PUBLIC POLICY AS A GROUND FOR REFUSING ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: INDONESIAN NOTION OF PUBLIC POLICY

Student Number: 660038502

Word Count: 12,204

LL.M. Programme

Law School

Exeter

United Kingdom

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October 2017

ABSTRACT

Article V of the New York Convention provides grounds for refusing enforcement of foreign arbitral awards. One of the grounds is when enforcement of the award would violate the public policy of the enforcing state. However, the concept of public policy itself is still unclear and different from one jurisdiction to another. In industrialized countries like England and United States, the pro-enforcement bias of the New York Convention is applied by interpreting the notion of public policy narrowly and applying it restrictively; this makes enforcement of foreign arbitral awards more easy and certain. On the other hand, Indonesian courts interpret the notion of public policy broadly and in a domestic sense, in which a mere violation of Indonesian national laws can be construed as a violation of public policy to refuse enforcement of foreign arbitral awards.

The current notion of public policy that is applied by the Indonesian court has undermined the effectiveness of international commercial arbitration by hindering enforcement of foreign arbitral awards. Therefore, the Indonesian court must shift their approach towards the pro-enforcement bias of the New York Convention.

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ACKNOWLEDGMENT

I would like to express my thanks to the various people and institutions from whom I have received support and aid during the process of conducting the present research for a LL.M. Without any of them, this work will not be completed.

Firstly, my gratitude to my supervisor Prof. Andrea Lista, for his kind help and supervision during the course of this dissertation. During my LL.M., especially in his seminars, I have learned much about international commercial arbitration. More importantly his passion in the field of international commercial arbitration has inspired me to learn more about this subject and made me decide to undertake a dissertation in this topic.

I also want to give my thanks to the Indonesia Endowment Fund for Education (**LPDP**) for their generous scholarship, which made it possible for me to pursue a master's degree at the University of Exeter. I hope I can give it back with my good contribution to Indonesia. Finally, I am grateful to my mother and father for their encouragement during this study. Everything that I have achieved would not have been possible without their support.

CHAPTER I

INTRODUCTION

I.1. Background

A party who succeeds in earning an arbitral award in its favour may want to enforce it, which can only be done through national courts. Therefore, the enforcing party must request that the courts in the place where the other party has assets make an order to seize those assets to the value of the award. Often, the enforcing party will have to make its enforcement in a country other than the country where the arbitration was seated.[1] On the other hand, the party to whom the award was against may want to challenge the award by preventing its enforcement, which requires him to prove that the requirement needed to enforce the award has not been met or that the award should not be enforced.[2]

Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York, 1958] ("**New York Convention**"), set out the grounds for refusing enforcement of an award. One of the grounds as set out in Article V (2) (b) of the New York Convention is when the recognition or enforcement of the award would be contrary to the public policy of the enforcing state.[3] However, the concept of public policy itself is not clear. Public policy has been described as the principle of law, which states that no one can lawfully do that which has an inclination against public good. It has also been defined as some moral, social or economic principle that is so sanctified that it needs to be always maintained. In another case, public policy has also been described as the forum state's most basic notions of morality and

[1] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2010) para 13.01.
[2] ibid para 13.02.
[3] ibid para 13.11.

justice. All these attempts to define the notion of public policy shows how difficult it is to give an exact definition of public policy in the context of enforcing international arbitral awards.[4]

In order for international arbitration to be effective, parties to the dispute must be able to enforce the arbitral awards. Treaties such as New York Convention have been enacted to ensure the international respect that is necessary for the domestic courts of various nations to enforce foreign arbitral awards. However, this treaty contains public policy exceptions that allow domestic courts to refuse enforcement of a foreign arbitral award if the award violates the public policy of the enforcing state. The public policy exceptions need to be defined in accordance with the spirit of the New York Convention, which is to ensure respect for the enforcement of foreign arbitral awards. A broad interpretation of the public policy defence would undermine the strength and effectiveness of the New York Convention, and in turn cast doubts about the effectiveness of international arbitration.[5]

Therefore, it is essential to describe the concept of public policy. In the second chapter of this dissertation, we will discuss about the notion of public policy as a ground for refusing enforcement of foreign arbitral awards, along with cases in several jurisdictions that explain it. Then, in the third chapter, this dissertation will explain about the notion of public policy in Indonesia according to its regulations and courts precedents. Finally, in the fourth chapter and as a conclusion, this dissertation will elaborate about how the notion of public policy in Indonesia should be modified so it can be more in line with the international approach.

1.2. Purpose and Research Questions

The purpose of this dissertation is to describe the notion of public policy as a ground for refusing enforcement of foreign arbitral awards in international commercial arbitration, with

[4] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) Arbitration 3, 5-6
[5] Richard A. Cole, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) Journal on Dispute Resolution Vol.1:2 365, 366

specific attention to the notion of public policy in Indonesia and how to modify it so it can be more in line with the international approach. In order to reach this purpose, the research questions that will be addressed in this dissertation go as follows:

1. How does the notion of public policy act as a ground for refusing enforcement of foreign arbitral awards in international commercial arbitration?
2. How is the notion of public policy defined by Indonesian laws and courts in the context of enforcement of foreign arbitral awards?
3. How should the Indonesian notion of public policy be modified so it can be more in line with the international approach?

1.3. Methodology

This dissertation will use a doctrinal or black-letter law approach and focuses on the notion of public policy as a ground for refusing enforcement of foreign arbitral awards with a particular attention to Indonesian laws and practices. A doctrinal or black-letter law approach itself is defined as a research methodology that concentrates on seeking to provide a detailed and highly technical commentary upon, and systematic exposition of, the content of legal doctrine.[6]

Regulations such as the New York Convention and UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"), legal precedents from various jurisdictions, and the work of other academics will be used in this dissertation to answer the research questions as stated above. This dissertation will also give a critical analysis of the existing practices (especially in Indonesia) regarding the notion of public policy, and how it should be modified so it can be more in line with the international approach.

[6] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007), 49

CHAPTER II

THE NOTION OF PUBLIC POLICY AS A GROUND FOR REFUSING ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

II.1. Refusing Enforcement of Foreign Arbitral Awards

The purpose of the New York Convention, which replaced the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on Execution of Foreign Arbitral Awards 1927 ("**Geneva Convention**"),[7] is to encourage enforcement of foreign arbitral awards.[8] One way to do this is by strictly limiting the grounds for denying their enforcement. Article V of the New York Convention in particular contains procedural and substantive grounds for challenging the enforcement of an award. Article V (1) of the New York Convention specifically provides several procedural bases on which a party may resist enforcement. Furthermore, Article V (2) of the New York Convention provides a basis, that can be invoked by the parties and considered by the court, to refuse the enforcement of foreign arbitral awards if the dispute is not arbitrable or if enforcement of the award would violate public policy of the state where enforcement is being sought.[9]

[7] Anil Changaroth, 'International Arbitration – A Consensus on Public Policy Defences?' (2008) Asian International Arbitration Journal 143, 144

[8] Troy L. Harris, 'The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes' (2007) Journal of International Arbitration 24(1) 9, 9

[9] ibid 10.

II.1.A. Jurisdictional Requirements

However, for the New York Convention to be applied, several jurisdictional requirements applicable to recognition of arbitral awards must be satisfied. The New York Convention and most arbitration statutes are required to show: [10]

1. The recognition must be on arbitral awards. There are several conditions that must be met, which are: (a) the award must be as a result of arbitration agreement; (b) the award must meet several characteristics of an award; and (c) the award must settle a substantive issue of a dispute and not just procedural issue;[11]
2. That they arise from a "commercial" relationship. New York Convention and national arbitration legislation limit their scope to arbitral awards that arise from commercial relationships;[12]
3. A "defined legal" relationship. The New York Convention and UNCITRAL Model Law only applies to arbitration agreements and awards concerning disputes that arise from a defined legal relationship.[13]
4. That the award is a foreign or non-domestic award. These limitations are contained in Article I (1) of the New York Convention, which said that the Convention only applies to awards that either: (a) are made outside the country where enforcement is sought; or (b) in the enforcing country are not considered as domestic awards.[14] If an award is foreign, then the New York Convention will protect that award, and therefore it is subject to non-recognition in that state only if one of the exceptions set out in Article V of the New York Convention is applicable. For the non-domestic award, the tendency of the national legislatures is to treat the category of non-domestic awards the same as the category of

[10] Gary B. Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016), 375
[11] ibid 376.
[12] ibid.
[13] ibid.
[14] ibid 377.

foreign awards. Nevertheless, United States ("**U.S.**") courts held that any award made in the U.S. with a meaningful international connection is a non-domestic award that is subject to the New York Convention;[15] and

5. Any reciprocity requirements are satisfied. Article I (3) of the New York Convention permits contracting states to make reciprocity reservations. However, since almost all states have ratified the New York Convention, the reciprocity requirements are almost always satisfied and not too practically important.[16]

II.1.B Difference between Recognition and Enforcement

Before discussing further about the refusal of enforcement of foreign arbitral awards, it must be noted that there is a difference between recognition and enforcement of an arbitral award. A particular award may be recognized without being enforced. Recognition indicates that the award is accepted by the courts of a country as having been validly made. On the other hand, enforcement is a positive action to recover or claim whatever the award has ordered. A party may want the award only to be recognized if it only wishes to prevent the losing party from relitigating the matters that were already decided in the arbitration. Moreover, if the losing party has no assets in that jurisdiction, then the successful party has no reason to enforce the award.[17]

II.1.C Procedure for Recognition and Enforcement

In order to obtain recognition and enforcement of an award, according to Article IV of the New York Convention, a party must provide: (a) The duly authenticated original award or a duly certified copy of the award; (b) The original agreement as referred in Article II of the New York

[15] ibid 378-379.
[16] ibid 380-381.
[17] Tweeddale and Tweeddale (n 1) para 13.03.

Convention or a duly certified copy of the agreement. In the event that the award is made in a foreign language to that of the enforcing State, then the enforcing party is required to translate these documents into the language of the enforcing State and must be certified by the sworn translator or diplomatic agent. It is dependent on the *lex fori*[18] where the award is to be enforced to decide whether an award or agreement has been duly authenticated or duly certified.[19]

The New York Convention also makes it easier for foreign arbitral awards to be enforced by eliminating the double *exequatur* requirement, [20] which had previously existed under the Geneva Convention. That requirement necessitated the confirmation of an award in the court of the arbitral seat (first *exequatur*) before it could be recognized abroad (second *exequatur*).[21]

II.1.D. Grounds for Refusing Enforcement Under the New York Convention

Article V of the New York Convention set out very limited substantive grounds for non-recognition or non-enforcement.[22] These grounds are that: (a) incapacity of the parties to the agreement or invalidity of the agreement; (b) proper notice was not given to the party regarding the arbitrator appointment or the arbitration proceedings, or the party was unable to present its case; (c) the award deals with a matter that beyond the submission to arbitration; (d) the composition of the arbitral tribunal or the procedure of arbitration was not in accordance with the parties agreement, or if there is no agreement, not in accordance with the law of the country where the arbitration was being held; (e) the award has not yet become binding, or has been set aside or suspended; (f) in the country where enforcement is being sought, the subject matter of

[18] *Lex fori* is the law of the forum or court in which a case is tried. See Mick Woodley, *Osborn's Concise Law Dictionary* (12th edn, Sweet & Maxwell 2013) 256
[19] Tweeddale and Tweeddale (n 1) para 13.09-13.10.
[20] Bartlomiej Orawiec, 'The Public Policy Exception under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The UK Perspective)' (2016) Comparative Law Review 21 53, 54
[21] Born (n 10) 387.
[22] ibid 389.

the difference cannot be settled by arbitration; or (g) the recognition or enforcement of the award would violate public policy of the enforcing country.[23]

Article 36 of the UNCITRAL Model Law also mirrored these grounds for non-recognition or non-enforcement. However, it must be noted that there is nothing within these grounds which permits a national court to review merits of the award.[24] Furthermore, in its wording, Article V (1) of the New York Convention indicates that the burden of proof lies with the party who alleges that the award is unenforceable. However, the party who alleges that the New York Convention applies also has the burden of proof that the formalities for enforcing the award have been met.[25]

II.2. Public Policy as a Ground for Refusing Enforcement of Foreign Arbitral Awards

As explained before, one of the grounds for refusing enforcement of foreign arbitral awards is by invoking that enforcement of the award would against the public policy of the state where enforcement is being sought. This section will focus on the "public policy" exception as stated in the Article V (2) (b) of the New York Convention and Article 36 (b) (ii) of the UNCITRAL Model Law, which has been called by Troy L. Harris in his article as "*probably the most misused ground of non-enforcement of all*".[26] Article V (2) (b) of the New York Convention itself states:

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

Article 36 (b) (ii) of the UNCITRAL Model Law also use a similar wording, which states:

> "*Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*
> *…*
> *(b) if the court finds that:*

[23] Tweeddale and Tweeddale (n 1) para 13.11.
[24] ibid para 13.11-13.12.
[25] ibid para 13.14.
[26] Harris (n 8) 10.

> …
> *(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*"

The concept of public policy itself is unclear. Since 1824, Justice Burrough in the English case of *Richardson v. Mellish*[27] has referred to public policy as:

> "*A very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound of law. It is never argued at all but when other points fail.*"[28]

Moreover in 1853, Justice Parker held in the English case of *Egerton v. Brownlow*[29] that public policy:

> "*… is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expedience", or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not.*"[30]

The concept of public policy has been debated for decades. As explained by Prof. Karl-Heinz Bockstiefel in his article, that the concept of public policy is dependent on the judgment of the respective legal community. What in one state is considered to be part of public policy may not be seen as public policy in another state with a different religious, social, economic, political, and legal system. The concept of public policy is also affected by the time factor. The values and standards of communities are not stable, they change and develop, and so does public policy since it is derived from these. Due to these factors, public policy has been interpreted differently in each jurisdiction by their courts and authors.[31]

However, despite its unclear concept, states often controlling arbitral process by using a wide array of public policy defences. Therefore, such impositions of domestic values and laws

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[27] *Richardson v. Mellish* (1824) 2 Bingham 229
[28] ibid [252].
[29] *Egerton v. Brownlow* (1853) IV House of Lords Cases (Clark's) 1
[30] ibid [123].
[31] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) Dispute Resolution International Vol. 2 No. 1 123, 124-125

need to be balanced with the growing need to respect arbitral awards in the area of international commerce.[32] U.S. Court of Appeal in the case of *Waterside Ocean Navigation Co v. International Navigation Ltd.*,[33] when dealing with the issue of the public policy defences, Chief Judge Feinberg states:

> "*… defences set out in Article V(2)(b) of the New York Convention had to be construed in light of the overriding purpose of the Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and so unify the standards by which agreements to arbitrate are enforced in the signatory countries.*"[34]

Fortunately, recent developments in most industrialized countries show that the courts have given great deference to arbitrators' decisions in accordance with the use of public policy defences. Even some claims that in domestic arbitration are not arbitrable and usually would be refused on the grounds of public policy have been found arbitrable, and enforcement of awards deciding such claims has been granted.

In practice, public policy argument is often used as the last resort of the desperate, because public policy has become a variable notion that is open-textured and flexible. Courts in industrialized and developing countries, and in most countries that have ratified the New York Convention, have invoked the public policy exception to refuse enforcement of foreign arbitral awards on both substantive and procedural grounds. Nevertheless, there is still no meaningful guidance regarding how the court would interpret the public policy exception.[35] In the rest of this chapter, we will discuss examples of public policy defences raised in order to refuse enforcement of foreign arbitral awards.

[32] Changroth (n 7) 144.
[33] *Waterside Ocean Navigation Co v. International Navigation Ltd.* 737 F. 2d 150 (2d Cir. 1984)
[34] ibid 83.
[35] Harris (n 8) 11.

II.3. The Notion of Public Policy in International Commercial Arbitration

In the following section, we will discuss cases where the court has accepted the public policy defence as a ground for refusing enforcement of foreign arbitral awards. Cases that will be discussed in the next section are *Soleimany v. Soleimany*[36] and *Eco Swiss China Time Ltd. v. Benetton International NV*[37]; in these two cases we will see how the court describes the notion of public policy.

II.3.A. Soleimany v. Soleimany

Perhaps the most well-known case about public policy is *Soleimany v. Soleimany*.[38] In this case the plaintiff bought carpets in Iran and illegally exported them out to the United Kingdom to be sold by the defendant. Disputes arose between the parties regarding the distribution of the revenue of the sale. The parties made an agreement to arbitrate their disputes before the Beth Din and applied Jewish law. The arbitral tribunal rendered an award in favour of the plaintiff. Then, the plaintiff applied to the High Court to register the awards as a judgment. On the other side, the defendant applied to set aside the order on the grounds that enforcement of an arbitral award that was founded on an illegal agreement or transaction would be against public policy.[39]

In answering this question, the English court states that:

> "*The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.*"[40]

[36] *Soleimany v. Soleimany* [1998] 3 WLR 811, CA
[37] *Eco Swiss China Time Ltd. v. Benetton International NV* [2000] 5 C.M.L.R. 816
[38] *Soleimany* (n 36).
[39] ibid 785.
[40] ibid 800.

The English court in this case explains that they will not enforce a foreign arbitral award where the contract was illegal under English law as the law of the country of performance, even though the contract was legal under the applicable law.[41]

II.3.B. Eco Swiss China Time Ltd. v. Benetton International NV

In the case of *Eco Swiss China Time Ltd. v. Benetton International NV*,[42] the European Court of Justice answers the question of whether the violation of Article 85 (now Article 81) of the EC Treaty was a violation of mandatory public policy so the arbitral award could be set aside. In this case a Dutch company (Benetton) entered into a licensing agreement with Hong Kong and New York based retailers (Eco Swiss) for the production and sale of watches and clocks under Dutch law.[43] Benetton terminated the agreement and arbitration was commenced. An arbitral award was rendered and decided that Benetton had to compensate Eco Swiss for wrongful termination of a licensing agreement. Benetton requested the annulment of the arbitral award by arguing that it violated public policy, which is Article 81 of the EC Treaty regarding competition law.[44] In answering this question, the European Court of Justice states that:

> "*Article 81 E.C. (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81 (2) E.C. (ex Article 85 (2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.*"[45]

The court further added that:

> "*…, the provisions of Article 81 E.C. (ex Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention.*"[46]

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[41] Tweeddale and Tweeddale (n 1) para 13.45.
[42] *Eco Swiss* (n 37).
[43] *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) [1999] E.C.R. I-3055
[44] Blavi (n 4) 14.
[45] *Eco Swiss* (n 37) 36.
[46] ibid 39.

The European Court of Justice in this case basically explains that the provision of Article 81 of the EC Treaty was essential for the functioning of the internal market and should be categorized as a matter of public policy under the New York Convention. The court therefore concluded that a breach of Article 81 of the EC Treaty justified the annulment of the arbitral award.[47]

II.4. The Pro-Enforcement Bias in International Commercial Arbitration

In his book, Gary B. Born explains that the New York Convention establishes a pro-enforcement approach towards foreign awards.[48] As opposed to the previous section, where we see that the court has accepted the public policy defence to refuse enforcement of foreign arbitral awards, in the following section we will discuss cases where courts in many jurisdictions especially in the U.S. and England have implemented the pro-enforcement bias in order to fulfill the purpose of the New York Convention and the UNCITRAL Model Law, that the grounds to refuse recognition and enforcement of arbitral awards should be interpreted and applied restrictively,[49] including the grounds of public policy.

II.4.A. Overseas v. RAKTA

In the case of *Parsons & Whittemore Overseas Co., Inc.*, ("**Overseas**") *v. Societe Generale de L'Industrie du Papier* ("**RAKTA**"),[50] Overseas an American company appeals the judgement rendered by the Southern District Court of New York that confirm a foreign arbitral award that held Overseas liable to RAKTA for breach of contract.[51] In this case, Overseas and

[47] Tweeddale and Tweeddale (n 1) para 13.51.
[48] Born (n 10) 384.
[49] Blavi (n 4) 14.
[50] *Overseas v. RAKTA* 508 F.2d 969 (2nd Cir. 1974)
[51] ibid 545.

RAKTA made an agreement to build, manage and supervise for one year a paperboard mill located in Alexandria. A branch of the U.S. State Department which called Agency for International Development ("**AID**") would finance the project by giving funds to RAKTA in order to purchase letters of credit for the favour of Overseas. The contract's term contained an arbitration clause, which was meant to settle disputes that may arise. Then in 1967, with the Egyptian hostility towards Americans caused by the Arab-Israeli Six Day War, in which America became the ally of Israel, the majority of Overseas workers left Egypt. In June, Egypt broke diplomatic relationship with the U.S. and ordered all Americans (except for those with a special visa) to get out of the country.[52]

Having abandoned the project when the construction phase was almost complete, RAKTA invoked the arbitration clause and sued Overseas. The arbitration was governed by the rules of the International Chamber of Commerce ("**ICC**"), and the arbitral tribunal made its final award in favour of RAKTA. Subsequently, Overseas challenged the enforcement of the award in the US Court of Appeals. In one of their arguments, Overseas argued that enforcement of the award would violate U.S. public policy[53]; this was because AID's withdrawal of financial support from the contract required a loyal American citizen such as Overseas to abandon the project.[54] In answering the question of public policy, the U.S. Court of Appeals states 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.*"[55]

The court further added that:

> "*To read the public policy defences as a parochial device protective of national political interest would seriously undermine the Convention's utility.*"[56]

[52] ibid 545-546.
[53] ibid 546-547.
[54] ibid 548.
[55] ibid.
[56] ibid 549.

In this case, the U.S. court explains that Article V (2) (b) of the New York Convention must be construed narrowly and the public policy defences can only be granted if the enforcement of the foreign arbitral award would violate the state's most basic notions of morality and justice. It cannot be used as a device to protect parochial national political interest. U.S. court in this case for the first time gives significance guidance for us about how the notion of public policy in the New York Convention must be construed. The Author agrees with the judgment in this case that basically explains that the notion of public policy must be construed narrowly in order to be in line with the pro-enforcement bias of the New York Convention.

II.4.B. Westacre Investments Inc. v. Jugoimport – SPDR Holding Co Ltd.

In another case of *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co. Ltd.*,[57] The English Court of Appeal addressed the issue about whether the enforcement of an award should be refused on the grounds of public policy in a case where it was alleged that a commission contract containing the arbitration agreement required the corrupt purchase of personal influence from a Kuwaiti government official. [58] In this case, the contract is governed by Swiss law and will be settled in accordance with the Arbitration Rules of the ICC; the arbitration was held in Geneva. The plaintiffs were appointed by the first defendant as consultants for the procurement of military contracts to Kuwait. At the arbitration, the defendants argued that because the arrangement was for procuring sales by fraud through bribery or alternatively by illicit personal influence of other kinds, then the agreement with the plaintiff was contrary to public policy. However, the arbitral tribunal still found in the plaintiff's favour. The defendants then appealed to the Swiss Federal Tribunal, on the grounds of the award was contrary to public policy and that the consultancy agreement was contrary to Kuwait law, but the appeal was also dismissed. Afterwards, the plaintiff obtained leave to enforce the award in England and

[57] *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co Ltd.* [2000] QB 288, CA.
[58] Changroth (n 7) 150.

subsequently brought an action on the award. The defendants applied to set aside the leave to enforce and alleged that because the agreement was a contract to pay a bribe using the plaintiffs as a vehicle, then the enforcement of the award would be contrary to public policy. The defendant's application was refused and the judge held that they had no defence to enforcement.[59] Lord Justice Waller in his judgment states:

> "*…, that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed.*"[60]

He also added that:

> "*… there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.*"[61]

The English court states in this case, that even though the enforcement of a foreign arbitral award might be contrary to domestic English public policy, as long as it is not contrary to the public policy of the proper law of the contract or with the curial law[62], the award must still be enforced. This case also explains that English law considers the practice of exacting payment for the use of illicit personal influence in procuring government contracts as being against English public policy.

In this case the English court put a high standard on the use of public policy as a ground for refusing enforcement of foreign arbitral awards. This is different from the approach in the case of *Soleimany v. Soleimany*,[63] where the award which against domestic English public policy cannot be enforced; in this case the English court has shifted their approach to the pro-enforcement bias by saying that as long as the award is not contrary to the public policy of the

[59] *Westacre* (n 57) 288-289.
[60] ibid 305.
[61] ibid 305.
[62] Curial law or procedural law is the law chosen by the parties for the conduct of the procedure, or is the law applied to the procedure, in default of the parties' choice of law. See Tweeddale and Tweeddale (n 1) para 7.60.
[63] *Soleimany* (n 36).

proper law of the contract or to public policy of the curial law, the award still can be enforced. The Author agrees with this judgment, which is more pro to the enforcement of arbitral awards in accordance with the spirit of the New York Convention.

II.4.C. Gater Assests Ltd. v. Nak Naftogaz Ukrainiy

Furthermore, in the case of *Gater Assests Ltd. v. Nak Naftogaz Ukrainiy*,[64] the English court explains an award that had been procured by dishonest means.[65] In this case the defendant (Naftogaz) distributed natural gas supplied by Gazprom. Then, Gazprom alleged that Naftogaz had taken a greater quantity of gas than it was entitled under the contract governing use of the pipeline. To overcome the problem of recovering directly from Naftogaz, Gazprom and its captive insurer, Sogaz, had devised an insurance and reinsurance structure. Then, the risk of Sogaz having to pay an indemnity in respect of misappropriation of gas had been reinsured by Sogaz to Monde Re, and Monde Re commenced an arbitration against Naftogaz before the International Commercial Arbitration Court ("**ICAC**") in Moscow. Afterwards, ICAC issued an award in favour of Monde Re against Naftogaz.[66]

Naftogaz argued that enforcing the award in the UK would be contrary to public policy since it had been procured by dishonest means. The allegation was that the award had been obtained by fraud, because Sogaz, Monde Re and their lawyers had deliberately withheld an important document to obtain an award in his favour, and that the court should consider that the award was procured in a manner contrary to public policy.[67] In answering this question, Judge Tomlinson states that:

> "*Proceeding with a reference following an innocent failure to disclose a document, even one of importance, could not properly be described as acting contrary to public policy. What would normally be required to be demonstrated, for the court to conclude that an*

[64] *Gater Assests Ltd. v. Nak Naftogaz Ukrainiy* [2008] EWHC 237 (Comm)
[65] Orawiec (n 20) 65.
[66] *Gater* (n 64) 141-142.
[67] Orawiec (n 20) 65.

> *award has been procured by a party in a way which is contrary to public policy, will be some form of reprehensible or unconscionable conduct on his part which has contributed in a substantial way to obtaining an award in his favour.*"[68]

He further added that:

> "*… nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to consider denying to the award recognition or enforcement. That means conduct which we would be comfortable in describing as fraud, conduct dishonestly intended to mislead.*"[69]

In this case, the English court explains that in order for the enforcement of the arbitral award to be contrary to public policy, the failure to disclose an important document must be deliberately conducted by the party, in order to mislead the arbitration and to obtain an award ruled in his favour. Just proving that there is an innocent failure would not suffice to prove that enforcement of the arbitral award would be contrary to public policy. The English court in this case maintained the high standard as shown previously in the case of *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co. Ltd.*[70]. The Author agrees with this approach because the pro-enforcement bias of the New York Convention means that the public policy defence should rarely be accepted as a ground for refusing enforcement of foreign arbitral awards.[71]

II.5. Analysis of the Cases and the Concept of International Public Policy

As we have seen from the cases explained above, in *Soleimany v. Soleimany*,[72] the English court explains that they will not enforce a foreign arbitral award where the contract was illegal under English law as the law of the country of performance, even though the contract was legal under the applicable law. However, in *Westacre Investments Inc. v. Jugoimport – SPDR*

[68] *Gater* (n 64) 170.
[69] ibid.
[70] *Westacre* (n 57).
[71] Blavi (n 4) 15.
[72] *Soleimany* (n 36).

Holding Co. Ltd.,[73] the English court gives higher standards towards the use of public policy defence by saying that even though the enforcement of a foreign arbitral award might be contrary to the domestic English public policy, as long as it is not contrary to the public policy of the proper law of the contract or with the curial law, the award must still be enforced. This higher standard is also maintained by the English court in the case of *Gater Assests Ltd. v. Nak Naftogaz Ukrainiy*,[74] which states that in order for the enforcement of the arbitral award to be contrary to public policy, the failure to disclose an important document must deliberately be conducted by the party, in order to mislead the arbitration and obtaining an award ruled in the party's favour. Just proving that there is an innocent failure would not suffice to prove that enforcement of the arbitral award would be contrary to public policy. In these cases, we can see that there is a pattern in the English court to restrictively interpret and apply the notion of public policy towards the pro-enforcement bias.

The same pattern also occurred in the U.S. court. In *Overseas v. RAKTA*,[75] U.S. court has applied the pro-enforcement bias by adopting a narrow construction of the public policy defence to the enforcement of foreign arbitral award.[76] Public policy defences can only be granted if the enforcement of a foreign arbitral award would violate the state's most basic notions of morality and justice. It cannot be used as a device for protecting parochial national political interest. In *Eco Swiss China Time Ltd. v. Benetton International NV,* [77] we see the example of the concept of basic notions of morality and justice when the European Court of Justice held that Article 81 of the EC Treaty regarding competition law was essential for the functioning of the internal market and should be categorized as a matter of public policy under the New York Convention. Therefore, the violation of it justified the annulment of the arbitral award.

[73] *Westacre* (n 57).
[74] *Gater* (n 64).
[75] *Overseas* (n 50).
[76] Harris (n 8) 12.
[77] *Eco Swiss* (n 37).

From all the explanations and cases regarding the notion of public policy stated above, we can conclude that public policy as a ground for refusing the enforcement of foreign arbitral awards must be construed in accordance with the pro-enforcement bias of the New York Convention to ensure the international respect that is necessary for the domestic courts of various nations to enforce foreign arbitral awards and thus is also necessary for the effectiveness of international commercial arbitration. Therefore, the notion of public policy must be interpreted narrowly and applied restrictively.

In various jurisdictions, courts have given effect to the pro-enforcement bias of the New York Convention, for example by interpreting public policy narrowly. Conditions that might violate domestic public policy are permitted in the context of international public policy (as shown in the case of *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co. Ltd.*[78]), it is important because international trade needs to be encouraged and free from the parochial interest of any particular state.[79]

The International Law Association's Committee on International Commercial Arbitration defines international public policy as:

> "… *body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)*".[80]

In addition, Francisco Blavi in his article states that arbitral tribunals in international commercial cases should rarely encounter challenges from domestic courts using the notions of domestic public policy. This is because arbitration must be viewed as a delocalized phenomenon, and therefore international standards must prevail rather than domestic ones. He also describes the international public policy concept as "more restrictive", "more narrow", and "more tolerant", than

[78] *Westacre* (n 57).
[79] Harris (n 8) 11-12.
[80] Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) Arbitration International Volume 19 Number 2 249, 253

the domestic public policy concept, and being applicable only in “exceptional circumstances” and confined to violation of “really fundamental conceptions of legal order in the country concerned” when “the innate feeling of justice is hurt in an intolerable manner”.[81]

This concept of international public policy can be seen in the case of *Overseas v. RAKTA*,[82] when the court held that public policy defence should be construed narrowly, declaring that the recognition and enforcement of foreign arbitral awards should be denied only when the enforcement would violate the forum state’s most basic notions of morality and justice. As a conclusion, the application of international public policy that must be defined narrowly means that public policy defence should rarely be accepted as a ground to refuse enforcement of foreign arbitral awards.[83]

After discussing about approaches in international commercial arbitration regarding the notion of public policy that has moves towards a pro-enforcement bias (i.e. in England and U.S.) with a narrow and restrictive interpretation of public policy. In the next chapter of this dissertation, we will discuss the notion of public policy in a particular developing country, Indonesia, so we can see how the notion of public policy develops in other parts of the world.

[81] Blavi (n 4) 13-14.
[82] *Overseas* (n 50).
[83] Blavi (n 4) 15.

CHAPTER III

THE INDONESIAN NOTION OF PUBLIC POLICY

III.1. Arbitration in Indonesia

Indonesia is the world's fourth most populous nation with population approximately 250 million people. It stretches more than 6,000 kilometers, from Banda Aceh, south-west of Thailand, to Papua, north of Queensland, Australia. Indonesia is made up of more than 17,000 islands.[84] Indonesia is also the largest economy in Southeast Asia, with abundant natural resources and a relatively open foreign investment framework. Therefore, it offers local and foreign investors numerous opportunities.[85]

In Indonesia, the history of arbitration itself extends back to 1977 when the Indonesian National Board of Arbitration ("**BANI**") was established, and at that time Indonesian arbitration law was still based on the Dutch Code of Civil Procedure of 1847, book III, article 615-651.[86] However, as the needs for arbitration grew, it was eventually replaced with the promulgation of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Indonesian Arbitration Act**").[87] Indonesia also has ratified the New York Convention with the issuance of Presidential Decree No. 34 of 1981 on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**Presidential Decree No. 34/1981**"). Furthermore, there is also a Supreme Court Regulation No. 1 of 1990 on the Enforcement of Foreign Arbitral Awards ("**Supreme Court Regulation No. 1/1990**"), which is considered as the implementation legislation of Presidential Decree No. 34/1981.[88]

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[84] Narendra Adiyasa and Charles Ball, 'Indonesia', in Michael J. Moser and John Choong, *Asia Arbitration Handbook* (OUP 2011) para 18.01
[85] ibid para 18.02.
[86] Fifi Junita, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) Macquarie Journal of Business Law Vol. 5 369, 375
[87] Adiyasa and Ball (n 84) para 18.07.
[88] Fifi Junita, 'The Concept of Public Policy Exception to the Enforcement of Foreign Arbitral Awards: The Indonesian Perspective' (2013) International Arbitration Law Review 148, 157

It was said that the Indonesian Arbitration Act was primarily adopted from the New York Convention. However, according to Fifi Junita, an Indonesian legal scholar, even though Indonesia has legally endorsed the pro-enforcement policy that is embodied in the New York Convention, in practice there has been a substantial intervention by municipal courts and the application of a domestic approach to public policy exception, that consequently inhibits the pro-arbitration policy.[89]

Principally, international (and national) arbitral awards are final and binding in Indonesia, as long as the foreign arbitral awards meets certain conditions as stipulated in Article 66 of the Indonesian Arbitration Act,[90] which are: (1) reciprocity reservation, which means that the award must be made in a country that have bilateral or multilateral agreement with Indonesia regarding recognition and enforcement of foreign arbitral award; (2) commercial reservation, which means that the award must be on commercial matters under Indonesian law; and (3) the award must not violate Indonesian public policy.[91] For the prerequisite that the awards not violate Indonesian public policy, there is no clear concept about the notion of public policy in Indonesia. Article 66 (c) of the Indonesian Arbitration Act only states that:

> "*foreign arbitral awards can be recognized and enforced in Indonesia unless they violate Indonesian public order;*"

Article III of the New York Convention[92] itself left much discretionary power for the enforcement of foreign arbitral awards to the rule of procedure of the state where the awards would be enforced. In Indonesia, according to Article 66 (d) of the Indonesian Arbitration Act, a foreign arbitral award can be enforced in Indonesia after it receives writ of execution (*exequatur*) from the Central Jakarta District Court. Nevertheless, before the *exequatur* is issued, the court

[89] ibid 152.
[90] Junita (n 86) 376.
[91] ibid 379.
[92] Article III of the New York Convention, states that: "*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.*"

will examine whether the enforcement of the awards will violate Indonesian public policy as stated in Article 66 (c) of the Indonesian Arbitration Act.[93] Unfortunately, according to Fifi Junita in her article, public policy defense and intervention from the court have disturbed the effectivity of arbitration in Indonesia.[94] In the next section of this chapter, we will discuss the notion of public policy in Indonesia in connection with the enforcement of foreign arbitral awards.

III.2. The Notion of Public Policy in Indonesia

According to Frans Winarta, a prominent Indonesian lawyer, as a contracting party to the New York Convention, Indonesia interprets and applies public policy in a domestic sense.[95] Article 3 (3) of the Supreme Court Regulation No. 1/1990 provides that: "*foreign arbitral awards cannot be enforced in Indonesia if they violate public order*." Furthermore, Article 4 (2) of the Supreme Court Regulation No. 1/1990, adds that:

> "*Exequatur will not be granted if the Foreign Arbitral award is against the basic principles of the entire Indonesia legal system and society (public policy).*"

By using the words "the basic principles of the entire Indonesia legal system and society", it means that Indonesia construe the concept of public policy as an internal conditions in Indonesia and not international conditions.[96] Fifi Junita also argues that the public policy under Article 4 (2) of the Supreme Court Regulation No. 1/1990 lead to a greater acceptance of the domestic concept of public policy based on sovereignty of Indonesian society, legal traditions and cultures rather than international public policy. Furthermore, she adds that the meaning of public policy

[93] Junita (n 86) 385-386.
[94] ibid 384.
[95] Frans Winarta, 'Indonesia Country Report on Public Policy for IBA APAG' <https://www.ibanet.org/Document/Default.aspx?DocumentUid=35A890AC-0D36-4953-BC10-22E1BF3F89AD> accessed 24 May 2017, 1
[96] ibid.

exceptions may include all of the public interests or the state's political interests or mandatory rules.[97]

Since the Indonesian arbitration law does not specifically define the meaning and scope of public policy, it mostly depends on the court's discretion in determining the scope and meaning of public policy.[98] In the next part of this section we will discuss how Indonesian courts define the notion of public policy in connection with the enforcement of foreign arbitral awards.

III.2.A. Bakrie Brothers v. Trading Corporation of Pakistan Ltd.

Bakrie Brothers v. Trading Corporation of Pakistan Ltd.,[99] was the first Indonesian case where the court rejected enforcement of foreign arbitral awards on the grounds of public policy. In this case an Indonesian company named Bakrie Brothers entered into a sale and purchase agreement of palm oil with Trading Corporation of Pakistan Ltd. The dispute arose when Bakrie Brothers failed to meet its contractual obligation with Trading Corporation of Pakistan Ltd., to ship palm oil to Karachi. Then, Trading Corporation of Pakistan Ltd., as stated in the contract, brought the dispute to the Oil and Seed Arbitration in London. The arbitral tribunal thereafter rendered an award in favour of Trading Corporation of Pakistan Ltd., which ordered Bakrie Brothers to pay compensatory damages.[100]

Trading Corporation of Pakistan Ltd., then requested enforcement of arbitral award issued in London to the South Jakarta District Court. However, Bakrie Brothers challenged the enforcement of the award on the grounds that since the proceedings failed to give equal treatment for them to present their case, then the award became unlawful. The South Jakarta

[97] Junita (n 88) 158.
[98] ibid 159.
[99] 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 also upheld by the Indonesian Supreme Court Decision No. 4231 K/Pdt/1986 dated 4 May 1988; as cited in Winarta (n 95) 3.
[100] Erman Radjagukguk, 'Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy' (2011) Indonesia Law Review No. 1 Volume 1 1, 7-8

District Court then accepted the Bakrie Brothers objection and refused to enforce the arbitral award on the basis that the award was against Indonesian laws because it does not fulfill the principle of *audi et alteram partem* which require that the parties in a dispute should have equal opportunity to present their case. In this case, however, according to the South Jakarta District Court, the arbitral tribunal in rendering their award failed to observe this rule, which was a violation of Indonesian laws and thus public policy. The South Jakarta District Court decision was also upheld by the Indonesian Supreme Court.[101]

The Indonesian court in this case construes the notion of public policy as a violation of Indonesian laws which is the principle of *audi et alteram partem*. If we look previously in the case of *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co. Ltd.*,[102] when the English court states that enforcement of a foreign arbitral award must still be accepted even if it violates domestic public policy, as long as it is not contrary to the public policy of the proper law of the contract or to the public policy of the curial law; or in another case of *Overseas v. RAKTA*,[103] when the U.S. court explains that public policy as stated in Article V (2) (b) of the New York Convention must be construed narrowly, which means that enforcement of a foreign arbitral award can only be refused if it would violate the state's most basic notions of morality and justice. The violation of domestic law must not necessarily be construed as a violation of public policy to refuse enforcement of foreign arbitral awards. It must first be assessed whether that violation also violates the public policy of the proper law of the contract or the curial law; if not, then the arbitral award still can be enforced. The second assessment is that it must first be looked at whether the violation is a violation of the state's most basic notions of morality and justice. In this case for instance, an Indonesian court can assess whether the violation of the principle of *audi et alteram partem* is a violation of Indonesia's most basic notions of morality and justice; if not, then the arbitral awards still can be enforced. The Author argues that these approaches are more in

[101] Winarta (n 95) 3.
[102] *Westacre* (n 57).
[103] *Overseas* (n 50).

line with the pro-enforcement policy of the New York Convention than the Indonesian court approach in the case of *Bakrie Brothers v. Trading Corporation of Pakistan Ltd.*,[104] because it put a higher standard towards the use of public policy defence as a ground to refuse enforcement of foreign arbitral awards.

III.2.B.E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto

In another case of *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,[105] public policy was construe as an invalidity of the contract and the lack of commerciality.[106] In this case an Indonesian businessmen named Yani Haryanto entered into sale and purchase agreements of sugar with E.D. & F. Man (Sugar) Ltd., a British exporter. However, after the signing of the agreements, Yani Haryanto realized that only the Indonesian Bureau of Logistic ("**BULOG**") had the sole authority to do such export,[107] since the Indonesian government issued Presidential Decree No. 39 of 1978 on BULOG ("**Presidential Decree No. 39/1978**"), that prohibits private parties to import sugar into Indonesia.[108] Yani Haryanto then unilaterally terminated the agreements, which made E.D. & F. Man (Sugar) Ltd. bring the dispute to arbitration in London. The arbitral tribunal in London made an award that ordered Yani Haryanto to pay compensatory damages.[109]

Yani Haryanto afterwards opposed the arbitral award in Central Jakarta District Court by making a claim to annul the underlying agreements between him and E.D. & F. Man (Sugar) Ltd., on the grounds that the agreements were violating Indonesian laws, because according to Presidential Decree No. 39/1978, only BULOG that have the authority to import sugar into

[104] *Bakrie* (n 99).
[105] Central Jakarta District Court Decision No. 499/Pdt/G/VI/1988/PN.Jkt.Pst dated 29 June 1989, upheld by the Jakarta High Court Decision No. 486/Pdt/1989/PT.DKI dated 14 October 1989, and subsequently by the Indonesian Supreme Court Decision No. 1205 K/Pdt/1990 dated 14 December 1991; as cited in Winarta (n 95) 4.
[106] Junita (n 86) 389.
[107] Winarta (n 95) 4.
[108] Junita (n 86) 389.
[109] Radjagukguk (n 100) 8.

Indonesia. E.D. & F. Man (Sugar) Ltd., then replied, that Central Jakarta District Court did not have jurisdiction to the dispute since they have an arbitration clause in their agreements. Along with their reply, E.D. & F. Man (Sugar) Ltd., also made an *exequatur* request which later being granted by the Indonesian Supreme Court. However, not long after, the Central Jakarta District Court annul the underlying agreements on the grounds that the agreements violate Indonesian laws. This decision was upheld by the Indonesian Supreme Court which decides to annul the *exequatur* that previously granted to E.D. & F. Man (Sugar) Ltd., on the grounds of the invalidity of the underlying agreements.[110]

In this case, it can be noted that since the enforcement of the award would violate Indonesian laws, then the arbitral award could not be enforced in Indonesia. This is mainly because the agreements were considered invalid due to the violation of Indonesian laws. This case shows that Indonesian court defines the notion of public policy as domestic public policy and not international public policy.[111] However, the Author disagrees with this approach because according to the doctrine of separability, the jurisdiction to determine the validity of the contract still lies with the arbitral tribunal.

III.2.C. Bankers Trust Group v. Mayora & Jakarta International Hotels

Bankers Trust Company and Bankers Trust International Plc. v. PT. Mayora Indah Tbk., and Bankers Trust Company and Bankers Trust International Plc. v. PT. Jakarta International Hotels & Development (**"*Bankers Trust Group v. Mayora & Jakarta International Hotels***"),[112] are two identical cases and will be discussed simultaneously in this section. In these cases, PT. Mayora and PT. Jakarta International Hotels failed to make payments to Bankers Trust Group as

[110] Winarta (n 95) 4.
[111] Junita (n 86) 389.
[112] Central Jakarta District Court Decisions No. 01 and 02/Pdt/Arb.Intl/1999/PN.Jkt.Pst in conjunction with No. 02/Pdt.P/2000/PN.Jkt.Pst dated 3 Feburary 2000, upheld by the Indonesian Supreme Court Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000, in conjunction with the South Jakarta District Court Decision No. 46/Pdt.G/1999/PN.Jkt.Sel dated 9 December 1999; as cited in Winarta (n 95) 5.

stipulated in their agreements. However, when negotiations were still taking place between the parties, PT. Mayora and PT. Jakarta International Hotels request annulment of the agreements in the South Jakarta District Court on the grounds that the agreements pose a form of gambling that prohibited under Indonesian laws. Bankers Trust Group objected the allegations and since there is an arbitration clause in their agreements, they initiated arbitration proceedings in London which produce an award in favour of the Bankers Trust Group. Nonetheless, the South Jakarta District Court made a decision who decided that the agreements were invalid. Despite of that, Bankers Trust Group still made an exequatur request to the Central Jakarta District Court. Unfortunately, since there were contradictory rulings between the South Jakarta District Court's decision and the award from the arbitral tribunal in London, the Central Jakarta District Court refused the *exequatur* request because it will violate Indonesian public policy. The Indonesian Supreme Court also upheld this decision.[113]

These decisions have raised much criticism. Fifi Junita said that basically since the parties had agreed in their agreements to settle their disputes in arbitration, the Indonesian court, under Article 11 of the Indonesian Arbitration Act[114], had no authority to settle this dispute. The Indonesian court has disregarded the arbitration clause provision which existed in the agreements. Moreover, the decisions from the Indonesian court, besides violating Article 11 of the Indonesian Arbitration Act, also seriously undermine the purposes of Article III of the New York Convention.[115] The Author also disagrees with the Indonesian court decisions in these cases, because if the parties still have a chance of bringing their disputes to a national court even though they already have an arbitration clause in their agreement, the institution of arbitration would become useless.

[113] Winarta (n 95) 5.
[114] Article 11 of the Indonesian Arbitration Act states that: "*(1) The existence of a written arbitration agreement eliminates the right of the parties to submit the resolution of the dispute or difference of opinion contained in the agreement to the District Court; (2) The District Court must refuse and must not interfere in any dispute settlement which has been determined by arbitration, except in particular cases determined in this Law*."
[115] Junita (n 86) 382.

III.2.D. Astro Group v. Lippo Group

Astro Group v. Lippo Group,[116] parties in this case were entered into an agreement that unfortunately defaulted and resulted into an arbitration proceedings in Singapore. However, Lippo Group also initiated legal proceedings against Astro Group at the South Jakarta District Court, which being objected by the Astro Group and latter was received an interim award from the arbitral tribunal in Singapore to stop legal proceedings in Indonesia. An award that Lippo Group refused to comply, thus made Astro Group to submit an *exequatur* request to the Central Jakarta District Court in order to enforce the interim award. Nevertheless, the Central Jakarta District Court made a decision to refuse the *exequatur* request on the grounds of public policy, because it violates Indonesia's sovereignty by ordering court in Indonesia to stop existing legal proceedings. Indonesian Supreme Court also upheld this decision.[117]

In this case the Author disagrees with the Indonesian court decision that states an arbitral award from Singapore which orders Indonesian courts to cease existing legal proceedings is a violation to public policy. In this case both parties to the dispute have chosen arbitration as a forum to settle their dispute; because of that the Indonesian court does not have the jurisdiction to try the case. The interim award from the arbitral tribunal in Singapore upholds the integrity of the arbitration agreement and cannot be said to be a violation of public policy.

III.3. Analysis of the Cases and the Concept of Domestic Public Policy

As we have seen from the several cases in Indonesia as mentioned above, Indonesian courts interpret the notion of public policy in a domestic sense and defines it broadly.[118] Erman Radjagukguk in his article explains that violation of domestic public policy is a violation to the

[116] Central Jakarta District Court Decision No. 05/Pdt.Arb.Int/2009 dated 28 October 2009, that also upheld by the Indonesian Supreme Court Decision No. 01 K/Pdt.Sus/2010 dated 24 February 2010; as cited in Winarta (n 95) 5.
[117] Winarta (n 95) 5-6.
[118] ibid 8.

national laws, regulations or interest of the state concerned. For example, foreign arbitral awards cannot be enforced if the underlying agreement is illegal under the law of the enforcing country, or if the enforcement of the foreign arbitral award is against the national interest (such as national economy) of the enforcing country.[119]

In the case of *Bakrie Brothers v. Trading Corporation of Pakistan Ltd.*,[120] the Indonesian court explains that under Indonesian laws the parties should be given equal opportunity to present their case, and the failure to do that means that the arbitral award could not be enforced because the enforcement of such an award would be contrary to public policy. Furthermore, in the case of *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,[121] public policy was interpreted as violation of the validity of contract. In this case, the Indonesian court explains that if the underlying agreements are violating prevailing Indonesian laws, then the agreements become invalid, and the arbitral award that rendered from it cannot be enforced because it will be violating public policy.

In the case of *Bankers Trust Group v. Mayora & Jakarta International Hotels*,[122] the Indonesian court explains that if there are contradictory rulings between the Indonesian court's decision and the arbitral award, then the arbitral award cannot be enforced because it will against Indonesian public policy. Furthermore, in the case of *Astro Group v. Lippo Group*,[123] the Indonesian court states that an interim award which orders to cease existing legal proceedings in Indonesia is against public policy, because it violates the sovereignty of Indonesia if foreign arbitral award ordered Indonesian court to cease the existing legal proceedings.

From all the regulations and cases explained above, we can see that in Indonesia, any foreign arbitral awards that are in conflict with the Indonesian laws may be refused to be enforced. As a result, a mere violation of Indonesian laws may lead to the conclusion that public

[119] Radjagukguk (n 100) 2.
[120] *Bakrie* (n 99).
[121] *Sugar v. Yani* (n 105).
[122] *Bankers* (n 112).
[123] *Astro v. Lippo* (n 116).

policy has been violated.[124] Indonesian courts also categorize invalidity of the underlying contract (illegality) and violation of the sovereignty of Indonesia as a violation of public policy.

As we see from the explanation above, there are differences regarding the notion of public policy between Indonesia and other courts (i.e. England and U.S.). English and U.S. courts tend to interpret the notion of public policy as international public policy, which is more restrictive and narrower, which results in the defence of refusing enforcement of the foreign arbitral awards using the notion of public policy rarely being accepted. On the other hand, Indonesian courts interpret the notion of public policy in a domestic sense and define it broadly, which results in a mere violation of the Indonesian laws becoming the reason to refuse enforcement of foreign arbitral awards. In the next chapter, we will discuss how to modify the Indonesian notion of public policy so it can be more in line with international approaches, which, according to the New York Convention, is to become more favourable towards the enforcement of foreign arbitral awards.

[124] Junita (n 88) 159.

CHAPTER IV

MODIFYING THE INDONESIAN NOTION OF PUBLIC POLICY

IV.1. Flaws in the Indonesian Notion of Public Policy

Before we can determine how to modify the Indonesian notion of public policy in connection with the enforcement of foreign arbitral awards, we must first discover what the problem with it is. The previous chapter has elaborated on how the notion of public policy is defined in Indonesia by its regulations and court practices; several conclusions can be taken from this. First, contrary to the notion of public policy adopted by industrialized countries (i.e. England and U.S.) that interpret the notion of public policy narrowly and apply it restrictively, Indonesian courts tend to interpret and apply the notion of public policy in a domestic sense where the mere violation of Indonesian laws may result in the conclusion that public policy has been violated. Secondly, from the court precedents we know that there are several situations that can be regarded as a violation of public policy in Indonesia, which are: (1) when the enforcement of the award would violate Indonesian laws; (2) when the underlying agreement is invalid under Indonesian laws; (3) when the arbitral award is contrary to the Indonesian court decision on the same particular case; and (4) when the arbitral award is violating Indonesian sovereignty.

In the next section of this chapter we will examine each situation that is considered a violation of Indonesian public policy from the perspective of international commercial arbitration laws and practices. We will also compare the Indonesian notion of public policy with international practices such as are commonplace in England and U.S. From that examination and comparison, the flaws in the Indonesian notion of public policy are hoped to be found, alongside how public policy must be modified so that it can be more in line with the international approach.

IV.1.A. Enforcement of the Award Would Violate Indonesian Laws

As we can see from the previous chapter explanations, the very basic concept of the Indonesian notion of public policy revolves around the violation of Indonesian laws. Even if there is only a mere violation of Indonesian laws, it can be regarded as a violation of Indonesian public policy. In *Bakrie Brothers v. Trading Corporation of Pakistan Ltd.*,[125] the court states that the failure to give the parties equal opportunity to present their case is a violation of Indonesian laws and thus public policy.

If we assume that indeed the Bakrie Brothers had not been given equal opportunity to present their case (*audi et alteram partem*) in the arbitral proceedings and that it was a violation of Indonesian laws, not every violation of the laws of the enforcing state has to be construed as a violation of public policy. It must be assessed whether or not the violation is violating the most basic notions of a state's morality and justice (as shown by the U.S. court in the case of *Overseas v. RAKTA*[126]). Moreover, the English court in the case of *Westacre Investments Inc. v. Jugoimport – SPDR Holding Co. Ltd.*,[127] shows that a violation of the domestic public policy of the enforcing state does not necessarily lead to the refusal of the enforcement of a foreign arbitral award, as long as it is still not contrary to the public policy of the proper law of the contract or the curial law. Unfortunately, in the case of *Bakrie Brothers v. Trading Corporation of Pakistan Ltd.*,[128] we did not see the Indonesian court assessing these factors. They immediately decided that because Bakrie Brothers had not been given equal opportunity to present their case, it was a violation of Indonesian laws, and rejected enforcement of the arbitral awards on the grounds of public policy.

The author agrees with the approach taken by the English and U.S. courts. In this case, the Indonesian court should assess whether the violation of the principle of *audi et alteram*

[125] *Bakrie* (n 99).
[126] *Overseas* (n 50).
[127] *Westacre* (n 57).
[128] *Bakrie* (n 99).

partem is a violation of Indonesia's most basic notions of morality and justice; if not, then the arbitral award must still be enforced. Furthermore, the Indonesian court must also look at whether the enforcement of the arbitral award is violating the public policy of the proper law of the contract or the public policy of the curial law; if not, then the arbitral award must still be enforced. These approaches are more in line with the spirit of the New York Convention, which is more narrow and restrictive in interpreting and applying the notion of public policy.

IV.1.B. The Underlying Agreement is Invalid under Indonesian Laws

Another situation where Indonesian public policy is violated is when the underlying agreement is invalid under Indonesian laws. In the case of *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,[129], the Indonesian court states that because the underlying agreement is contrary to Indonesian laws, the agreement becomes invalid and the arbitral award that is rendered from it cannot be enforced because it will violate public policy. In this case we see that the Indonesian court in the enforcement stage is examining the issue of validity of the contract.

However, according to the doctrine of separability, the jurisdiction to judge the validity of the contract lies with the arbitral tribunal. Separability doctrine means that the invalidity of the underlying contract does not make the arbitration clause also become invalid. The arbitral tribunal may declare that the underlying contract is invalid but still maintain its jurisdiction to settle the dispute over the consequences of that invalidity, because the arbitration clause is still valid as a separate agreement. [130] Separability of the arbitration clause doctrine in the Indonesian Arbitration Act is regulated under Article 10 (h), which states:

> "*An arbitration agreement will not become void because of the circumstances mentioned below:*
> *…*
> *(h) the main contract expires or nullified.*"

[129] *Sugar v. Yani* (n 105).
[130] Tweeddale and Tweeddale (n 1) para 4.56.

In international commercial arbitration practices, the doctrine of separability was applied by the English court in the case of *Fiona Trust & Holding Co. v. Privalov*,[131] which states:

> "*The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect …*"[132]

Therefore, in the case of *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,[133] we can conclude that the Indonesian court has violated the doctrine of separability by examining the validity of the underlying contract in the enforcement stage. The issue of validity should be examined in the arbitration proceedings by the arbitral tribunal in London due to the existence of a valid arbitration clause in the agreements. The Indonesian court cannot make a decision that states the underlying contract is invalid and that the award that is rendered from has also become invalid, and that therefore the enforcement of the award is against public policy. The issue of validity should be resolved in the arbitration proceedings by the arbitral tribunal, not in the enforcement stage by the enforcing court.

IV.1.C. The Arbitral Award is Contrary to the Indonesian Court Decision on the Same Particular Case

In the cases of *Bankers Trust Group v. Mayora & Jakarta International Hotels*,[134] the Indonesian court states that where there are contradictory rulings between an arbitral award and a decision from Indonesian court on the same particular case, the arbitral award cannot be enforced, because it will be against public policy. The issue in here is how there can be both an arbitral award and a court decision judging the same particular case.

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[131] *Fiona Trust and Holding Co. v Privalov* [2007] UKHL 40; as cited in Gary B. Born, *International Arbitration: Cases and Materials* (2nd edn, Kluwer Law International 2015), 205
[132] ibid 211.
[133] *Sugar v. Yani* (n 105).
[134] *Bankers* (n 112).

Article 11 of the Indonesian Arbitration Act clearly states that the Indonesian court has no authority to settle the disputes by which parties to their agreement have decided to settle such disputes in arbitration. Neglecting such a rule makes Indonesian courts trapped in their own rulings. If there is a valid arbitration agreement, and the arbitral proceeding has already taken place, the Indonesian court cannot settle such a dispute; the authority lies entirely with the arbitral tribunal. Even if one of the parties disputed the validity of the underlying agreements, the authority to judge such a dispute still lies with the arbitral tribunal (according to the doctrine of separability) and not with the national court of the enforcing state.

Furthermore, even in the case where the validity of the arbitration clause is being challenged, the power to decide it still lies under the jurisdiction of the arbitral tribunal; this is according to the principle of kompetenz-kompetenz. The doctrine of kompetenz-kompetenz explains that arbitrators are having authority to determine their own competence and jurisdiction to settle the dispute before them.[135] This principle basically regulates that because the parties have chosen arbitration to resolve their dispute, they therefore must have intended that the arbitral tribunal resolve all aspects of the dispute including jurisdictions.[136] The kompetenz-kompetenz principle can be found in Article 16 of the UNCITRAL Model Law, which states:

> "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*."

Unfortunately, this principle is not specifically regulated under the Indonesian Arbitration Act, and maybe this is one of the reasons why Indonesian courts are sometimes still accepting cases from parties that in their agreements already have an arbitration clause to settle their disputes.

The Author agrees with the critics about the decisions in *Bankers Trust Group v. Mayora & Jakarta International Hotels*.[137] Indonesian court decisions in these cases have made a bad precedent for arbitration law in Indonesia; this is simply because Indonesian courts have neglected not only their own regulation (Article 11 of the Indonesian Arbitration Act), but also

[135] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012), 91
[136] Tweeddale and Tweeddale (n 1) para 9.18.
[137] *Bankers* (n 112).

principles that exist in international commercial arbitration (separability doctrine and the kompetenz-kompetenz principle). If parties to the dispute still have a chance of bringing their dispute to the court even though they have an arbitration clause, then arbitration will become useless.

IV.1.D. The Arbitral Award is Violating Indonesian Sovereignty

The Indonesian court, in the case of *Astro Group v. Lippo Group*[138], made a decision that states that an interim award that is rendered by foreign arbitral tribunal, which orders the Indonesian court to cease existing legal proceedings, is a violation of Indonesian sovereignty and thus public policy. It states that no foreign authority could ever intervene with ongoing legal proceedings in Indonesia.

In this case we see that the parties in their agreement have choose arbitration in Singapore as a forum to settle their dispute; the arbitration proceedings have also already taken place and rendered an interim award that ordered the ceasing of legal proceedings in the Indonesian court. In regard to this, Article II of the New York Convention clearly requires that all states that are signatories of the New York Convention uphold arbitration agreements. It means that where the court proceedings that have been commenced are in breach of the arbitration agreement, national courts are required to stay those proceedings in favour of arbitration if so requested.[139]

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[138] *Astro v. Lippo* (n 116).

[139] Tweeddale and Tweeddale (n 1) para 9.16. Article II of the New York Convention, states that: "*(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration; (2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams; (3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*"

Indonesia as a party to the New York Convention has an obligation to uphold arbitration agreements. Therefore, if there is an award that has ordered an Indonesian court to cease court proceedings because it has breached the arbitration agreement, such an order cannot be considered as a violation of Indonesian sovereignty and public policy.[140]

IV.2. Modifying the Indonesian Notion of Public Policy

After identifying flaws in the Indonesian notion of public policy, we can now discuss how it must be modified, so it can be more in line with the international approach. Basically, the notion of public policy in Indonesia has been far from the purpose of the New York Convention, which is to be more favourable to the enforcement of foreign arbitral awards. The Indonesian notion of public policy has been construed in a domestic sense and applied so broadly that even a slight violation of Indonesian laws can be regarded as a violation of public policy.

There are also several notions of public policy in Indonesia that are contrary to the principles of international commercial arbitration (i.e. the doctrine of separability and the principle of kompetenz-kompetenz), and even contrary with the regulation that is stipulated in the Indonesian Arbitration Act. It is important for Indonesian court judges when examining cases regarding enforcement of foreign arbitral awards to bear in their mind that for international arbitration to be effective, parties to the dispute must be able to enforce the arbitral awards.

As discussed in the previous chapter, international commercial arbitration practices, especially in industrialized countries such as England and U.S., construe the notion of public policy narrowly and apply it restrictively, only when the enforcement of foreign arbitral awards would violate the state's most basic notions of morality and justice. Moreover, in international practices, what constitutes a violation of domestic laws does not necessarily need to be

[140] It must be noted that according to the Section 2 (1) of the Singapore International Arbitration Act 1994 (which is the curial law in the case of *Astro Group v. Lippo Group*), definition of award and interim award is not distinguished, which mean a decision on the substance in dispute. See Tweeddale and Tweeddale (n 1) para 10.21.

construed as a violation of public policy for the refusal of the enforcement of foreign arbitral awards; this is because international trade must be encourage and free from the parochial interest of any particular state. As the U.S. Supreme Court in the case of *The Bremen et al. v. Zapata Off-Shore Co.*,[141] states:

> "*We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.*"[142]

The Indonesian notion of public policy, which is too inclined towards the enforcement of domestic laws with its broad interpretation, has undermined the effectiveness of international commercial arbitration by making the enforcement of foreign arbitral awards become uncertain and difficult. Indonesia as a party to the New York Convention should apply the pro-enforcement bias and make enforcement of foreign arbitral awards more easy and certain. Indonesian courts must interpret the notion of public policy narrowly and apply it restrictively; not every violation of Indonesian laws must be construed as a violation of public policy, only the ones which violate Indonesia's most basic notions of morality and justice. Furthermore, Indonesian judges must equip themselves with adequate knowledge of international commercial arbitration law, including its principles. It is embarrassing when Indonesian courts construe the notion of public policy as the invalidity of the underlying agreement, while according to international commercial arbitration principles (i.e. doctrine of separability and principle of kompetenz-kompetenz) the jurisdiction to examine the validity of the underlying agreement lies with the arbitral tribunal, or when the Indonesian court (contrary to its own rules as stipulated in the Indonesian Arbitration Act) made it possible for parties to the disputes to refer their cases to the court while they have a valid arbitration clause in their agreements. Indonesian courts must uphold the integrity of the arbitration agreement and awards that are rendered by the arbitral tribunal.

Indonesian courts can ensure the application of the pro-enforcement bias by strictly refusing cases from the parties that already have an arbitration clause in their agreement.

[141] *The Bremen et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)
[142] ibid 9.

Moreover, if Indonesian courts are faced with cases where one of the parties brings up the public policy defence to refuse enforcement of foreign arbitral awards, Indonesian courts must apply the pro-enforcement bias of the New York Convention. If the awards do not violate the most basic notions of Indonesia's morality and justice, and if the awards do not violate the public policy of the proper law of the contract or the curial law (even if it violates Indonesia's domestic public policy), the public policy defence cannot be accepted. Basically, to be more in line with the international approach, the public policy defence to refuse enforcement of foreign arbitral awards must not be so readily accepted by Indonesian courts.

IV.3. Conclusion

Article V of the New York Convention provides grounds for refusing enforcement of foreign arbitral awards. One of the grounds as set out in Article V (2) (b) of the New York Convention is when enforcement of the awards would be contrary to the public policy of the enforcing state. However, there is no clear and universal concept of public policy. Notions of public policy are different from one jurisdiction to another, influenced by different aspects in each society such as economic, political and religious factors, and also by the legal system. States often use a wide array of public policy defences to control the arbitral process. Therefore, it is important to define the notion of public policy, so that enforcement of foreign arbitral awards can be less uncertain.

Fortunately, international commercial arbitration practices, especially in industrialized countries such as England and U.S., have moved to a narrower interpretation and more restrictive application of public policy as a ground for refusing enforcement of foreign arbitral awards. This approach is more in line with the spirit of the New York Convention, which is to ensure respect for the enforcement of foreign arbitral awards. However, Indonesian courts are still stuck in the domestic and broad notion of public policy that undermines the effectiveness of international commercial arbitration. Some of the Indonesian notions of public policy are even

contrary to the principles of international commercial arbitration and to the regulation in the Indonesian Arbitration Act. As a party to the New York Convention, Indonesia has an obligation to ensure respect for the enforcement of foreign arbitral awards and must shift its approach to the pro-enforcement bias. It is essential, because for international commercial arbitration to be effective, parties must be able to enforce arbitral awards.

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