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ARTICLE

Unclear Public Policy: The Real Barrier in Recognizing Foreign Arbitration Awards?

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Abstract

In Indonesia, a foreign arbitral award refers to a decision issued by an arbitration institution or arbitrator outside the country or recognized as such under Indonesian law. This classification reflects Indonesia's adherence to the principle of territoriality in distinguishing arbitration awards as "international." However, enforcement remains contentious due to courts' broad interpretation of public policy under Article 66(c) of Law No. 30 of 1999. Despite Constitutional Court Decision No. 100/PUU-XXII/2024, the lack of a clear definition of public policy persists, leaving courts to determine its scope on a case-by-case basis. Until further regulations provide clarity, Article 66(c) will remain ambiguous and continue to be a basis for challenging foreign awards. A comparison with Singapore highlights two key findings. First, Indonesia applies a broad and inconsistent interpretation of public policy, while Singapore's approach is narrower and more predictable. Second, Indonesian courts lack uniformity, as shown in three patterns: (1) awards are rejected for allegedly breaching sovereignty by restricting access to local courts; (2) awards are annulled for contravening Indonesian laws; and (3) awards are refused for endangering national interests. Rather than redefining international arbitration awards, Indonesia needs clearer guidelines and consistent application of public policy to enhance investor confidence and its global arbitration competitiveness.

Keywords

public policy, setting aside, refusal, foreign arbitral award.

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Introduction

International arbitration has been on the rise, as reflected in data from the International Chamber of Commerce (ICC). In 2023, the ICC Court registered 890 new cases, making it the third-best year in its history. Of these, 870 were conducted under the ICC Rules of Arbitration, while 20 fell under the ICC Appointing Authority Rules. Notably, a record 189 new cases were administered under the Expedited Procedure Provisions. Other key trends include the growing geographical diversity of parties and arbitration venues, as well as an increasing number of female arbitrators.[1]

This data represents just one institution, while many other international arbitration bodies have reported a similar upward trend. Research conducted by Queen Mary University of London and the School of International Arbitration in 2021 highlights this growth, revealing that 90% of respondents preferred arbitration as their chosen method for resolving disputes.[2]

Although international arbitration is widely used to resolve commercial disputes involving cross-border parties, challenges remain in enforcing foreign arbitral awards in the chosen enforcing state. These challenges can render an arbitral award unenforceable. Ideally, an arbitral award should be final and binding; however, losing parties may still challenge it in local courts, sometimes leading to annulment. This poses a significant disadvantage for the winning party, as an award holds no practical value if it is not recognized or enforced by the national court. As a result, the time and costs invested in arbitration may be wasted if the award lacks enforceability. Meanwhile, many arbitration institutions have been updating their rules to align with international best practices, incorporating recent regional developments to strengthen the enforcement of arbitral awards.[3]

Under Indonesian law, arbitration is governed by Law No. 30 of 1999 on Arbitration and Dispute Resolution ("Indonesian Arbitration Law"). It defines arbitration as a method of resolving civil disputes outside the general court system, based on a written arbitration agreement between the disputing parties.[4] Article 34 of the Indonesian Arbitration Law allows parties to choose either an international or national arbitration institution, as stipulated in their agreement. According to Article

[1] International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics," 2020.
[2] Abby Smutny and Norah Gallagher, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World," https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf., 2021, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
[3] Andy Moody, "International Arbitration Year Book 2023-2024," Global Arbitration News, 2024.
[4] Pemerintah Pusat Indonesia, " Undang-Undang (UU) Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa" (Jakarta, July 12, 1999).

65, the authority responsible for recognizing and enforcing foreign arbitral awards in Indonesia is the Central Jakarta District Court. As a signatory to the New York Convention, Indonesia ratified it through Presidential Decree No. 34 of 1981, requiring its application based on the principle of reciprocity. Currently, the enforcement of foreign arbitral awards is governed by Articles 65–69 of the Indonesian Arbitration Law. Following the latest judicial review by the Constitutional Court of the Republic of Indonesia, these provisions remain unchanged.[5]

Consequently, the frequent instances in which courts have refused to enforce awards based on public policy raise significant questions within the international community regarding the effectiveness of arbitral awards for execution or recognition, especially in Indonesia. This situation may further impact the dynamics of commercial cooperation and foreign direct investment in the country. Additionally, it brings to light concerns about the legal certainty surrounding the enforcement of arbitral awards in Indonesia, particularly given that Indonesia is a signatory to the New York Convention.

Conversely, Singapore, also a signatory to the New York Convention, recognizes Article V(2)(b) of the convention, which allows for the refusal of enforcement of foreign arbitral awards on public policy grounds. However, Singapore has established its own definitions and standards concerning public policy, and many have believed that Singapore International Arbitration Centre (SIAC) holds a global standard. Therefore, it is pertinent to conduct a comparative analysis between the two nations, especially considering Singapore's reputation as a leading jurisdiction for arbitration, both domestically and internationally. Through this comparative study, the author aims to provide perspectives on the enforcement of arbitration awards from both countries as well as insights on SIAC's role in the enforcement of arbitration awards that may be beneficial for Indonesia and enhance the understanding of readers regarding the application of public policy as a basis for setting aside or refusing the enforcement of foreign arbitral awards.

Singapore regulates arbitration through three key laws: (i) the International Arbitration Act ("IAA"), (ii) the Arbitration Act ("AA"), and (iii) the Arbitration (International Investment Disputes) Act. The IAA incorporates both the UNCITRAL Model Law and the New York Convention. However, in matters of enforcement and recognition of foreign arbitral awards, the IAA adopts provisions from the New York Convention while exempting Article 36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985. The AA applies to domestic arbitration cases that lack international elements and are subject to local court supervision.[6] For an international arbitral

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[5] Eri Hertiawan and Albertus Aldio Primadi, "Indonesia's Constitutional Court Clarifies 'Foreign Arbitral Award' Definition," January 31, 2025, https://www.ahp.id/clientalert/AHPClientUpdate-31January2025.pdf.

[6] Kelvin Aw et al., "An Introductory Guide to Arbitration in Singapore" (Singapore, 2015), https://www.morganlewis.com/-/media/files/publication/marketing-material/supplemental-info/mlstamford_arbitrationsingapore_june15.ashx.

award to be enforced, it must first be recognized by the enforcing country. Such recognition grants the award res judicata status, giving it the same legal effect as a local court judgment.[7] In essence, recognition serves as the process of acceptance.[8]

An award in international commercial arbitration may only be annulled or denied recognition and enforcement on the specific grounds delineated in Articles V(1)(a)-(e) and V(2)(a)-(b) of the New York Convention, as well as Articles 34 and 36 of the (UNCITRAL) Model Law. These grounds underscore the structural integrity of the arbitration proceedings, rather than the substantive merits of the arbitral award. A court may decline to enforce an arbitral award if it determines that the award contravenes the public policy of that state.

The concept of enforcement is straightforward—it involves executing a decision to ensure compliance. In practice, some arbitral awards only require recognition by the enforcing state, particularly in cases where the losing party is ordered to refrain from certain actions as specified in the award. However, in other cases, both recognition and active enforcement by the enforcing state are necessary to implement the award effectively.[9]

What makes an arbitration considered as an 'International Arbitration' still varied according to how each State would define their term of 'International'. There are 2 (two) criteria for international arbitration to be differentiated from local arbitration, which is through the differences of nationality or the domicile of the parties. This approach was adopted by the European Convention of 1961, which looked at the differences of nationality and also the English Legislation, which considered both the nationality and domicile as the consideration of differences.[10] The characteristics of an international arbitration could be seen from the international arbitration organization, for example, SIAC, which is an international arbitration institution. The second characteristic is the Procedural Structure, for example, SIAC, in which they have their own procedural laws that govern its proceedings. The last characteristic is, in fact, it is international. For example, the disputing parties came from different States with different jurisdictions.[11] Currently,

[7] Margaret L. Moses, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) (1958)," in *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2024), 272–77, https://doi.org/10.1017/9781009444750.014.

[8] Rudy Andreas Sitorus, Golden Mandala, and Tania Rahel Hutapea, "Redefining Legal Certainty: The Constitutional Court's Rulings on Arbitration Law" (Advisory Makarin & Taira, January 2025), https://www.makarim.com/storage/uploads/299d2446-c17f-49d1-aa8d-9492ff7d69ec/M&T-Advisory---The-Constitutional-Court%E2%80%99s-Rulings-on-Arbitration-Law.pdf.

[9] Fabio Trevisan, Aure-Hélène Gaicio-Fievez, and Francesca Mastragostino, "Sovereign Immunity as an Obstacle to Enforcement: The Luxembourg Approach," *Journal of International Arbitration*, 2025, 19–38, http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2025009.pdf.

[10] Rudy Andreas Sitorus, Golden Mandala, and Tania Rahel Hutapea, "Redefining Legal Certainty: The Constitutional Court's Rulings on Arbitration Law."

[11] Alvin Yeo SC, Chou Sean Yu, and Lim Wei Lee, "Singapore: Latest Arbitration Development," in *Asia-Pacific Arbitration Review 2023* (United Kingdom: Law Business Research LTD, 2022), 277–89.

Indonesia shares the same view of these characteristics of international arbitration.[12] The New York Convention Article 1 paragraph (1) defined a foreign arbitral award as an arbitral award that was made in the territory of a State outside of the State where the recognition and enforcement of that award are sought. Parties to International Arbitration could be Inter-State arbitration; State and non-State actors, which is also known as "mixed arbitration"; and between two non- State actors. In general, the parties could conduct the arbitration by *ad hoc* or through an arbitration institution. For ad hoc, the disputing parties have the upper hand to decide on the law of the procedure since they are not bound to the rules and regulations of a particular international arbitration institution. The next one is through an International Arbitration institution in which the parties are bound to the procedural rules from the respective institution, and the disputing parties will be assisted during the procedure by the institution thereof.[13] for example, if the parties agreed in their arbitration clause that they are to resolve the dispute through SIAC, they would be bound by the SIAC Rules.

For international arbitration, the primary regulatory frameworks include the New York Convention and the UNCITRAL Model Law, which states may choose to adopt. Additionally, international arbitration institutions play a crucial role in dispute resolution by providing arbitrators, a forum for proceedings, and applicable procedural rules. Parties involved in arbitration must adhere to the rules of the chosen arbitration institution. Commonly used institutions include the International Chamber of Commerce (ICC), which serves as a widely recognized standard, as well as the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution of the American Arbitration Association (ICDR), and the Hong Kong International Arbitration Centre (HKIAC), among others.[14] Parties have the flexibility to select the institution and the specific rules under which they wish to resolve their disputes.

In Indonesia, a foreign arbitral award is defined as a decision issued by an arbitration institution or arbitrator outside the Republic of Indonesia, or a decision that, under Indonesian law, is recognized as a foreign arbitral award. This reflects Indonesia's adherence to the principle of territoriality in determining whether an arbitration award qualifies as "international".[15] This classification applies even in cases where both disputing parties are Indonesian. If the award is rendered outside Indonesia, it is considered a foreign arbitral award and must comply with the

[12] Eri Hertiawan and Albertus Aldio Primadi, "Indonesia's Constitutional Court Clarifies 'Foreign Arbitral Award' Definition."

[13] Nicholas Poon, "Legislation and Case Notes: Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration," *Singapore Journal of Legal Studies*, July 31, 2012, 185.

[14] Panusun Harahap, "The Implementation of International Arbitration Decisions in Indonesia and Some Foreign Countries," *Yuridika* 34, no. 1 (January 1, 2019): 116, https://doi.org/10.20473/ydk.v34i1.11402.

[15] Panusunan Harahap, "Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan / The Executability of Arbitration Award by Judicial Institutions," *Jurnal Hukum Dan Peradilan* 7, no. 1 (March 21, 2018): 127, https://doi.org/10.25216/jhp.7.1.2018.127-150.

enforcement provisions outlined in Articles 65–69 of Law No. 30 of 1999.[16] A recent ruling in Constitutional Court Decision No. 100/PUU-XXII/2024 addressed the definition of a "foreign arbitral award" under Indonesian Arbitration Law. Previously, Article 1(9) of the Arbitration Law included the term "considered," which led to legal uncertainty due to varying interpretations by courts. The Constitutional Court ruled that this term should be removed to provide greater clarity and consistency. Following this decision, Article 1(9) of the Arbitration Law now states: "A foreign arbitral award is a decision rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or a decision rendered by an arbitral institution or individual arbitrator that, according to the legal provisions of the Republic of Indonesia, is recognized as a foreign arbitral award." This clarification was necessary to prevent inconsistent judicial interpretations, which had previously led to confusion and potentially unjust outcomes in international arbitration cases.[17]

Under Article 66 of the Indonesian Arbitration Law, an international arbitral award can be recognized and enforced in Indonesia only if it meets the following conditions: (1) The award was issued by an arbitrator or arbitral tribunal from a country that has a bilateral or multilateral agreement with Indonesia, (2) The award falls within the domain of commercial law, (3) The award must not conflict with Indonesia's public policy, (4) Enforcement requires an exequatur from the Chairman of the Central Jakarta District Court, and (5) If the dispute involves the Republic of Indonesia as a party, enforcement requires an exequatur from the Supreme Court of Indonesia.

Meanwhile, under Singapore's International Arbitration Act (IAA), an arbitration is considered international if it meets any of the following criteria: (1) At least one party to the arbitration agreement has its place of business outside Singapore, (2) The parties have explicitly agreed that the arbitration involves more than one jurisdiction, (3) A substantial part of the contractual obligations is to be performed in, or the dispute is more closely connected to, a country outside the parties' primary place of business, (4) The parties have agreed in the arbitration agreement that the subject matter involves multiple jurisdictions.

Additionally, the International Arbitration Act (IAA) may apply to a non-international arbitration, but only if explicitly stated in the arbitration agreement. This highlights a key distinction between Singapore's and Indonesia's approach to defining international arbitration. While Indonesia relies solely on territoriality to determine an arbitration's international status,[18] Singapore takes a broader approach, considering factors such as the subject matter, the presence of cross-border elements between the parties, and whether the award is subject to foreign arbitration.

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[16] Eri Hertiawan and Albertus Aldio Primadi, "Indonesia's Constitutional Court Clarifies 'Foreign Arbitral Award' Definition."
[17] Eri Hertiawan and Albertus Aldio Primadi.
[18] Rudy Andreas Sitorus, Golden Mandala, and Tania Rahel Hutapea, "Redefining Legal Certainty: The Constitutional Court's Rulings on Arbitration Law."

In Singapore, the party against whom enforcement is sought has 14 days from the application date to challenge the enforcement of the award. If no challenge is made within this period, the award becomes binding and enforceable as a judgment of the Singapore High Court, with full enforcement remedies attached. To challenge an award, parties may rely on the grounds outlined in Article 34 of the UNCITRAL Model Law or Section 24 of the IAA. These grounds include procedural irregularities, fraud, public policy violations, breaches of natural justice, and jurisdictional issues.

Examining the longstanding issues surrounding the enforceability of international arbitral awards in Indonesia, it is evident that foreign awards are classified as international arbitration. However, some national courts may still choose not to recognize or enforce them. Many well-studied cases highlight public policy conflicts as the primary basis for setting aside or refusing enforcement, rather than challenging the international nature of the awards themselves. In the recent Constitutional Court Decision No. 100/PUU-XXII/2024, the need for a clear definition of public order remains unaddressed, leaving its interpretation to the courts on a case-by-case basis.

Until further regulations are introduced, Article 66(c) of the Indonesian Arbitration Law regarding public policy will remain ambiguous and continue to be a basis for challenging international arbitral awards, rather than focusing solely on the requirements for their enforcement. Ideally, an arbitral award should be final and binding on the parties. However, in certain cases, the losing party may challenge the award in local courts, potentially leading to its annulment or refusal of enforcement. This poses a significant disadvantage to the winning party, as the time and costs invested in arbitration may be wasted if the award is rendered unenforceable. These provisions align with Article V(2)(b) of the New York Convention, as well as Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law, which allow courts to refuse enforcement based on public policy considerations. Notably, Article V(2)(b) of the New York Convention grants each state the discretion to define and determine its own public policy standards.

Under Indonesian arbitration law, courts have the authority to intervene in the enforcement of foreign arbitral awards, including the discretion to refuse recognition and enforcement based on their interpretation of public policy.[19] This basis for refusal is outlined in Article 66(c) of the Indonesian Arbitration Law. However, the law does not define public policy, establish specific standards, or clarify the limits of what constitutes being "in conflict with public order." As a result, Article 66 remains open to broad interpretation, which can sometimes benefit the losing party by allowing the court to reject the enforcement of the award.

From the Authors' perspective, although the New York Convention serves as the foundation for international arbitration regulations in Indonesia, there should be further clarification on what constitutes public policy in alignment with Indonesia's moral and legal framework. This would help enhance legal certainty. While the New

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[19] Winner Sitorus, "Judicial Control of Foreign Arbitral Awards in Indonesia," *Indonesian Journal of International Law* 14, no. 4 (July 31, 2017), https://doi.org/10.17304/ijil.vol14.4.706.

York Convention provides general guidelines for all signatory states, it ultimately falls upon each member state to refine and define its own interpretation of public policy.

As a result, the frequent refusal of courts to enforce arbitral awards on the grounds of public policy raises concerns within the international community about the effectiveness of such awards in Indonesia. This uncertainty may also impact the flow of commercial cooperation and foreign direct investment in the country.[20]

This raises concerns about the legal certainty of enforcing foreign arbitral awards in Indonesia, particularly given its status as a party to the New York Convention. Similarly, Singapore, also a signatory to the convention, recognizes Article V(2)(b), which allows public policy as a ground for setting aside or refusing enforcement of foreign arbitral awards. However, Singapore has established its own definition and standards for public policy. Given that Singapore is one of the most arbitration-friendly jurisdictions both domestically and internationally, a comparative study between the two countries is particularly relevant. This research focuses on analyzing how public policy is interpreted and applied in Indonesia compared to Singapore, aiming to identify patterns and characteristics that shape its role in setting aside or refusing the enforcement of foreign arbitral awards in Indonesia.

Through this comparative analysis, the Authors aim to provide insights that may be considered for adoption in Indonesia while offering readers a deeper understanding of the use of public policy as a key basis for setting aside or refusing the enforcement of foreign arbitral awards. This research specifically focuses on how local courts apply and interpret public policy in such cases. The results will provide valuable insights into the application of public policy in the context of setting aside and refusing enforcement of foreign arbitral awards in Indonesia and Singapore.

Methods

Research as a scientific endeavour that follows specific methods, systematics, and reasoning to examine one or more legal phenomena through analysis.[21] This study employs normative legal research methods, which focus on gathering and analyzing secondary data. Such data is categorized into three levels: (1) primary legal materials, including the 1945 Constitution of Indonesia, the Indonesian Civil Code, and various laws and regulations, such as Law No. 30 of 1990 on Arbitration and Alternative ; (2) secondary legal materials, consisting of books and journals; and (3) tertiary legal materials, which encompass websites and other reference sources.

[20] Fathur Riyadhi Arsal, "The Role of International Arbitration Institutions in Resolving Business Disputes Between Countries," *Indonesian Journal of Law and Justice* 1, no. 4 (January 17, 2024): 11, https://doi.org/10.47134/ijlj.v1i4.2137.

[21] Soekanto S and Mamudji, Penelitian Hukum Normatif : Suatu Tinjauan Singkat. (Jakarta: Rajawali Pers, 2015).

Results and Discussion

I. Public Policy or Public Order in International Arbitration

Essentially, public policy has a broad and complex definition. In the practice of international private law pertaining to the enforcement of foreign judgements, public policy share or refer to the same definition as public order in which the performance of a certain judgement or contracts shall not contravene with the fundamental moral and principles that exists or something that would offend the public interest of the enforcing State. However, it is used differently in accordance with the respective country or legal system.[22]

Public policy in arbitration allows courts of the enforcing country to exercise their jurisdiction in refusing enforcement as provided under Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law. The local court of the country who rendered the arbitral award are also allowed to set aside the arbitral award on the basis of public policy, as stipulated under Article 34(2)(b)(ii) of the UNCITRAL Model Law. The use of public policy was originally intended to become the safety net for States, in which they can refer to public policy whenever there are circumstances or cases where the enforcement sought would abandon and harm the State's fundamentals.[23] However, its broad and vague interpretation adopted by States could also weaken the potential of international arbitration, as there is no clear standard.[24]

The New York Convention 1958 Article V(2)(b) gives room for each State to define what constitutes as public policy in accordance with their respective views and local culture. The New York Convention does this to respect the sovereignty of each State. In practice, there are certain countries that adopted a broad interpretation of public policy. Meanwhile, there are also countries that clearly defined the standard of public policy and adopted a more restrictive definition.

The most widely accepted definition of public policy under Article V(2)(b) of the New York Convention refers to the public policy of the local forum State. As stated under Article V(2)(b), it explicitly stipulates that it refers to "the public policy of that country". Therefore, public policy in Article V(2)(b) refers to the public policy that is applicable in the state where recognition and enforcement is sought. The New York Convention 1958's main role is to facilitate international trade, thus, public policy

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[22] Iyllyana Che Rosli et al., "Judicial Preclusion in International Arbitration: Comparative Analysis of UK, Australia, and Malaysia's Practices," *Jambe Law Journal* 7, no. 2 (November 24, 2024): 313–40, https://doi.org/10.22437/home.v7i2.385.

[23] Robert S. Matlin, "The Federal Courts and the Enforcement of Foreign Arbitral Awards," *Pace Law Review* 5, no. 1 (September 1, 1984): 151, https://doi.org/10.58948/2331-3528.1574.

[24] Che Rosli et al., "Judicial Preclusion in International Arbitration: Comparative Analysis of UK, Australia, and Malaysia's Practices."

shall be interpreted in a national context.[25] However, when it comes to determine whether public policy is international or domestic, most countries understand it as a simple breach of local law, which is sufficient to refuse recognition and enforcement on the basis of public policy.

Further definition on public policy could be found in the famous and frequently quoted judgement of the Parsons & Whittemore Overseas v. *Société Générale de L'Industrie du Papier* (RAKTA), the Second Circuit of the United States Court of Appeals, which stated that:

"enforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice".[26]

The same court also stated that:

"to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy".[27]

From the definition provided by Parsons & Whittemore Overseas v. *Société Générale de L'Industrie du Papier*, public policy should be construed or defined in an extremely narrow manner, where the enforcement of such award would violate the forum court's basic notions of morality and justice. This judgement also provided that public policy should be used in an extremely careful manner, as such it should not result in protectionism, which would potentially undermine the original intention and utility of the Convention, thus, would also discourage international arbitration, considering that the original intent of the New York Convention and UNCITRAL Model Law is to encourage the use of international arbitration. In the English Common Law System, the England and Wales Court of Appeals upheld that the use of public policy exception as regulated under the New York Convention shall only be applied only if the enforcement of the foreign award would be detrimental to the public good or the possibility of the enforcement to be offensive to the average reasonable and fully informed member of the public on whose behalf the state's powers are exercised.[28] The Court of Appeal of England and Wales further explained that while public policy can never be exhaustively defined, public policy should be approached with extreme caution.[29]

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[25] Sandy Octavian Ewangga, "Comparison of Public Policy Defenses Implementation in Indonesia with USA and UK," *Transnational Business Law Journal* 3, no. 2 (August 31, 2022): 77–94, https://doi.org/10.23920/transbuslj.v3i2.1371.
[26] Huseyin Alper Tosun, "Public Policy Consepts International Arbitration" (University of California, Berkeley, 2019).
[27] Huseyin Alper Tosun.
[28] Darius Chan and Elias Khong, "Re-Calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards," *Journal of International Arbitration*, 2024, 271–316, http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2024014.pdf.
[29] "Introducing the Special Issue on 'Enforcing Arbitral Awards Against Sovereigns: Recent Trends in Law & Practice,'" *Journal of International Arbitration*, 2025, 1–4,

Therefore, it is clear that public policy is a complex doctrine where there are various different views on it. Public policy cannot be ultimately defined into one definition, considering that the use of public policy tends to look into case-to-case basis, and thus, resulting in a broader adoption by most States. Hence, it is important to also have a clear standard on the use of public policy. With the existence of a clear standard, the use of public policy would have legal certainty and thus, decreasing the chance for it to be misused.

II. Public policy in Indonesia

In accordance with Article V(2)(b) of the New York Convention, the recognition and enforcement of foreign arbitral awards may be refused if it is found that the recognition and enforcement of the award would be against the public policy of the enforcing country. The New York Convention was ratified by Indonesia through the issuance of Presidential Decree No. 34 of 1981. Article V(2) of the New York Convention is also stipulated in the Supreme Court Regulation No. 1 of 1990 on the Procedures of Enforcement of Foreign Arbitral Awards, which was later enhanced and stipulated under Articles 65 to 69 of the Indonesian Arbitration Law.

Article 3 paragraph (3) and Article 4 paragraph (2) of the Supreme Court Regulation No. 1 of 1990 on the Implementation Procedures of Foreign Arbitral Award stipulates that exequatur for foreign arbitral award would not be granted if the arbitral award is against the public policy of Indonesia. The Supreme Court Regulation No. 1 of 1990 refers public policy as the very basic principle of Indonesia's entire legal system and society. Article 66(c) of Indonesian Arbitration Law also stated that a foreign arbitral award can be recognized and enforced in Indonesia if the arbitral award is not against the public policy of Indonesia.[30]

In recent years, legal scholars have been trying to provide a clear definition of public policy. However, these are only views that are not legally binding. Moreover, the views between scholars may differ according to their interpretation of public policy but many of them headed to the same need dan shared the same purpose, that is to set limits and clear definition of public policy in order to enforce finality of foreign arbitral awards.

However in practice, the enforcement of foreign arbitral awards still faces challenges in Indonesia, especially regarding the non-exequatur given by the enforcing court on the basis of public policy. These landmark cases are:

1. F.MAN v. YANI HARYANTO

The case of F Man v Yani Haryanto is considered as one of the landmark cases in Indonesia pertaining to the use of public policy to set

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http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2025007.pdf.

[30] Chan and Khong, "Re-Calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards."

aside foreign arbitral awards. In this case, E.D. & F MAN ("F MAN") entered into a sale and purchase agreement with Yani Haryanto (hereinafter, Yani) on the purchase of 400,000 ton of sugar, consisting of 2 (two) contracts which are, 300,000 ton of White Sugar number 7458 dated 12 February, 1982 and White Sugar number 7527 for 100,000 ton dated 23 March, 1982. The parties agreed that the payment and other procedures shall be stipulated in the agreement, the parties also agreed to solve any disputes through arbitration in London, based on English Law. In the agreement, it is also stipulated explicitly that the buyer shall be entirely responsible in obtaining all the necessary import license and failure to do so will not be sufficient to be the grounds for *force majeure*.

However, in around 1982 to 1983, the price of sugar in Indonesia fell and thus, Yani wanted to annul the agreement that he had with F MAN, unilaterally. On the other hand, F MAN had already bought the sugar from a third party to fulfil their obligation. In 1984, F MAN brought this dispute to arbitration in London and requested USD $146 million as compensation for breach of contract. This request was granted by the London Arbitration and required Yani to pay USD 22 million to F MAN. However, Yani refused to acknowledge and pay the compensation and consequently, appealed the case to the British High Court in London. Yani argued he did not fully understand the language of the agreement. In the end, the British High Court refused Yani's appeal and upheld that Yani is bound to the agreement including the arbitration clause. On 7 July 1986, both parties agreed to negotiate and as the result of the negotiation, Yani agreed to pay USD $27 million that will be paid in three stages. However, in the end Yani could only pay USD $5 million to F MAN.[31]

Yani then requested for the annulment of the agreement to the Central Jakarta District Court in 1988 under the basis that the agreement violates Presidential Regulation No. 43 of 1971 and Presidential Regulation No. 39 of 1978 regarding sugar importation, both of which stated that only *Badan Urusan Logistik* (BULOG) is authorised to conduct sugar importation in Indonesia. In the end, the Central Jakarta District Court ruled that the sale and purchase agreement violated Presidential Regulation No. 43 of 1971 and Presidential Regulation No. 39 of 1978 and thus, the agreement is void by law in accordance with Article 1320 of the Indonesian Civil Code, in which the agreement is against the prevailing law of Indonesia. In view of the fact that the underlying agreement to the arbitration is void by law, the arbitral award is unenforceable.[32] Therefore, the arbitral award is unenforceable on

[31] Mutiara Hikmah, "The Roles of The Supreme Court of The Republic Of Indonesia in Enforcement of International Arbitral Awards in Indonesia," *Indonesia Law Review* 3, no. 3 (December 31, 2013), https://doi.org/10.15742/ilrev.v3n3.40.
[32] Ewangga, "Comparison of Public Policy Defenses Implementation in Indonesia with USA and UK."

the basis of breach of Indonesia's public policy and thus, is no longer relevant to be enforced.

Based on the case of F MAN v. Yani, it could be concluded that the court defined the breach of public policy as something that is against the prevailing rules and regulations in Indonesia. In this case, due to the main agreement between the parties that is against the Indonesian law, in which it breached Presidential Regulation No. 43 of 1971 and Presidential Regulation No. 39 of 1978 and consequently failed to fulfil Article 1320 of the Indonesian Civil Code on the legality of an agreement which are: (1) consent between the parties; (2) the parties entering the agreement must have the capacity to do so; (3) there must be a specific Subject; and (4) legal Cause. Therefore, since the main underlying agreement to the arbitration is illegal and ruled as void by law, the court concluded that the enforcement of the arbitral award would be against the public policy of Indonesia.[33]

One of the famous cases pertaining to the use of public policy to set aside an award is the case of Pertamina v Karaha Bodas Company ("KBC"). In this case, Pertamina breached the contract entered with KBC. KBC then sought to settle this dispute through arbitration in Geneva, Switzerland. The arbitral award rendered was in favor of KBC, thus, requiring Pertamina to pay for compensation to KBC of USD 261 million for the postponement of the 1998 electric energy development project. KBC then submitted the application to enforce the award in various countries where Pertamina's assets are located, such as, Indonesia, the United States, Singapore, and Hong Kong. In response, Pertamina has taken legal measures to set aside the arbitral award in those countries

2. Karaha Bodas v. Pertamina

One of the famous cases pertaining to the use of public policy to set aside an award is the case of Pertamina v Karaha Bodas Company ("KBC"). In this case, Pertamina breached the contract entered with KBC. KBC then sought to settle this dispute through arbitration in Geneva, Switzerland. The arbitral award rendered was in favor of KBC, thus, requiring Pertamina to pay for compensation to KBC of USD 261 million for the postponement of the 1998 electric energy development project. KBC then submitted the application to enforce the award in various countries where Pertamina's assets are located, such as, Indonesia, the United States, Singapore, and Hong Kong. In response, Pertamina has taken legal measures to set aside the arbitral award in those countries.[34]

Pertamina filed to annul the arbitral award to the Central Jakarta District Court on 14th of March 2002. On the basis that (1) the arbitral Tribunal exceeded its power in rendering the arbitral award by disregarding

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[33] Ewangga.

[34] US District Court for the Southern District of Texas, "Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara," 2002.

the parties' express choice of Indonesian law; (2) during the proceeding, the arbitral tribunal consolidated the two proceedings into one proceeding, thus, violating the agreement between both parties and the UNCITRAL Model Law; (3) Pertamina was forced by the Tribunal to share the choice of arbitrator with the Indonesian Government and PLN; and lastly, (4) the arbitral award is against the public policy in Indonesia considering that Pertamina and PLN are liable for their compliance with Indonesian law.[35]

The court then issued Decision No. 86/PDT.G./2002./PN.JKT.PST dated 27 August 2002 in which the court ruled in favour of Pertamina and decided to annul the Swiss arbitral award. According to the Central Jakarta District Court, they annulled it in consideration that the arbitral award is against the public policy of Indonesia.[36] The court took into consideration the definition from Erman Rajagukguk, which defined public policy as "order, welfare, and security" thus, equating the definition of public policy with "justice".[37]

Due to this consideration and interpretation of public policy, the court ruled that the Swiss arbitral award violates Presidential Regulation No. 39 of 1997on the Suspension or Reassessment of Government, State-Owned and Private Projects Related to Government or State-Owned Enterprises and Presidential Regulation No. 47 of 1997 on Changes in the Implementation Status of Some Government Projects, State-Owned Enterprises, and the Private Sector Related to the Government or State-Owned Enterprises that were Originally Suspended or Reviewed. Both Government Regulations in essence regulates the suspension of all government procurement or projects that require huge amount of money, including, the project between KBC and Pertamina. Moreover, Presidential Regulation No. 39 of 1997 and No. 47 of 1997 were issued due to the current situation during that time, in which Indonesia was experiencing a financial crisis. Therefore, the Central Jakarta District Court ruled that if the geothermal project between Pertamina and Karaha Bodas is to be continued, it will harm Indonesia's interest and welfare, as Indonesia must uphold and protect the economic welfare of the whole nation, during the economic crisis.

In the appeal to the Supreme Court with case number No.01/Bandin/Wasit.Int/2002, dated 8 March 2004, the Supreme Court overturned the Central Jakarta District Court's verdict with considerations, inter alia, that the scope in Law No. 30 of 1999 that discussed about international arbitration is limited to only Article 65 to 69 and thus, Article 70 and other provisions outside of Article 65 to 69 that regulates the

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[35] US District Court for the Southern District of Texas.
[36] Ning Adiasih and Sam Letare Simanjuntak, "Non-Enforcement of Foreign Arbitration Award in Indonesia," 2023, 981–87, https://doi.org/10.2991/978-2-494069-49-7_164.
[37] Sitorus, "Judicial Control of Foreign Arbitral Awards in IndonesiA."

requirements for recognition and enforcement of foreign arbitral award in Indonesia is not applicable for international arbitration.[38]

In this case, the Central Jakarta District Court interpreted Article V(2) of the New York Convention as the provision that allows local courts to annul an arbitral award. However, the context of New York Convention regarding the use of public policy is only to set aside the recognition and enforcement of the foreign arbitral award and not to annul the award. Hence, the one that has the competency to annul the award should be the Swiss court *vis-à-vis* where the arbitral award was rendered. It is important to note that annulment of an arbitral award is different from the refusal of recognition and enforcement in which both have different legal consequences. Annulment refers to an act of denial or to make the award as if it had never been made. Meanwhile, refusal of an arbitral award does not mean that the arbitral award is invalidated, as it only refused the recognition and enforcement of the arbitral award in the enforcing jurisdiction. Moreover, the court also critically misinterprets the Article 70 of Law No. 30 of 1999, in which Article 70 concerning the annulment of an award shall only be applied to local arbitral award, as the enforcing forum should not have the power to annul foreign arbitral awards.

From this case the Central Jakarta District Court defined that the project as the basis of the arbitration between Pertamina and KBC is against the public policy of Indonesia as it violates Presidential Regulation No. 39 of 1997 and No. 47 of 1997. Moreover, the court also interprets public policy as something that might harm or threaten the welfare of the Indonesian people in the middle of the severe monetary crisis. This consideration by the court has fulfilled one of the criteria of Article 4(2) of the Supreme Court Regulation No. 1 of 1990, which stipulates that public policy relates to the basic foundations of the entire Indonesian legal system and society.

Therefore, the court interpreted that the Swiss arbitral award harms the public policy that is fundamental of the entire Indonesian legal system and society. Thus, the agreement should be considered as invalid as it breached the Presidential Regulation No. 39 of 1997 jo. Presidential Regulation No. 5 of 1998 and No. 47 of 1997. Meanwhile, the Supreme Court found that the Central Jakarta District Court does not have the jurisdiction and power to set aside the arbitral award.

3. Astro v. Ayunda Prima

In the case of Astro All Asia Network, et al. (hereinafter, Astro) v PT Ayunda Prima Mitra, et.al., (hereinafter, PT Ayunda Prima), the Indonesian court refused the enforcement of an arbitral award rendered by SIAC on the basis of public policy. This case started from the dispute between Astro All

[38] US District Court for the Southern District of Texas, "Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara."

Asia Network, a Malaysian company, with PT Ayunda Prima, one of the subsidiary companies of PT First Media Tbk, which is still under Lippo Group. In 2005, both parties entered into a joint venture agreement to establish PT Direct Vision. The share allocation was divided into 49% owned by PT Ayunda prima and 51% owned by Astro.[39]

In 2008 both parties had a dispute regarding share ownerships and payment of bills. The joint venture agreement between the parties appointed SIAC to have the jurisdiction to arbitrate any dispute that arises from this agreement. Pursuant to the agreement, Astro brought the case to SIAC to resolve the dispute and demanded IDR 2.46 trillion as compensation for breach of contract.[40] However, First Media and Ayunda Prima had already filed the case to the Indonesian district court on the basis of act against the law or tort on September 3, 2008, registered as case number No.1100/Pdt.G/2008/PN.JKT.SEL. First Media argued that the arbitral award rendered was against Indonesia's public policy and also interferes with the sovereignty of the Indonesian court in assessing the case, previously submitted by Ayunda Prima. In total, SIAC issued 4 (four) awards:

1. Further Partial Award issued on 3rd October 2009;
2. Award On Cost for The Preliminary Hearing From 20-24 April 2009 issued on 5th February 2010;
3. Interim Final Award issued on 16th February 2010 which was later revised with the Memorandum of Correction issued on 23rd March 2010; and
4. Final Award - Interest and Costs issued on 3rd of August 2010.[41]

Astro submitted the SIAC arbitral award (ARB062/ 08/JL) to the Central Jakarta District Court for enforcement. The Central Jakarta District Court rejected the arbitral award and concluded the arbitral award as unenforceable in Indonesia. Astro then appealed to enforce the award, which the court also decided to not grant exequatur through the Decision of the Central Jakarta District Court Number 12/PDT.ARB.INT/2011/PN.JKT.PST dated March 23, 2010, due to reasons namely:

1. The court assessed that the Partial Award issued on 3rd of October 2009 intervened the sovereignty of Indonesia specifically, the Indonesian court proceeding (Article 3(2) of Law No. 48/2009) since case No. 1100/ Pdt.G/ 2008/ PN.JKT.SEL filed by Ayunda Prima was still ongoing during that time.

[39] Sultan Fauzan Hanif and Rully Faradhila Ariani, "Fair Legal Certainty In The Implementation Of International Arbitration Awards (A Socio Legal Study)," *Pattimura Law Journal* 6, no. 2 (March 31, 2022): 16, https://doi.org/10.47268/palau.v6i2.947.
[40] "Astro Nusantara International & Others v PT Ayunda Prima Mitra & Others," Singapore, 2012.
[41] Chartered Institute Of Arbitrators, "Singapore Court Refuses to Entertain a Jurisdictional Objection to the Enforcement of Domestic International Arbitration Awards" (Singapore, 2012).

2. The court also assessed that the Final Award clauses 17.4 and 17.6 issued on 23rd of March 2010 limits the right of a person to file a lawsuit to the court and this is deemed to be against the public policy regulated and applied in Indonesia. Article 17.6 of the SSA of the SIAC arbitral award stipulated:
3. "No Litigation. The Parties agree that none of the Parties will be allowed to commence or maintain any action in any court of law with respect to any Dispute, except for the enforcement of arbitral award granted pursuant to proceedings commenced pursuant to Clause 17.4 or interim orders under Clause 17.11"
4. 1. The court assessed that the Award On Cost For The Preliminary Hearing From 20-24 April 2009 issued on 5th of February 2010 and the Final Award - Interest and Costs issued on 3rd of August 2010 falls within the scope of procedural law and not commercial law as regulated under Article 66(b) of Indonesian Arbitration Law.[42]

Due to these considerations, the court granted non-exequatur on all four arbitral awards issued by SIAC. However, Astro submitted other measures such as, cassation to the Central Jakarta District Court, which rendered Decision No. 12/PDT.ARB.INT/2011/PN.JKT.PST and Judicial Review to the Supreme Court of Indonesia, which also concluded that the SIAC Arbitral award No. 062 (ARB062/08/JL) as unenforceable under Supreme Court Decision No. 26PK/PDT.SUS-ARBT/2016. Astro then proceed to enforce the SIAC arbitral award in Singapore and Hong Kong.[43] This case is considered as one of the landmark cases in Singapore and gained attention worldwide.

From this case, it could be seen that the court interprets public policy in Article 66(c) of Indonesian Arbitration Law as something that (1) must not be in conflict with the basic principles of Indonesia's entire legal system and society, as stipulated under Article 4(2) of the Supreme Court Regulation No. 1 of 1990, which relates to the basic principles of the entire legal system and society in Indonesia; (2) must not be against the prevailing rules and regulations of Indonesia. For this interpretation, the court refers to the Karaha Bodas v. Pertamina case based on Central Jakarta District Court Decision No.86/PDT.G./2002./PN.JKT.PST dated 27 August 2002; (3) must not violate Indonesia's sovereignty as a State. The court refers to the interpretation of public policy made by the Supreme Court Decision No. 01K/Pdt.Sus/2010 dated 24 February 2010, which ruled that an arbitral award is prohibited to stop the judicial process in Indonesia. Hence, if the arbitral award stipulates or limits the judicial process in Indonesia, it is considered to have breached the public policy in Indonesia, as no foreign power can interfere with the ongoing legal process.

[42] Sitorus, "Judicial Control of Foreign Arbitral Awards in Indonesia."
[43] "Astro Nusantara International & Others v PT Ayunda Prima Mitra & Others."

Consequently, the court's ruling that the arbitral award is against the public policy of Indonesia is already in line with the previous precedent and prevailing regulations, considering that the Interim Final Award dated 16 February 2010, which was later revised with the Memorandum of Correction issued on 3rd March 2010 contains decisions that breached Indonesia's sovereignty and judicial process, which stipulates, inter alia, (a) Ordered PT First Media and PT Ayunda Prima Mitra to stop the ongoing trial process in Indonesia; (b) Demanded PT First Media and PT Ayunda Prima Mitra to cease funding of the trial process in Indonesia; and (c) Prohibited PT First Media and PT Ayunda Prima Mitra to file any court proceedings in Indonesia. Hence, the SIAC arbitral award is clearly a breach to Indonesia's public policy as it (1) intervened the judicial process in Indonesia, which is prohibited by Article 3(2) of Law No. 48 of 2009 concerning Judicial Power, considering that Case No. 1100/Pdt.G/2008/PN.JKT.SEL is still ongoing during that time; (2) The arbitral award breached the principle of procedural law in Indonesia (i.e., Poin't de action principle), which gives everyone the right to defend their interests; and (3) The arbitral award breached the principle of Audit Et Alteram Partem since it eliminates the chance of someone's opportunity to defend their rights and interests. Therefore, it could be seen that breach of public policy is not only interpreted as something that is against the prevailing laws, but also if the arbitral award interferes with the local court proceeding in Indonesia by limiting the right of a person or the Indonesian court to assess or to submit a case to the national court.

4. Bankers Trust v. PT Mayora Indah Tbk

Another case pertaining to the use of public policy to refuse enforcement of foreign arbitral award is the case of Bankers Trust, a London based company with PT Mayora Indah ("PT Mayora"), an Indonesian company. The case first started when PT Mayora and Bankers Trust entered into an agreement in 1995. However, shortly after the agreement was signed, PT Mayora failed to fulfil its obligation under the agreement due to the financial crisis in Indonesia in 1998. Bankers Trust brought this case to the London Court of International Arbitration ("LCIA") to settle the dispute. At the same time, PT Mayora brought this case to the South Jakarta District Court to request for annulment of the ISDA agreement with the basis that the derivatives swaps transaction is against Indonesian law as it has similarity with gambling. Thus, it breached the public policy of Indonesia. Even though the London Arbitration has the power to assess the case, the South Jakarta District Court still accepted the case filed by PT Mayora, which rendered Decision No. 46/Pdt.G/1999 dated 9 December 1999, in favour of PT Mayora. The court ruled that the ISDA Agreement between the parties is against the public policy and law of Indonesia.[44] In view of the fact that the agreement dealt with swap trading, which is considered as illegal in Indonesia.[45] Thus, the South Jakarta District Court ruled that the agreement between PT Mayora and Bankers Trust is invalid (*void ab initio*). Meanwhile, LCIA ruled in favour of Bankers Trust.

In the end, the Central Jakarta District Court refused to enforce the LCIA arbitral award through decisions No.001/Pdt/Arb.Int/1999/PN.JKT.PST and No.002/Pdt/Arb.Int/1999/PN.JKT.PST *juncto* No.02/Pdt.P/2000/PNJKT/PST.[46] The court refused Bankers Trust's request for exequatur on the basis that the arbitral award breached Indonesia's public policy. The public policy meant by the Central Jakarta District Court is the consideration that the court proceeding was still ongoing during the request for enforcement of the arbitral award, the court concluded that the enforcement would breached Indonesia's public policy. Bankers Trust appealed the non-exequatur to the Supreme Court under the basis that the Central Jakarta District Court did not exercise its role in accordance with Indonesia Arbitration Law in which the Central Jakarta District Court only has the right to examine the formality of the application of the award and not the substantive of the arbitral award.

The Central Jakarta District Court ruled that the arbitral award is unable to be enforced since it is against the public policy in Indonesia and the Supreme Court upheld Central Jakarta District Court's verdict. The Supreme Court ruled that the Central Jakarta District Court did not apply the law wrongly. In the end, through the Supreme Court Decision No.02 K/Ex'r/Arb.Int/Pdt/2000 dated 5 September 2000, the Supreme Court upheld the decision of the Central Jakarta District Court and issued non-exequatur on the LCIA arbitral award since the execution of the award will be considered as a violation of the prevailing rules and regulations in Indonesia.[47]

Therefore, from the case of Bankers Trust v. PT Mayora, the court approached public policy differently. The court upheld that since the South Jakarta District Court annulled the ISDA agreement between PT Mayora and Bankers Trust, the enforcement of the LCIA arbitral award would be against the public policy of Indonesia. Moreover, the court also assessed that considering there was an ongoing court proceeding related to the dispute to the arbitral award in the South Jakarta District Court and it has not become

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[44] Hanif and Ariani, "Fair Legal Certainty In The Implementation of International Arbitration Awards (A Socio Legal Study)."
[45] Hikmah, "The Roles of The Supreme Court of The Republic of Indonesia in Enforcement of International Arbitral Awards In Indonesia."
[46] Lu Sudirman and Ritaningtyas Ritaningtyas, "Penerapan Putusan Arbitrase Internasional Ditinjau Dari Undang-Undang Dan Hukum Acara Di Indonesia," *Journal of Judicial Review* 8, no. 1 (2017).
[47] Sitorus, "Judicial Control of Foreign Arbitral Awards in Indonesia."

res judicata, the enforcement of the London arbitral award, will be against the public policy of Indonesia as it interferes the ongoing court proceeding.

Article 4(2) of the Supreme Court Regulation No. 1 of 1990 stipulates that public policy relates to the basic foundations of the entire Indonesian legal system and society, both the society and law can be considered as the "general considerations of supposed public interest", as previously applied in the cases above. However, this case does not show that the breached of public policy caused by the underlying contract to the arbitration affects the welfare and public interest.[48] At best, it only affects the parties to the case. Conclusively, it could be seen that the use of public policy from this case is unclear and the court still did not provide a clear definition of public policy. Moreover, the South Jakarta District Court is also wrong to accept the case filed by PT Mayora, as the agreement refers to arbitration to resolve the dispute, and not the South Jakarta District Court as regulated under Article 3 of Indonesian Arbitration Law.

Base on the analysis and assessment of the landmark cases above, there are several characteristics and patterns that could be taken from the use of public policy as the basis to refuse enforcement of foreign arbitral awards in Indonesia. The Indonesian court refused the enforcement of foreign arbitral awards on the basis of public policy when:

1. The arbitral award breached the prevailing rules and regulations of Indonesia. This could be seen in most cases, such as from the Karaha Bodas v. Pertamina, Astro v. Ayunda Prima, Bankers Trust v. Mayora, and the E.D & F Man v. Yani Haryanto case.
    a. In the case of Karaha Bodas v. Pertamina, the court ruled that the agreement to the arbitration is against Presidential Regulation No. 39 of 1997 and No. 47 of 1997;
    b. In the case of Astro v. Ayunda Prima, the arbitral award is against Law No. 48 of 2009 concerning Judicial Power as it interferes with the judicial proceeding in Indonesia;
    c. The underlying agreement in F Man v. Yani Haryanto is against the Presidential Regulation No. 43 of 1971 and the Presidential Regulation No. 39 of 1978 concerning the import of sugar, thus, it is considered to be void by law as it does not fulfil Article 1320 of the Indonesian Civil Code; and
    d. Similar to the previous cases, in the Bankers Trust v PT Mayora case, the agreement on derivatives swaps transactions are against Indonesian law. Therefore, the arbitral award or the underlying agreement to the arbitration, the court concluded that by enforcing such award, it would be against Indonesia's public policy.
2. The foreign arbitral award endangers the national interests of Indonesia, which also includes the danger towards local economy. This could be seen

[48] Theodoor Bakker, Sahat Siahaan, and Ulyarta Naibaho, "CHAPTER XX," in *The Great Sahara* (Cambridge University Press, 2012), 330–44, https://doi.org/10.1017/CBO9781139245692.022.

from the Karaha Bodas v. Pertamina case where the district court ruled that the project between Karaha Bodas and Pertamina required a huge amount of money and thus, the project might harm the national economy and welfare of the country and is detrimental to the interests and livelihoods of the people.[49]

3. The foreign arbitral award breached Indonesia's sovereignty, which is similar with the Astro v. Ayunda Prima case, where the SIAC arbitral award contains clauses that prohibits Ayunda Prima and First Media from taking legal measures to the Indonesian court, and demanded to stop the ongoing court proceeding, thus, the award clearly breached Indonesia's sovereignty as it interferes with Indonesia's judicial process and is contrary to the basic principles of Indonesia's legal system.[50] Also, similar to the case of Bankers Trust v. PT Mayora, with the existence of the ongoing court proceeding of the same dispute to the arbitral award, the enforcement of the award is considered as a breach of Indonesia's public policy, as it interferes the local court proceeding.

The broad and inconsistent interpretation of public policy that is applied by Indonesian courts, has caused concerns especially to the party who won the arbitration as they do not have any legal certainty over their status and when they can get their compensation as granted by the arbitral award. Hence, with the inconsistent application of public policy, it has created legal uncertainty in Indonesia. This is an extremely important matter to consider as Indonesia is making its way to become more open to international trade, and also foreign direct investments.[51]

Providing legal certainty in the use of public policy by setting a clear standard on public policy as the basis to set aside or refuse enforcement of the arbitral award is extremely important, considering that it will help establish legal certainty and act as a standard that courts can refer to. Moreover, Indonesian courts would have the tendency to uphold local laws, and if the court continuously set aside foreign arbitral awards, it might discourage international arbitration in Indonesia.

Consequently, similar cases of setting aside an award under the basis of public policy imposes several questions in the international community such as if the arbitral award is even effective to be executed or recognized in Indonesia in the first place.[52] The application of public policy to refuse recognition and enforcement of foreign arbitral awards is the factor that might make Indonesia to be considered as a

[49] Ircham Suryo Nugroho, "Kewenangan Pengadilan Negeri Jakarta Pusat Dalam Pembatalan Putusan Arbitrase Di Janewa Swiss (Studi Kasus PT. Pertamina Dan PT. PLN Melawan Karaha Bodas Company)," *Jurnal Lex Renaissance* 5, no. 3 (July 1, 2020), https://doi.org/10.20885/JLR.vol5.iss3.art3.
[50] Adiasih and Simanjuntak, "Non-Enforcement of Foreign Arbitration Award in Indonesia."
[51] Lona Puspita et al., "The Dilemma of International Arbitration Awards in Indonesia," *International Journal of Social Science Research and Review* 6, no. 1 (January 6, 2023): 114–21, https://doi.org/10.47814/ijssrr.v6i1.745.
[52] Tiurma M. Pitta Allagan and Putu George Matthew Simbolon, "The Cooling-Off Period Under the International Investment Law Regime in the Indonesian Regulations Context," *Journal of Indonesian Legal Studies* 9, no. 2 (December 15, 2024): 835–66, https://doi.org/10.15294/jils.v9i2.19153.

non-friendly arbitration State in the international community, which might also further affect the flow of commercial cooperation or foreign direct investment in Indonesia.[53]

Hence, without the existence of legal certainty regarding the execution of foreign arbitral awards in Indonesia, there is no legal protection for the winning party to the foreign arbitral award. This might result in concerns from foreign business and investors to conduct trade or invest in Indonesia.[54] Moreover, considering that Indonesia is a party to the New York Convention, Indonesia should show their pro-arbitration stance. Therefore, the limitation and standard should be set in order for public policy to be applied cautiously on special cases that have fulfilled the high standard of public policy.

III. Public Policy In Singapore

Over the years, Singapore has always been consistent in upholding its principle to be a pro-arbitration country, which also means that they often refuse to set aside arbitral awards to respect the arbitration proceeding, despite the fact that it might affect their financial outcome by siding in favour with the non-paying respondent.[55] The number of foreign arbitral awards that Singapore has set aside on the basis of public policy is extremely few. This shows that public policy is applied only when it can fulfil the high standard.

The Singapore International Arbitration Act incorporates both, the UNCITRAL Model Law and the New York Convention. The UNCITRAL Model Law contains provisions that regulates the requirements to set aside a foreign arbitral award, as provided under Article 34 of the UNCITRAL Model Law. Meanwhile, the International Arbitration Act incorporates the New York Convention to regulate the recognition and enforcement of foreign arbitral awards, as provided under Article V of the New York Convention and exempted Article 36 of the UNCITRAL Model Law.

Public policy as the basis to refuse enforcement is regulated under Section 31(4)(b) of the International Arbitration Act. Meanwhile, UNCITRAL Model Law Article 34(2)(b)(ii) is referred to as the grounds to set aside foreign arbitral award on the basis of public policy in Singapore. In applying public policy to set aside foreign arbitral awards, Singapore has similar views as the English common law. In the case of RBRG Trading UK v Sinocore International [2018] EWCA Civ 838, the court upheld the restrictive interpretation of public policy defense. The English Court of Appeal ruled that to apply public policy, there is a high standard that must be met.[56]

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[53] Puspita et al., "The Dilemma of International Arbitration Awards in Indonesia."
[54] Niken Junika Sari, Ahmad Arif Zulfikar, and Sulaiman Dorlah, "Implementation of International Arbitration Awards in Indonesia from the Perspective of Legal Value Theory," *Jurnal Media Hukum* 31, no. 1 (June 22, 2024): 167–85, https://doi.org/10.18196/jmh.v31i1.20026.
[55] Reed Smith, "Singapore Supreme Court Declines Opportunity to Overturn Arbitral Awards on Grounds of Natural Justice or Public Policy," May 22, 2020.
[56] Chan and Khong, "Re-Calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards."

Singapore also interprets and uses public policy restrictively. Public policy should only be used to set aside an award only if the enforcement of the award would 'shock the conscience' or violate the 'most basic notion of morality and justice'. This standard is adopted from the case of PT Asuransi Jasa Indonesia (Persero) v Dexia Bank in 2006.

1. PT Asuransi Jasa Indonesia (Persero) V. Dexia Bank SA

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA is considered as one of the landmark cases in assessing public policy as the basis to set aside an award in Singapore. From this case, the court ruled that public policy may only be used restrictively. The court agreed that public policy regulated under the IAA encompasses an extremely narrow scope.[57]

The Singapore Court of Appeal upheld the decision of the High Court in which the judge ruled that the appeal filed by PT Asuransi Jasa Indonesia (Persero) as the appellant against the decision of the previous court, in dismissing the application to set aside the arbitral award on 5 December 2003 is already correct. In this case, the appellant is an Indonesian state-owned company and is the guarantor of a series of BI Notes issued by Rekasaran BI Ltd. Meanwhile, the respondent is the holder of BI Notes that has not paid the BI Notes that has reached its maturity in 1999.[58]

In the first arbitration, the Arbitral Tribunal issued the First Award on 18 of October 200, which ruled in favour of the respondent thus, granting its claim and ordered the issuer and appellant to pay amounted to USD $8.6 million. The second arbitration was submitted by the appellant on 10 January 2002 and the tribunal ruled in favor of the respondent.

The appellant then applied the Second Award to the High Court to be dismissed on the basis that the Second Award is against the public policy of Singapore considering that the Second Award is contrary to the findings of the First Award by the Previous Tribunal when the award should be final and binding, thus, it breached Article 34(2)(b)(ii) of the UNCITRAL Model Law.[59]

In the end, the basis of public policy to set aside the Second Award as claimed by the appellant was dismissed by the Court of Appeal as the court upheld the trial judge's assessment, which stated that:

"Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, i.e., the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy. If I were to make such a holding, it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as

[57] "PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA," 2005.
[58] "PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA."
[59] "PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA."

international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal. Further, in the context of this case, whilst it is obviously not desirable to have conflicting arbitral decisions existing on the very same dispute between the same parties, I do not see any public policy implication in such a state of affairs existing between private parties, nor has the [appellant] identified any such implication."[60]

The judge also opined that even though the concept of public policy is not explicitly defined in the prevailing Arbitration Acts or the Model Law, the Singapore court holds that the public policy under those laws encompasses an extremely narrow scope. The judge also opined that public policy should only operate in instances whereby upholding the arbitral award, it would "shock the conscience" or it is "clearly injurious to the public good", or is "offensive to the ordinary reasonable and fully informed member of the public", or when it violates the forum's basic notion of morality. Therefore, the judge concludes that only by those basis would it be categorized as the breach of public policy. In the end the Appeal Court upheld the Trial Court's decision to not set aside the Second Award dated 5 December 2003.From this case, it could be seen how the Singapore court applies a high standard on the application of public policy as the basis to set aside foreign arbitral awards. Public policy could only be applied in setting aside an award only if by enforcing the foreign arbitral award, it would "shock the conscience" or it is "clearly injurious to the public good", or is "offensive to the ordinary reasonable and fully informed member of the public", or when it violates the forum's basic notion of morality. Additionally, as stated by the court, a mere breach of prevailing laws would not directly set aside the foreign arbitral award, as not every law has to be regarded as public policy. Thus, this requires the court to assess deeper on the existing breach. The court also concluded that the errors of law or fact of the arbitral award does not reach the high standard of Singapore's public policy.[61] Therefore, from the case of PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA, it could be seen that Singapore applies an extremely high standard to set aside arbitral awards on the basis of public policy and also, Singapore holds a high respect to arbitration proceedings. Hence, the use of public policy or any other grounds to set aside arbitral awards should be assessed and applied in an extremely careful manner.

2. AJT v. AJU

In the case of AJT v AJU in 2010, the Singapore court continuously upheld its high standard of public policy. The parties to this case are AJT, a company incorporated under the laws of the British Virgin Islands and AJU, a company from Thailand that creates television programming and promotes performances and events. The agreement between the parties

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[60] "PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA."

[61] Michael Pryles, "Recent Singapore Decisions on International Arbitration," *National Law School of India Review* 24, no. 1 (2012): 35–53, http://www.jstor.org/stable/44283749.

stipulated an arbitration clause that appoints that the dispute shall be settled by arbitration in Singapore using the UNCITRAL Arbitration Rules. AJT brought claims against AJU to arbitration pertaining to the dispute arising from the agreement between the parties on August 21, 2006. On 21 November 2006, AJU filed a complaint against AJT on the basis of fraud, forgery, along with the use of forged documents, which induced AJU to enter the agreement. The Thai police then commenced the investigations.

To ease the tension between the parties and to settle the dispute aside, the parties then signed an agreement on 4 February 2008. The agreement stipulated, inter alia, for AJU to discontinue the criminal proceedings against AJT and to pay AJT a fee through this settlement. In return, AJT shall terminate the arbitration proceeding. Both parties then agreed on the agreement and AJU withdrew its complaint to the Thai police and the criminal investigation against AJT was discontinued. However, AJT still refused to terminate the arbitration proceeding with claims that the settlement agreement was made under duress and thus, the agreement is illegal. Consequently, the arbitral tribunal rendered the interim award which ruled that the settlement agreement between the parties is legal and enforceable to the parties. AJT then applied for the interim award to be set aside to the Singapore High Court under the basis of Article 34(2)(b)(ii) of the UNCITRAL Model Law. AJT applied to set aside the interim award under the basis, inter alia, pertaining to the illegality of the settlement agreement under Thai law, which will resulted in the breach of Singapore's public policy if the arbitral award is enforced. In the end, the High Court ruled in favour of AJT and thus, AJU appealed the decision on the basis that the High Court is not allowed to re-open the tribunal's findings and this may only be done in special cases.[62]

Notwithstanding the fact that this was the first time that the Singapore High Court ruled to set aside an arbitral award on the basis of public policy, Singapore Court of Appeal overturned the decision, as they ruled that the court is not allowed to re-open the tribunal's findings. At first, the Singapore High Court ruled to set aside the award on the basis of public policy since they found that the settlement agreement entered by AJT and AJU as the basis of the arbitration proceeding was illegal and thus, if that award is enforced, it will be a breach to Singapore's public policy. Meanwhile, the Singapore Court of Appeal overturned the High Court's judgement on the basis that even though, the Court could decide if an agreement is illegal or if it is against the public policy of Singapore, it does not necessarily mean that the Court is entitled to reopen the tribunal's findings, which already concluded that the underlying contract is not illegal. The Court of Appeal concluded that there are different findings of fact between the High Court and the Arbitral Tribunal.[63] In the end, the Court of Appeal ruled in favor of AJU and overturned the decision of the

[62] SGCA. "AJT v. AJU [2011] SGCA 41." 2010.
[63] SGCA. "AJT v. AJU [2011] SGCA 41." 2010.

High Court. The Court of Appeal upheld that the High Court was not entitled to re-open the tribunal's findings to assess the legality of the settlement agreement and that the use of public policy should not automatically allow the court to reopen tribunal's findings. Thus, by the High Court re-opening the tribunal's findings, it is contrary with the principle of finality of arbitral award under the IAA.[64]

From this case, it could be seen that Singapore holds a high standard on setting aside an award on the basis of public policy. In this case, the Court of Appeal upheld that the findings of fact by the arbitrator are final and binding unless there is fraud or breach of natural justice. The tribunal's findings may only be reopened by the court if the tribunal has made an error in deciding public policy violations in Singapore and the findings of fact to the case could not be questioned on the basis of public policy. Therefore, court intervention is justified since the State does not give the authority to arbitral tribunals to decide what constitutes as a breach of public policy.[65] Thus, it could be seen that Singapore continues its pro-arbitration stance by imposing a high standard for breach of public policy. From the Court of Appeal's judgement, it upholds the general rule that the use of public policy as the basis to set aside an award shall be implemented in extremely limited circumstances and thus, must always respect the arbitral proceedings and finality of arbitral awards.[66] Therefore, even though the tribunal's findings or conclusions pertaining to the law and fact are incorrect, it is still insufficient to cross the high standard of Singapore's public policy, as in this case, the error of law is against Thailand's public policy and not Singapore's.

3. BBA v. BAZ

The case of BBA v. BAZ, is one of the few times that the Singapore court set aside a portion of a foreign arbitral award on the basis of public policy. The dispute arose from a share sale and purchase agreement by the parties, controlling 64% stake of the shares in Company C. Company C is an Indian company and the largest manufacturer of generic pharmaceutical products. The buyer of the shares was BAZ, a Japanese company. During the time of the sale and purchase, the sellers consisted of the family members from Company C's founders and other subsidiary companies controlled by C. However, when the sale and purchase was conducted, there are some Sellers that were still minors.[67]

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[64] Nicholas Poon, "Legislation and Case Notes: Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration."

[65] Derek Finch and Peter Megens, "Setting Aside an Award on Public Policy Grounds: AJT v AJU," *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 2011, 155–57, http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AMDM\AMDM2011025.pdf.

[66] Pryles, "Recent Singapore Decisions on International Arbitration."

[67] SGCA, "BBA v. BAZ [2020] SGCA 53" (2019).

The dispute arose from the alleged misrepresentation and concealment of material facts that were done by the Sellers. BAZ claimed that the Sellers had withheld the existence of an internal report revealing how C falsified data to get regulatory approval for a number of drug products. The US Department of Justice ("DOJ") and the Food and Drug Administration ("FDA") initiated their investigations in 2006 after an employee from company C leaked the information in 2005 by providing the Report to the authorities. Negotiations with the DOJ and FDA resulted in a settlement or consent decree in December 2011, with C agreeing to pay a US$500 million settlement sum.

BAZ commenced with arbitration in Singapore against the Sellers on 14 November 2012, in accordance with what was stipulated in the SPA. BAZ claimed that there are misrepresentations and withheld information about the investigations by the DOJ and FDA. The arbitral award was rendered on 26 April 2016, in which the majority of the arbitral tribunal ruled in favour of BAZ.

BAZ then pursued to enforce the arbitral award by applying Originating Summons No 490 of 2016 and obtained ex parte order to enforce the award on 18 May 2016. However, the Sellers also take measures to set aside the award by filling summons and splitting themselves into 2 (two) groups. The two groups consists of the minors with Summons No 4497 of 2016 and the remaining Sellers with Summons 4499 of 2016. On August 3, 2016, the Sellers also filed a claim against BAZ based on Section 24 of the IAA along with Article 34(2)(a)(iii) and 34(2)(b)(ii) of the UNCITRAL Model Law, requesting to set aside the award.[68]

In the end, The High Court ruled that the application of Summons 4499 to be dismissed, however, allowed the Minors (Summons 4497) to be set aside in accordance with Article 34(2)(b)(ii) of the Model Law, in which it is against Singapore's public policy. The court ruled that the minors' involvement in this dispute and agreement is a breach of public policy, and in contrast, the court still enforced the award for Summons 4499 on the basis that mere errors of law is not sufficient to cross the high standard of breaching Singapore's public policy.[69]

From this case, it could be seen that the Singapore court set aside foreign arbitral award on the basis of public policy when there is the involvement of minors. With the involvement of minors in an agreement, it is considered to have violated Singapore's most basic notion of justice, especially to find them allegedly liable for fraudulent misrepresentation over a lawsuit claim amounting over SGD 720 million. The award was set aside considering that it is against the principle of Singapore, which aims

[68] Chan and Khong, "Re-Calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards."

[69] Chan and Khong.

protect the interests of minors under Singapore law. The involvement of minors in commercial transactions, is considered to be against Singapore's public, even though the underlying agreement and the law prescribed to the arbitration were governed by Indian law. Therefore, the court interprets the involvement of minors in this case as something that clearly shocked the conscience, and if the court does not protect the rights and interests of minors involved in commercial transactions, it would be clearly injurious to the public good.

Moreover, if the court chose to not set aside the award related to the minors, it would shift the whole precedent that minors can enter into commercial agreement that is worth over millions of dollars. The judge concluded that the principle of protecting the interests of minors in commercial transactions is part of the public policy of Singapore. The judge also took consideration of family law cases and the UN Convention on the Rights of the Child in making this decision.[70]

The court upheld that the argument made by the minors regarding the proportionality of damages as a breach of Singapore's public policy did not cross the high standard of breach of public policy. Instead, the involvement of minors in a commercial transaction and dispute itself has successfully proven that the enforcement of the arbitral award would shock the conscience and will be injurious to the public good, thus have fulfilled the high standard of public policy breach in Singapore. Therefore, it could be seen that the Singapore court still consistently upholds their pro- arbitration agenda, by enforcing the award for the Sellers in Summons 4499, as the court ruled that a mere error of law is not sufficient to successfully cross the high standard of public policy breach in Singapore.

4. Gokul Patnaik v. Nine Rivers Capital Limited

From the case of Gokul Patnaik v. Nine Rivers Capital Limited, the Singapore court continues to uphold their high standard in using public policy as the basis to set aside foreign arbitral award. In 2010, various parties, inter alia, Nine Rivers Capital Limited and Gokul Patnaik (Mr. Patnaik) entered into a share subscription and shareholders agreement (SSSA) dated 4 March 2010. The agreement was entered pertaining to the investment in Global Agrisystem Private Limited, an Indian company. The main terms of the SSSA entered by the parties, inter alia, the agreement regarding a "Qualified Exit" (i.e., for Global Agrisystem Private Limited to not undertake an initial public offering with a valuation not less than INR 4.000.000.000).[71] However, in this case, the Qualified Exit did not meet the stipulated deadline. Hence, it led the parties to reach a new agreement in 2014. The new agreement was contained in a sale and purchase agreement (SPA), which compelled an existing shareholder in the

[70] Finch and Megens, "Setting Aside an Award on Public Policy Grounds: AJT v AJU."
[71] SGHCI, "[2020] SGHC(I) 23" (Singapore, 2020).

company to buy Nine River's securities. Notwithstanding the SPA, the shareholders did not performed the required purchase. This led to further negotiations between the parties which resulted in multiple amendments made to the 2014 SPA through the 2015 addendum, including the appointment of Ramesh Vangal as the additional purchaser of the securities owned by Nine Rivers.

However, as the purchase of securities as what was agreed on in the 2014 SPA and the 2015 Amendment is not fulfilled, Nine Rivers issued a Put Option Notice under the SSSA, instructing Mr. Patnaik and Shareholder to purchase the investor securities for INR1.329 billion (the "Put Option Price"), as specified in the SSSA. Then again, Mr. Patnaik and the shareholders still refused to comply with the Put Option Notice, which resulted in Nine Rivers, submitting this dispute to arbitration, as the parties have an arbitration agreement included in the 2014 SPA. Consequently, the arbitral tribunal then ruled in favor of Nine Rivers Capital.

After the arbitral award was rendered, Mr. Patnaik submitted the award to the Singapore Court to be set aside, one of which is through the basis of public policy. Mr. Patnaik argued that the award rendered is against India's public policy considering that the relief granted, which is the performance of the Put Option is against the prevailing rules and regulations in India, and consequently be against Singapore's public policy. To further support the statement, Mr. Patnaik also filed an export affidavit on Indian law.

However, the Singapore International Commercial Court ("SICC") then dismissed the application by the plaintiff to set aside foreign arbitral awards on the basis of public policy and subsequently, struck out the Expert Affidavit as the court upheld that it was not relevant to this case in setting aside the arbitral award.[72]

Pertaining to the use of public policy as the basis to set aside an award, the court adopted the two-stage enquiry by the Singapore Court of Appeal when assessing the case of PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA. The court examined: (a) Whether the Award included such matters; or (b) if the Award included matters outside the scope of submission to the Arbitration.

In the end, the SICC rejected the plaintiff's argument to dismiss the award on the basis of public policy. The court upheld that the tribunal's findings regarding the legality of the nature of the transaction under the 2014 SPA, the 2015 Amendment, along with the SSSA are all findings of fact. Nevertheless, even if the tribunal's findings are findings of law, it would still be in the scope of Indian findings of law, considering the relevant agreements to this case were governed by Indian law. Hence, the tribunal's findings of the Indian law are considered as findings of fact of foreign law. Moreover, from the case of AJU v AJT, the findings from an

[72] Chan and Khong, "Re-Calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards."

arbitrator is final and binding as long as there is no breach of fraud or natural justice, thus, courts are not allowed to re-open the tribunal's findings. Consequently, the court upheld that the challenges based on Singapore's public policy should only be made if the opposing party can show that the arbitrator made an incorrect legal decision.

The arbitral award can only be set aside on the basis of public policy when there was an erroneous finding of law by the arbitrator. However, SICC failed to see if the arbitral award is against the public policy of Singapore. Firstly, SICC followed the arbitral tribunal's findings, which decided that the contracts are not illegal under the foreign law (i.e., Indian law). Accordingly, as the arbitral tribunal concluded that the contract is legal, it has nothing to do with Singapore law and thus, there is no finding of law that the SICC could set aside.[73] Moreover, the matter regarding the legality of the contract is findings of fact of foreign law, which Singapore court does not have the right to intervene.

Secondly, the use of public policy ground is immensely narrow with the relevant question being 'whether the illegality of the contract in the foreign State would demonstrate sufficiently egregious circumstances that would shock the conscience or would violate the most basic notions of morality and justice as would amount to a breach of public policy in Singapore. Hence, even though SSSA and the 2014 SPA were found to be illegal under Indian law, this would not merely satisfy the public policy ground to set aside the arbitral award. Therefore, the plaintiff had failed to identify and prove that the illegality of a contract in a foreign country breached Singapore's public policy.[74]

Therefore, from the case of Gokul Patnaik v Nine Rivers Capital Limited, it could be seen that the Singapore court continues to uphold a high standard in the use of public policy. In this case, the court dismissed the application submitted by the plaintiff to set aside the arbitral award under the basis of public policy, as the court holds that just because the underlying contract is illegal in another country, it does not prove that when enforced, the award will also be illegal or against Singapore's public policy. As the result, the court determined that the illegality of the contract did not 'shock the conscience' or 'break the most basic conceptions of morality and justice.[75] Hence, in order to successfully convince the court to set aside an award on the basis of public policy, the applicant must fulfil the high standard of public policy and demonstrate the existence of such "egregious circumstances" that when enforced, it will resulted in the "violation of the most basic notions of morality and justice." The SICC also concluded that just because there is a breach of foreign law, it is still not enough to satisfy the high standard of public policy.

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[73] Andy Moody, "International Arbitration Year Book 2023-2024."
[74] "Introducing the Special Issue on 'Enforcing Arbitral Awards Against Sovereigns: Recent Trends in Law & Practice.'"
[75] Alvin Yeo SC, Chou Sean Yu, and Lim Wei Lee, "Singapore: Latest Arbitration Development."

IV. Public Policy In Singapore

From the explanation and elaborated cases, it is clear that Singapore interprets public policy in a restrictive manner and upholds a high standard to set aside foreign arbitral awards on that ground. The Singapore court quoted multiple times from the precedent case of PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank in assessing the use of public policy to set aside foreign arbitral awards. In the case of PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank, the court ruled that the use of public policy as basis to set aside an arbitral award must be proven that by upholding and enforcing the award:

1. It would shock the conscience;
2. Is clearly injurious to the public good;
3. Is highly offensive to the ordinary reasonable and fully informed member of the public; and
4. It violates the forum's most basic notion of morality and justice.

Therefore, if one of the elements can be proven, the award can be set aside under the basis of public policy. Moreover, reasons, inter alia, that the award: (1) breached a foreign law; (2) breached Singapore's prevailing laws; (3) contained mere errors of fact or law by the arbitrator, are still not sufficient to fulfil the high standard to set aside an arbitral award on the basis of public policy. However, the court would further assess whether the enforcement of the award would shock the conscience or will clearly be injurious to the public good. Thus, there is a high burden of proof that must be done by the person who wants to set aside the award on the basis of public policy, in which they must prove that the enforcement of the award would shock the conscience of the court.

Conclusively, from the cases elaborated above, the Singapore court consistently applies its standards in defining and using public policy as the basis to set aside an award. Thus, through the consistency of the application and existence of a clear standard on public policy by Singapore courts, it has achieved legal certainty. Singapore's high standard on the use of public policy aims to favor public policy to encourage international arbitral awards and to uphold its pro-arbitration agenda.[76] With the high standard in the application of public policy, this has helped Singapore to be one of the most favorable places for the seat of arbitration.

Conclusion

There is a clear difference in the use of public policy to set aside foreign arbitral award in Indonesia and Singapore. The main difference is the approach of

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[76] Troy L Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes," *Journal of International Arbitration*, 2007, 9–24, http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2007003.pdf.

interpretation that was adopted, in which Indonesia adopted a broader approach in defining public policy, whereas Singapore adopted a more restrictive approach. From the cases elaborated above, it could be seen how Indonesian courts inconsistently applies and interprets public policy and how there is no clear standard to regulate its use. Whereas Singapore applies a strict and high standard of public policy as the basis to set aside foreign awards, which could be seen that there are extremely rare cases where an arbitral award could be set aside on the basis of public policy. In view of the fact that, to achieve the standard, the arbitral award must be proven to: (1) shock the conscience, (2) is clearly injurious to the public good, (3) highly offensive to the ordinary reasonable and fully informed member of the public, or (4) if it violates the forum's most basic notion of morality and justice. Hence, through the high standard of applying public policy in Singapore, Singapore continuously upholds its pro- arbitration agenda, which has resulted Singapore to become one of the most favourite arbitration hubs in the world.

The main patterns of how Indonesia defined the breach of public policy are: (1) the award breached Indonesia's sovereignty as a State by limiting a person's right to pursue court proceedings in Indonesia; (2) the underlying agreement to the arbitration and/or the arbitral award breached Indonesia's prevailing rules and regulations; and (3) the arbitral award endangers the national interest of Indonesia, which also includes the danger towards the local economy.

From this comparison, Indonesia could certainly learn a thing or two from Singapore. One of which is to set a clear standard in the use of public policy in arbitration. This is extremely important for Indonesia considering that international trade and the use of arbitration continues to increase, and thus, Indonesia must put efforts to improve its arbitration laws by setting a clear standard on public policy in order to avoid multiple interpretations, which consequently would decrease the misuse of public policy as the reason to set aside the enforcement of an award.

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