Enforcement of Foreign Arbitral Awards in Indonesia: The Role of Public Policy Exception

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Presented for the Degree of Doctor of Philosophy in Business Law
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April 2011

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Abstract

The public policy exception under Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) is the most controversial ground for challenging enforcement of foreign arbitral awards. The great uncertainty as to the ambit of the public policy exception has led to inconsistent approach adopted by the courts which created problems for parties wishing to enforce foreign arbitration awards.
This thesis explores the complexity and inconsistent application of the public policy exception in Indonesia. It critically analyses the tendency of the Indonesian judiciary system towards the judicial application of public policy in determining the enforceability of foreign arbitral awards after the ratification of the NYC, considering the distinctive feature of the Indonesian legal system and approaches that have been taken by the courts of other countries. Occasionally, reference is also made to statutory provisions in arbitration from other countries to indicate approaches that have been taken elsewhere in regard to the public policy exception. This thesis examines whether current decisions of the Indonesian Supreme Court and the District Courts are in compliance with the pro-enforcement policy of the NYC, which demands a narrow approach to the public policy exception. It also examines the extent of judicial review of foreign arbitral awards by the Indonesian courts, particularly concerning the standards for applying judicial discretion to refuse or allow enforcement under the public policy exception.

A proposition presented in this thesis is that the concept of public policy in Indonesia lacks a strong international character and, for this reason, it has a tendency to be interpreted in domestic terms instead of international public policy under the NYC. Another central proposition is that domestic concept of public policy in the Indonesian arbitration law is influenced by Indonesian pluralistic legal traditions and cultures. Therefore, a harmonisation of the concept of public policy in Indonesia with the concept of public policy under the NYC and the Model Law needs to be addressed.

Despite the changes brought by new Indonesian arbitration law reform, the central position of the narrow approach to the public policy exception has yet to achieve full recognition. If this situation is related to the enforcement of foreign arbitral awards in Indonesia, it can be seen that the finality and enforceability of the awards will hardly be achieved until the underlying issue concerning a restrictive concept of public policy is addressed. It is argued that a failure to adopt a narrow approach to the public policy exception can be related to the enforceability of foreign arbitral awards in Indonesia.
The recommendations throughout this thesis promote the Indonesian judiciary system to shift away from a ‘domestic’ concept of public policy. They encourage the Indonesian judiciary and Arbitration legal framework to strongly adopt the concept of internationalism in establishing the judicial approach to public policy exception. In doing so, this thesis also contributes to harmonizing the judicial application of public policy through establishing the concept of ‘international’ public policy that is based on the narrow approach to the public policy exception and the presumption of favouring enforcement of international arbitral awards.
Acknowledgements

It gives me great pleasure to give thanks to many people who contributed in various ways in making this thesis possible.

Sincere thanks to my principal supervisor, Professor Peter Gillies, for his edifying assistance, patience and understanding. I found his extremely dependable throughout the prosecution of my thesis. My sincere thanks also go to my second supervisor, Dr. Niloufer Selvadurai, for her encouragement and enlightenment. They were a sure source of inspiration.

I gratefully acknowledge the Macquarie Research Excellence Scholarship (MQRES) which funded my study at Macquarie University for PhD. The MQRES scheme is funded and administered by the Department of Business Law, Faculty of Business and Economics, Macquarie University. I am also grateful to the HDR Staffs of the Faculty of Business and Economics for their generous support and practical assistance. I also thank to Dr. Lisa Lines for editing and proofreading the manuscripts. To my friends, Miko Kamal and Iman Prihandono, many thanks for your support.

Finally, I would like to thank my parent, my husband, Gunawan and my daughters, Iyana Dawamal Afiyah and Princess Nirvana, without whom this thesis may never have been completed.
Table of International Conventions and National Legislations

**International Conventions**

4. Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention)
5. International Centre for Settlement of Investment Dispute Convention (Washington Convention)

**National Laws**

**Indonesia**

1. Indonesian Arbitration Act No 30 of 1999 regarding Arbitration and Alternative Dispute Resolution
2. Supreme Court Regulation No 1 of 1990 regarding the Enforcement Procedure of Foreign Arbitral Awards—1 March 1990
5. Civil Code (*Burgerlijk Wetboek voor Indonesie*), State Gazette No 23 of 1847—30 April 1847
7. *Algemene Bepalingen van Wetgeving* (AB) (The Code containing the provision of Private International Law), State Gazette No. 23 of 1847—30 April 1847
8. IS (*Indische Staatsregeling*), State Gazette No 415 of 1925—23 June 1925

**Other Countries’ Legislation**
1. United States—Federal Arbitration Act 1925 (FAA)
   Section 10
2. Australia
   1. Commercial Arbitration Act 1985 (CAA)
      Article 38 sub-section (5)
      Section 33
3. Switzerland—Private International Law 1987 (SPIL)
   Article 190 (2)
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   Article 595 (7)
5. Netherlands Arbitration Act (Code of Civil Procedure, Book IV)
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   Article 1068
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Commonwealth Coatings Corp. v Continental Casualty Co., 393 US 145, 149 (1963)

Gateway Technologies v MCI Telecommunication Corp., 64 F.3d 993 (5th Cir. 1995)

Bowen v Amoco Pipeline Corp., 254 F.3d 925 (10th Cir. 2001)

Kyocera Corp. v Prudential Bache Trade Services Inc., 341 F.3d 987 (9th Cir. 2003)

Wilko v Swan, 346 US 427 (1953)

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MACTEC Inc. v Gorelick, 427 F.3d 821 (10th Cir. 2005)

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The Hague


Zimbabwe
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ICSID Award

Saudi Arabia v Arabian American Oil Company (ARAMCO), 27 I.L.R. 117 (1958)

Table of Abbreviations

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<td>Arbitrability exception</td>
<td>New York Convention Art V(2) (a); Model Law Art 3 (1) (b) (i); Indonesian Arbitration Act Article 5 (1)</td>
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<td>Annulment exception</td>
<td>New York Convention Article V (1) (e); Model Law Article 36 (1) (a) (v); Indonesian Arbitration Act Article 70</td>
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<td>Swiss Arbitration Association Bulletin</td>
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