT Mahameru Centratama Mills*³⁴ or *PT Tripatria Citra Pratama v. Abdulelah Jamal Al Zamzani Est Cs*³⁵. In these two cases, the request of the parties to central Jakarta court for enforcement were granted.

4. Law No 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

The government promulgated the Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (the Law) in August 1999. The Law replaced the old Dutch-private procedural law on arbitration as embodied in Articles 615 – 651 Rv (*Rechtsverordering*).³⁶

The Law regulates both domestic and international arbitration and their awards. The requirement of public policy is contained in article 66. This article states that International Arbitration Awards will only be recognised and enforced within the jurisdiction of the Republic of Indonesia if they fulfil the following requirements:

- (a) The International Arbitration Award must have been rendered by an arbitrator or arbitration tribunal in a country which, together with the Republic of Indonesia, is a party to a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards.
- (b) International Arbitration Awards, as contemplated in item (a), above, are limited to awards which, under the provisions of Indonesian law, fall within the scope of commercial law.

³²Supreme Court Regulation Article 4 para (2) reads (in original): “*nyata-nyata bertentangan dengan sendi-sendi azasi dari seluruh sistem hukum dan masyarakat di Indonesia (ketertiban umum)*”.

³³There was a strong debate (when this definition of public policy was drafted) between the choice of adopting limited/restrictive or broad definitions of public policy. The decision taken was to adopt the broad definition on the grounds that it was difficult to provide positive definition (“*batasan positif*”) of public policy. According to the Supreme Court, the definition of public policy would cover all provisions of the law and all the norms that binds the order in the society based on economic, social, moral, culture and religion values”) (MARI, *Kapita Selekta, Op.Cit.*, note. 27, p. 52).

³⁴Grant of Execution by the Decision of the Supreme Court No. 4 Pen.Ex’r/Arb.Int/Pdt/1992 (further elaboration of this case, see: Mutiara Hikmah, *Analisis Hukum, Op.Cit.*, note. 28, p. 244-246).

³⁵Grant of Execution by the Decision of the Supreme Court No. 1 Pen.Ex’r/Arb.Int/Pdt/1993 (further elaboration of this case, see: Mutiara Hikmah, *Analisis Hukum, Op.Cit.*, Note. 28, p. 248-249).

³⁶Articles 615 to 651 Rv did not contain the provisions on public policy as the grounds for the annulment of (foreign) arbitration awards. This suggested that Rv on arbitration seemed to regulate the domestic arbitration. The Rv on arbitration was divided into five parts. Part 1 regulated the appointment of arbitrators (Articles 615-623); part 2 was the provisions on arbitration proceedings (Articles 624 – 630); part 3 regulated the arbitration awards (Articles 631-640); part 4 was on the efforts or measures against the arbitration award (Articles 641-647); and part 5 contained the provisions concerning the end of arbitrators’ duty (Articles 648-651).

- (c) International Arbitration Awards, as contemplated in item (a), above, may only be enforced in Indonesia if they do not violate *public order*;
- (d) The international arbitration awards may be executed in Indonesia after obtaining executatur (“execution”) from the Head of the Central District Court of Jakarta; and
- (3) When one of the parties involved in the international arbitration is the State of the Republic of Indonesia, the international arbitration may only be enforced if it has obtained executatur from the Supreme Court, in which the power will be delivered to the head of the Central District Court of Jakarta.

The explanatory notes of article 66 of Law No 30 of 1999 does not offer any explanation what the terms public policy means. The lack of the definition would imply that the broad definition mentioned under the Supreme Regulation No 1 of 1990 still applies. This would also mean that the term could be still extensively interpreted.

C. The Opinions of Scholars

1. Prof. Sudargo Gautama

The scholar who for the first time tried to define the term public policy was Sudargo Gautama, a professor of private international law. He explained the term public policy or the principle of public order in the following statements: “public policy or open *bare orde* is merely a reserve principle which is only to be invoked exceptionally.” He also explained the term in the light of private international law as follows: “*Because public policy is meant in private international law as the things that are principles in a society, which is utterly economically and socially important that it cannot be replaced with the application of foreign law.*”³⁷

He said the application of this expression ought to be strictly limited and be applied cautiously. This term was only an exception. He opined, if this term was used without any limitation to set aside the application of the foreign law, it would make the private international law fail to develop and would only uphold the supremacy of the national law to foreign law. This condition could alienate Indonesia from the international community.³⁸ He further noted that the public policy should be an “escape clause” and should be confined to be used as a “shield not a sword.”³⁹

What Prof Gautama meant to intent is quite clear. He did not try to provide the meaning to the term public policy. He merely wanted to argue that this term should be applied cautiously, and this would mean that the term should not be applied easily.

2. Prof Priyatna Abdurrajsid

The other scholar trying to explain the meaning of public policy was Prof. Priyatna Abdurrajsid. He was the Chair of the BANI Arbitration Centre of Indonesia. In his leading book on arbitration (in Indonesia) titled Arbitration and Alternative Dispute Resolution, Abdurrajsid did not try to give the meaning of public policy. He only stated that there needed a further study about public

³⁷ Sudargo Gautama, *Undang-Undang Arbitrase Baru 1999 (transl., New Arbitration Act of 1999)*, Bandung: Citra Aditya Bakti, 1999, p. 134.

³⁸ Prof Sudargo Gautama’s opinion of public policy is discussed in: Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum dan Konvensi New York 1958*, PT. Citra Aditya Bhakti, Bandung, 1998, p. 24.

³⁹ Sudargo Gautama, *Ibid.*, Cf., Redfern and Hunter *Op.Cit.*, p. 615. (Redern and Hunter argued that “...many states are increasingly taking a restrictive approach to the application of public policy”).

policy.⁴⁰ Secondly, Abdurrasyid merely quoted the meaning of public policy as contained in the Supreme Court Regulation No 1 of 1990 (above).⁴¹

Abdurrasyid admitted Article V (2) (b) of New York Convention is the most important provision for a (domestic) court to set aside the foreign arbitral awards when they are violating the public policy of a state.⁴²

Although admitting the importance of public policy ground, Abdurrasyid was of the opinion that the existence of this ground did not mean that it was a mandatory for a court to set aside the award. He opined that the public policy *might be used* to set aside the award.⁴³ The words “**may be used**” printed in bold and italics emphasises that public policy ground should not be freely or at all the time used by the court to set aside the foreign arbitral awards. It was on the hand of the Court whether it would use it or refused to use it to set aside the foreign arbitral awards.

My personal opinion about the public policy under Indonesian Arbitration Law is that since the term is not really clear and subject to broad interpretation depending upon the (National) Court to interpret it, the term, I share with the opinion of Prof Gautama above, must be used carefully. The term cannot be used easily to set aside the foreign arbitration awards. The basis for this position are the followings.

Firstly, the public policy should be used cautiously mainly because all States must respect the application of the due process of law in other countries. This position is of importance and respect must be taken into consideration mainly because the existence and different meaning of public policy in every legal system should be appreciated. This fact should be considered carefully, in order to prevent the misuse of this institution (“public policy”). In the end of the day, the free use of this institution would endanger the existence and the future of international arbitration.

Secondly, the recognised principle of acquired rights under private international law. This principle suggests that what has been recognised as valid under national law where the arbitration (awards) takes place, must also be recognised in other States.

Thirdly, arbitration has been a universal mechanism for the settlement of commercial disputes acknowledged by states in the world. The universal character of arbitration requires that it is a universal mechanism and therefore should be universally recognised by states in the world. This universal character is found in its substantive provisions as well as formal provisions for arbitration.⁴⁴

Fourth, today, we have an internationally recognised convention on the recognition and enforcement of foreign arbitral awards, namely the New York Convention of 1958. This convention lays down the obligation upon its members to recognise the arbitration agreement or clause and the arbitral awards made in the territory of the member states.⁴⁵ The convention recognizes the principle of public policy that requires its more than 150 member States to observe it.⁴⁶

⁴⁰Priyatna Abdurrasyid, *Arbitrase dan Alternatif Penyelesaian Sengketa (APS)* (Translation: *Arbitration and Alternative Dispute Resolution*), 2nd Rev. Ed., Jakarta: Fikahati, 2nd.rev.ed., 2011, p. 23.

⁴¹Priyatna Abdurrasyid, *Ibid.*

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴These substantive and formal provisions universally accepted are embodied in the UNCITRAL Arbitration Rules of 1976 as well as in the UNCITRAL Model Law on International Commercial Arbitration of 1985. Also importance is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, below.

⁴⁵Article III of the Convention.

⁴⁶Article V:2 (e) of the Convention.

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

No comprehensive data reported concerning the number of foreign arbitral awards registered with the Central District Jakarta Court requesting for their execution in Indonesia. However, the survey made in 2010, the number of foreign arbitration awards registered with Central Jakarta Court was about 29 cases (per year).⁴⁷ The case laws on the application of the principle of public policy to the foreign arbitration awards so far are few. There are three reported cases, which related to the application of public policy in Indonesia. They included:

1. *Bankers Trust vs. PT Mayora Indah Tbk and Bankers Trust vs. Pt Jakarta International Development Tbk (2000)*⁴⁸;
2. *Astro Nusantara Bv et.al., vs. PT Ayunda Primamitra (2010)*⁴⁹; and
3. *PT Sumi Asih v. Vinmar Overseas and AAA (2010)*.⁵⁰;

1. *Bankers Trust vs PT Mayora Indah (2000)*⁵¹

a. Fact of the Case

The claimant, Bankers Trust is a company based in London. The respondent, PT Mayora Indah Tbk, is an Indonesian company. The dispute between the parties arose out of the International Swaps and Derivatives Association (“ISDA”) Master Agreement signed in 1995. When the financial crisis hit Indonesia in 1998, the respondents failed to fulfil their obligations under the Agreements.

The respondent brought the dispute to the South District Court of Jakarta requesting for the annulment of the ISDA Agreements. The respondent argued that the agreement was in violation of the public policy. The claimant opined that the swaps and derivatives transaction were transactions violating public policy in Indonesia.

The claimant on the other hand submitted the dispute to the arbitration in London (London Court of International Arbitration or LCIA). The Jakarta district court was in favour of the Respondent while the LCIA was in favour of the claimant. The arbitration award was registered with the Central District Jakarta Court for execution. While at the same time, the Claimant appealed the decision of the South Jakarta Court to the Supreme Court.

Faced with the fact that the dispute was being appealed and being examined by the Supreme Court, the Central District Court of Jakarta refused to enforce the arbitration award.

The Claimant appealed the decision of the Central District Court to the Supreme Court. The claimant argued that *firstly*, the Central District Jakarta Court had not exercised its power in accordance with the Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution. The claimant argued, based on the Law No 30 of 1999, the authority of the District Court in examining the application for the *execuatur* (execution) of the arbitration award, is an administrative measure. The Court may only look at the formality of the application. The Court, however, is not authorised to examine and value the substantive aspect of the arbitration award.⁵²

⁴⁷Mutiara Hikmah, *Pelaksanaan Putusan Arbitrase Internasional Di Indonesia Berdasarkan Undang-Undang Arbitrase*, (“The Application of International Arbitration awards in Indonesia based on the Law on Arbitration”), PhD Thesis, Universitas Pelita Harapan, 2010, p. 256.

⁴⁸Decision of the Supreme Court No. 02 K/Ex’r/Arb.Int/Pdt/2000

⁴⁹Decision of the Supreme Court No 01 k/PDT.SUS/2010.

⁵⁰Decision of the Central Jakarta Court No. 271 K/Pdt.G/2010/PN.Jkt.Pst.

⁵¹The Decision of the Supreme Court No. 02 K/Ex’r/Arb.Int/Pdt/2000. Some authors have discussed this case, among others, Karen Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration*, Paper, February, 2003, revised February, 2005; Mutiara Hikmah, *Loc.cit.*

⁵²The Decision of the Supreme Court No. 02 K/Ex’r/Arb.Int/Pdt/2000, page. 6.

Secondly, the Central District Court of Jakarta had made a serious fault in examining the three documents required by the Law. The required documents were only the authentic copy of the arbitration award, the authentic copy of the arbitration agreement, and the note from the Indonesian embassy where the arbitration award was made declaring the country where the arbitration award is made, is also a party to the international agreement on the recognition and enforcement of foreign arbitral awards.⁵³

Thirdly, the Central District Court had made a serious fault in exercising its function by taking into account the application of a party to refuse the application of arbitration award. The claimant argued, the application of “*execuatur*” (execution) of an arbitration award was an ex parte proceeding, not two parties proceeding.⁵⁴

Fourth, the Central District Court had made a serious fault in accepting and enjoining the two applications, one from the claimant and one from the respondent, to become one application.⁵⁵

Fifth, the Central District Court had made a serious fault in examining the “substance” of the international arbitration award.⁵⁶

b. The Decision of the Court

The Supreme Court (“Court”) dismissed the objections or the arguments of the claimant on point one to five mentioned above. The Supreme Court held that the Central District Jakarta Court had not applied the law wrongly. There are however no arguments made by Court to support its position on this point.

The Court also held that the dispute between the parties were in fact still in the process of examination at the South District Court of Jakarta. Therefore, the Court was on the opinion that the application for the *execuatur* (execution) should not be submitted until the case heard at the South District Court of Jakarta gave its final and binding decision.

The Court on the other hand agreed with the argument of the Claimant that the Central District Court of Jakarta had only an authority to examine the formal measure of the arbitration award. The Court however opined that based on Article 66 c of the Law No 30 of 1999, the Central District Court of Jakarta had also an authority to examine whether the substance of the application for the *execuatur* (execution) of the (foreign) arbitration award did not violate the public policy, including legal order in Indonesia.⁵⁷

On the basis of these considerations, the Court held that the application of the “i” (execution) of the London arbitration awards was a violation of law.⁵⁸

⁵³The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 7.

⁵⁴The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 8.

⁵⁵The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 8.

⁵⁶The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 10.

⁵⁷The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 11.

⁵⁸The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, p. 12. (Note that the decision of the Court used the term “violation of law or the Law” (bertentangan dengan hukum dan atau Undang-Undang). The Court did not use the term “public policy.” Although not specifically used the term, one may see that the considerations of the Court in its arguments, mentioned above had previously used the term public policy.

2. *Astro Nusantara Bv et.al., v. PT Ayunda Primamitra (2010)*⁵⁹

a. Fact of the Case

The dispute between the parties arose due to the unsuccessful joint venture agreement. The two parties had signed an agreement called the Subscription and Shareholders Agreement (SSA). The SSA contained the agreement of the two parties to provide direct-to-home multi-channel digital satellite pay television, radio and interactive multimedia services in Indonesia.

The failure of the agreement led the claimant to bring this dispute to the SIAC Arbitration in Singapore in accordance with Article 17.4 SSA. When the dispute was heard at the SIAC Arbitration, the respondent brought the dispute to the District Court of South Jakarta.

The Arbitrators were in favour of the claimant and issued among others the order to the respondent to stop the court proceedings at the South District Court of Jakarta. The Arbitrators reiterated that the Clause 17.6 of the SSA forbid the parties to submit their dispute to the national court.

The claimant shortly submitted the copy of the arbitration award to the Central Jakarta Court requesting the *execuatur* or the execution of the award.

When the registration of the SIAC arbitration award filed with the Central Jakarta Court, the respondent filed a petition to the Central Jakarta Court requesting that the Court rejected the application for the execution on the basis of, among others, the violation of public policy.

In its decision, the Central District Court was in favour of the respondent. The Court stated that, among others, the award of the SIAC Arbitration was non-executable due to the violation of public policy in Indonesia.

The Claimant appealed to the Supreme Court.

One of the legal problems arising out of the fact of the case is whether the ground for the rejection of the execution of the arbitration of awards was strong.

The claimant argued that the request of the respondent to reject the execution of the arbitration award was not valid under Indonesian arbitration law. The claimant argued that the issue of the execution of the award was merely between the party requesting for the execution and the court that will give its execution order to the losing party to fulfil the order in the award. Therefore, the Claimant argued that the Central District Court should not take into account the request of the third party (the respondent)

Furthermore, the claimant argued among others that the decision of the Central District court that the SIAC Arbitration was non-executable due to the violation of public policy in Indonesia. The argument of the claimant was based on the opinion of Prof Sudargo Gautama concerning the meaning of public policy (above).⁶⁰ In particular, the Claimant argued that there was no violation of the principles and the basic of the legal system and national interests of the national which were violated by the arbitration award (“*sendi-sendi and nilai-nilai asasi sistem hukum dan kepentingan nasional suatu bangsa yang dilarang oleh putusan arbitrase tersebut*”).⁶¹

⁵⁹The Supreme Court Decision No. 01 K/Pdt.Sus/2010. Some authors have discussed this case, among others, Karen Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration*, Paper, February, 2003, revised February, 2005; Michelle Ayu Chinta Kristy and Zhengzheng Jing, “Public Policy Violation under New York Convention,” *MIMBAR HUKUM*, Vol. 25:1, February 2013; also found in: <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15029-astro-nusantara-international-bv-and-others-v-pt-ayunda-prima-mitra-and-others-2012-sghc-212>.

⁶⁰The Supreme Court Decision No. 01 K/Pdt.Sus/2010, Paragraphs 32-34.

⁶¹The Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 22 (Paragraph 34).

The claimant also questioned whether the intervention of the process of the court in Indonesia is also considered as the form of the violation of public policy.⁶²

The claimant also argued that the subject matter of the dispute was in the realm of the commercial matters (commercial disputes). Since the dispute brought to the arbitration was related to the violation of the agreement. Furthermore, the claimant argued that the SSA contained the provision where prohibited the parties to take legal action in court.⁶³

b. The Opinion of the Courts

The Central Jakarta Court issued the decision on 28 October which firstly, that the request of the claimant was not granted; and secondly the execution for the arbitration award of the SIAC NO 062 of 2008 9ARB 062/08/JL cannot be granted. The Supreme Court rejected the request of the claimant.⁶⁴

The Supreme Court recognized article 66 of Arbitration Law does not regulate that the third parties might submit the request for the rejection of the provision of the execution. The Supreme Court however was in the opinion that from the procedural law aspect and based on the principle of “*Pon't de interest Poin't de action*” which gives the right to the interested parties with the award, the third or interested parties have the right to submit exception to the execution which may impair their interest.⁶⁵

On the substantive provision, the Supreme Court was in favour of the decision of the Central District. The Supreme Court argued that the order of the arbitration award to stop the process of the proceedings in the Indonesian court was a violation of the principle of Sovereignty. The court argued that no other foreign power may intervene the legal process of the Court in Indonesia⁶⁶ The Supreme Court also argued that the subject matter of the dispute was not within the meaning of the commercial dispute but within the procedural law matter.⁶⁷

3. PT Sumi Asih v. Vinmar Overseas Ltd and AAA (2010).⁶⁸;

a. Facts of the Case

This case was about the request for the annulment of the decision of the American Arbitration Association (AAA) to the Central Jakarta Court. One of the reasons for the annulment because the decision of AAA was *ultra petita*.⁶⁹ The concept of *Ultra Petita* under Indonesian law provides that the decision of the court or arbitral tribunal shall not be more than or above what the claimant's plead. When the court or arbitral tribunal violated the concept, the decision of the court or arbitral tribunal be null and void.⁷⁰

The claimant argued, *ultra petita* is considered as a violation of public policy.

⁶²The Supreme Court Decision No. 01 K/Pdt.Sus/2010, Paragraphs 35 and 36.

⁶³The Supreme Court Decision No. 01 K/Pdt.Sus/2010, Paragraphs 35 and 36.

⁶⁴The Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 37.

⁶⁵The Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 36.

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.

⁷⁰The prohibition of *ultra petita* is found in Article 178 Renewed Indonesian Regulation which provides (unofficial translation): (1) Judges when in the process of consultation because of his position, shall provide legal basis which are not possible put forward by both of the parties; (2) Judges shall adjudicate all the claims; (3) Judges shall not decide the claims that are not claimed, or grant more than what the damage claimed.

The respondent argued, the arbitral tribunal award did not breach *ultra petita*. The amount that the arbitral tribunal decided was in accordance with the claimant's claim.⁷¹ It was not either a violation of public policy. The respondent cited the opinion of Indonesian legal expert Prof. Sudargo Gautama on the meaning of public policy. According to Gautama, public policy meant "... matters that are considered 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."⁷²

b. The Opinion of the Court.

The central Jakarta Court rejected the request for the annulment. In its deliberation, the Court rightly did not examine the consideration of the arbitral tribunal. The central Jakarta court responded each of the claimant's argument. In this part, only relevant issues relating to the public policy would be seen.

The Court argued, on the basis of grammatical interpretation, public policy concerned with the interest of the economy, security and interest of the society as a whole and state.⁷³ This position of the court seemed to have its own opinion, did not agree with the arguments of the claimant and respondent.

The court argued, *ultra petita* was not a violation of public policy, because the AAA's arbitral award only affected the claimant. The award on *ultra petita* did not affect the economy, security, interest of society as a whole and state. In addition, the court argued, the damage granted by the arbitral tribunal was the claim made by the Respondent.⁷⁴

III. CLOSING REMARKS

The Indonesian laws and the opinions of scholars above does not give any direction as to what the public policy means. The Indonesian laws which for the first give gave the meaning of public policy ie., the Supreme Court Regulation No 1 of 1990 provides a very broad meaning of public policy. Prof Gautama referred the definition to the one that was found in private international law supporting the strict application of the concept. While Prof Abdurrasyid merely referred to the definition as found in the Supreme Court Regulation (No 1 of 1990).

The three decisions of the Supreme Court when the Presidential Decree No 34 of 1981 on the Ratification of the New York Convention as shoen in *the PT Bakrie Brothers, E.D. & F. Man and PT Nizwar*, were unfortunately not in accordance with the implementation of the New York Convention. The decisions of the Supreme Court to annul the arbitration awards were based on the unclear interpretation of the concept of public policy.

The two decisions of the Supreme Court after the Arbitration Law was passed, namely *the Bankers Trust and Astro Nusantara*, seemed to give only a little light on what the Supreme Courts' interpretation of violation of public policy. It appeared that first of all, the decisions of the Indonesian Supreme Court on the cases above appeared to have been confusing. These decisions of the courts seemed to have not been in favour of enforcement of foreign arbitral awards.

However, the decision of the Central Jakarta Court in *PT Bumi Asih*, had shown the position of this court that was in favour of arbitration. The position of the court by clinging to the grammatical interpretation of public policy is worth praising. The court opined violation of public policy includes

⁷¹ Decision of the Central Jakarta Court, *Op.Cit.*, p. 30.

⁷² Sudargo Gautama, *Undang-Undang Arbitrase Baru 1999*, Bandung: Citra Aditya Bakti, 1999, p. 134.

⁷³ Decision of the Central Jakarta Court, *Op.Cit.*, p. 50.

⁷⁴ *Ibid.*

those that “*affect the economic, security and interest of the society as whole and state.*” The court had shown that what constituted the violation of public policy, the yardstick is whether the award would only affect a party or the society as a whole. When the award only affected the party, it could not be considered as the violation of public policy. This pro-enforcement bias toward foreign arbitration awards should be applauded.

Nonetheless, according to Indonesian law, the decision of the district court, such as Central Jakarta court, could not be regarded as having binding force (precedent) to other courts. According to the court’s practice, it is the decision of the Supreme Court that has an influential power that binds the lower courts, in particular the domestic court.⁷⁵

The national arbitration laws of states discussed above, namely the arbitration acts of New Zealand, Malaysia and Fiji are also worth considering. The arbitration act of these countries have similarities on what constitutes the violation of public policy. The three acts do not give the definition of public policy. They only indicate the situations considered as a violation of public policy which include:

- (a) the making of the award was induced or affected by fraud or corruption;
- or
- (b) a breach of the rules of natural justice occurred—
 - (i) during the arbitral proceedings; or
 - (ii) in connection with the making of the award

The three acts or situations do not define the public policy but merely what constitutes the act that is considered a violation of public policy. Since the three act have the same indicators as to what the violation of public policy, similar step could be incorporated into Indonesian arbitration law in the near future when the law is to be amended.

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