PUBLIC POLICY VIOLATION UNDER NEW YORK CONVENTION

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Abstract

The increasing number of the use of arbitration in Asia has highlighted the significant influence of the recognition and enforcement of arbitral awards. The New York Convention currently becomes the most widely accepted convention to which the courts would refer when recognizing and enforcing foreign arbitral awards. This article would firstly provide a comparative study of the court's interpretation towards public policy as mentioned under Article V (2) b of the New York Convention between non-arbitration-friendly-law Indonesia and arbitration-friendly-law China. Subsequently, it will discuss whether uniformity in interpreting and reserving public policy is required or not.

Keywords: *New York Convention, public policy.*

Intisari

Peningkatan jumlah penggunaan lembaga arbitrasi di Asia mendorong peningkatan signifikansi pengakuan dan pelaksanaan putusan arbitrasi asing. Konvensi New York saat ini menjadi konvensi yang diterima secara luas dimana dijadikan referensi oleh pengadilan dalam hal pengakuan dan pelaksanaan putusan arbitrasi asing. Artikel ini akan pertama-tama membahas studi perbandingan atas interpretasi pengadilan mengenai penggunaan kebijakan publik sebagaimana tertera pada Pasal V (2) b Konvensi New York antara Indonesia yang hukumnya tidak mendukung dan China dengan hukum yang mendukung pengakuan dan pelaksanaan putusan arbitrasi asing. Apakah keseragaman antar negara dalam menginterpretasi dan dan menggunakan kebijakan publik diperlukan atau tidak dibahas pada diskusi selanjutnya.

Kata Kunci: Konvensi New York, kebijakan publik.

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A. Introduction

As commercial transactions become more borderless, commercial disputes may arise between countries with different legal backgrounds and systems. International dispute settlement system subsequently becomes crucial because it has to embrace commercial disputes between parties from different nationalities. Amongst the available means of dispute resolution, beside courts, arbitration is by far the most commonly internationally used due to several advantages that it has to offer, *inter alia*, final and binding decisions, international recognition of arbitral awards, and neutrality.[1] Therefore, it is acceptable to acknowledge that international commercial arbitration has become the norm for dispute resolution in most international business transaction.[2]

Arbitration, as an alternative to traditional litigation, is popularly adopted by businessmen to resolve their disputes due to the universal enforceability of arbitral award.[3] Accordingly, the effectiveness of arbitration in resolving international commercial disputes depends on the recognition and enforcement of international arbitration awards. One of the most effective ways to avoid being sued in a foreign jurisdiction is to ensure that all commercial contracts that a business enters into contain a comprehensive and effective arbitration clause.[4] The obstacles engaged in foreign courts have led to an increasing number of foreign companies that undertake business in Asia including arbitration agreements in their contracts.[5]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards or commonly known as the New York Convention is one of the key instruments in international arbitration which applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.[6] The New York Convention is inevitably one of the most significant international conventions of the 20th century.[7]

The recognition and enforcement of foreign arbitration awards can add more feeling of security for foreign partners whilst doing economic and business activities in a country. Therefore, a supportive role of a country on both the recognition and enforcement of foreign arbitration awards can attract foreign investors and other business entities to conduct business there, which in return may develop the country's economy. However, the concept of arbitration, which has been introduced in a large majority of legal systems, does not always take the same form in different countries.[8] These circumstances lead to different practices in the development of arbitration among countries, not to mention the recognition and enforcement of foreign arbitral awards.

In accordance with recognition and enforcement of foreign arbitral awards, the New York Convention 1958 establishes limitations for member states to refuse foreign arbitration awards. This limitation is allowed only if they can prove one of several conditions stipulated under Article V of the New York Convention to a competent authority where the recognition and enforcement of the awards are sought.[9] Perloff observes:

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1 International Court of Arbitration (Dispute Resolution Services) – International Chamber of Commerce, "Introduction to Arbitration", *http://www.iccwbo.org/court/arbitration/id4089/index.html,* accessed on 19 December 2011.

2 Margaret L. Moses, 2008, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York, p. 1.

3 Li Hu, "Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China", *Arbitration International*, Vol. 20, No. 2, 2004, p. 167.

4 Damian Sturzaker, "Arbitration in Asia", *http://www.mediate.com/articles/sturzakerD.cfm*, accessed on 27 December 2011.

5 *Ibid.*

6 New York Arbitration Convention, "The New York Convention", *www.newyorkconvention.org,* accessed on January 14, 2012.

7 A.A. de Fina, "The New York Convention – 50 Years On", *Indonesia Arbitration Quarterly Newsletter - BANI Arbitration Center*, No. 4, 2008, p. 2.

8 Mauro Rubino-Sammartano, 2001, *International Arbitration – Law and Practice*, Kluwer Law International, the Netherlands, p. 1.

9 Article V of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

> The New York Convention also proposes a limited role for national courts with regard to the enforcement of arbitral awards. Article V provides the seven grounds upon which the court of a contracting state may review a foreign arbitral award for the purposes of recognition and enforcement. The first five of these grounds are quite specific and relate to fundamental contractual and due process requirements. These defences can only be applied at the request of the party against whom the award is invoked. Article V also lays down two grounds for denying recognition and enforcement that a court may raise *sua sponte*. Thus, a court may refuse to recognize or enforce a foreign arbitral award if it deems that under its law: (a) the subject matter of the dispute is not capable of settlement by arbitration; or (b) recognition or enforcement of the award would be contrary to public policy.[10]

This paper shall confine itself to discuss the refusal of foreign arbitral awards on the public policy grounds as stipulated in Article V 2 (b) of the New York Convention. Seeing the fact that the derivation of Article (2) (b) of the New York Convention confers member states to determine whether a foreign arbitral award is on the contrary or not with their public policy, the ambit of public policy might vary amongst member states. Accordingly, the first question posed within this paper is when foreign arbitral awards violate public policy as stipulated under Article V (2) (b) of the New York Convention. The purport of this paper is to examine to what extent public policy is allowed as a means to refuse the enforcement of foreign arbitral awards under this convention. A comparative study of the court interpretation on this Article will be examined between Indonesia, which is known as non-arbitration-friendly-law,[11] and Mainland China, which currently has smooth and effective enforcement mechanism on foreign arbitral awards.[12] The comparative study leads to the second question which is whether further disposal as to conclude uniformity is required in interpreting and reserving public policy as stipulated under Article V (2) (b) of the New York Convention amongst member states.

B. Discussion

1. Refusal of the Enforcement of Foreign Arbitral Awards under the New York Convention on the Public Policy Grounds

The efficacy of arbitration as one of international commercial dispute settlement is ultimately measured by the enforcement of its awards. Both validity and enforceability of an arbitral award are aspects which an arbitral tribunal has to seek aside from the correctness of an award.[13] However, the New York Convention provides grounds to not enforce international arbitral awards if such awards meet the conditions as stipulated in Article V of the New York Convention. A.A. de Fina observed: "The New York Convention, by its term,[14] relies upon "nationality" of the arbitration or award which without further definition potentially gives rise to uncertainty".[15]

There are two distinctive mechanisms on applying refusal grounds provided in Article V of the New York Convention, which states:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the

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[10] Saul Perloff, "The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration", *University of Pennsylvania Journal of International Business Law*, Vol. 13, No. 2, 1992, p. 326.

[11] Herliana, "General Overview of the New York Convention and Indonesian Arbitration Law related to the Recognition and Enforcement of International Arbitration Awards", *Paper* , Seminar on Recognition and Enforcement of International Arbitration Awards under New York Convention 1958 and Indonesian Arbitration Law, Yogyakarta, April 25, 2011.

[12] Li Hu, *Loc.cit.*

[13] Nigel Blackaby, *et al.*, 2009, *Redfern & Hunter on International Arbitration*, Fifth Ed., Oxford University Press, New York, United States, p. 550.

[14] Article I (1) of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), cited from A.A. de Fina, *Loc.cit.*, p. 7.

[15] *Ibid*.

law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. 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:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The grounds rendered under the first paragraph must be proven by the respondent whereas the second paragraph, which regulates violation of public policy under the law of the forum, confers a court to derive its own motions.[16] Accordingly, public policy exception, as stipulated under Article V (2) (b) of the New York Convention, seems to be the only significant criteria,[17] the most controversial ground[18] for refusing the enforcement of foreign arbitral awards. This phenomenon directs various approaches of the courts amongst member states in determining the scope of public policy, which is met under the condition as set in this Article. In accordance with the public policy term, Li Hu further explained:

> However, even now there is no uniform definition of public policy generally accepted by the international community. In fact, the norm of public policy is deeply affected by the judicial practice of the state, and it evolves and develops constantly with a judge's specific interpretation in each case. Thus, public policy is relative. What constitutes a violation of it largely revolves around the facts and is to be decided on an ad hoc basis.[19]

The general rule of interpretation which is applicable to the grounds for refusing enforcement per Article V of the convention is the narrow construal of interpretation.[20] Prof. Dr. Albert Jan van den Berg affirmed:[21] "Except for some occasional aberrations, in general, the courts interpret the public policy defense under the Convention in a restrictive way".

Albeit there seems to be a general trend by most jurisdictions towards a narrow interpretation

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16 Albert Jan van den Berg, "The New York Convention of 1958: An Overview", *http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf*, accessed on 17 December 2011.

17 M. Husseyn Umar, "Court Interventions in International Arbitration – Indonesia Experience", *Indonesia Arbitration Quarterly Newsletter - BANI Arbitration Center*, No. 4, 2008, p. 16.

18 Fifi Junita, "Public Policy Exception and the Enforcability of Foreign Arbitral Awards in Indonesia", *http://www.businessandeconomics.mq.edu.au/phd_studies_research/phd_projects2/research_students_projects/buslaw/fifi_junita*, accessed on 14 January 2012.

19 Li Hu, *Op.cit.,* p. 176.

20 Albert Jan van den Berg, *Op.cit.*, p. 18.

21 Stated on 16 January 2012 in an interview conducted via e-mail.

on the derivation of public policy ground, there are still jurisdictions of member states which interpret this Article in reverse.[22] The inconsistency of the application on the ambit of public policy under this Article might create a judicial barrier on the use of arbitration as a cross-border commercial dispute settlement.

The distinction between domestic and international public policy within national legislation of member states can be a means to determine the ambit of narrow interpretation of Article V. In accordance with the term "narrow interpretation", Prof. Dr. Albert van den Berg construed:

> What is considered to pertain to public policy means in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international case is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations. In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts. They apply it to both the question of arbitrability (ground a of Article V(2)) and other cases of public policy (ground b of Article V(2)). The application of the distinction between domestic and international public policy in cases falling under the Convention also can be seen as a consequence of the general rule of interpretation to construe narrowly the grounds for refusal of enforcement in Article V of the Convention.[23]

However, there is no mandatory command to apply such distinction for member states enshrined in this Article. In accordance with the impact for not rightly in compliance with the New York Convention, Prof. Dr. Albert van den Berg stated:

> In theory, a State could start an action for breach of treaty obligations against the State whose judiciary violates the New York Convention before the International Court of Justice (assuming jurisdiction can be obtained). In practice, that will be *acasus non dabilis*.[24]

Consequently, member states can freely determine whether such distinction is derived or not in their respective national legislation. This phenomenon creates a bias extent on the scope when such public policy is justifiable to be functioned as legal grounds to refuse a foreign arbitral award.[25] Each member state might therefore have different approach on the application of this Article under its own disposal.

2. A Comparative Study: How the Courts in Mainland China and Indonesia Interpret Public Policy Grounds to Refuse Foreign Arbitral Awards?

As obvious, examples of the various approaches and disposals on the public policy ground as stipulated under Article V (2) (b) of the New York Convention come under this heading. A comparative study of courts' interpretation on public policy grounds as to refuse foreign arbitral awards between Mainland China and Indonesia will be examined under several circumstances, both their similarities and differences.

In general, the accession applied to the New York Convention is subject to the reciprocity and the commercial reservations in both Mainland China[26] and Indonesia.[27] Therefore, foreign arbitral awards which will only be applied are those which meet two conditions.: (1) the arbitral award is concluded within the territory of other

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22 Obinna Ozumba, "Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?", *http://www.dundee.ac.uk/cepmlp/car/html/cepmlp_car_13_200809.pdf,* accessed on 17 December 2011.

23 Albert Jan van den Berg, *Op.cit.,* p. 18.

24 Stated on 16 January 2012 in an interview conducted via e-mail.

25 Albert Jan van den Berg, "New York Convention of 1958: Refusals of Enforcement", *ICC International Court of Arbitration Bulletin,* Vol. 18, No. 2, 2007, p. 21.

26 Li Hu, *Op.cit.,* p. 173; see also Article 2 and 3 of the Arbitration Law of the People's Republic of China (applicable only in Mainland China).

27 Article 3 (1) of Indonesian Supreme Court Regulation No. 1 of 1990 concerning Procedure for Enforcement of Foreign Arbitral Awards; see also Indonesian Law No. 30 of 1999, it is implicitly stated that foreign arbitral awards rendered in states that are not member to the New York Convention will not be enforced in Indonesia, quoted from: Karen Mills, "Enforcement of Arbitral Awards in Indonesia and Other Issues of Judicial Involvement in Arbitration", *Paper*, Inaugural International Conference on Arbitration of Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur, Malaysia, March 1, 2003, p. 5.

member states of the New York Convention (reciprocity principle), and (2) the dispute arises under the scope of contractual and non-contractual commercial legal relationships.[28]

However, the requirements as to conclude whether foreign arbitral awards violate the term of "public policy" in both countries are distinctive. They can best be delineated as follows:

a) Mainland China

1) General Introduction of the Use of "Public Policy" in Mainland China

Domestic arbitration and international arbitration are clearly distinguished in Chinese law.[29] Mainland China referred foreign arbitral awards as arbitral awards rendered by the arbitration bodies outside of China.[30] Chinese law has no such phrase as public policy; it uses "public and social interest" instead.[31] When it comes to the interpretation of the "public policy" in international arbitration awards, a very restrictive interpretation is given, making the recognition and enforcement of the foreign arbitration award quite liberal. However as can be seen from the milestone case given by Jinan Intermediate People's Court, which will be discussed later, it is never quite loose in invoking "public policy" as a reason to reject the enforcement of arbitral awards that are rendered outside Mainland China, which is a misconception concluded by legal practitioners outside Mainland China.[32]

In order to seek some parameters on how Chinese courts comprehend and apply the concept of "public policy" to foreign arbitration awards, two parameters have been captured from three study cases conducted by Henry (Litong) Chen and B. Ted Howes[33] as paraphrased below:

1. Violation of public policy does not equal violation of compulsory provisions in the administrative regulations and departmental regulations;[34] and
2. A difficult level of proof, whether related to the moral order of the country[35] or the sovereignty of the Chinese courts,[36] of an affront to the higher "social public interest" of China as a whole is seemingly required in order to conclude a violation of public policy.[37]

As an obvious step to ensure the enforcement of foreign arbitral awards, on 17 April 2000, prior approval[38] from the Supreme People's Court of China (SPC) is mandatorily needed to vacate or refuse the enforcement of foreign arbitral awards.[39] Furthermore, Li Hu observed:

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28 There are two reservations provided for member states under Article I of the New York Convention, *inter alia*: (1) reciprocity reservation, and (2) commercial reservation; cited from Albert van den Berg, "The New York Convention of 1958: An Overview", *Op.cit.*, p. 2 and p. 5.

29 Herman Verbist, "Recognition of Foreign Arbitral Awards in China", *International Business Law Journal – Revue de Droit des Affraires Internationales*, No. 3, 1997, p. 377.

30 This definition is not directly construed in Article 258.2 of the Civil Procedural Law of People's Republic of China (2007), it is eventually defined from the implied meaning under the aforesaid Article as well as a matter of practice, cited from: Henry (Litong) Chen and B. Ted Howes, "The Enforcement of Foreign Arbitration Awards in China", *Bloomberg Law Report - Asia Pacific*, Vol. 2, No. 6, 2009; There is also "foreign-related" arbitral awards which refer to arbitral awards rendered by arbitration bodies located inside mainland China which have a foreign element.

31 Xiaowen Qiu, "Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China", *American Review of International Arbitration*, Vol. 11, No. 4, 2000, p. 609.

32 Henry (Litong) Chen and B. Ted Howes, *Loc.cit.*

33 *Ibid*.

34 *Ibid.*; It has been derived from Case Study 2: a case, dating from March 1999, between Japanese company commenced an arbitration against a Chinese state-owned enterprise (SOE) under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. In the case, the court holds that although the SOE violated the administrative regulation on registration of external debits and the regulation by State Administration of Foreign Exchange, it does not naturally constitute the violation of the public policy. (further information of the case is not attached in detail).

35 *Ibid.*; Case Study 1: The SPC held that the CIETAC arbitral award could not be enforced without causing damage to the social public interests of China in pursuant to Paragraph 2 of Article 260 of the Civil Procedure Law of the People's republic of China of 1991.

36 *Ibid.*; see further on Case Study 3: Chinese court ruled and was affirmed by the SPC that the enforcement of ICC arbitration award would not be refused by the derivation of public policy grounds when there is no violation against China's judicial sovereignty.

37 *Ibid.*; A.A. de Fina stated: "Such provisions are beyond the defenses available under the New York Convention." Cited from: A.A. de Fina, *Op.cit.,* p. 5.

38 As a result, any decision by the lower courts of China which refuse foreign arbitral award must automatically be reviewed by the SPC. Based on a 2008 speech by a deputy Chief Justice of the SPC, between 2000 and 2008, there were about seven to eight times refusal to enforce foreign arbitral awards according to public policy grounds taken by the lower court without having upheld by the SPC; cited from *ibid.*

39 *Ibid*.

> Nowadays, the present enforcement mechanism works well in general. It may be said that the current Chinese enforcement mechanism can guarantee that foreign arbitral awards will be recognized and enforced effectively and smoothly in China, because China possesses a solid legal basis for enforcement as well as very strong supportive court intervention.[40]

At least, in the 2000-2008 time periods, public policy must be dealt with a very precautious and prudent way, in respect of the enforcement of foreign arbitral award upon its reservation by the Chinese courts.[41]

2) The Typical Case that Entails How Chinese Court Invoke "Public Policy" in Dealing with Recognition and Enforcement of the Foreign Arbitration Awards

As in China "foreign" arbitral award, distinguished from "foreign related"[42] arbitral award, is confined to only those arbitral award issued by a foreign arbitration tribunal, the number of cases of refusing foreign arbitration awards is relatively small. As from 2000, there is only one most recent and typical case[43] involving foreign arbitral award being rejected based on "social public interest" or "public policy" which is that given by the Jinan Intermediate People's Court.

On December 22, 1995, one Chinese company, Jinan Yongning Pharmaceutical Co.Ltd. (Yongning Company), and three non-Chinese companies, Hemofarm DD MAG International Trade Company and Sulam Media Limited Company concluded a contract to set up a joint venture. Under the contract, the parties choose to submit any disputes arising under the contract to arbitration under the rules of the International Chamber of Commerce ("ICC") in Paris. Subsequently, a leasing dispute occurred between the Yongning Company and the joint venture entity. The former sued the joint venture for payment of the rental and the return of partial leased property. A Chinese court, holding that the joint venture as the defendant in the disputes is not bound by the arbitration clause between the investors, accepted jurisdiction over the dispute, and ruled in favour of the Yongning Company, ordering that the assets of the joint venture be impounded, which in turn resulted in the suspension of business operation and final closure of the joint venture.

In July 2005, the three non-Chinese parties to the joint venture contract commenced an ICC arbitration in Paris against the Yongning Company, alleging Yongning Company had violated the legal obligation under the arbitral clause by lodging and maintaining litigation in Chinese Court, which further induced the failure of the business. After hearing both sides, the ICC arbitration tribunal confirmed the three non-Chinese parties' petition and ordered the Yongning Company to pay US$6,458,708.40 as damages. When the Yongning Company did not pay the money mandated by the ICC arbitration award, the three non-Chinese companies brought a lawsuit in Jinan Intermediate People's Court on September 10, 2007, seeking the court's recognition and enforcement of the foreign arbitral award. The Court, however, held that the ICC exceeded its power authorized by the arbitration clause. First, arbitration clause only bound the disputes between the contracting parties, therefore did not bind the leasing disputes between the Yongning Company and the joint venture. Secondly, ICC had violated the judicial sovereignty by declaring there was "no legal nor commercial justification for the application for the issuance and enforcement of the preservation orders". As a result, the Chinese court ruled that the ICC arbitration award violated China's judicial sovereignty and, with it, Chinese public policy. Accordingly, the Jinan Intermediate People's Court held that the arbitral award should

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40 Li Hu, *Op.cit.,* p. 178.

41 Delivered on a 2008 speech by a deputy Chief Justice of the SPC; cited from: Henry (Litong) Chen (MWE China Law Offices) and B. Ted Howes (MsDermott, Will & Emery), *Loc. it.*

42 Foreign related arbitration award refers to the arbitral awards issued by the arbitration bodies locate within mainland China, while embrace some foreign elements, e.g. one of the parties is not Chinese.

43 Detail of the case is published on *People's Court Daily,* 16 July 2008.

not be enforced, which decision was affirmed by the SPC.

b) Indonesia

1) General Introduction of the Use of "Public Policy" in Indonesia

Indonesian Arbitration Law distinguishes arbitrations with respect to their venue,[44] regardless of the nationality of the parties.[45] Accordingly, an arbitral award rendered outside the jurisdiction of Indonesia is deemed as international arbitral award. A more restrictive approach has been adopted by Indonesia as to the types of arbitration that will be recognized as international.[46] The District Court of Central Jakarta is designated as the venue to which application for enforcement of foreign-rendered arbitration was to be made.[47]

In accordance with the public policy term, the recognition and the enforcement of foreign arbitral awards will be granted *exequatur*[48] as long as they are not contrary with the public policy.[49] Further definition about the public policy term is not regulated under Indonesian Law No. 30 of 1999.[50] However, the Supreme Court frames the public policy term as the basic principle of the entire legal system and social system in Indonesia.[51] Huala Adolf affirmed that the District Court of Central Jakarta considered a foreign arbitral award to be against public policy if the award violated Indonesian law and its basic principles of the entire legal and social system, *vide* Supreme Court of Indonesia Regulation Number 1 of 1990.[52]

Nevertheless, Madjedi Hasan observed: "The scope of the public order exception under Indonesian law, however, remains unclear because there is no Indonesian case law providing criteria on determinations of international public policy".[53]

In practice, the reservation of public policy term in Indonesia indicates a problem on the broad interpretation of public policy insofar still come into existence.[54] It palpably deviates from the more common narrow interpretation of public policy.[55]

However, Indonesia has already been in a positive track towards a pro-enforcement bias. Karen Mills observed:

> Although Indonesia did take the public policy reservation in adopting the New York Convention in 1981 (only implemented in 1990), by the time the Arbitration Law was drafted, in 1999, they changed the parameter for refusal to enforce to "public order" and did not use the term "public policy." This is a bit stronger and less vague, indicating that enforcement of the award would be likely to cause civil unrest, not just against some undefined policy. This may have been in reaction to the only case in which the public policy ground was used to seek to contest enforcement of a foreign award, which was the very first case ever registered under the New York Convention, the case of *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*.[56]

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44 Herliana, *Op.cit.*, p. 6.

45 Karen Mills, "Arbitration and the Indonesian Judiciary – Enforcement and Other Issues", *International Arbitration Law Review*, Vol. 5, No. 5, November 2002, p. 150; as cited from *Ibid.*

46 Michael Hwang S. C. and Shaun Lee, "Survey of South East Asian Nations on the Application of the New York Convention", *Journal of International Arbitration*, Vol. 25, No. 6, 2008, p. 876.

47 Article 65 Indonesian Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution (State Gazette of 1999 No. 138, Supplement to State Gazette No. 3872).

48 Article 66 (d) Indonesian Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution (State Gazette of 1999 No. 138, Supplement to State Gazette No. 3872) states that international arbitral award can be enforced after being awarded *exequatur* (official approval) from the head of the District Court of Central Jakarta, whereas Article 66 (e) stipulates that the international arbitral award in which involved the Republic Indonesia as one of the parties in the dispute, must have been awarded *exequatur* from the Supreme Court of the Republic Indonesia.

49 Article 66 (c) Indonesian Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution (State Gazette of 1999 No. 138, Supplement to State Gazette No. 3872).

50 Indonesian Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution (State Gazette of 1999 No. 138, Supplement to State Gazette No. 3872).

51 Article 4 (2) The Supreme Court of Indonesian Regulation No. 1 of 1990 concerning Procedure for Enforcement of Foreign Arbitral Awards, cited from Herliana, *Loc.cit.*

52 Stated on January 11, 2012 in an interview conducted via e-mail.

53 Madjedi Hasan, "Enforcement of Foreign Arbitration Awards in Indonesia's Court", *Indonesia Arbitration – Quarterly Newsletter - BANI Arbitration Center*, No. 4, 2008, p. 18.

54 Michael Hwang S. C. and Shaun Lee, *Op.cit.*, p. 891.

55 *Ibid.*

56 Stated on January 13, 2012 in an interview conducted via e-mail.

2) Some Cases on the Annulment of Foreign Arbitral Awards in Indonesia

There are two cases in which the writers bring to be exposed in relation to the annulment of Foreign Arbitral Awards in Indonesia as in contravention with Indonesian public policy.

i) E.D. & Man (Sugar) Ltd. v. Yani Haryanto[57]

In this case, the Supreme Court posed refusal on the basis that the original contract was null and void and, therefore, so was the arbitration clause.[58] The same defects which cause the original contract cannot be declared applicable to the settlement agreement, which was clear, voluntarily entered into and not contrary to public policy.[59] Consequently, any award rendered under the settlement agreement should have been enforced.[60]

ii) Astro v. Ayunda Prima Mitra

The most recent case regarding interpretation of public policy under the Indonesian Arbitration Law is *Astro Nusantara International B.V. v. PT Ayunda Prima Mitra*.[61] This case construes about the enforcement of an award on interim injunction suit rendered by the Singapore International Arbitration Centre. Under this award, Ayunda was ordered not to continue the litigation proceedings against Astro at the South Jakarta District Court in particular as the subject matter of dispute falls under the arbitration clause agreed by both parties. Nonetheless, Ayunda refused to comply with the award voluntarily arguing the South Jakarta District Court has ruled that it has jurisdiction to hear its case against Astro. In response, Astro lodged an application for *exequatur* to the Central Jakarta District Court. The *exequatur* application was not successful.

The Central Jakarta District Court held that the award had violated the sovereignty of the Republic of Indonesia because it intervened with the judicial process in Indonesia even though the award essentially only compels Ayunda to adhere to the arbitration clause. The Central Jakarta District Court concluded that the award is contrary to public policy in Indonesia. This reasoning was accepted by the Supreme Court.

3. Does the Term "Public Policy" Need to Further be Regulated under the New York Convention Scheme as Uniforming its Application Amongst Member States?

As described above, the New York Convention confers a right for its member states to refuse the enforcement of foreign arbitral which violates their respective "public policy". However, there is no such clear definition of the term "public policy" under the New York Convention. It is subsequently presumed that the New York Convention also respectively allows courts of its member states to further define the term of "public policy." Therefore, there is room to use this term parochially in order to safeguard national political interests.[62] This term subsequently presents the possibility of another broad loophole for refusing enforcement which also undermines the utility of the Convention.[63]

However, a positive tendency to favor the enforcement of the New York Convention awards, which is called as pro-enforcement bias, has gradually been borne amongst its member states.[64] There is an overall bias towards the enforcement

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57 This case was decided prior the enactment of Indonesian Law No. 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution (State Gazette of 1999 No. 138, Supplement to State Gazette No. 3872).

58 Karen Mills, a short summary of the case attached in an interview via e-mail.

59 *Ibid.*

60 *Ibid.*

61 The Supreme Court of the Republic of Indonesia No. 01K/Pdt.Sus/2010, *Astro Nusantara International B.V. v. PT Ayunda Prima Mitra*, 24 February 2010.

62 Margaret L. Moses, *Op.cit.*, p. 218.

63 *Ibid.*

64 Alex Baykitch and Lorraine Hui, "Celebrating 50 Years of the New York Convention", *The University of New South Wales Law Journal*, Vol. 31, No. 1, 2008, p. 366. The pro-enforcement bias is construed as the willingness of courts to exercise their discretion to enforce awards and to interpret the public policy exception under Article V (2) narrowly.

of awards, which ensures a level of certainty and predictability in international arbitration that is crucial to international trade.[65] Albeit the pro-enforcement bias is willingly rendered by courts, there are still member states that misuse the public policy grounds as for refusing foreign arbitral awards. Accordingly, further disposal on the use of public policy grounds under this Convention might be an option to frame the existing misuse.

Some correspondences[66] have been conducted to examine whether further disposal in respect of the use of public policy ground in refusing foreign arbitral awards is practically needed or not. According to four respondents from various professions, two respondents in the side to create further disposal and the other two are in reverse.

Obinna Ozumba said:

> The problem, with the New York Convention is that it failed to give clear direction on how the public policy exception is to be interpreted or applied. The misinterpretation or misuse of the public policy exception under Article V (2) (b) can be limited if there is a global consensus on what should constitute international public policy. The International Law Association (ILA) has already given guidelines by giving a narrow interpretation to public policy in its Public Policy Report. The member states of the New York Convention should agree to a singular narrow interpretation of public policy and have this interpretation incorporated to the New York Convention by means of an amendment.[67]

Besides, Herliana mentioned:

> The public policy term may endanger the attempt to promote recognition and enforcement since it is too general and can be interpreted widely. Strict guidelines, as amendment might be difficult, should, therefore, be established in order to condition that each member country will be, at least morally, obliged to follow. [68]

Notwithstanding with both afore-said statements, in relation to whether amendment is necessary or not, Huala Adolf [69] is in an opinion that an amendment does not need to be established. In consonant with the aforesaid statement, Karen Mills observed:

> Nothing mandatory is necessary. There are 142 countries that have ratified the convention from 1958 or 1959 until now. It has taken over 50 years to get this many countries on board. There have been a number of discussions about revising/amending the convention but the daunting task of getting any amendment passed by all signatories put a quick end to any such consideration. So, the prevailing view is: it is not broken, so do not fix it.[70]

Eventually, uniformity in interpreting and reserving the extent of public policy is necessary to ensure legal certainty and predictability of the enforcement of international arbitral awards. However, further disposal as to having passed and adopted by the whole signatories of the New York Convention seems to be a difficult, daunting,[71] and unrealistic task. The recommendation proposed by Obinna Ozumba, conducting prior scrutiny on the majority asset of the one to whom we have an agreement, seems so restrictive and not practical since majority assets might unreservedly be scattered amongst member states. However, the application of pro-enforcement bias, not to mention on the narrow interpretation of the public policy term can be encouraged by increasing domestic court familiarity on this realm amongst member states.[72]

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65 *Ibid.*, p. 371.

66 The writer has conducted some interviews via e-mail with Karen Mills (a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators as well as of the Singapore and Hong Kong Institutes and special advisor to the Board of Indonesia's arbitral institution, BANI), Huala Adolf (an arbitrator of Indonesia National Board of Arbitration, BANI), Obinna Ozumba (a legal practitioner in Nigeria), and Herliana, a lecturer of Faculty of Law of Universitas Gadjah Mada (UGM) in Indonesia.

67 Stated on January 14, 2012 in an interview conducted via e-mail.

68 Stated on January 3, 2012 in an interview conducted via e-mail.

69 Stated on January 11, 2012 in an interview conducted via e-mail.

70 Stated on January 13, 2012 in an interview conducted via e-mail.

71 Karen Mills, stated on January 13, 2012 in an interview conducted via e-mail.

72 One way to improve enforcement rates in certain jurisdictions by increasing domestic court familiarity with the New York Convention, cited from Quentin Tannock, "Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards", *Arbitration International Journal*, Vol. 21, No. 1, 2005, p. 72.

C. Conclusion

The unclear ambit on how court must interpret the use of public policy in the enforcement of foreign arbitral awards has led to uncertainty in its practice. The court approaches on the interpretation of Article V (2) (b) might therefore vary amongst member states. As a very obvious example is the interpretation derived between the courts in Mainland China and Indonesia.

Both Mainland China and Indonesia construe the accession applied to the New York Convention is subject to reciprocity and commercial reservation. However, both contracting parties have their respective means in framing the public policy ground while reserving it to refuse foreign arbitral awards.

In mainland China, the grounds are more limited to two basic reasons, i.e. the *boni mores* or good morals of China[73] and judicial sovereignty and authority of jurisdiction of Chinese courts.[74] In contrary, a foreign arbitral award is against public policy if the award violated Indonesian law and its basic principles of the entire legal and social system, *vide* the Supreme Court of Indonesia Regulation No. 1 of 1990. It is subsequently obvious that the scope of the public order exception under Indonesian law remains unclear because there is no Indonesian case law providing criteria on determinations of international public policy. Nevertheless, by the time the Arbitration Law was drafted in 1999, Indonesian changed the parameter for refusal to enforce to "public order" and did not use the term "public policy." Albeit the distinctions applied to both contracting parties, both Mainland China and Indonesia have apparently been in a positive track of pro-enforcement bias towards the use of public policy grounds.

A positive tendency to favor the enforcement of the New York Convention awards seems to mostly be taken place by member states. However, it is not mandatorily regulated under the New York Convention. Therefore, the misuse of the reservation of public policy grounds in refusing foreign arbitral awards might still be found amongst member states.

Further disposal as to conclude uniformity in interpreting and reserving public policy might be necessary to ensure legal certainty and predictability of enforcement in international arbitration. However, establishing, having passed, and implementing amendments as well as additions of the New York Convention by all member states might be a daunting and difficult task,[75] which seems to be unrealistic. Nevertheless, the application of narrow interpretation of the public policy term can be encouraged by increasing domestic court familiarity on this realm amongst member states.[76]

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[73] It can be referred in the case of *USA Productions and Tom Hulett & Associates v. China Women Travel Agency*. In this case, the Supreme People's Court held that: "The American actors performed Heavy Metal Music causing bad social influence and breaching the contract by going against the Ministry of Culture of China's approval, as well as violating the public interest. The enforcement of the award will damage the social public interest."

[74] It is reflected in the case of *Hemofarm DD, MAG International Trade Company and Sulam Media Limited Company v. Jinan Yongning Pharmaceutical Co. Ltd.* which has already been discussed above.

[75] Karen Mills, stated on January 13, 2012 in an interview conducted via e-mail.

[76] Quentin Tannock, *Loc.cit*.

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