PUBLIC POLICY IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA: A TRULY UNRULY HORSE?

Vinka Damiandra Ayu Larasati
Aldwin Octavianus Wijaya

ALSA National Chapter: Indonesia

I. INTRODUCTION

Public policy is one of the most popular grounds invoked by parties to international arbitration to evade enforcement of foreign arbitral awards. Up to these days, it remains a highly debated and controversial subject, as national courts often took lenient approach when applying such concept in international arbitration. In preventing courts’ lenient approach, the International Law Association (ILA) has formulated a restrictive “international standard” of public policy defence, so that parties may benefit from a universally accepted concept of public policy.1 However, the diversity in national courts’ attitude when applying such concept has made this task virtually impossible.

Until recent times, the difference in attitude has been flagrant in Indonesia, where a series of court decisions have been deemed to hamper the development of a universally accepted concept of public policy. Despite its status as a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), Indonesia has been accused of being unfriendly to foreign arbitration, one of which is through its expansive construction of public policy defence.

Bearing in mind that the New York Convention leaves much discretionary power regarding the enforcement of foreign arbitral awards to the procedural rule of the State where the enforcement is sought,2 this paper aims to provide an assessment on two main points. First, whether Indonesia’s judiciary stance on public policy defence has been in compliance with Article V (2) b of the Convention. Second, whether Indonesia, in implementing its discretionary power, has undermined the very purpose of the Convention itself, which is to remove pre-existing obstacles to the enforcement of foreign arbitral awards.

II. REGULATORY FRAMEWORK ON THE USE OF PUBLIC POLICY IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA


The New York Convention is an international instrument for international trade, which its core is to facilitate the recognition and enforcement of foreign arbitral awards and arbitration agreement worldwide. The New York Convention was originated back in 1927 from the Geneva Convention on the Execution of Foreign

2 Article III of the New York Convention.
Arbitral Awards, and the draft made by the International Chamber of Commerce in 1955 concerning the enforcement of international awards. In 1958 the UN Economic & Social Council (ECOSOC) accepted and compiled such draft, which in turn prepared a draft Convention on Foreign Arbitral Awards, which we know now as the New York Convention.

Afterwards, the New York Convention became available for ratification in 1958, and now has 157 States as the parties. Indonesia is one of them, which ratified the New York Convention through the Presidential Decree No. 34 of 1981. These numbers of participations evidence the success story of New York Convention as the first foundation and international instrument for international trade through facilitating the recognition and enforcement of foreign arbitral awards and arbitration agreement. Its success story was gained as every nation understands that for an arbitration to be efficient in resolving the dispute, it requires certain degree of certainty that an award will be recognized and enforced almost anywhere in the world.

In providing such degree of certainty, New York Convention provides exhaustive grounds for States to refuse enforcement of foreign arbitral award. Article V of New York Convention laid down two methods for such refusal, namely, refusal pursuant to the request of the party, and refusal by the State’s competent authority.

As to the former, a party must able to proof five alternative grounds to refuse the enforcement or recognition of an award, namely: (a) That the parties to the agreement is under some incapacity or the said arbitration agreement is not valid; (b) That the party against whom the award is invoked was not given proper notice and there exists due process violation; (c) That the award fall outside or beyond scope of the arbitration agreement; (d) The appearance of irregularities in the composition of the arbitral tribunal or the arbitration procedure; (e) That the award has not yet become binding or has been set aside or suspended by a State’s competent authority.

On the second method, State’s competent authority may refuse the enforcement of an award under two circumstances, namely: (a) The subject matter of the dispute is not arbitrable; and (b) If the enforcement of recognition of the award will be contrary to the public policy. The New York Convention leaves the interpretation of the aforementioned public policy to the courts of the member states concerned. From a practical standpoint, contracting parties are strongly suggested to require its courts to adopt a ‘pro-enforcement bias’ when interpreting the New York Convention, and only refuse to recognize the award

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pursuant to the exhaustive grounds set out in Article V. This suggestion will further be discussed in Section III and IV of this article.

2. **Public Policy Pursuant to Supreme Court Regulation Number 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award**

The Indonesian court’s interpretation of public policy find its source in the Supreme Court Regulation No. 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award issued on 1 March 1990. The Regulation sets out the criteria and procedures applicable to the enforcement of foreign arbitral awards in Indonesia, which are, among others, that the foreign arbitral award shall not violate Indonesia’s public order or public policy. The term “public policy” is defined in Article 4 (2) of the Regulation No. 1 of 1990, which provides that:

*Exequatur [i.e. court order to enforce the foreign arbitral award] will not be granted if the Foreign Arbitral award is against the underlying principles of the entire Indonesian legal system and society (public policy).*

Under this regulation, violation of Indonesia’s public policy in the enforcement of foreign arbitral awards refers to a condition where an award violates the underlying principles of the entire Indonesian legal system and society. The Indonesian courts’ application towards this regulation will further be discussed in Section V of this article.

3. **Public Policy Pursuant to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (“Arbitration Law”).**

After the Supreme Court Regulation No. 1 of 1990 was issued, the Government of Indonesia finally enacted Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (“Arbitration Law”) on 29 August 1999. The Arbitration Law draws a distinction between international and domestic awards. Arbitrations seated in Indonesia are classed as domestic, while those seated outside Indonesia are classed as international. This legislation is the current vehicle for the implementation of the New York Convention and gives effect to Indonesia’s treaty obligations. In fact, the grounds for refusing the enforcement of international arbitral awards under the Arbitration Law are more restrictive than those under the New York Convention, being confined to a limited number of situations, one of which is if the award conflicts with Indonesia’s public policy.

These more restrictive grounds are based on the five requirements that must be fulfilled before a court could enforce international arbitral awards under the Arbitration Law, which are: “(a) The International Arbitration Award is rendered by an arbitrator or arbitral tribunal in a country which is bound to the Republic of Indonesia by either a bilateral or a multilateral treaty on the recognition and enforcement of International Arbitration Awards; (b) International Arbitration Awards, as mentioned in item a. are limited to awards which fall within the category of commercial law under Indonesian law; (c) International Arbitration Awards, as mentioned in item a. may only be enforced in Indonesia if they do not conflict with the public policy; (d) International Arbitration Awards may be enforced in Indonesia after obtaining a writ of execution from the Chairman of the Central Jakarta District Court; (e) International Arbitration Awards,

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9 Supreme Court Regulation Number 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award, issued 1 March 1990.
as mentioned in item a., in which the Republic of Indonesia is one of the parties to the dispute, may be enforced after obtaining a writ of exequatur from the Supreme Court of the Republic Indonesia which then delegates it to the Central Jakarta District Court for execution.\textsuperscript{10} The Arbitration Law, however, does not provide any definitions with regards to the public policy defence. As a result, Indonesian courts still refer to the definition provided by the Supreme Court Regulation No. 1 of 1990 when applying such defence in international arbitration.

\textbf{III. PUBLIC POLICY AND THE ‘PRO-ENFORCEMENT BIAS’ IN NEW YORK CONVENTION}

The hurdles in the implementation of New York Convention find their source in the national courts’ expansive interpretations of the Convention’s provisions, which gave rise to an abrupt denial of the finality of an award.\textsuperscript{11} This is clearly not in accordance with the purpose of the New York Convention, which is to promote certainty in the enforcement of arbitral awards. In interpreting and implementing the Convention’s provisions, rather, national courts shall adopt a \textit{pro-enforcement policy} as to ease the enforcement and recognition of foreign arbitral award.

A \textit{pro-enforcement policy/bias} is in accordance with the customary rule of interpretation, which is pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), where the provision must be interpreted in light of its object and purpose.\textsuperscript{12} The purpose of New York Convention is to promote international commerce and the settlement of international disputes through arbitration. It aims to facilitate the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. Consequently, courts should adopt a pro-enforcement approach when interpreting the Convention, in a sense that when there are several possible interpretations, courts should choose the meaning that favors recognition and enforcement.\textsuperscript{13}

The \textit{pro-enforcement policy} is also evidenced from various provisions in the Convention, i.e. Article III, IV, and V. For instance, Article IV of the Convention promotes restrictive procedure of enforcement by discouraging erroneous conditions of enforcement and establishing prima facie evidence of the enforceability of the awards.\textsuperscript{14} Article V of the Convention concerning the grounds to challenge the enforcement of an award, embodies three basic features that exemplify the \textit{pro-enforcement bias}: (1) the grounds are exhaustive; (2) there is no review of the merits of the award; (3) the burden of proof is upon the respondent.\textsuperscript{15} Just from the outset, the words “\textit{may be refused… only if}” in Article V of the convention instead of “\textit{shall be refused…}” already demonstrates the permissive nature of this provision that it is not mandatory to refuse the enforcement of the award, rather preserves the courts’ discretion to enforce the awards.\textsuperscript{16} Further, it has been accepted that the procedural defence to oppose enforcement under Article V

\begin{itemize}
\item \textsuperscript{10} See Article 66 of the Arbitration Law.
\item \textsuperscript{12} International Court of Justice, \textit{Pulp Mills on the River Uruguay (Argentina v. Uruguay)}, Judgment of 20 April 2010, para. 64; International Court of Justice, \textit{Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)}, Judgment of 13 July 2009, para 47.
\item \textsuperscript{13} ICCA (n 7) 14-15.
\item \textsuperscript{14} Fifi Junita (n 11).
\item \textsuperscript{16} Albert Jan van den Berg (2), ‘Enforcement of Arbitral Awards Annulled in Russia, Case Comment on Court of Appeal of
is exhaustive. Accordingly, the grounds for refusing the enforcement of the award under Article V of the Convention are exclusive, and the courts shall construe it narrowly in favor of enforcement.¹⁷

However, despite the existence of such *pro-enforcement bias* in interpreting and implementing the Convention’s provisions, the scope of public policy exception stipulated in the article V (2) b of the Convention has been discerned to be vague, as it does not provide any definition and leaves the interpretation to the courts of the member states concerned.¹⁸ Such definitional vagueness will then create possible challenges to the certainty and finality of a foreign award, as each state party will have its own international public policy framework. In the current global economic competition, despite the presence of emerging regional and global cooperation, every state will remain focusing on the promotion and protection of its own national interests.¹⁹ Consequently, in the absence of any concrete definitions, there is always a possibility for countries to abuse the public policy exception to protect its own national interest.

IV. THE APPROACH TAKEN BY MOST SIGNATORIES TO NEW YORK CONVENTION WITH REGARDS TO PUBLIC POLICY AND ITS RELATION TO THE CONVENTION’S ‘PRO-ENFORCEMENT BIAS’

In implementing the public policy defence allowed by the New York Convention, most signatories of the Convention have followed the U.S. interpretation of public policy, which is very liberal in international arbitration. The Courts in U.S. have viewed that the general *pro-enforcement bias* under the Convention leads toward a narrow reading of the public policy defence, and an expansive construction of public policy is deemed to violate the Convention’s basic effort to remove pre-existing obstacles to the enforcement of foreign arbitral awards.

This understanding was affirmed by the U.S. Court in the case of *Parsons & Whittemore v. RAKTA*, a landmark decision providing the standard of public policy defence, where the Court explicitly noted that the defence must be limited if the New York Convention were to be effective:

*The general pro-enforcement bias informing the Convention . . . points toward a narrow reading of the public policy defence. An expansive construction of this defence would violate the Convention's basic effort to remove pre-existing obstacles to enforcement . . . We conclude, therefore, that the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.*²⁰

As such, the U.S. divides public policy into domestic and international public policy. Unless international

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¹⁹ ibid 613.
public policy is violated, the court will enforce the award.\textsuperscript{21}

Similarly, the Court in Singapore has been reluctant to rely on public policy to refuse enforcement of foreign arbitral awards. This is evidenced from the Singapore High Court decision in the case between \textit{Hainan Machinery Import and Export Corporation and Donald \& McArthy PTE Ltd}, where the Court rejected the argument of public policy:

… public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad. I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the Commission.

Similarly, in Hong Kong, the Courts had deemed that the public policy defence should be construed narrowly as a party cannot attempt to wheel it out in all occasions. In \textit{Paklito Investment Limited v Klockner East Asia Limited}, when presented the question whether the defendant’s inability to present its case during the arbitration proceeding amounts to a violation of public policy, the Court referred to the standard stipulated in \textit{Parsons \& Whittemore v RAKTA}, and held that a breach of the requirement of an opportunity to present a case was irrelevant to establish violation of public policy. It noted that, “The present case does not involve issues of public policy and it is decided solely on the breach of the requirement of an opportunity to present a case which I have held to be a serious enough irregularity to justify refusal of enforcement.”

As such, most courts have construed the public policy defence very narrowly, where such defence could only be invoked when the enforcement of foreign arbitral awards would violate the forum state’s most basic notions of morality and justice. This approach is in line with the object and purpose of the New York Convention, which is to remove pre-existing obstacles to the enforcement of foreign arbitral awards. Hence, ideally, no expansive construction of public policy should be allowed.

\textbf{V. ANALYSIS ON THE APPROACH TAKEN BY THE INDONESIAN COURTS WITH REGARDS TO PUBLIC POLICY AND THE IMPLEMENTATION OF ‘PRO-ENFORCEMENT BIAS’ IN NEW YORK CONVENTION}

In contrast to the approach taken by other signatories to the New York Convention, Indonesia took broad interpretation on public policy. Indonesia – particularly the Indonesian courts – interprets and applies public policy in the “domestic” sense. This bearing is due to the provision of Article 4 (2) of the Supreme Court Regulation Number 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award mentioned earlier. From such provision, the emphasis of public policy is laid on the Indonesia’s internal conditions, and not international conditions.\textsuperscript{22}

Indonesian courts have indeed adopted certain ways in applying or interpreting the notion of domestic public policy. Indonesian courts’ interpretations on what constitutes a violation of Indonesia’s public policy can be categorized into 3 (three), as follows:23

(i) a violation of the prevailing laws and regulations in Indonesia;
(ii) endangering the national interest of Indonesia, which includes the local economy; or
(iii) a violation against the sovereignty of Indonesia.

These three categories are reflected in the major Indonesian judicial decisions on the request of foreign arbitral award enforcement (exequatur). The first example is *PT Bakri Brothers v. Trading Corporation of Pakistan Ltd*24, where the South Jakarta District Court (“SJDC”) was faced with a request for the enforcement of an arbitral award issued in London in favor of Trading Corporation of Pakistan Ltd (“TCPL”), which subsequently grant its approval and issued a decree of registration and enforcement of the arbitral award. However, PT Bakri & Brothers objected to it on the grounds, among others, that the arbitral award was unlawful as the proceedings failed to provide equal treatment for Bakri & Brothers to present its case with ample time. The SJDC accepted the objection and rejected the request to enforce the arbitral award. The legal reasoning of the SJDC was, among others, that to be enforced in Indonesia, the foreign arbitral award had to be in compliance with Indonesian laws and principles, and under the same, parties in arbitration should be given equal opportunity to present their case (*audi et alteram partem*). The SJDC held that the arbitral tribunal’s failure to observe such equal opportunity in rendering the award amounts to a violation of Indonesian public policy. The SJDC decision was subsequently upheld by the Jakarta High Court and later by the Indonesian Supreme Court.

Another example is *E.D. & F. Man (Sugar) Limited v. Yani Haryanto*25, a landmark case in Indonesia as it serves as the first case which rejected the enforcement of a foreign arbitral award on the grounds of public policy after the enactment of the Supreme Court Regulation No. 1 of 1990. Yani Haryanto, an Indonesian businessman, signed two sugar sales and purchase agreements with a British exporter, E.D. & F. Man (Sugar) Limited (“Sugar Ltd”). However, only after signing the two agreements did Yani Haryanto knew that the authority to do such export solely belonged to the Indonesian Bureau of Logistics (“BULOG”). Yani Haryanto then terminated the agreements and was involved in several legal proceedings (including arbitration) in the United Kingdom with Sugar Ltd. At a later date, an arbitral award was rendered in favour of Sugar Ltd.

As opposed to complying with the arbitral award, Yani Haryanto instead submitted a claim to the Central Jakarta District Court (“CJDC”) to annul the underlying agreements between him and Sugar Ltd. The

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24 The South Jakarta District Court Decision No. 64/Pdt/G/1984/PN.Jkt.Sel dated 1 November 1984, upheld by the Jakarta High Court Decision No. 512/Pdt/1985/PT.DKI dated 23 December 1985, and subsequently by the Indonesian Supreme Court Decision No. 4231 K/Pdt/1986 dated 4 May 1988.
ground brought by Yani Haryanto was, among others, that the agreements violated the prevailing law in Indonesia which regulated that imports of sugar were the sole authority of BULOG. Sugar Ltd objected to such claim and submitted that the CJDC did not have any jurisdiction to annul the award under Indonesian law, as the award was rendered in London.

In parallel to its objection to the annulment proceeding, Sugar Ltd also submitted an *exequatur* request to the Indonesian Supreme Court, which subsequently being approved. However, soon after, the CJDC issued a decision to annul the underlying agreements between Yani Haryanto and Sugar Ltd on the grounds, among others, that it violated the said prevailing rules and regulations in Indonesia, as well as it disrupts Indonesian economic policy. The court noted that since the Presidential Decree gave BULOG the exclusive authority to import sugar in order to safeguard public interest, any attempt by private individuals to import sugar would violate such public interest and therefore the Indonesian mandatory rules. Sugar Ltd appealed such decision to the Jakarta High Court but turn to no avail. At the cassation level, the Indonesian Supreme Court upheld the appeal decision and declared that the *exequatur* granted to Sugar Ltd was no longer relevant because the underlying agreements were considered as null and void.

As to the violation against the sovereignty of Indonesia, it was reflected in *Astro Group v. Lippo Group*[^26], where both parties were engaged in a joint venture agreement which did not went well and resulted in an arbitration in Singapore. Notwithstanding the existence of an arbitration agreement between both parties, the Lippo Group also initiated a legal proceeding against the Astro Group at the SJDC in addition to the arbitration. The Astro Group objected to the latter proceeding and was granted an interim award by the arbitral tribunal in Singapore which ordered the Lippo Group to cease any legal proceedings in Indonesia.

As the Lippo Group refused to voluntarily comply with the interim award, the Astro Group subsequently submitted an *exequatur* request for such award to the CJDC. However, the CJDC considered that the foreign arbitral award, which contained an order to cease the on-going legal proceedings in Indonesia, violated Indonesia’s sovereignty based on the reason that “no foreign power could ever interfere with the ongoing legal proceedings in Indonesia”. Therefore, the CJDC decided that the arbitral award was against Indonesian public policy, and rejected Astro Group’s *exequatur* request. The decision of the CJDC was subsequently upheld by the Indonesian Supreme Court most recently in 2016.

The three examples above demonstrate that Indonesian courts have interpreted the public policy exception very broadly. From *PT Bakri Brothers v. Trading Corporation of Pakistan Ltd*, it could be concluded that Indonesian courts have regarded violation of any prevailing laws and regulations in Indonesia – including any principles contained therein – as sufficient to justify nonenforcement of foreign arbitral awards on the grounds of public policy. The judicial stance in *E.D. & F. Man (Sugar) Limited v. Yani Haryanto* is also conceived as emphasizing more on sovereignty observation and national protectionism rather than adherence to international standard of public policy,[^27] as it has been emphasised that international restrictive approach to public policy defence does not cover all national mandatory rules of enforcement by the

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From Astro Group v. Lippo Group, it is further obvious that the Indonesian judiciary tends to adopt juridical sovereignty approach to enforcement of foreign arbitral awards, although the award in that case was, in essence, in line with Indonesia’s prevailing law, which clearly stipulates that Courts shall not be authorized to decide disputes between parties who are already bound in an arbitration agreement. From this point of view, the tendency of the Indonesian courts to refuse enforcement of foreign arbitral awards could be deemed to demonstrate what is known as “a very unruly horse,” which has made it difficult for a winning party to enforce foreign arbitral awards.

Under the international standard of public policy, the violation of public policy is viewed as an attitude which sets aside the state’s values, norms and rules under its restrictive international obligations. It is why merely adopting the ground of contravention of the state’s internal rules of law, including its mandatory rules, is not a good legal justification for refusing enforcement of foreign arbitral awards. Therefore, the stance taken by the Indonesian courts have been criticized as exaggerating and out of the principle of fundamentality, which has been discerned to be not reasonably enough for objecting the international nature of arbitral awards. This adoption of broad and “domestic” public policy exception to the enforcement of foreign arbitral awards could be deemed to demonstrate what is known as “a very unruly horse,” which has made it difficult for a winning party to enforce foreign arbitral awards.

Nevertheless, the discretion to adopt such broad and “domestic” interpretation of public policy exception is given by the New York Convention. Although such adoption could further be deemed to have undermined the very purpose of the Convention, which is to remove pre-existing obstacles to the enforcement of foreign arbitral awards, the Convention does leave the interpretation of such exception to the courts of the member states concerned. In such circumstances, without legislation ensuring that full obedience to New York Convention’s general pro-enforcement bias and the international restrictive approach to public policy be observed by the courts, the enforceability of foreign arbitral awards in Indonesia will remain uncertain.

VI. CONCLUSION

Despite a signatory party to the New York Convention, Indonesia has shown several unfriendly approaches to foreign arbitration through rejection of the enforcement of foreign arbitral awards. Through assessment of various cases, it is found that the Indonesian judicial attitude towards public policy defence to refuse enforcement of foreign arbitral awards has been broad and expansive. The decisions made by the court have raised various criticisms as the grounds construed have merely relied upon the domestic sense of public policy, and not the one that is required by the values and principles under international law. Yet, the discretion to interpret public policy in such domestic sense is allowed by the Convention, as it does not provide any definitions to public policy and leaves the interpretation to the courts of the member states concerned.

Nevertheless, general pro-enforcement bias under the New York Convention should have led towards a
narrow interpretation of the public policy defence, as an expansive construction of public policy would violate the Convention's basic effort to remove pre-existing obstacles to the enforcement of foreign arbitral awards. Enactment dealing with Indonesia’s judicial attitudes is therefore needed to ensure that full obedience to New York Convention’s *pro-enforcement bias* and the international restrictive approach to public policy defence be observed, adopted and used by the judiciary. If not, the judiciary’s broad interpretation of such defence will remain contributing to the Indonesian hostility to international arbitration.