RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN INDONESIA UNDER ARBITRATION LAW (A CASE STUDY OF PT. FIRST MEDIA TBK V. ASTRO NUSANTARA INTERNATIONAL BV)

Presented to Fulfill the Requirements to Obtain the
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By

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MOTTO

If you are irritated by every rub,

how will mirror be polished?

(Rumi)

Then which of Blessings of your lord

will you deny?

(QS. Ar-Rahman: 13)

Most people are happy with average,

but I am not most people.

(Harvey Specter)

DEDICATIONS

This thesis is dedicated to:

Allah SWT All-Mighty

My beloved Mother Emi Karwati, Father Indra Jaya. Thank you for every love, spirit, pray and attention.

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Yogyakarta, 7 March 2018

The Writer

Ratu Desti Wulandari

ABSTRACT

Indonesia had ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"), which was promulgated by Supreme Court regulation no. 1 year 1990 regarding Procedure for the Enforcement of Foreign Arbitral Awards. Furthermore, in 1999 the Indonesian government promulgated a new law No. 30 year 1999 regarding Arbitration and Alternative Dispute Resolution ("Arbitration Law"), in which article 65 until article 69 explained on the recognition and enforcement of foreign arbitral awards. Under the arbitration law, the process to enforce foreign awards must be rendered to the District Court of Central Jakarta, in accordance with the New York Convention 1958. Moreover, from the enactment of the act until at the moment, there are many enforcement of foreign award cases which has been rejected by the court based on the reason that the foreign awards had violated Indonesian public order. Under these grounds, the problems had risen, whether Arbitration law regarding foreign arbitral award is in accordance with New York Convention and the validity of Indonesian courts' rejection on Singapore International Arbitration Center award in the recent case between Astro v. Lippo group. The award was rejected because of public order violation, whereas under arbitration law there was none of definition of public order. After analyzing through normative research, indeed that arbitration law is in accordance with New York Convention, except arbitration law does not contain basic principle from New York Convention and all Indonesian courts' decisions were invalid due to lack of reasons for rejection of SIAC awards.

Key Words: Foreign Arbitral Award, Indonesian Arbitration Law, Public Order.

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CHAPTER I

INTRODUCTION

A. Context of Study

Indonesia is known for being one of the largest economies in the Asia-pacific region. The Indonesian economy is poised to undergo significant expansion over the coming year.[1] Consistent this background, it is unsurprising that Indonesia's foreign investment laws are expanding and modernizing at a rapid pace.[2] In 2015, the World Bank ranked Indonesia 170 out 189 in respect of the ease of enforcing commercial contract due to poor performance attributed to the high costs of litigation, absence of 'fast-track' procedures for small claims and a low score on the 'quality of judicial process' index.[3] Accordingly, most of international investors prefer to settle their dispute through arbitration, which

[1] The Organization for Economic Co-operation and Development, *Overview Economic Surveys Indonesia*, OECD 2016, p.12

[2] Warwick et al., "Foreign Investment and Dispute Resolution in Indonesia", October 2016, https://www.clydeco.com/insight/article/foreign-investment-and-dispute-resolution-in-indonesia, (accessed on November 3, 2017.)

[3] *Ibid*

Indonesia recognizes both Indonesian arbitration decisions and international arbitration decision.[4]

Indonesia have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"),[5] by means of Presidential Decree in 1981.[6] During the ratification, Indonesia had reserved two clauses: (i) International arbitral awards which may be recognized and enforced in Indonesia are only those relating to commercial disputes; and (ii) recognition of awards has to be one the basis of reciprocity, e.g. rendered in country which, together with Indonesia, is a party to an international convention regarding the recognition and enforcement of foreign arbitral award.[7] Following the ratification along with presidential decree and before the enactment of Indonesian Arbitration Law in 1999, the Supreme Court of Indonesia issued a regulation no. 1 year 1990 regarding the procedures for the Enforcement of Foreign Arbitral Awards.[8]

Enforcement of any arbitral award was handled in the same manner as enforcement of a final and binding court judgment.[9] Under article 436

[4] Baker Theodor, *The International Arbitration Review,* Seventh Edition, Law business research, Chapter 21: Indonesia, 2016, p.252

[5] New York Arbitration Convention, contracting parties, http://www.newyorkconvention.org/countries, (accessed on November 3, 2017)

[6] Presidential Decree Number 34 of 1981 Concerning on Recognition of New York Convention 1958, dated August 5, 1981.

[7] *Ibid*

[8] Supreme Court Regulation No. 1 year 1999 regarding the procedures for the enforcement of Foreign Arbitral Award

[9] Mils Karen, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", *Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered institute of Arbitrators*, Kuala Lumpur, 2003, p. 1; Rajagukguk, Erman, "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of

of the RV provided that, except for general decision, a judgment from foreign court cannot be enforced in Indonesia, which had assumed by the courts that this law applied the same with foreign-rendered arbitration awards, thus unforced within Indonesian territory.[10] However, under the second paragraph of 456 RV, the exemption of foreign court may be executed in in Indonesia only if it was provided in separate law, bilateral agreement, or multilateral agreement.[11] Such reluctant action from domestic court, has indeed violated the New York convention, which provides that every contracting party must recognize and enforce awards rendered in other contracting states without imposing substantially more onerous condition than are imposed upon recognition of enforcement of domestic awards.[12]

Besides the New York Convention, Indonesia also became the 27th member the Washington Convention on the Settlement of Investment Disputes between States and National of Other States in 1965 (ICSID).[13] The ICSID Convention was signed on 16 February 1968, ratified on 28

Foreign Arbitral Awards Enforcement on the Ground of Public Policy", *Indonesian Law Review*, Volume no.1, January 2011, p. 1

[10] 463 Burgerlijke Reglement op de Rechtsvordering, State Gazette No. 52 of 1847, jo. No. 63 of 1849 (Arbitration was covered in Articles 615 through 651 of Title I)

[11] *Ibid*, article 436(2); stated the only way to execute a foreign court decision in Indonesia is to make such decision as the legal basis for filing new lawsuit before the court. Subsequently, the decision of the foreign court by Indonesian court could serve as a proof of writing with its binding force in a casuistic manner namely;

(i) Can be valuable as an authentic deed which has perfect and binding proofing power, or

(ii) Only as a legal fact which can be interpreted freely by the judge.

[12] The New York convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"), art. 3

[13] List of members states, https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx, (accessed on November 9, 2017)

September 1968 and entered into force in Indonesia on 28 October 1968.[14]

In the bilateral sphere, until 2014 Indonesia have entered into 64 bilateral investment treaties (BITs) with the following countries: Algeria, Argentina, Australia, Bangladesh, Belgium, Bulgaria, Cambodia, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Guyana, Hungary, India, Iran, Italy, Jamaica, Jordan, Kyrgyzstan, Laos, Libya, Malaysia, Pakistan, Peru, Philippines, Poland, Qatar, Romania, Saudi Arabia, Singapore, Serbia, Slovak Republic, South Korea, Spain, Sri Lanka, Sudan, Suriname, Syria, Sweden, Switzerland, Tajikistan, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Venezuela, Vietnam, Yemen, and Zimbabwe.[15] The arbitration mechanism under ISCID convention has mostly been stipulated in these BITs, and there was no standard or model languages have been adopted in the BITs to which Indonesia is a party.[16] However, the BITs mostly contain similar provisions in promoting and protecting investment bilaterally.[17]

In order to strengthen the regulation on the dispute resolution, in 1999 Indonesia promulgated a new law No. 30 year 1999 about Arbitration and Alternative Dispute Resolution ("Indonesian Arbitration

[14] *Ibid*

[15] Indonesia Country Commercial Guide, "Indonesia – Agreement", https://www.export.gov/article?id=Indonesia-bilateral-investment-agreements, (accessed on November 9, 2017)

[16] Hutabarat, Pheo, *The Dispute Resolution Review: Chapter 26 Indonesia*, Law business research, Fifth edition, 2013 p. 389

[17] Indonesia Country Commercial Guide, *Op. Cit.* accessed on November 9, 2017

Law").[18] The law stipulates that only disputes that are arbitrable must be commercial in nature e.g. commerce, banking, finance, capital investment, industry, intellectual property rights and those concerning rights which as a matter of law and regulation, fall within the full legal authority of the disputing parties.[19] Unfortunately, in regard with the foreign arbitral awards under Indonesian arbitration law, only article 65 until article 69 explained about the enforcement of International Arbitration award and it does not comprehensively elaborate in detail about foreign arbitration as the Supreme Court Regulation does, also in several articles contradict with Supreme Court Regulation whereas in hierarchy of law, it is known for the general principle of *Lex Superior Derogat Legi Infriori*, the stronger law always be prevailed.

Under the arbitration law, the district court of central Jakarta is designated as the venue which has jurisdiction to issue orders of *exequatur* for international arbitration awards, as well as to execute the awards,[20] while Supreme Court regulation stated that the enforcement of foreign arbitral award first must be registered to district court of Central Jakarta, and the final decision is in the hand of Supreme Court to issue order of *Exequatur.*[21] Even if the above non-involvement of the Indonesian courts in arbitration matters is clearly stipulated in the Indonesian Arbitration Law, in practice, some jurisprudences decided by

[18] Law of Republic Indonesia No. 30 year 1999 on Arbitration and Alternative Dispute Resolution [Indonesian Arbitration Law]
[19] *Ibid*, art. 5(1) jo. the official elucidation of article 66(b)
[20] *Ibid*, art. 65, 67
[21] Art. 4-5 Supreme Court Regulation No. 1 year 1999

the Supreme Court has justified the non-applicability of the arbitration award.[22] In particular if the case are not related with the breach of contract *per se*, but relating to civil wrong doing.[23]

Since the enforcement of the foreign arbitral award in Indonesia will require an *exequatur* from the chairman of district court of central Jakarta,[24] in practice it has created much room for the disputed party to avoid the enforcement or refusal the award to the district court. In most of the foreign arbitral awards in Indonesia had annulled by the court on the ground of violating public policy, whether the reason were submitting by the loss party in arbitration nor the decision of the court itself.[25]

Although a violation of public policy is one of the grounds for declining the foreign arbitral award, the Indonesian Arbitration Law, does not define public policy or its limits. Under Supreme Court regulation, the definition of public policy is very general as 'the basic principles of the entire Indonesian legal system and social system. Consequently, in the past, often led to their declining to enforce international arbitration awards.[26]

The urgency of this thesis is trying to address how the law concerning the enforcement of arbitral awards in Indonesia is still lacking

[22] Hutabarat, Pheo, *Op. cit.*, p. 390.
[23] *Ibid*.
[24] *Ibid*
[25] *Case of E.D. & F. Man (Sugar) Ltd . vs. Yani Haryanto* under Singapore International Arbitration Centre, Mills, Karen, "Enforcement Arbitration Awards in Indonesia & other Issue of Judicial Involvement in Arbitration", *Karimsyah Law Firm Press*, Jakarta, 2013, p. 9.
[26] Sudargo Gautama, *Perkembangan Arbitrase Dagang Internasional di Indonesia*, International Trade Arbitration Developments in Indonesia, Bandung, 1989, p. 62

of the power to perform demanding task, especially with the law enforcement to implement the international arbitration award in Indonesia.

As what happened in the case of PT. First Media TBK v. Astro Nusantara BV.

The case was arises out of a dispute involving a failed joint venture between the parties in the satellite TV business in Indonesia.[27] Astro Nusantara International BV and others and another appeal or known as the Astro Group [Astro Group] is a Malaysian broadcasting media entity led by Mr. Ananda Krishnan while the opponent,[28] PT. First Media TBK (formerly PT. Broadband Multimedia TBK) or known as the Lippo Group [Lippo Group] is an Indonesian conglomerate led by Mr. James Riady, both of whom are prominent tycoons in the South East Asian region.

In March 11th 2005, Astro and Lippo agreed to sign a contract of shareholder owner or known as Subscription and shareholder agreement (SSA) to establish a joint venture company in Indonesia for operating television paid program reendowed as Direct Vision, which was owned by Lippo and its affiliation. Under SSA Astro was having 51% and Lippo with 49% of shares. In august 2005, Indonesian government issued a regulation toward the mass medium companies oblige to gain broadcasting license according with the broadcasting law, it includes to

[27] Astro vs. Lippo – An Overview, https://singaporeinternationalarbitration.com/2012/07/25/astro-vs-lippo-an-overview/, (accessed on November 5, 2017)

[28] Singapore Law Reports, [2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng", p. 372

regulate foreign company to have maximum 20% shares. Such regulation at the end reconstructed the venture agreement between Lippo and Astro group.[29]

This was the beginning of problem occurred between the parties. In 2007 after Natrindo case occurred between the parties, Lippo sent a letter stated that SSA was not applicable anymore and all the draft of reconstructed Joint Venture Agreement will no longer negotiable and irrelevant.[30]

Lippo group through its branch company (PT. Ayunda Prima Mitra) filed a civil wrongdoing case to District Court of South Jakarta against Astro Group Company and related party on 2 September 2008 and claimed US$ 2,024,846,199 for material and immaterial losses. In the week after, Astro Group through its subsidiaries also file a lawsuit against Lippo Group in Singapore International Arbitration Centre (SIAC).

Under arbitration process, SIAC issued a preliminary award on 7 May 2009 regarding Anti-suit Jurisdiction, ordered for the respondent to discontinue the court proceeding in Jakarta based on Arbitration clause under article 17.4 of SSA, which automatically gives arbitration to have jurisdiction over the case.[31]

The foreign award from SIAC registered to the chairman of District Court of Central Jakarta in order to obtain *exequatur*, however,

[29] Konflik Astro Lippo kian memanas, http://www.hukumonline.com/berita/baca/hol20086/konflik-astrolippo-kian-memanas, (accessed on September 9, 2017).
[30] *Ibid*.
[31] ARB 062/08/JL, issued 7 May 2008

the court issued a decision to set aside the award on the preliminary issues and declare that the anti-suit jurisdiction award is non-enforceable (non-*exequatur*) in Indonesia.[32]

Astro group filed two cassations to Supreme Court in 2010 and 2012 against refusal decision of District Court of Central Jakarta.[33] Unfortunately both decisions from Supreme Court still refused preliminary award from SIAC and rendered decision from District Court of Central Jakarta was accordance with the arbitration law. [34]

The main reason of refusal for the the judgment from SIAC is that the award has issued to discontinue trial process in Indonesia, such decision violates the principle the sovereignty of the republic of Indonesia and the principle of Public Policy, no foreign power can in anyway interfere legal process in Indonesia. Thus this decision has created a new precedent in Indonesia legal practice.

Furthermore, there has been some foreign arbitration awards registered in Indonesia since 1991, such as Bankes Trust vs. Pt Jakarta International Hotel Development case (from London arbitration), Banker Trust vs. PT. Mayora, E.d & F. MAN (sugar) ltd vs. Yani Haryanto, Pertamina vs. Karaha Bodas Companu, LLC and PT Perusahaan Listrik Negara (persero) (UNCITRAL arbitration Geneva), etc. From decision of foreign arbitral awards as mentioned above, none of them were gained

[32] Jurisprudence District Court of Central Jakarta, 05/PDT.ARB.INT/2009/PN.JKT.PST
[33] Jurisprudence of Supreme Court No. 1/K/PDT.SUS/2010, NO. 877/K/PDT.SUS/2012
[34] *Ibid*;

any *exequatur* from District Court of Central Jakarta and/or Supreme Court in Indonesia.[35]

The main reason of the courts' refusal toward foreign arbitral award in Indonesia is that the foreign award violates public policy of Indonesia and it is against the sovereignty Indonesia by means of intervention.[36] This becomes dilemma for foreign companies/local company to settle their dispute in international arbitration, because at the end the award itself becomes impediment to gain exequatur and to be enforced in Indonesia.[37] Whereas, theoretically, once the parties were agreed to proceed the case before arbitration, the court cannot in any way can intervene into its agreement. However, in Indonesia courts, it almost likely the court had intervened into the decision of arbitration and does not comply for what the stipulated laws.

B. Problems Formulation

1. Is the Indonesian Arbitration Law on enforcement of the foreign arbitral award Articles 65-69 in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards?
2. How is the validity of Indonesian courts' decision for the annulment of the Singapore International Arbitration Centre Awards in the case of Astro group v. Lippo?

[35] *Ibid*
[36] *Ibid*
[37] *Ibid*, p. 373

C. Research Objectives

1. To figure out whether the Indonesian arbitration law No. 30 year 1999 Articles 65-69 is in accordance with the New York Convention on the recognition and enforcement of foreign arbitral award 1958.
2. To analyse the validity of Indonesian courts' decision in the annulment of Singaporean International Arbitration Centre casein the case of Astro Group vs. Lippo Group.

D. Definition of Terms

I. *International Arbitration* : It is a means of resolving disputes arising under international contract,[38] which characterized by a mechanism for the settlement of disputes, consensual, a private procedure, leads to a final and binding determination of the rights and obligation of the parties.[39]

II. *Foreign arbitral awards* : a decision imposed by an institution arbitration or personal arbitrator outside the jurisdiction of particular state.[40] It is also considered if the award involves property located abroad, envisages performance or enforcement

[38] Gualtier Susan, "International Commercial Arbitration", Hauser Global Law School Program, 2014, http://www.nyulawglobal.org/globalex/International_Commercial_Arbitration.html, (accessed on October 7, 2017).

[39] United Nations Conference on Trade and Development, "Dispute Settlement", *International Commercial Arbitration*, 2005, P. 5

[40] Indonesian Arbitration Law, art. 1(9)

abroad, or has some other reasonable relation with one or more foreign states.[41]

III. *Anti-suit Jurisdiction* : a court order rendered against a private party with the aim wither of preventing that party raising an action in another forum, or forcing that party to discontinue such an action if already started.[42] If the party disregards the anti-suit injunction and continue with the foreign action,[43] it will face sanction in the enjoining forum.[44]

IV. *Subscription and shareholder agreement (SSA)* : an arrangement among a company's shareholders describing how the company should be operated and the shareholders' relationship, the management of the company, ownership of shares and privileges and protection of shareholders.[45]

V. *Intervention* : the proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an

[41] U.S. Federal Arbitration act 2012, section 202; Berman George, "Recognition and Enforcement of Foreign Arbitral Award: The Application of the New York Convention by National Courts", *Columbia Law School*, 2014, p.17.

[42] J J Barceló III, *Anti-foreign suit Injunctions to Enforce Arbitration Agreements in a Rovine (ed),* Contemporary Issues in International Arbitration and Mediation (2007), pgs. 107,108 as cited by Neil A Dowers, "The Anti-suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law", *Cambridge Journal of International and Comparative Law* (2)4, (2013), p. 960-973

[43] *Ibid*

[44] https://definitions.uslegal.com/a/anti-suit-injunction/, (accessed on October 7, 2017)

[45] Share Subscription and shareholders' agreement, http://seriesseed.in/docs/v1/investment-agreement.pdf, (accessed on October 12, 2017)

interest in the subject matter in dispute, in order to protect such interest, interposes his claim.[46]

VI. *Sovereignty* : an ultimate power, authority and/or jurisdiction over people and a territory.[47] Or it is an independence, i.e. non-interference by external powers in the internal affairs of another state.[48]

VII. *Public Policy* : the overall framework within which government actions are undertaken to achieve public goals.[49]

E. Theoretical Review

i. The Development of International Arbitration

The history of International arbitration was renowned from thirteen century in Central Europe, when Pierre Dubois a political lawyer from French, advocated arbitration to settle outstanding quarrel.[50] The court consisted of three ecclesiastical judges, three from each of the disputed parties. The decision from judges could not be appealed,

[46] Brown, Ecclesiastical law, Black's Law dictionary 2nd edition, http://thelawdictionary.org/intervention/, (accessed on October 7, 2017)

[47] General principles, sovereignty, http://nationalunitygovernment.org/pdf/Sovereignty-Guidelines-Alessandro-Pelizzon.pdf, (accessed on October 7, 2017)

[48] Benoust de Alain, "What is Sovereignty?", Translated by Julia Kostova from "Qu'est-ce que la souveraineté? *in Éléments, No. 96,* 1999, p.100

[49] Dye, Thomas R, *Understanding Public Policy,* Englewood Cliffts, 1972, p. 2

[50] Fraser Henry, "Sketch of the History of International Arbitration", *Cornel Law Review 178,* 1926, p. 179-180

except to the pope.[51] Hundreds of years later, Hugo Grotius, the father of International Law in 1625, published his greatest book, *"De Jure Belli et Paris"*, it explained about length on the history and value of international arbitration.[52] Selecting historical instances of successful arbitration, he showed the antiquity and demonstrated the reasonableness of this method of settling disputes.[53]

International commercial arbitration is a work in progress. In early 1920, there was difficulty regarding jurisdiction of an agreement clause or *compromise*. [54]Consequently, the League of Nation adopted 1923 Geneva Protocol on Arbitration Clause to effectively eliminate non-domestic arbitration agreement between disputed parties, followed by establishment the court of arbitration in Paris.[55]

The strength of the desire for internationally accepted rules of procedure was demonstrated by the rapid and overwhelming reception of the UNITRAL arbitration rules after they were adopted by The United Nations commission on International Trade Law in 1976. The UNCITRAL arbitration rules were followed in the Model Law in 1985, in which permits the parties to conduct the arbitration as they

[51] *Ibid*.
[52] *Ibid*, p.182
[53] *Ibid*.
[54] Craig, Park and Paulsson, "International Chamber of Commerce Arbitration", third edition, *Oceana publications*, 2000, p. 273-4
[55] *Ibid*.

wish. Up to date, majority countries in the world are referring to this law to develop their arbitration law, including Indonesia.[56]

ii. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

There was a widely recognized difficulty regarding to the recognition and enforcement of foreign arbitral awards. Four years later after the adoption of the Protocol on Arbitral Clauses (1923), the League of Nations adopted the Geneva Convention for the Execution of Foreign Arbitral Award. The convention was adopted by a large number of state and was generally succeed in regard to its substance.[57]

The Geneva Convention for the Execution of Foreign Arbitral Award turned out risen another major problem in the requirement that the party who seek for the enforcement of the award necessitates to prove that the conditions for recognition had been fulfilled. In order to resolve this problem, the country where the arbitration had taken place requires to recognize the award or known as "double exequateur".

The ICC managed the preparation and submitted to United Nation as the successor of the League of Nations. As a result, they took advantaged by combined 1923 protocol and 1927 convention into a

[56] United Nations Conference on Trade and Development, "Dispute Settlement", *International Commercial Arbitration*, UN New York and Geneva, 2005, p.19-25

[57] *Ibid*, p. 21

single convention, it produced 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[58] which has 157 contracting parties.[59]

iii. Theory of sovereignty

Among the Romans era, the idea of sovereignty found its clearest expression in the sentence, "The will of the Prince has the force of law, since the people have transferred to him all their right and power.[60] Sovereignty is an essential character of a state,[61] as defined in Montevideo convention, the state is made of four basic components; population, territory, government and sovereignty.[62] Sovereignty in the Latin word *'superanus'*[63] means the state should enjoy supreme power its citizens and has authority to enforce obedience to its laws and regulations.[64]

[58] *Ibid*, p.22

[59] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, (accessed on October 12, 2017)

[60] Jr. C.E. Merriam, *History of the Theory of Sovereignty Since Rousseau*, Botoche Books, Kitchener 2001, p. 6; Note 3, *Quidquid princip placuit legis habet vigorem cum placuit legis habet vigorem cum populous ei et in eum omne suum imperium et potestatem concessit*. Institution, LI, Pt. II, sec. 6. Other expressions were, "*Princeps legibus solutus est.*" "Error principis facit jus," "*Omnia jura habet princeps in pectore suo.*"

[61] William Archibald Dunning, *A History of Political Theories: from Luther to Montesquieu,* the mac Millan Company, 1953, p. 281

[62] Montevideo Convention on the Rights and Duties of States 1933, art. 3

[63] Ray, B.N., "Political Theory: Interrogations and Interventions", *Published by Authors Press*, Delhi, 2006, p. 177

[64] Garner, J.W., "Political Science and Government", *World Press*, 1955, p. 1947.

iv. Judicial intervention in arbitration

Generally speaking, the definition of intervention is a procedure that lets a person or organ who is not party to a particular case join the case in order to protect its own interest.[65] Intervention may be "as of right", or "permissive, where the intervener must show that he/she has interest related to the property or transaction involved in the case.[66] Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third party, but without having resource to a court of law.[67]

As independent body, arbitration proceeding must be away from any judicial intervention. [68] It is stated clearly under Arbitration law of Indonesia if there is arbitration agreement between the parties, public courts shall not authorized to try disputes between the parties already bound in the agreement.[69]

v. The existence of public policy principle

[65] http://www.rotlaw.com/legal-library/what-is-an-intervention/, (accessed on October 31, 2017)

[66] *Ibid*

[67] Jain, Sankalp, "Judicial Intervention in Arbitration", *Delhi High Court*, 2015, p.1

[68] Goyal, Mitakshara, "Extend of Judicial Intervention in the Arbitral Regime: Contemporary Scenarion", *International Journal of Law*, Haryana India, 2016, p. 68; Indonesian Arbitration Law, art. 3

[69] Indonesian Arbitration Law, art. 3

Public policy defined as the overall framework within which government actions are undertaken to achieve public goals, with a good working definition of public policy,[70] it is part of government decisions and actions designed to deal with a matter of public concern.[71] The public policies are also coming through a specific policy process, adopted, implemented through laws, regulatory measures, courses of government action, and funding priorities, and enforced by a public agencies.[72] Under ordinary meaning, public policy is a government maintains order or addresses the needs of its citizen's through actions defined by its constitution.[73] The public policy itself is generally not a tangible thing, but rather is a term used to describe a collection of laws, mandates, or regulations established through a political process.[74]

vi. Theory of Anti-suit jurisdiction

Anti-suit jurisdiction or known as Anti-suit injunction,[75] this term is frequently used in International arbitration for a recalcitrant party to attempt to disrupt the arbitral process bringing the dispute

[70] Young, Shaun P., "Evidence-Based Policy-making in Canada", *Oxford University press*, 2013, p. 1.
[71] Charles L. Cochran and Malone, *Public Policy: Perspectives and Choices*, 5th edition, 2014, p. 3.
[72] *Ibid*.
[73] http://study.com/academy/lesson/what-is-public-policy-definition-types-process-examples.html, (accessed on October 14, 2017)
[74] *Ibid*.
[75] Gaillard Emmanuel, *Anti-suit Injunctions Issued by Arbitrators*, International Council for Commercial Arbitration, 2006, p. 235.

covered by the arbitration agreement before national courts and seeking "anti-suit injunction" from those courts.[76] Such act of seeking different types of remedy has been widely commented[77] and criticized.[78]

Even though it has been severe critics by experts in international arbitration, in the arbitration institution the frequency of the parties seek to anti-suit injunction has not diminished in any manner.[79] Consequently, in regard with the jurisdiction which familiar with the mechanism of anti-suit injunction, the problem is that the possibility for the courts to provide support to the arbitral process by enjoining the refractory party from proceeding with its request for an anti-suit injunction,[80] or prohibiting the party targeted by the injunction from complying with the first court's decision.[81]

This chain reaction results in anti-suit injunctions whereby each state court prohibits a party either from proceeding with arbitration or from pursuing its disruptive attempts against an

[76] *Ibid.*
[77] Emmanuel Gaillard, ed., *Anti--Suit Injunctions in International Arbitration,* IAI Series on International Arbitration No. 2 Juris Publishing 2005.
[78] Julian D.M. Lew, *Control of Jurisdiction issued by National Courts,* as cited form International Arbitration, 2006: Back to Basic?, ICCA Congress Series, Volume 13, 2007, p. 185-220.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.

arbitral proceeding.[82] Neither of these situations offers any suitable response to the extent that, in each case, the domestic court's jurisdiction is based on presumption that the court decided about the existence and validity of the arbitration agreement will have absolute extraterritorial effect.[83]

vii. The Development on Arbitration in Indonesia

Arbitration in Indonesia was developed by Indonesian Chamber of Commerce and Industry (*Kamar Dagang dan Industri Indonesia- "KADIN")* on 3 December 1977. Under KADIN, the establishment of independent institution for arbitration known as Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia- "BANI")*. [84] Before 1999, legal basis for arbitration process in Indonesia was referred to article 615 to 651 of the *Reglemen op de Burgerlijke Rechtsvordering*,[85] article 377 of the *Het Herziene Indonesisch Reglement*[86] and Article 705 of the *Rechtsreglement Buitengewesten.*[87]

[82] Gaillard Emmanuel, "The Misuse of Anti-Suit Injunction", *New York Law journal*, 2002, ps. 3, 7; Case on KBC v. Pertamina: "Landmark Decision on Anti-suit Injunction", *New York Law Journal*, 2003, pg. 3, 8

[83] *Ibid.*

[84] Hadiputranto, Hardinoto & Partners, "Arbitration in Indonesia Law No. 30 of 1999 Arbitration and Alternative Dispute Resolution", *Dispute Resolution*, 2012, p. 2.

[85] Reglemen op de Burgerlijke Rechtsvordering (RV).

[86] Het Herziene Indonesisch Reglement (HIR).

[87] Rechtsreglement Buitengewesten (RBG).

viii. Indonesian Regulations of foreign arbitration award in Indonesia

Under Indonesian law, international arbitral awards will only be recognized and may only be enforced within the jurisdiction of Indonesia if they fulfill the following requirements:[88]

a) The foreign arbitral award is rendered by an arbitration body or an individual arbitrator in country that is bilaterally bound to Indonesia or jointly with Indonesia to an international convention regarding the recognition and enforcement of foreign arbitration awards.
b) The foreign arbitral awards are only limited to awards that according to Indonesian law, fall within the definition of commercial law
c) The foreign arbitral awards are not in contravention of public order under Indonesian law
d) The foreign arbitral awards may be enforced in Indonesia only after the central Jakarta district court has issued *exequatur*
e) If the republic of Indonesia is a party to the foreign arbitration award, this award may be enforced in Indonesia only after supreme court has issued *exequatur*

[88] Art. 65-67 Arbitration Law.

f) The application for the enforcement of the foreign arbitral awards must be accompanied by:[89]

i. The original or duplicate of the foreign arbitration award, authenticated pursuant to the provisions regarding authentication of foreign documents, and an official translation thereof,

ii. The original or duplicate of the agreement, as the basis for the foreign arbitration award, authenticated in accordance with the provisions regarding authentication of foreign documents, and the official translation thereof,

iii. A statement from Indonesian diplomatic representative in the country where the foreign arbitration awards was rendered, starting that such country is bilaterally bound to Indonesia or jointly bound with Indonesia in an international convention regarding or jointly bound with Indonesia in an international convention regarding the recognition and enforcement of a foreign arbitration award.[90]

ix. Arbitration process in Singaporean International Arbitration Center

[89] *Ibid.*
[90] *Ibid*.

Under the newest SIAC rules, it is stated that when both parties are agreed to settle their disputes to SIAC, the parties shall deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with the rules of SIAC.[91] Arbitral proceedings in SIAC rules were adopted from United Nations Commission on International Trade Law (UNCITRAL),[92] *inter alia*; general provision,[93] place of arbitration,[94] language,[95] statement of claim, statement of defence, amendments to the claim or defence,[96] pleas as to the jurisdiction of the arbitral tribunal,[97] written statements, evidence, hearings, experts appointed by the arbitral tribunal,[98] default, closure of hearings,[99] waiver of right to object, and decision.[100]

F. Research Methods

I. Sources of Data

The sources of data are divided into three; (i) the primary legal materials that were used to complete this research are laws and regulations, both nationals and internationals as well as other

[91] Arbitration Rules of the Singapore International Arbitration Centre, sixth edition, 1 August 2016, art. 1 (1.1).
[92] United Nation Commission on International Trade Law, *UNCITRAL Arbitration Rules*, revised in 2010, p. iii.
[93] *Ibid*, art. 17.
[94] *Ibid*, art. 18.
[95] *Ibid*, art. 19.
[96] *Ibid*, arts. 20-22.
[97] *Ibid*, art. 23.
[98] *Ibid*, arts. 30-32.
[99] *UNCITRAL Arbitration Rules, Op. cit.* 93, rule 24.
[100] *Ibid*, rule 32.

jurisprudences. (ii) The secondary legal materials comprises of books, journals, articles, documents and news that cover various aspects within this topic and written by relatively highly qualified publishers. And (iii) the tertiary legal materials are law dictionaries and business dictionaries.

II. Data Collecting

The process of collecting data in the making of this research was done through both library studies by collecting as many as possible knowledge and information from the books, jurisprudences, awards, journal, articles, documents and news, as well as from national and international laws.

III. Data Approach

The approach in this research is using the combination of the normative-empiric approach. Which will be centering on statute approach, conceptual approach, analytical approach, historical approach, philosophical approach and case approach, as well as sociological approach.

IV. Data Analysis

In the process of analysing data during the process of this research, it is applied the qualitative method of analysis. Which is done by describing the already gained data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own arguments.

G. Systematic writing

I. Chapter 1.

Chapter one contains an introduction a background of the thesis, which includes these following parts: the context of the study, statement of problems, research objectives, theoretical frameworks, research procedures and system of writing.

II. Chapter 2.

Chapter two contains the theoretical reviews regarding of international arbitration, the New York Convention 1958, Anti-suit jurisdiction, sovereignty principles, and the development of International arbitration in Indonesia. Definition and elements related with International Arbitration award and it implementation

in Indonesia, especially related with Astro vs. Lippo group case under Singapore International Arbitration Centre.

III. Chapter 3.

Chapter three contains of; first, the analysis of the impediments for international arbitration award to be recognized and enforced in Indonesian territory. Whether the regulation of foreign arbitration enforcement in Indonesia is accordance with New York Convention 1958.

Second, it will review the decision from Singapore International Arbitration Centre about anti-suit jurisdiction in the case of Astro vs. Lippo group related with Subscription and shareholder agreement, whether it is violating the sovereignty of Indonesia and Indonesia public policy as what had been issued by central Jakarta district court, supported by Supreme court decision in annulment the SIAC anti-suit jurisdiction decision

IV. Chapter 4.

Chapter four provides the conclusion and recommendation that are made based on the previous analysis.

CHAPTER II

GENERAL OVERVIEW OF INTERNATIONAL ARBITRATION AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA

A. The Development of Alternative Dispute Resolution

International business is booming. In fact, some say the pace of globalization is faster and more comprehensive than at any time in world history. While many of the top 500 largest corporations in the world remain headquartered in the United States, over fifty percent are spread across over two dozen other countries. In addition, with rapid technological advances, the twenty-first century international business sector is no longer reserved for major, multi-national corporations; small and medium-sized businesses are now global players too. Because recent decades have seen a marked increase in the size and complexity of international commercial transactions, the potential for transnational business disputes is perhaps greater now than ever before.[101]

In regard with the rise of the global economy, private dispute resolution processes, including international arbitration and other

[101] Stromberg Winston, "III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes", *Loyola of Los Angeles Law Review*, 2007, p. 1341.

alternative dispute resolution ("ADR") mechanisms, have quickly become a vital component of international business relationships. A recent study on corporate attitudes towards such topics as international arbitration and cross-border litigation reveals an overwhelming preference for international arbitration over litigation in national courts. And, while arbitration may be the current preferred method for resolving international business disputes, the past decade has seen an upsurge in the use of non-arbitral ADR processes, most notably mediation and conciliation.

Alternative Dispute Resolution ["ADR"] also called Appropriate Dispute Resolution is a general term, used to define a set of approaches and techniques to resolve a dispute in a non-confrontation way.[102] It consists varieties way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution.[103] The consensual nature of either opting for dispute resolution or deciding the outcome of a dispute by the parties is a cornerstone element of ADR.[104]

The concept of ADR is not a new phenomenon, where over centuries, societies had been developing the process informal and non-adversarial for resolving disputes.[105] One of the earliest mediation and conciliation had

[102] Samir, Yona, "Alternative Dispute Resolution Approached and Their Application", UNESCO, *PCCP Publications* , 2003, p. 2.
[103] *Ibid.*
[104] Investment Climate Advisory Services of the World Bank Group, "Alternative Dispute Resolution Guidelines", *The world bank group,* 2011, p.2.
[105] Consultation Paper, "Alternative Dispute Resolution", *Law Reform Commission,* July 2008, p. 20.

recorded in more than 4,000 years ago,[106] where a merchant organization advocated that commercial disputes be resolved outside of the court process through a confrontation between the creditor and debtor in the presence of a third party referee. ADR methods outside the court system means to generate solutions to complex problems that would better meet the requirements of disputants and their communities, reduce reliance on the legal system, strengthen local civic institutions, preserve disputants' relationship, and teach alternatives to violence or litigation for dispute settlement.[107]

As ADR began expand around the world, in the first time was sprung out in the common law countries such as the United States, the United Kingdom, Canada, Australia, and New Zealand.[108] Since then, many countries had adopt ADR as part of their integral part of modern civil justice system.[109] ADR processes are being implemented to meet a wide range of social, legal, commercial, and political goals.[110] In 1980, demand for ADR in the commercial factor has spread out as part of an effort to find more efficient and effective ways compare to litigation. Since this time, the use of private arbitration, mediation, and other forms of ADR in the business activities has risen rapidly, flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve

[106] Fuler, *Mediation; its Forms and Function,* 44 S. Call. L. REV. 305, 1971, p. 325.
[107] https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf, (accessed on November 14, 2017).
[108] The world bank group, *Op. Cit.*, p. 4.
[109] Law Reform Commission, *Op. Cit.*, p. 34.
[110] Stephen B. Goldberg, et al., *Dispute Resolution: Negotiation, Mediation and Other Processes,* second edition., Little Brown and Co., New York 1922, p. 3-12.

disputes.[111] The ADR was also accompanied by an explosion in the number of private firms offering ADR services.[112]

Many international commission had promulgated laws regarding alternative dispute resolution, such as The Organization for Economic Co-Operation and Development (OECD) Recommendation on Consumer Dispute Resolution and Redress which set out principles for an effective and comprehensive dispute resolution and redress system that would be applicable to domestic and cross-borders disputes.[113] "It must become such well-established part of it that when considering the proper management of litigation it forms an intrinsic and as instinctive a part of our lexicon and out thought processes, as standard considerations like what, if any, expert evidence is required".[114]

The main concern concern in here is that, the used of ADR intended to give a general sense of the relative advantages of different dispute resolution procedures under a wide range of conditions. [115] ADR is way more efficient and effective sources compared to court in delaying or corrupting inhibit foreign investment and economic restructuring. [116] Here

[111] Shamir Yona, *Op. Cit.*, p. 4

[112] Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts: A sourcebook for Judges and Lawyers,* Federal Judicial Center and CPR Institute for Dispute Resolution, 1966, p. 3-13.

[113] OECD Recommendation on Consumer Dispute Resolution and Redress This Recommendation was developed by the OECD Committee on Consumer Policy (CCP). Work on its principles was initiated in late 2005. The Recommendation was adopted by the OECD Council on 12 July 2007.

[114] Speech by Sir Anthony Clarke, Master of the Rolls, "The Future of Mediation" at the second civil mediation council national conference Birmingham, May 2008.

[115] What Can ADR Do? Goals and Possible Uses of ADR, *op. cit. 7,* p. 7

[116] Fladjoe, *Alternative Dispute Resolution: A Developing World Perspective,* Cavendish, 2004, p. 10.

is the following matrix matches the general ADR systems with the purposes and development objectives to the best suited. Comparing ADR and court procedures: how likely are they to achieve disputants' goals.

Disputants' Goals	**ADR Procedures**			**Court Procedures**
	Mediation/ Conciliation	Non-Binding Arbitration	Binding Arbitration	Adjudication
Minimize Costs	3	2	1	0
Resolve Quickly	2	2	3	0
Maintain privacy	2	2	2	0
Involve Constituencies	3	1	1	0
Link Issues	3	1	1	0
Get neutral opinion	0	3	3	3
Set precedent	0	0	1	3

Source from Frank Sander and Stephen Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting and ADR Procedure".[117]

[117] Frank Sander and Stephen Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting *and* ADR Procedure", *Negotiation Journal*, 1994, p. 49-68.

Key:

3 = highly likely satisfy goal

2 = likely to satisfy goal

1 = unlikely to satisfy goal

0 = highly unlikely to satisfy goal.

ADR process can be arranged along a spectrum which correlates with increasing third party involvement, decreasing control of the parties over the process and outcome, and usually, increasing likelihood of having the relationship between the disputants deteriorate during and after resolution of the dispute.[118] This spectrum can also be grouped into four distinct categories:

1. Negotiation

Negotiation has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them.[119] Negotiation has also been characterized as the "preeminent mode of dispute resolution".[120] The characteristics of negotiation are: [121]voluntary, bilateral/multilateral, non-adjudicative, informal, confidential, and flexible. Principled negotiation refers to the interest-based approach to negotiation, which the essence of

[118] Fladjoer, *Op. Cit.*, p. 21.

[119] The Law Society of Upper Canada, "Short Glossary of Dispute Resolution Terms", *Research and Planning Committee*, Canada, 1992, p. 6.

[120] S.G. Goldberg, et al., *op. cit.* p. 3.

[121] Dispute Resolution Reference Guide, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html, (accessed on November 14, 2017).

this approach is that parties concentrate on solving the problem by finding a mutually-beneficial solution rather than on defeating the other side.[122] During the negotiation, parties are mostly influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement, or known as "best alternatives to a negotiated agreement".[123]

The better their alternatives, the more they may push for a more favorable settlement, vice versa, the worse their alternatives, the more accommodating they may be in the settlement negotiations.[124]

2. Mediation

Mediation defined as a third party attempts to settle a dispute between two – or more – other parties, it can also refer to a medium for a process or effect.[125] In comprehensive way mediation can be defined as a process by which disputing parties voluntarily engage the help of an impartial mediator, who has no authority to make any decisions for them but who uses certain skills to help them to resolve their dispute by negotiated agreement without adjudication.[126]

The main objectives for mediation is that, it allow all parties involved to move away from legal concepts such as fault and instead, allow for a sharing of people's perceptions and experiences and a determination of

[122] Fisher and Uri, *Getting to Yes: Negotiating Agreement without Giving in*, second edition Penguin Books, 1991, p. 108.
[123] *Ibid.*
[124] *Ibid.*
[125] Definition from the Oxford University Press, Compact Oxford English Dictionary
[126] Brown, Henry and Arnold Simanowitz, *Alternative Dispute Resolution and Mediation*, quality in Helath care, 1995, p. 153.

each party's actual need and interest.[127] The mediator should remain dispassionate and avoid become partial to one party or view. If it expressly agreed, all statements and disclosures made and information and documents provided to the mediator are confidential.[128]

3. Conciliation

Conciliation defines as a process in which independent person or persons are appointed by the parties with mutual consent by agreement to bring about a settlement of their dispute through consensus or by using of the similar techniques which is persuasive.[129] Under UNCITRAL Model Law on International Commercial Conciliation defines conciliation as:

> "… a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (―the conciliator‖) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[130]

Conciliation can be similar to mediation, however, the main difference is that the conciliator's role may be more directive and advisory.[131] The body plays an active role when examine all aspects of the dispute, it may attempt to identify the parties' underlying interests and their positions;

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[127] Dispute Resolution Reference Guide, *op. cit,* mediation.

[128] *Ibid.*

[129] Shinde Ujawal, "Conciliation as An Effective Mode of Alternative Dispute Resolving System", *IOSR Journal of Humanities and Social Science (JHSS),* Volume 4, December 2012, p. 1.

[130] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at www.uncitral.org. See also Dobbins ―UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly‖ (2002) 3 Pepp Disp Resol L J 529.

[131] Australian Government Attorney-General's Department, "Your Guided to Dispute Resolution", *NADRAC,* Australia, 2012, p. 18.

and the settlement proposed is not necessarily based on law and is not binding.[132] The difference can also be found between conciliation and arbitration, in the condition that the conciliation body does not have the *a priori* political authority to influence the parties or exert political pressure on them in order to settle the dispute.[133]

4. Arbitration

Arbitration provides a valuable alternative to the battle-like atmosphere inherent in litigation. As Judge Learned Hand once remarked, "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." Although there are other alternatives to litigation, such as negotiation and mediation, arbitration is the only alternative that can be binding on the parties. Therefore, it can achieve the same result as litigation—a binding award. Moreover, the arbitration can be performed in a neutral location, exempt from potential territorial prejudice.

The key to a successful arbitration is the enforceability of the award. The majority of arbitral awards are honored, without resistance, by the losing party. The vast number of arbitrations, and the lack of data exhibiting enforcement difficulties, illustrate the positive results of international arbitrations. While the process is private, the results in the form of a written award can be made public. The lack of adverse data is a

[132] Bernier Ivan and Nathalie Latulippe, "Conciliation as A Dispute Resolution Method in The Cultural Sector", *The International Convention on the Protection and Promotion of the Diversity of Cultural Expression,* p.6.

[133] *Ibid.*

reasonable confirmation of its phenomenal success.[134]

Arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state. The state requires the parties to honor their contractual obligation to arbitrate, provides for limited judicial supervision of arbitral proceedings and supports the enforcement of arbitral awards in a manner similar to that for national court judgment.[135] The main characteristics of arbitration are:[136]

- Its consensual nature – arbitration is a mechanism for the resolution of a disputes in which parties must agree to settle their disputes;

  In 1854 came the Common Law Procedure Act, and section 17 of this act dealt with arbitration; but this too was insufficient to cover the usual case of voluntary submission in which the parties had not agreed that it might be made a rule of court. The previous arbitration act of 1833 applied only to cases where the arbitrator or umpire had been appointed, that is to say, where there had been a submission under an agreement that the submission might be made a rule of court. Section 7 of the act of 1854 provided further:

  "Every agreement of submission to arbitration by consent

[134] Hardock Roger S. & Jane L. Volz, "Foreign Arbitral Awards: Enforcing the Award against the Recalcitrant Loser", 21 William Mitchel Law Review, 1996, p. 870.

[135] Latham and Watkins, *Chapter I: What is arbitration,* Guide to International Arbitration, p.1.

[136] Investment Climate Advisory Services of the World Bank Group, *op. cit.,* p. 9-10.

whether by deed or instrument in writing not under seal may be made a rule of any one of the superior courts of law or equity at Westminster on the application of any party thereto unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court."[137]

- It is a private procedure – the decision-makers are non-governmental and the procedure is not part of the state court system;
- It is a flexible procedure – the parties agree on the procedural rules to be used; the concession agreement qualified as a "*contrat administratif,*" a civilian legal concept which effectively skirts the rigid boundaries of private law in the face of public regulatory intervention. The *contrat administratif* doctrine assumes an "essentially unequal", relationship between its parties, where the state may exercise its coercive power to take unilateral action in amending its legal obligations. The state is presumably guided in such actions by the dictates of public interest.[138] And,
- It is a binding award – arbitration leads to a final and binding determination of the rights and obligation of the parties.[139]

In order for the disputing parties settle the dispute before arbitration, they required to have arbitration agreement to include an

[137] Sayre Paul L., "Development of Commercial Arbitration Law", *35 Yale Law School,* 1928, p. 607.
[138] Shalakany Amr A., "Arbitration and The Third World: A Plea For Reassessing Bias under The Specter of Neoliberalism", *41 Harvard International Law Journal,* 2000, p. 462.
[139] Investment Climate Advisory Services of the World Bank Group, *op. cit.,* p. 9-10.

arbitration clause in a contract or a separate agreement.[140] Arbitration agreement in UNCITRAL define as:

> "Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"[141]

Unlike litigation, arbitration generally allows the parties to design most aspects of the resolution process to suit their needs and the nature of the disputes. Further, the parties to an arbitration are able to choose the arbitrator, an option which is not available in the traditional court system.[142]

French Code of Civil Procedure provided that, in international arbitrations,

> "[t]he arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, Prior to 1985, provisions in national arbitration statutes addressing the role of trade usages in resolving commercial disputes were rare. Under he shall decide according to the rules he deems appropriate. In all cases, he shall take into account trade usages."[143]

Since 1985, however, that has changed dramatically. Beginning with the Netherlands Arbitration Act of 1986, twenty-eight countries have revised their arbitration laws to include provisions requiring arbitrators o

[140] UNCITRAL, *op. cit.,* an agreement in writing includes a telex, letter, telegram or other means of telecommunication which provides a record of the agreement. See footnote 8, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html (accessed on November 17, 2017).

[141] UNCITRAL, *op. cit.,* Chapter II, article 7.

[142] UNCITRAL, *op. cit.,* http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html (accessed on November 17, 2017).

[143] Article 1496 of the 1981 French Code of Civil Procedure.

consider trade usages.

There are at least two possible reasons for this change. First, competition among countries to serve as arbitral sites has accelerated. Increasingly countries are adopting specialized international arbitration statutes to replace their previous statutes that, while applying to international arbitration, were designed principally for domestic arbitrations. It may be that this inter jurisdictional competition has resulted in states adopting arbitration statutes that include provisions requiring arbitrators to consider trade usages. If so, that many, although certainly not all, of the new arbitration statutes contain such provisions supports the thesis of this article.

Second, in 1985 UNCITRAL promulgated its Model Law on International Commercial Arbitration, which significantly reduced the cost to countries of updating their arbitration statutes. Of the twenty-nine arbitration statutes listed in Table 3 as requiring arbitrators to consider trade usages, twenty-four are considered by UNCITRAL to have adopted the UNCITRAL Model Law, with some slight variations. Those countries that have adopted the UNCITRAL Model law generally have been countries without a significant history of serving as an international arbitration site. This suggests that the ease of adoption played an important role in those countries' decisions to adopt the Model Law. It also counsels against drawing overly strong conclusions from inclusion in national arbitration statutes of a rule on trade usages. The text of the arbitration

statutes concerning trade usages varies in much the same way as the wording of arbitration rules does, as discussed earlier.[144] Under UNCITRAL Arbitration Rules: the arbitrator "shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."[145]

Almost all of the countries that based their arbitration statutes on the UNCITRAL Model Law track this language. One exception is Egypt, whose statute requires the arbitrator to "decide in accordance" with both the contract and the trade usages. The Italian statute likewise seems to put contract language and trade usages on the same level. The statutes of France and the Netherlands address only trade usages and require arbitrators to take them into account in all cases. Sri Lanka modified the provision of the UNCITRAL Model Law to provide that "[t]he arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorized it do so." Sri Lanka seems to have interpreted the Model Law as adopting a broad view of the meaning of trade usages (as incorporating the *lex mercatoria*) rather than a narrow one (of incorporating business practices). Other countries, such as England, whose new statutes were influenced by the Model Law but do not include the provision on trade usages, seem to have had similar concerns.

[144] Drahozal Christopher R., "Commercial Norms, Commercial Codes, International. Commercial Arbitration", *33 Vanderbilt Journal of Transnational Law,* 2000, ps. 120-122.
[145] Article 28(4) of the UNCITRAL Model Law.

At best, the provisions of national arbitration laws provide uncertain support for using commercial norms to decide contract disputes. Many national laws require to varying degrees that arbitrators consider trade usages, but that requirement is by no means universal and certainly has been influenced by the UNCITRAL Model Law. None of the statutes contain any similar provision dealing with course of performance or course of dealing.[146]

There are types of arbitration, *inter alia;* First, institutional and ad hoc arbitration. Institutional arbitration, the arbitration that takes place within an institution and is conducted in accordance with its procedural rules. Most arbitration organizations have only one set of arbitration rules. Differentiation in procedure arises out of the organizations' specializations. However, some arbitration organizations have different rules for different types of disputes.[147] While ad hoc arbitration is arbitration takes place without any reference to an arbitration institution. The parties may also choose ad hoc arbitration because they are unable to agree on an arbitration institution.[148]

Second, International and domestic arbitration. International commercial arbitration is similar to domestic arbitration in most respects, but it has several characteristics that distinguish it: it often involves parties

[146] Drahozal Christopher R., *op. cit.,* ps. 121-122.

[147] For example, the American Arbitration Association has different sets of rules for commercial disputes, consumer disputes, employment disputes, labor disputes, as well as the rules for certain state programs. See http://www.adr.org/arb_med (accessed November 17, 2017).

[148] UNCITRAL, *op cit.* p. 19.

from different jurisdictions; the subject matter of the dispute is international; or a substantial part of the commercial obligations are conducted outside of the state in which the parties have their place of business.[149]

The growth of international commercial arbitration is largely a post-World War II phenomenon, fueled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries. While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modem commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or businesslike to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have a very different impact on foreign persons and entities, to whom not only the procedure but frequently the language is foreign, than they do on their local contracting partners. Finally, there is

[149] *Ibid*, article 1(3) arbitration is international if: (a) the parties to an arbitration agreement have their places of business in different states when that agreement is concluded; or (b) one of the following places is situated outside the state in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests.

In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdictions language and procedures, preferences of the judge, and possibly even national bias.[150]

B. The Arbitration Process in Indonesia and Singapore

Arbitration are governed by a multiplicity of procedural rules, both those of the seat of arbitration and institutional procedural rules chosen by the parties. Not only must parties navigate this duality in order to obtain an award, but they must also tackle the procedural rules of any state in which the judgment creditor seeks to execute the award. Even where the UNCITRAL Model Law on International Commercial Arbitration (chosen by the party) has been enshrined by legislation, different countries balance the competing factors of state sovereignty and party autonomy differently. The by-product of balance is that both enforcement and execution of an arbitral award can be a costly and time-consuming process.[151]

[150] Craig W. Laurence, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration", *50 Texas International Law Journal,* 2016, p. 701.

[151] Chan Laina, "International Disputes, The Execution of Foreign Arbitral Awards in The Asia-Pacific and Two Case Studies", 28 *New York International Law Review,* 2015, p. 2.

1. Arbitration Process under Indonesian law

Indonesia is a civil law country, where law ("undang-undang") is the main source for judges to determine the final decision of a case. The dispute in Indonesia might be adjudicated into two types of law process, namely litigation process in front of court proceeding, and second is non-litigation or outside the court procedures.[152] Litigation process in Indonesia can be brought before: (i) general civil and criminal court, located in every provinces and cities; (ii) special courts, such as administrative court, labor court, commercial court, corruption court, located in certain provinces in Indonesia; (iii) and other quasi-judicial powers, such as antitrust commission, human rights court, the consumer commission, etc.[153]

Non-litigation in Indonesia, can be defined as non-court proceeding such as; negotiation, mediation, conciliation and arbitration. Through this paper, the author will address specific in the topic of Arbitration, which was developed by Indonesian Chamber of Commerce and Industry (*Kamar Dagang dan Industri Indonesia- "KADIN")* on 3 December 1977. Moreover, under KADIN, the establishment of independent institution for arbitration had released known as Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia- "BANI")* on 3 December 1977. Before 1999,

[152] Hutabarat, M Pheo, *op. cit.*, page 371.
[153] *Ibid*.

legal basis for arbitration process in Indonesia was referred to article 615 to 651 of the *Reglemen op de Burgerlijke Rechtsvordering*, article 377 of the *Het Herziene Indonesisch Reglement* and Article 705 of the *Rechtsreglement Buitengewesten.*[154] Since then, many business actors choose BANI as their dispute settlement, because they think BANI has more efficiency ways in settling their dispute. However, the award itself will not becoming self-executing without register in the district court, which somehow the mechanism of imposing arbitration awards are often delayed and difficult. Therefore through this paper, there will be analysis in the obstruction for Arbitration in Indonesia both domestic and foreign arbitration awards.

The principal sources of commercial arbitration law in Indonesia are traditional norms known as the pancasila, the colonial Code of Civil Procedure, the Indonesian Civil Code, and, most recently, Law No. 30 of 1999. Historically, each of these sources' peculiarities, and their occasionally conflicting demands, have hobbled the development of clear and predictable rules concerning enforcement of foreign awards in Indonesia.

Traditionally, Indonesian society is somewhat "non-litigious;" Indonesians are thought to prefer amicable dispute settlement through negotiation, and value greatly the preservation of commercial relationships. This consensual approach finds inspiration in the

[154] Hadiputranto, Hardinoto & Partners, *op. cit.*, page 2.

pancasila (the “five pillars”), an influential body of traditional philosophy that calls for avoiding confrontation whenever possible. From a legal standpoint, those legal scholars and judges who closely adhere to pancasila promote such alternative dispute resolution (“ADR”) forms as mediation and conciliation or consensus building, rather than arbitration --the more adversarial approach.

Until 1999, Indonesia’s arbitration legislation was a jumble of provisions dating back to the colonial period and based squarely on early twentieth-century Dutch models. The Indonesian Constitution of 1945 stipulated that the laws of the Netherlands would remain valid so long as they did not contradict the Constitution, or until they were superseded by new local laws. Articles 615-651 (Title I) of the Dutch colonial Code of Civil Procedure, together with the general freedom of contract provisions of the Indonesian Civil Code, formed the legislative basis for arbitration in Indonesia.

This legal framework had important shortcomings. The civil procedure rules contained no express arbitration rules, so Articles 615-651 of the Code provided legitimacy to arbitration only implicitly. Further, there was no clear mandate for recognizing and enforcing domestic arbitral awards, let alone foreign ones. These deficiencies caused some foreign businesses to question the legal security of their

investments in Indonesia. [155]

BANI is an arbitral tribunal, in capital letters or small letters, shall be the tribunal formed according to the BANI procedure and comprising one or three or more arbitrators.[156] It was established in 1977 by Prof. R. Subekti, Mr. Jaryono Tjitrosoebono and Prof. H. Priyatna Abdurrasyid. BANI is providing services beside arbitration proceeding, which are mediation, binding opinion and other form of dispute resolutions. The center of BANI is in Jakarta, and its branches are located in various cities including Surabaya, Bandung, Pontianak, Denpasar, Medan, Palembang, and Batam. As an independent institution, BANI is not only relied upon the new law of arbitration No. 30 year 1999 about arbitration and alternative dispute resolution, but also had developed its own rules and procedures for the arbitration.

As previously mention, many parties show their interest to choose BANI as their last mechanism to settle the dispute. The reasons why they choose BANI over court litigation because BANI are speedier, efficient and final characteristics, it gives parties win-win solution and no more appeals or cassation. Moreover, arbitration has confidentiality characteristic, which the process of obtaining award is close to public and the final award is not published. [157] Compare to court proceeding, the process in the court will take a lot of times, even more than one

[155] Rubins Noah, "The Enforcement and Annulment of International Arbitration Awards in Indonesia", *20 American University International Law Review,* 2005, p. 365-465.
[156] BANI Procedure, article 3 (a).
[157] http://www.baniarbitration.org/about.php, (accessed on January 14, 2018).

year for complicated civil case, while in Arbitration, the process takes times as efficient as possible.

2. Arbitration Process in Singapore

Singapore's arbitration scene has gone from strength to strength, a trend that continued in 2015. It is now the fourth most popular arbitration seat, ranked just after London, Paris and Hong Kong.2 Symptomatic of the sophistication of the bar and judiciary, Singapore arbitral jurisprudence, while largely adhering to the norms of international arbitration practice, has also developed in ways unique to Singapore. Although this chapter deals primarily with arbitration, brief mention is also made of the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC).[158]

Singapore has two parallel arbitral systems. In general, an international arbitration as defined under Section 5 of the International Arbitration Act (IAA) is governed by the IAA. Any arbitration that is not governed by the IAA is governed by the Arbitration Act (AA). Additionally, the Rules of Court applicable to the IAA are set out in Order 69A, while those applicable to the AA are set out in Order 69.[159]

Singapore's *International Arbitration Act* (Cap. 143A, 1995) (Singapore IAA) adopts the Model Law as the foundation of its legislative framework for international arbitration, reflecting its status

[158] Dispute Resolution Review, *op cit.*, p. 457.
[159] *Ibid*, p. 458.

as a hub of international financial and commercial activity. The provisions of the Singapore IAA and the Model Law, which limits the potential for courts to interfere in the enforcement process, encapsulates Singapore's preference for minimal curial intervention in international arbitration.[160]

With the exception of Chapter VIII, the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) has the force of law in Singapore vide its incorporation by the IAA.[161] Any departures from the Model Law are listed in Part II of the IAA. Chapter VIII of the Model Law relates to the recognition and enforcement of awards. This has not been incorporated in the IAA in order to avoid duplication with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to which Singapore is a signatory.[162] The New York Convention only governs the recognition and enforcement of foreign awards.

The position in relation to awards issued in respect of international arbitrations seated in Singapore (and thus not governed by the AA) is governed by Section 19 of the IAA. In turn, Section 19 of the IAA merely states that: 'An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same

[160] Chan Laina, *op. cit.,* p. 14.
[161] Singapore International Arbitration Act, section 3, schedule 1 [IAA].
[162] *Ibid*, part. III, schedule 2.

manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.' The Singapore Court of Appeal recently ruled that Section 19 should be read consonant with the underlying philosophy of the Model Law.[163] Although the Court of Appeal did not elaborate as to whether this meant that the precise grounds of Section 34 of the Model Law are replicated under Section 19, it would be surprising if it were not. This would be consistent with the primary legislative intent behind the IAA, which was to implement 'the Model Law [and] introduce additional provisions which will facilitate arbitrations'. Some of these provisions include conciliation proceedings prior to arbitration, granting immunity to arbitrators, curial assistance of arbitration proceedings, and the awarding of costs and interests.

Unlike the IAA, the Model Law is not enacted in full in the AA. Nevertheless, the provisions of the AA are in fact 'largely based on the UNCITRAL Model Law, which forms the basis of Singapore's International Arbitration Act'. Where there are similar provisions in the AA and the IAA, 'the court is entitled and indeed even required to have regard to the scheme of the [IAA or the Model Law] for guidance in the interpretation of the [AA]', given the clear legislative intent to align Singapore's domestic laws with the Model Law. As a result, it is

[163] *PT First Media TBK v. Astro Nusantara International BV* [2014] 1 SLR 430, para. 53-55.

expected that arbitral jurisprudence under the AA and the IAA would be similar, if not identical, in practice.[164]

C. The Recognition and Enforcement of Foreign Arbitral Awards

One of the reasons that international commercial arbitration has become a mainstay in the resolution of international commercial disputes is not only that it provides a neutral forum for the resolution of such disputes, but also that the awards rendered by an international arbitral tribunal are readily enforceable in jurisdictions throughout the world.[165] The paramount enforcement concern when drafting an international arbitration clause is seating the arbitration in a country that has acceded to the New York Convention. There are currently 146 signatories to the New York Convention, and parties should have good reasons if they choose to seat the arbitration in a country that has not ratified it.

Moreover, practitioners should not assume that a country has acceded to the New York Convention when seating an arbitration there. There are still countries in Africa, Asia, Latin America, the Middle East and the Caribbean that have not acceded to the treaty, and unnecessarily seating an arbitration in one of those countries can have dire enforcement

[164] Dispute Resolution Review, *op cit.*, p. 457.

[165] Donahey M. Scott., "Enforcement of Injunctive Relief and Arbitration Awards Concerning Title to and Enforcement of Intellectual Property Rights in Asia and The Pacific Rim", *19 Hasting International and Comparative Law Review,* 1996, p. 530.

consequences.[166]

Historically, many international organizations have attempted to ensure the enforceability of arbitral awards through multilateral treaties, beginning with the Geneva Protocol of 1923 and followed by the Geneva Convention of 1927, both treaties collectively known as the Geneva Treaties. While the Geneva Treaties are essentially historical remnants today, they remain the New York Convention. The New York Convention is by far the most important international arbitration treaty today. Thus, it is helpful to take a brief look at the Geneva Treaties, which created the fundamental underpinnings of the New York Convention.[167]

1. Geneva Protocol Arbitration Clauses 1923 [Geneva Protocol]

In 1923, the League of Nations, predecessor to the United Nations, established the Geneva Protocol in an effort to make arbitration agreements and clauses enforced on an international level. Specifically, its purpose was to guarantee the enforcement of arbitration awards in the nations in which the awards were rendered.[168] Article I

> "required ratifying nations to recognize the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction

[166] Salomon Claudia T., "Enforcement Begins when the Arbitration Clause is Drafted", *22 American Review of International Arbitration,* 2011, p. 274.
[167] Hardock Roger S. & Jane L. Volz, *op. cit.*, p. 873.
[168] *Ibid*, p. 876.

none of the parties is subject." [169]

Despite a desire to internationalize commercial arbitration, the Geneva Protocol left much to be desired. In addition to clauses that permitted individual national policies to govern the arbitration process, drafting defects hindered the enforcement process. For example, nations could have varying interpretations on what was a "commercial matter." Nations also could vary their interpretation of "existing and future differences." Further, nations could disagree on which disputes were capable of settlement by arbitration.

Besides that, the Geneva Protocol only applied to arbitrations made between parties who were both subject to jurisdictions that had ratified the treaty. Courts had difficulty in determining what constituted jurisdiction. In complying with the jurisdiction component, some courts held it to be a nationality requirement, while others held it to be "a requirement of residence, domicile or usual place of business."[170]

2. Geneva Convention on the Execution of Foreign Award of 1927

Most significantly, the Geneva Protocol did little to impose guarantees of enforcement once an awards was decided. Ratifying nations needed only to enforce awards rendered in their own jurisdiction. Consequently, even if both disputing parties were determined to be in a jurisdiction that adhered to the Geneva Protocol, if the nation in which the awards was made was not the nation in which the awards was to be

[169] Geneva Protocol 1923, article 1.
[170] Hardock Roger S. & Jane L. Volz, *op. cit.*, p. 875-876.

enforced, the successful party lacked power to enforce the awards. This limitation defeated the fundamental purpose of the international nature of the Geneva Protocol: to enforce arbitration awards across international borders.

The Geneva Convention on the Execution of Foreign Award of 1927 ("Geneva Convention") was the first significant multilateral treaty concerning enforcement of foreign arbitral award. The Geneva Convention rendered enforcement of foreign arbitral award in signatory nations provided the awards met certain criteria. The Geneva Convention proved cumbersome, however, because it placed the burden of proving the validity and enforceability of awards upon the party seeking enforcement.[171]

3. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award ("New York Convention")

To rectify the deficiencies in the Geneva Treaties, the United Nations Economic and Social Council in 1956 drafted a multilateral convention to provide for a more "pro-enforcement arbitral process that would further protect the integrity of international arbitration awards. A conference at the United Nations headquarters in 1958 ultimately produced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention.[172]

The New York Convention is a multilateral international treaty that

[171] Cleary Sean J., *op. cit.*, p. 573.
[172] Hardock Roger S. & Jane L. Volz, op. cit., p. 878.

provides signatory nations uniform guidelines for enforcement of foreign arbitral award. Under article V(1)(b) of the New York Convention, an exception to enforcement may arise where a party was denied an opportunity to present its claim before the ruling arbitral body. [173]

The New York Convention has been hailed as the "cornerstone of current international commercial arbitration. Described as "the single most important pillar on which the edifice of international arbitration rests," it has gained phenomenal acceptance by the international community. Currently, over ninety countries have ratified the treaty and over one hundred are signatories to the Convention. Moreover, additional countries are being added to the growing list of New York Convention parties every year, demonstrating an extraordinary satisfaction with the benefits under the Convention.

The fundamental purpose of the New York Convention is to eradicate the limitations under the Geneva Treaties and promote liberalized procedures for enforcing foreign arbitral awards. For example, the Geneva Treaties apply only to commercial claims, but the New York Convention can apply to both commercial and noncommercial matters. Also, unlike the Geneva Treaties, the New York Convention allows for the enforcement of an award in a no contracting country. As a result, the New York Convention "confers legitimacy upon awards granted in any state,

[173] Cleary Sean J., "International Arbitration-Foreign Arbitral Awards-Enforcement of Foreign Arbitral Award Refused Under Article V(I)(B) of New York Convention, Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (2d cir. 1992)", *17 Suffolk Transnational Law Review,* 1994, p. 566

whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states.[174]

The goal of New York Convention was to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate and the resulting awards are enforced.

The New York Convention was completed on 10 June 1958, in New York City, New York and its early ratifiers included France, Russia, Morocco, India, Egypt, Czechoslovakia, and the Federal Republic of Germany. Now, some 121 nations have ratified the New York Convention which has become a cornerstone upon which most international arbitral awards are built. The New York Convention also is available from the archives of United Nations in Chinese, French, Russian and Spanish texts.[175]

After having ratified the New York Convention, a party then notifies the United Nations Secretary General of this fact. Accession is effected by the deposit of an instrument of accession with the Secretary-General of the United Nations. An accession can be made along with declarations and reservations.[176]

[174] Hardock Roger S. & Jane L. Volz, *op. cit.*, p. 878.
[175] Oehmke Thomas H., *Arbitrating Internatinal Claims – At Home and Abroad,* American Jurisprudence, 2001, para. 20.
[176] *Ibid*, para. 23.

The New York Convention has been applied retroactively to a previously executed contract because "the Convention does not affect the parties' substantive rights." For comparable reasons, the Second Circuit applied the New York Convention retroactively to an arbitration agreement and award which predated the United States' accession in 1970. Thus, any law or decision prior in time to the ratification by a foreign state must be construed as consistent with the New York Convention or set aside.[177]

Under New York Convention stated that:[178]

(1) To obtain the recognition and enforcement mentioned in the pre-ceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
    a. The duty authenticated original award or a dully certified copy thereof;
    b. The original agreement referred to in article II or a duly certified copy thereof
(2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Under Indonesian law, international arbitral awards will only be recognized and may only be enforced within the jurisdiction of Indonesia if they fulfill the following requirements:[179]

[177] *Ibid.*
[178] New York Convention, article IV.
[179] Art. 65-67 arbitration law, art. 3 of supreme court regulation; Hikmah Mutiara, *Pengakuan dan Pelaksanaan Putusan Arbitrase Asing di Indonesia,* International Law Journal, Volume 5 No. 2 January 2008, page 325; Hutabarat, Pheo, *op. cit.,* page 389.

- The foreign arbitral award is rendered by an arbitration body or an individual arbitrator in country that is bilaterally bound to Indonesia or jointly with Indonesia to an international convention regarding the recognition and enforcement of foreign arbitration awards.
- The foreign arbitral awards are only limited to awards that according to Indonesian law, fall within the definition of commercial law
- The foreign arbitral awards are not in contravention of public order under Indonesian law
- The foreign arbitral awards may be enforced in Indonesia only after the central Jakarta district court has issued *exequatur*
- If the republic of Indonesia is a party to the foreign arbitration award, this award may be enforced in Indonesia only after supreme court has issued *exequatur*
- The application for the enforcement of the foreign arbitral awards must be accompanied by:
    - The original or duplicate of the foreign arbitration award, authenticated pursuant to the provisions regarding authentication of foreign documents, and an official translation thereof,
    - The original or duplicate of the agreement, as the basis for the foreign arbitration award, authenticated in accordance with the provisions regarding authentication of foreign documents, and the official translation thereof,

- A statement from Indonesian diplomatic representative in the country where the foreign arbitration awards was rendered, starting that such country is bilaterally bound to Indonesia or jointly bound with Indonesia in an international convention regarding or jointly bound with Indonesia in an international convention regarding the recognition and enforcement of a foreign arbitration award.

International arbitration awards which relate to the Republic of Indonesia as a party to the dispute can only be executed after they have obtained an execution deed from the Supreme Court, which is then delegated to the Central Jakarta District Court. The Central Jakarta District Court's decision, which permits the enforcement of the international award, is not subject to an appeal. However, if the decision is to reject the enforcement of the award, an appeal against the decision can be filed at the Supreme Court, which then has 90 days to decide.

D. Judicial Intervention in Arbitration Process

It has become increasingly frequent in international arbitration for a recalcitrant party to attempt to disrupt the arbitral process by bringing the dispute covered by the arbitration agreement before national courts (ordinarily those of that party's own State) and seeking an "anti-suit injunction" from those courts. The nuisance introduced into international arbitration by this type of measure has been widely commented upon and criticized.1 The fact that the mechanism of anti-suit injunctions—in this instance, anti-arbitration injunctions—originates from common law

systems in no way means that the disruption of the arbitral process is specific to those systems. Courts in civil law countries such as Brazil or Venezuela have had recourse to this mechanism in the same way as courts in common law countries such as Pakistan, India or the United States.[180]

Intervention from domestic courts has significantly impacted the application of the New York Convention. While appropriate and positive intervention promotes arbitration and international business, inappropriate court intervention damages international arbitration, and in turn, negatively impacts international business. Striking an appropriate balance of intervention in international arbitration is a challenging task for domestic courts. In offering universal rules for domestic courts, the New York Convention has achieved unprecedented success. However, achieving the goals set by the Convention depends heavily on the implementation process in domestic courts. As a result of the ambiguity of the original Convention language and the variation between domestic implementation systems and judicial discretion, achievement of a universal application of the New York Convention is far from a reality.

Studies have shown that domestic courts could effectively diminish or expand the benefits of the New York Convention by strategically limiting or expanding the scope of its application. Though originally purporting to implement a set of universal rules, the New York Convention leaves contracting states with broad discretion over domestic

[180] Gailard Emaanuel, *op. cit.*, p. 235.

implementation procedures. The substantive standards and legal grounds set in the Convention are clear, and there is little room for domestic courts to exercise interpretation. However, domestic courts have broad discretion in determining the application and scope of the Convention.[181]

As stated under UNCITRAL;[182]

> "In matters governed by this law, no court shall intervene except where so provided in this law"

Beyond the instance in these two groups, the article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instance of possible court intervention in this law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may viewed as the primary addresses of any special law on international commercial arbitration, will appreciate that they do not have to search outside this law.[183]

In general, the discretion of local courts can be classified into two categories: macro, and micro level discretion. At the macro level, domestic courts interpret reciprocal rules, Convention wording, and domestic implementation rules. Examples of decisions from courts with macro

[181] Zhou Jian, "Judicial Intervention in International Arbitration: A Comparative Study of the Scope of The New York Convention in U.S and Chinese Courts", 15 *Pacific Rim & Policy Journal*, 2006, p. 453.

[182] UNCITRAL, Art. 5.

[183] UNCITRAL Yearbook, vol. XVI: 1985, A/CN9/264, Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, para. 16.

discretion are the U.S. court's ruling in Lander and the Chinese SPC's exclusion of non-domestic awards category from the application of New York Convention. At the micro level, individual courts may use a single factor to distort legislative intention, as illustrated in Jones.[184]

The expression 'Judicial Authority" instead of 'Court' has been used obviously with the object of widening the scope of the applicability of the provisions of the Act with respect to parties who have entered into an arbitration agreement. In *Fair Air Engineers Pvt Ltd., V. NK Modi* the Supreme Court held that the District Forum, the State Commission and the National Commission constituted under the Consumer Protection Act 1986 are all included in 'Judicial Authority' for the purpose of section 34 of the Arbitration Act of 1940.

While in Indonesia, under Article 1338 of the Indonesian Civil Code provides that a contract validly entered into has the force of law as between the parties thereto. The validity depends upon satisfying the requirements of Article 1320 which include the parties must be legally competent to enter into an agreement; the contractual terms must be clear and certain; the parties have agreed to such terms voluntarily and the contract may not be for a purpose contrary to law or public policy. Thus a clear arbitration clause in a valid underlying commercial agreement should be binding upon the parties. Articles 3 and 11 of the arbitration law mandates that where the parties to a validly entered into a contract have

[184] Zhou Jian, *op. cit.,* p. 453.

designated arbitration as the means of resolution of any disputes arising out of and/or in connection with that contract, the court does not have, and may not take, jurisdiction to hear any case within the scope of the parties' agreement to arbitrate. [185]As the law provides:

> "The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement."[186]
>
> "(1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court.
>
> (3) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act"[187]

The ". . . particular cases determined in. . . " the arbitration law, as previously mention, restrict the role of the judiciary to: (i) select and dismiss of arbitrators where the parties are unable to agree and have failed to designate another appointing authority or institutional rules which provide otherwise;[188] and (ii) enforcement of awards.[189] The arbitration law does not go the extra step and specifically provide that when faced with a dispute under a contract containing an arbitration clause, the court is required to diminish any court proceedings and/or refer the parties to arbitration, as is called under the UNCITRAL Model Law. The arbitration law is not based upon the Model Law, although a few provisions may have been adopted therefrom.

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[185] Karimsyah, *op cit.*, p. 7.
[186] Arbitration law, article III.
[187] *Ibid*, art. 11.
[188] *Ibid*, art. 11, 14, 15, 19, 23-25, 75 (2).
[189] *Ibid*, art. 61-72.

E. The Theories of Public Order

In general, Public order divided into several terms, in Dutch it is known as *openbare order,* in French known as *ordre public*, and in Anglo Saxon known as Public Policy.[190] Justice Cardozo define public order as ".. the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They don't close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, and some deep-rooted tradition of the common weal."[191]

Public order has a broad meaning that contain of ambiguity, in practice, according Yahya Harahap there has been various interpretations of the meaning of public order, *inter alia,* first in narrow sense, the scope of public order only limit to positive clause, thus the violators are limited to violation of the provision of Indonesian positive law. Hence, arbitration decision that are contradictory / violating public order, is a decision violating / contrary to the provisions of Indonesian legislation. Second, public order in broad sense defines public order does not only limit the scope and meaning of public order to the provisions of positive law alone, but includes all the values and principles of the living law in consciousness

[190] Sri Wahyuni, "Konsep Ketertiban Umum dalam Hukum Perdata Internasional: Perbandingan Beberapa Negara Civil Law dan Common Law", *Supremasi Hukum Vol. 3, No. 1, Juni 2014,* p. 49.
[191] *Ibid.*

of society (e.g. general justice principle). Therefore arbitration decision that violating Indonesian society cannot be enforced.[192]

In European continental, the concept of public order developed based on the principle of "all rules of local law are made to protect the common welfare and become priority from the provisions of foreign law whose contents is considered contrary to the rule of law". Moreover, Kollewijn argues that we can a priori determined what are includes in public order, whereas expert couldn't fine the categories, it's only the judges are in case of certain matters can determine what is contrary to public interest or legal order. It is due to factors of time and place, state philosophy held by the law community concerned, the system economic and cultural and political patterns, all of which affect opinion s on public order.[193]

Under New York Convention, it is clearly stated that:[194]

> 2. Recognition and enforcement of an arbitral award may be also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Moreover, to the extent that domestic political judgments about competing policies and/or values are embedded in judicial judgments,

[192] http://www.hukumonline.com/klinik/detail/lt4e3e380e0157a/apa-definisi-ketertiban-umum-, (accessed on March 7, 2018).
[193] Imelda Onibala, "Ketertiban Umum Dalam Perspecktif Hukum Pedata Internasional", *Vol.I/No.2/April-Juni/2013 Edisi Kusus,* p. 126.
[194] New York Convention, art. V (2).

political tensions may emerge as litigants seek recognition and enforcement of these judgments in foreign states holding divergent policies and/or values. A clearly defined set of internationally agreed-upon rules on recognition and enforcement of judgments would remove a recognizing court's need to grapple with such conflicting political values and/or incentives in the recognition and enforcement process. Specifically, it would do so by providing a greater measure of independence to courts facing public scrutiny. As a result of being bound by the government's ascension to a multilateral judgments agreement the judicial branch would be free to recognize foreign judgments that might otherwise have been unpalatable by shifting the blame for an unpopular recognition decision to the government.

While the perceived policy benefits of an international agreement on the enforcement and recognition and foreign judges have been laid out, what must be clarified is the empirical research supporting the notion that the current system is indeed in need of the sort of overhaul that such a treaty would introduce. While such data are indeed mixed, there is nevertheless enough support for such a proposed undertaking in legal scholarship, case law, and among practitioners.[195]

The grounds for refusal of recognition and enforcement of foreign awards derive directly from Article 5 of the Convention and are primarily confined to procedural criteria. As in many jurisdictions, the most

[195] Zeynalova Yuliya, *op. cit.,* p. 172.

controversial ground for refusal is that the award is ruled to be against "public policy." This can be vulnerable to abuse by protectionist concerns. Although difficult, if not impossible, to define, "public policy" under the Convention is generally limited to violation of a State's "international public policy.[196]

United State courts have found "public policy" to refer to "the most basic notions of morality and justice."[197] The Supreme Court has since clarified that a court's refusal to enforce an arbitrator's interpretation of a contract is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and not from general considerations of supposed public interests. In United *Paperworkers International Union v. Misco, Inc*., the arbitrator determined that Cooper, an employee of Misco, Inc., did not violate company policy by his use or possession of marijuana on company property, and ordered Cooper's reinstatement. The district court vacated the award and the Fifth Circuit affirmed, holding that reinstatement would violate public policy against operation of dangerous machinery by persons under the influence of drugs. The Supreme Court reversed and held that the Fifth Circuit's formulation of public policy did not comply with the requirement that such policy must be ascertained in reference to concrete laws and legal precedents and not from general arbitrary considerations of

[196] D'Souza Fiona, "The Recognition and Enforcement of Commercial Arbitral Awards in The People's Republic of China", *30 Fordham International Law Journal,* 2007, p. 1329.

[197] *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

supposed public interests.[198]

The case for applying the New York Convention's defenses as the public policy of the state may be stronger when viewed as a matter of federalism. If unenforceable foreign arbitral awards can bypass the New York Convention as foreign money judgments in state courts--whatever the reason may be for the unenforceability of the award --arguably this subverts federal--and state-- policy to promote arbitration, for the reasons discussed previously. As the Second Circuit has recognized, the "balance" between the broad enforceability of arbitral awards and its limitations "would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that award, flawed for any of the reasons [recognized by those limitations], must nevertheless be blessed" by the courts. In short, the same considerations animating a potential preemption issue may also be cast in public policy terms.[199]

F. The Case Concerning Recognition and Enforcement of Arbitral Awards in Islamic Perspective and Public Order in Islam

During the period from the end of World War II to the 1970s, several notable international arbitral decisions concerning oil concession

[198] Cheung Christina, "The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in The United States & Foreign-Related Arbitral Awards Rendered in The People's Republic of China Pursuant to Domestic Law and The New York Convention", 11 *Santa Clara Journal of International Law,* 2012, p. 252-253.

[199] Robinson Tyler B., "The Recognition and Enforcement of Foreign Arbitral Awards as Foreign Judgments in The United States, *24 American Review of International Arbitration,* 2013, p. 91.

disputes set aside and undermined Islamic domestic laws.[200] The decisive characteristics of each of these arbitrations were the negation of domestic, Islamic laws and the elevation of "general principles of law" that were firmly rooted in the jurisprudence of Western jurisdictions. One notable opinion questioned the adequacy of general contract law in *Shari'a*, instead applying principles of English law because they were the "common practice of the generality of civilized nations."

A similar ethnocentrism was evident in *Ruler of Qatar v. International Marine Oil Co. Ltd*.[201] In that case, the arbitrator held that Qatari law, based on Islamic law, was the proper law to apply. However, rather than apply Qatari law, the arbitrator dismissed it, stating that "[he was] satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract."[202] Such a statement indicated disregard of extensive Islamic legal scholarship that sets out clear principles of contract law based on the primary and secondary sources of Islamic law. [203]

The features of Islamic public policy may be divided into two categories: those of a procedural nature and those of a substantive nature. With respect to the procedural features of Islamic public policy, three important principles emerge. These principles are not necessarily found in

[200] *Petroleum Dev. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q., 1952, p. 247, 247; *Saudi Arabia v. Arabian Am. Oil Co*., 27 I.L.R., 1958, p. 117.
[201] *Ruler of Qatar v. Int'l Marine Oil Co*., 20 I.L.R 534, 534 (1953).
[202] *Ibid*, p. 541 (stating that the arbitrator did not find Islamic contract law sufficient)
[203] Wakim Mark, *op. cit.*, 19, 20.

the *Quran* or *Sunna*; however, they historically constitute the immutable rules of Islamic judicial law. The three principles are: (1) the strictly equal treatment of the parties to the judicial or arbitral action; (2) the prohibition against a judge or arbitrator deciding a dispute without hearing both plaintiff and defendant; (3) the prohibition against a judge or arbitrator making his judgment or award without giving the parties the opportunity to submit their evidence, pleas, and defenses.[204]

The procedural concerns of Islamic law are well addressed by the New York Convention. Article V(1)(b) of the New York Convention allows for the refusal of recognition or enforcement of an arbitral award if a party was not given proper notice of the proceedings or was otherwise unable to present his case.[205] That provision directly addresses the second and third Islamic procedural principles listed above. Similarly, article V(1)(a), the provision of the New York Convention that deals with the capacity of the parties and the validity of their arbitration agreement, addresses the Islamic procedural principle of fair treatment and may allow for the same type of exception to exist as contemplated by the Islamic principle.[206] Perhaps because of their appeal to universal norms of due process and fairness, Islamic arbitration procedural concerns overlap well with the New York Convention.

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[204] Samir Saleh, *The Recognition and Enforcement of Foreign arbitral Awards in the States of the Arab Middle East*, 1 ARAB L. Q. 1985, p. 26 (noting that the court petitioned for enforcement cannot review the substantive matters of the case).

[205] New York Convention, art. V(1(b).

[206] *Ibid*, art. V(1)(a).

With respect to the substantive features of the Islamic concept of public policy, two problems most likely to arise stem from the prohibitions of *riba* and *gharar*. In contrast to the procedural concerns, the substantive concerns are deeply rooted in scriptural sources. *Riba* is prohibited because it is morally reprehensible for a lender to exploit a borrower. *Hanafi* adherents have managed to circumvent the prohibition of *riba* for centuries by a series of judicial ruses that endow the concept of interest with a semblance of respectability (*hyals*). These *Hanafi hyals* are of little interest because the countries in which *Hanafi* teachings prevail (Syria, Jordan, and Egypt) historically have operated under laws that greatly relax the prohibition against *riba* through regulation of interest rates.

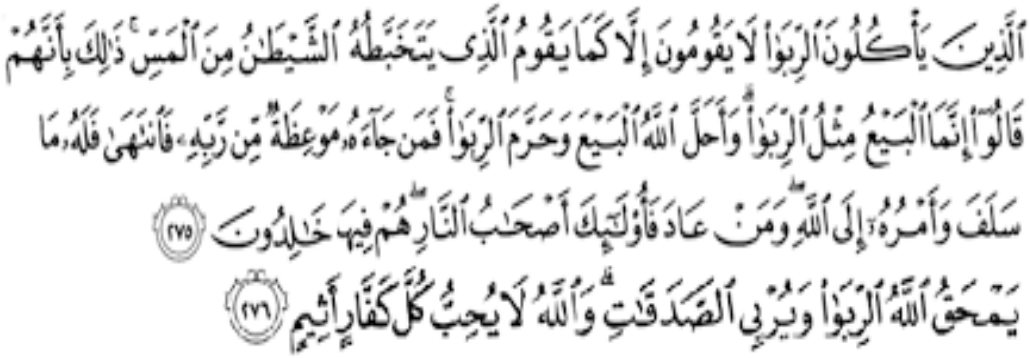
The prohibition of *riba* is strictly applied in *Hanbali* and *Zaydi* jurisdictions. Also, in Saudi Arabia, Qatar, Oman, and Yemen, the prohibition against *riba* is strictly enforced. According to *Hanbali* teaching, the prohibition extends beyond the geographical boundaries of Islam.[207] In such countries, one can expect foreign arbitral awards that incorporate interest as compensation for damages to be viewed as *riba* and struck down as against public policy.[208]

As stated in the Qur'an;[209]

[207] Samir Saleh, "commercial arbitration in the middle east: shari'a, lebanon, syria, and egypt", *Hart Publishing,* 2006, p. 1984 (stating that the Hanbali school claims the prohibition against riba extends beyond Islam's territorial boundaries).

[208] Wakim Mark, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East", *New York International Law Review,* 2008, p. 46-47.

[209] Qur'an surah Al-baqarah, (2; 275- 276).



“Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah . But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.(275) Allah destroys interest and gives increase for charities. And Allah does not like every sinning disbeliever.”

G. Case Concerning the Annulment of Foreign Arbitral Awards in Indonesia and Singapore

In *Pertamina v Lirik Petroleum*, Pertamina filed an application to annul an arbitration award issued by the tribunal in an ICC arbitration case decided in favour of Lirik. One of Pertamina’s arguments was that the award violated public policy because it disregarded Pertamina’s authority as the government’s only representative in the oil and gas sector. Pertamina claimed that as the holder of oil and gas mining authority in Indonesia, it had the authority to regulate and control the policy for determining the commercialisation of oil and gas fields. As such,

Pertamina viewed the ICC award sanctioning Pertamina for its failure to commercialise Lirik's oil and gas fields as violating public policy. The Central Jakarta District Court rejected this argument and declared that the ICC award did not violate public policy, considering that the ICC tribunal, as the dispute settlement forum mutually agreed by Pertamina and Lirik, had the exclusive jurisdiction to examine and adjudicate the dispute between Pertamina and Lirik. The Supreme Court affirmed this finding in 2010, after which Pertamina tried to annul the ICC award by applying for a civil review to the Supreme Court. The Supreme Court dismissed this application as well, on the grounds that its previously issued appeal decision was final and binding.[210]

Karaha Bodas Company LLC ("Karaha Bodas") v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and PT. PLN (Persero) ("PLN") and Himpurna California Energy Ltd ("Himpurna") v. PLN are two arbitral proceedings that centered upon investments by foreign companies in Indonesia's electricity sector in the 1990s.The origins of this dispute lie in two contracts to construct a power plant in Indonesia. Pertamina is an oil, gas, and geothermal energy company that is wholly owned by the Government of Indonesia ("GOI").[211]

[210] https://globalarbitrationnews.com/indonesia-the-risks-of-enforcing-foreign-awards-20150129/, (accessed on January 3, 2018).

[211] S Ripinsky with K Williams, "Damages in International Investment Law", BIICL, 2008, https://www.biicl.org/files/3931_2000_himpurna_and_karaha_bodas_arbitrations.pdf, (accessed on January 3, 2018).

KBC is a Cayman Islands limited liability private power Development Company established to develop geothermal resources, including the construction and operation of electric power generating facilities. In November 1994, KBC entered into two contracts with Pertamina to develop the Karaha-Bodas Geothermal Project (the "Project"), which included the building of a geothermal power plant in West Java, Indonesia. Under the first agreement, the Joint Operation Contract ("JOC"), KBC contracted with Pertamina to develop geothermal energy resources from two geothermal fields in Indonesia. In the second agreement, the Energy Sales Contract ("ESC"), KBC, Pertamina, and Pt. PLN (Persero) ("PLN"), an electric company wholly owned by the GOI, agreed that Pertamina would sell the KBC-produced electricity to PLN.

In 1997, the Indonesian economy suffered during the Asian financial crisis. In January 1998, after a brief suspension and a temporary restoration of the Project, the President of Indonesia issued a decree suspending the Project indefinitely as part of a national effort to stabilize the Indonesian economy. KBC declared force majeure and ceased performance under the contracts.[212]

The awards delivered in the Karaha Bodas and Himpurna proceedings are noteworthy because of the approach taken to awarding damages in these cases. In particular, the Tribunals awarded damnum emergens (actual losses caused) plus lucrum cessans (gains prevented).

[212] http://caselaw.findlaw.com/us-5th-circuit/1046829.html, (accessed on January 3, 2018).

This approach, according to Wells, resulted in the Tribunal in Karaha Bodas "double counting" (i.e. awarding damages twice). Moreover, based on Wells' reading of Karaha Bodas, awarding damnum emergens and lucrum cessans in Himpurna should have also, on the face of it, resulted in the arbitral Tribunal double counting. Relevantly however, a number of other commentators have argued that the Tribunals in Himpurna and Karaha Bodas did not in fact double count because the Tribunals in those cases applied contractual-related as opposed to expropriation-related principles to the awards of damages. After setting out the factual circumstances giving rise to the Karaha Bodas and Himpurna proceedings, this note outlines the findings of the two Tribunals in the two awards on the applicable law and on damages, interest and costs. Finally, the case note discusses the issue of double counting when awarding damages for breach of contract. [213]

Under the case of *PT. Asuransi Jasa Indonesia (persero) v. Dexia Bank SA*, the IAA and AA provide for two additional grounds on which an arbitral award may be set aside. The first is if the making of the award was induced or affected by fraud or corruption.[214] The Court of Appeal noted that an award induced or affected by fraud would be contrary to public policy. The second additional ground is if a breach of the rules of natural

[213] S Ripinsky with K Williams, *op. cit.*, https://www.biicl.org/files/3931_2000_himpurna_and_karaha_bodas_arbitrations.pdf, (accessed on January 3, 2018).

[214] *PT. Asuransi Jasa Indonesia (persero) v. Dexia Bank SA*,3 SLR (R), 2007, para. 597.

justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.[215]

Under *Churchill case*,[216] the background to the arbitration is the involvement of the claimant in a coal mining project, which it developed with various Indonesian companies in East Kutai Regency, Kalimantan, Indonesia (project). In 2006, the claimant acquired 95 per cent of the shares in PT Indonesian Coal Development (PT ICD), which acquisition was approved by the Indonesia Investment Coordinating Board (BKPM) in 2006. Then, in 2007, the Ministry of Energy and Mineral Resources and the BKPM granted PT ICD a permanent business license to provide general mining-support services. In 2007, the claimant entered into a cooperation agreement and investors' agreement with some companies in the Ridlatama Group (namely, PT RTM, PT RTP, PT RS, PT RP, PT TCUP and Mmes Setiawan and Florita). Mmes Setiawan and Florita also concluded pledge-of-shares agreements with PT ICD and PT RTM, PT RTP, PT RS and PT RP. In 2008, the claimant concluded cooperation and an auxiliary agreement, an investor's agreement and two pledge-of-shares agreements. PT RTM, PT RTP, PT IR and PT INP were issued with mining licences in 2009 by the Regent of Kutai. These licences allowed them to engage in the construction, mining, processing, refining, hauling and sale of the resource for an initial term of 20 years with the possibility of two 10-year extensions. However, in April 2010, the Ministry of

[215] *Ibid*, para. 86.
[216] Churcill Mining Plc v. the Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40.

Forestry sent a letter to the Regent of East Kutai recommending the revocation or cancellation of the Ridlatama Group companies' mining licences in the project area for the following reasons: (1) the Ridlatama Group companies were operating without the permission of the Ministry of Forestry; (2) the Ridlatama Group companies' licences were allegedly forged; and (3) the licences overlapped with other permit areas. The Regent of East Kutai duly revoked all of the mining licences. In response, the Ridlatama Group companies filed several lawsuits against the Indonesian government seeking to reverse the revocations.

Following these legal proceedings, on 22 May 2012, the claimant submitted a request for arbitration to ICSID against the respondent. On 13 and 14 May 2013, the first hearing to decide on the jurisdiction issue was held in Singapore. The legal issue was whether the ICSID Arbitration Tribunal had jurisdiction to hear the dispute. The respondent submitted that it had not consented to ICSID arbitration on the ground that Article 7(1) of the UK–Indonesia BIT cannot be construed as a standing offer to arbitrate. The respondent's main contention was that it did not 'assent' to Churchill's request for arbitration; therefore, the Tribunal lacked jurisdiction. The respondent further argued that Article 7(1) only contemplates a two-step process in which the foreign investor submits a request for arbitration and Indonesia then gives its consent. In response, the claimant argued that the phrase, 'shall assent' requires no further action from the host state after the filing of the request for arbitration and

the ordinary meaning of the word 'shall' denotes a legally binding obligation.

The Tribunal noted that there were several treaties between the respondent and other states that contained clauses similar to the arbitration clause in dispute. The Tribunal therefore concluded that the treaty drafters considered the 'shall assent' language as functionally equivalent to 'hereby consents'. The Tribunal also stated that it would also have found consent to ICSID Arbitration in the BKPM approval for Churchill's involvement in the mining project.21 Accordingly, the Tribunal concluded that Article 7(1) contains a standing offer to arbitrate any dispute that may arise in connection with an investment in ICSID Arbitration, and held that the Arbitral Tribunal had jurisdiction over the dispute. The examination of the merits of the case remains pending.[217]

[217] The Dispute Resolution Review, *op. cit.*, p. 258-259.

CHAPTER III

THE REGULATION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER INDONESIAN ARBITRATION LAW AND THE INVALIDITY DECISION FROM INDONESIAN COURTS' FOR THE ANNULMENT OF SIAC AWARDS IN THE CASE OF ASTRO GROUP V. LIPPO GROUP.

A. Indonesian Arbitration Law in Recognition and Enforcement of Foreign Arbitral Award under Articles 65-69 is in Accordance with the New York Convention on the Recognition of Foreign Arbitral Award 1958

1. The New York Convention on the Recognition of Foreign Arbitral Award 1958

In the New York Convention, there are two main points; first part is dealing with the recognition and enforcement of foreign arbitral awards. Foreign award is defined as an award that is made in the territory of another contracting states. Under article one, the general obligation for the contracting parties to recognize and enforce the awards as binding in accordance with their rules of procedures stated in article three. A party who's sought for enforcement of foreign award needs to supply the court (a) the arbitral award and (b) the arbitration agreement (article four).

The party who rejected the award can object to the enforcement by submitting evidences and reasons for refusal the enforcement, which are imitatively listed in article five, *inter alia;*

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

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

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. [218]

[218] New York Convention, article V.

The award is subject to an action for settling aside in the state in which, or under the law of which, it is made (country of origin), the foreign court before which enforcement of the awards were sought may adjourn its decision on enforcement (article VI). The last of this chapter, under article VII if a party seeks for enforcement from the domestic court on enforcement of foreign arbitral awards or bilateral or multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favorable-right of article VII (1).

The second point is dealt with referral by a court to arbitration. Under article II (3) stated that courts of contracting states, when seized of a matter in respect of which the parties have made an arbitration agreement, required to request one of the parties, refer them to arbitration (unless the arbitration agreement is invalid) and in order to satisfy the requirement under article II (1) and (2), the particular agreement must be in writing.[219]

2. Supreme Court Regulation No. 1 of 1990 on the Procedure for Enforcement of Foreign Arbitral Award

Indonesia became contracting state to the New York Convention in 1981 by virtue of Presidential Decree No. 34 of 1981. Indonesia entered into the convention with two notes: [220] (i) This State will apply the Convention only to

[219] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.newyorkconvention.org/in+brief, accessed on January 13, 2018, 7.59 PM.

[220] Declaration or other notification pursuant to article I(3) and article x(1), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on January 13, 2018).

recognition and enforcement of awards made in the territory of another contracting state. (ii) This state will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law

Under Supreme Court regulation explained the procedures for international arbitration awards to be recognized and enforced in Indonesia:

1. The foreign arbitral awards must be rendered by an arbitrator or arbitration tribunal in a country which together with the Republic of Indonesia is a party to a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards, the execution is based on reciprocity principle.
2. The foreign arbitral awards are limited to awards, which under Indonesian laws, fall within the scope of commercial law;
3. The foreign arbitral awards do not contravene with public order;
4. The foreign arbitral awards are enforceable after obtaining an order of "exequatur" from the supreme court of Indonesia.[221]

In order to obtain exequatur the exequatur is given by the chief justice of the Supreme Court or Deputy Chief Justice of the Supreme Court or Deputy Chief Justice of the Supreme Court or the Chief Young Officer of the Civil Law field authorized by the Chairman Supreme Court or Deputy Chief Justice of the Supreme Court. Exequatur shall not be granted if the decision of the Foreign Arbitration is proven contrary to the principles of Indonesian legal system and Indonesia public order.[222]

[221] Supreme Court regulation, article 3.
[222] *Ibid*, article 4.

3. Indonesian Arbitration Law No. 30 year 1999, article 65-69

Under arbitration law, specifically for enforcement of international arbitration, the law mandated Central Jakarta District court as the authorize body to handle the recognition and enforcement of international arbitration awards.[223] The District Court of Central Jakarta will issue and order of exequatur and will send the order of exequatur to both parties.

Along with the issuance of exequatur order, the successful party can implement the awards. If the losing party or its assets are domiciled or located outside the jurisdiction of Central Jakarta District Court, further enforcement process will be proceeded by the other competence courts.

The successful party may in this respect file a request to the appropriate court to issue an *aanmaning* (warning/reminder) to the losing party to comply with the foreign arbitral awards. If the awards could not be satisfied by the losing party, the successful party can apply for an attachment order over the assets of the losing party and the assets can be sold by public auction.[224]

Basically, the new law of arbitration year 1999, did not create any significant differences from Supreme Court regulation, except for an international arbitration award where one of the party is Republic of Indonesia, the enforcement of the award must obtain an order of exequatur directly from the Supreme Court, which order is then mandated to the District Court of Central Jakarta for

[223] Arbitration law, articles 65, 66.

[224] Enforcement of Foreign Arbitral Awards in Indonesia, http://www.kndlawyers.com/component/k2/item/70-enforcement-of-foreign-arbitral-awards-in-indonesia.html, (accessed on January 13, 2018).

execution.[225] Whereas, under Supreme Court regulation, regardless of the parties, enforcement of the awards were only relied on Central Jakarta District Court.

Another major difference can be found from appellate process;

> (1) No appeal to either the High Court or the Supreme Court may be lodged against a decision of the Chief Judge of the District Court, as contemplated in Article 66 (d), above, recognizing and enforcing an International Arbitration Award.
>
> (2) An appeal may be filed with the Supreme Court against a decision of the Chief Judge of the District court contemplated in Article 66 (d), refusing to recognize and enforce an International Arbitration Award.
>
> (3) The Supreme Court shall consider and rule upon an appeal submitted to it, as contemplated in paragraph (2) above, within a period of nor more than ninety (90) days after the application for appeal has been received by the Supreme Court.
>
> (4) No appeal may be submitted against a decision of the Supreme Court, as contemplated in Article 66 (e). [226]

Based on the explanations above, Arbitration law articles 65-69 is in conformity with the New York Convention 1958, under several reasons. First, in procedures under the Arbitration Law is article 66, the international arbitral award must have been rendered by arbitration tribunal where the county had been ratified the New York Convention and the case arise must be fallen under as parallel with article I of the Convention. In regard with the place for seeking the enforcement, arbitration law mandated the District Court of Central Jakarta as authorize body to issue exequatur, the parties also required to provide necessary documents (e.g. original foreign arbitral award, original documents, and a

[225] Arbitration law, article 66.
[226] *Ibid*, article 68.

certification from diplomatic representatives), this is also in line with the article IV of the Convention.

Second reason is under arbitration law article 66, the foreign award can only be enforced if the award does not violate Indonesian public order, this is parallel with article III of the Convention, which the recognition and enforcement of foreign award can be refused if the award would be contrary to the public policy of that country. However, public order/public policy has become debate among scholars, because there was no single definition of public order under Indonesian Arbitration Law, which led to different interpretation from the courts. Consequently, many foreign awards couldn't be recognized and imposed in Indonesia.

Unlike in United States, United States Law has clearly defined public policy as "the most basic notions of morality and justice."[227] Relied on the case of *United Paperworkers International Union v. Misco, Inc.,* The district court vacated the award and the Fifth Circuit affirmed, holding that reinstatement would violate public policy against operation of dangerous machinery by persons under the influence of drugs. The Supreme Court reversed and held that the Fifth Circuit's formulation of public policy did not comply with the requirement that such policy must be ascertained in reference to concrete laws and legal precedents and not from general arbitrary considerations of supposed public interests.[228] The precedent from United States Supreme Court clearly explained the public policy

[227] *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

[228] Cheung Christina, *op. cit.,* p. 252-253.

must be interpreted in concrete ways through the stated laws not merely from general considerations. Therefore, it is very important for the Indonesian Law Arbitration to define and regulate Public Policy in an assertive way, with the result that no bias could occur for implementing foreign arbitral awards.

Even though the procedures of recognition and enforcement award under arbitration law is accordance with the New York Convention, arbitration law has not covered fundamental principle from the New York Convention called as "onerous principle"[229] which means burdensome, troublesome or oppressive or more liabilities than benefits to impose significant obligations.[230] This principle supposed to be adopted in arbitration law, to obligate the court to fully commit in enforcing the foreign awards without burdening the disputing party who seek for exequatur.

[229] New York Convention, article III
"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[230] https://www.thefreedictionary.com/onerous, (accessed on January 13, 2018).

B. Invalidity of Indonesian Courts' decision in the annulment of Singapore International Arbitration Centre Awards in the case of Astro group v. Lippo

1. Chronology of the case

This case arises out of a dispute involving a failed joint venture between the parties in the satellite TV business in Indonesia.[231] Astro Nusantara International BV and others and another appeal or known as the Astro Group [Astro Group] is a Malaysian broadcasting media entity led by Mr. Ananda Krishnan while the opponent,[232] PT. First Media TBK (formerly PT. Broadband Multimedia TBK) or known as the Lippo Group [Lippo Group] is an Indonesian conglomerate led by Mr. James Riady, both of whom are prominent tycoons in the South East Asian region.[233]

In March 11th 2005, Astro and Lippo agreed to sign a contract of shareholder owner or known as Subscription and shareholder agreement (SSA) to establish a joint venture company in Indonesia for operating television paid program knowns as Direct Vision, which was owned by Lippo and its affiliations. Under SSA Astro had 51% of shares and Lippo with 49%. The SSA contained a number of conditions precedent upon which the parties' respective obligations in the JV were predicated. The parties agreed that they would have until 2006 to fulfil the condition precedent. Nonetheless, pending such fulfilment, funds and services were provided by Astro All Asia Networks PLC and All Asia Multimedia

[231] Astro vs. Lippo – An Overview, https://singaporeinternationalarbitration.com/2012/07/25/astro-vs-lippo-an-overview/, (accessed on November 5, 2017).

[232] Singapore Law Reports, [2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng", p. 372.

[233] *Ibid.*

Networks FZ-LLC (who are not parties to the SSA) to Direct Vision (DC) to build up the latter's business from December 2005.[234]

In august 2005, Indonesian government issued a regulation toward the mass medium companies obligated to gain broadcasting license in accordance with the broadcasting law, it includes to regulate foreign company to have maximum 20% of shares. Such regulation at the end reconstructed the joint-venture agreement between Lippo and Astro group.[235] Moreover, the conditions precedent were not fulfilled in accordance with the schedule and by mid-august 2007, it became likely, even clear to the parties, that Joint-Venture agreement would not close. Nonetheless, Astro All Asia Networks PLC and All Asia Multimedia Networks FZ-LLC (hereinafter 6th and 8th respondent) had separately agreed, either orally or by conduct, that they would continue funding and providing services to Direct Vision.[236]

Lippo sent a letter stated that SSA was not applicable anymore and all the draft of reconstructed Joint Venture Agreement will no longer negotiable and irrelevant.[237] Lippo group through its branch company (PT. Ayunda Prima Mitra) filed a civil wrongdoing case to District Court of South Jakarta against Astro Group Company and related party on 2 September 2008 and claimed US$ 2,024,846,199 for material and immaterial losses. Relying on SSA 17.4 and 17.6 Astro therefore commenced arbitration No. 63 of 2008 at the SIAC on 6 October

[234] In the Court of Appeal of The Republic of Singapore, 2013 SGCA 57, Civil appeals Nos 150 and 151 of 2012, para. 6.

[235] Konflik Astro Lippo kian memanas, http://www.hukumonline.com/berita/baca/hol20086/konflik-astrolippo-kian-memanas, (accessed on September 9, 2017).

[236] 2013 SGCA, *op cit.*, para. 7.

[237] *Ibid*.

2008 against first media (FM), Ayunda and Direct Vision, with the seat of the arbitration was Singapore. There was however, a preliminary hurdle to be cleared, as the 6th and 8th respondent were not parties to the SSA. [238] Astro argued that those respondents were being added to arbitration in accordance to article 24. 1(b) of the SIAC rules (3rd edition, 1 july 2007 "allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration."[239]

Under arbitration process, SIAC issued a preliminary award on 7 May 2009 regarding Anti-suit Jurisdiction, ordered for the respondent to discontinue the court proceeding in Jakarta based on Arbitration clause under article 17.4 of SSA, which automatically make the arbitration has jurisdiction over the case.[240] The foreign award from SIAC registered to chairman of District Court of Central Jakarta in order to obtain *exequatur*, however, the court issued a decision to set aside the award on the preliminary issues and declare that the anti-suit jurisdiction award is non-enforceable (non-*exequatur*) in Indonesia.[241]

Astro group filed two cassations to Supreme Court in 2010 and 2012 against refusal decision of District Court of Central Jakarta.[242] Unfortunately both decisions from Supreme Court still refused preliminary award from SIAC and rendered decision from District Court of Central Jakarta was accordance with the arbitration law.

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[238] 2013 SGCA, *op cit.*, paras. 8, 10.

[239] SIAC Rules 3rd edition, 2007, http://siac.org.sg/our-rules/rules/siac-rules-2007#siac_rule24 , (accessed on January 19, 2018).

[240] ARB 062/08/JL, issued 7 May 2008.

[241] Jurisprudence District Court of Central Jakarta, 05/PDT.ARB.INT/2009/PN.JKT.PST.

[242] Jurisprudence of Supreme Court No. 1/K/PDT.SUS/2010, NO. 877/K/PDT.SUS/2012.

The main reason for the refusal of the judgment from SIAC is that the award has issued to discontinue trial process in Indonesia, such decision violated the principle the sovereignty of the republic of Indonesia and the principle of Public Policy, no foreign power can in anyway interfere legal process Indonesia. Thus this decision creates a new precedent in Indonesian legal practice.

Furthermore, there has been some foreign arbitration awards registered in Indonesia since 1991, such as *Bankes Trust vs. Pt Jakarta International Hotel Development case* (from London arbitration), *Banker Trust vs. PT. Mayora, E.d & F. MAN (sugar) ltd vs. Yani Haryanto, Pertamina vs. Karaha Bodas Companu, LLC and PT Perusahaan Listrik Negara (persero)* (UNCITRAL arbitration Geneva), etc. From decision of foreign arbitral awards as above mentioned, none of them were gained any *exequatur* from District Court of Central Jakarta and/or Supreme Court in Indonesia.[243] The main reason of the court refuse foreign arbitral award in Indonesia is the foreign award violates public policy of Indonesia and it against sovereignty Indonesia by means of intervention.

2. Decision from Singapore Arbitration

There are several awards rendered by SIAC, first on February 19th, the three member tribunal conducted a preliminary hearing to determine the joinder application. It then decide that this power should be exercised.

[243] *Ibid*

a. Preliminary award no. 062 year 2008 dated May 7, 2009. [244] On this joinder application, the tribunal firstly held that on a true construction of SIAC rule art. 24.1(b) and allowed the respondents to join application. This was because the close connection between the different claims advanced by Astro and the potential defenses and counterclaims of First Media, Ayunda and Direct Vision made the joinder based on the interest of justice. The arbitration is also concerned about potential inconsistent findings come from the arbitration and the Indonesian proceeding, then issued and anti-suit injunction restraining Ayunda from proceeding.[245] This award stipulates:

> (I) reject the respondents' objections to tribunal jurisdiction. SIAC has the authority to examine and settle all disputes as detailed under article 17.4, in the amendment and novenmal agreement. the commencement and pursuit of the Indonesian proceeding case No. 1100/Pdt.G/2008/PN.JKT.SEL in the South Jakarta District Court was a breach of clause 17.6 of the SSA as amended and novated insofar as those proceedings made claim against the sixth to eight claimants and Mr. Ralph Marshall".
>
> (II) Command Republic of Indonesia to:
>
> > i. immediately discontinue the judicial process in Indonesia (case no. 100/Pdt.G/2008/PN.JKT.SEL) related to C.6, C.7, 8 and Mr. Marshall;
> >
> > ii. Takes no further steps in the judicial process in Indonesia except to terminate the inspection as set forth in (i) insofar as it relates to C.6, C.7, C.8 and Mr. Marshall
> >
> > iii. Prohibited to bring further judicial proceedings against C.6, C.7, C. 8 and Mr. Marshall insofar as they relate to a joint venture relationship except through arbitration under section 17.4 of the SSA, until further orders are made.
>
> (III). the order stating that the applicant candidate shall be incorporated in this arbitration proceeding

[244] SIAC Award no. 062/2008
[245] 2013 SGCA 57, *op cit.*, paras. 10-11

b. Further Partial award dated October 3, 2009. This award stipulates; (i) discontinuity of the joint-venture agreement or an amended or restricted terms by the parties, (ii) the claimants or through its affiliates are not bound to continue or to provide cash or supply of services to PT. Direct Vision in relation to any dispute arising out from SSA agreement, (iii) the SSA was, subjected to ties terms and conditions, the only effective joint venture contract for R.3 concluded by the claimants, (iv) the SSA constituted the parties entire agreement and suspended any alleged prior oral joint venture agreement such as that now claimed by Republic of Indonesia in its Indonesian proceedings, and (v) there was no closing of the SSA

c. Award on cost and preliminary hearing dated February 5, 2009. This award principally instructs; (i) the tribunal should assess the costs as the respondents had contended, (ii) the tribunal assessed costs on the basis that the claimants were entitled to reasonable costs based on time spent and the complexity of the disputes, (iii) the tribunal ordered the respondents to pay to the claimants fees and interest as a direct result and the implementation of the SIAC arbitration session dated 20 until April 24, 2009.

d. Interim final award and memorandum of correction dated February 16, 2010. This award principally instruct the SIAC arbitrators including the claimants to pay compensation to the Respondents for any loss suffered by the respondent related to the Joint Venture plan based on the SSA also indicates that the amendment arises from a dispute arising out of the implementation of the SSA Agreement.

e. Final award - Interest and Cost Ruling dated august 5, 2010. This award principally instructs the Respondent in the case to bear the costs and interest.

3. Confirmation of international arbitration award according to SIAC regulation nomor: 062 tahun 2008 (ARB062/08/JL) under District Court of Central Jakarta.[246]

District Court of Central Jakarta decided; (i) declares that the exception concerning the absolute competence set forth by respondents is unreasonable under the law, (ii) rejects the exception of the absolute competence set forth by the respondents, (iii) declares that the South Jakarta District Court has the authority to examine and decide the case, (iii) declare the examination of the case under Indonesian law, and (iv) suspend the cost of the case up to the final decision.

The decision from the court are under several consideration; first, the respondent of the case (PT. Ayunda Prima Mitra) had already filed a lawsuit through South Jakarta District Court in September 2, 2008 based on civil wrong doing. Second, the arbitral award does not fall under the scope of commercial law, as stipulated under arbitration law. Third, the substance of international arbitration award is beyond the prescribed authority that has interfered with the implementation of the judicial process in Indonesia which has been in accordance with the prevailing laws and regulations (in accordance with public order), thus the international arbitration cannot be executed (non-exequatur). Fourth, the arbitration award is a not a final decision. Finally, with aforementioned reasons

[246] Confirmation of international arbitration award according to SIAC regulation nomor: 062 tahun 2008 (ARB062/08/JL) under District Court of South Jakarta [Confirmation of South Jakarta District Court], p. 3

the exequatur application and other attached documents are not granted and ordered Central Jakarta District Court Registrar to treat this non-execution derivative to the litigants.[247]

4. Decision from Supreme Court of Indonesia No. 01 K/Pdt.Sus/2010

The Supreme Court of Indonesia had also denied the cassation filed by claimant (Astro Nusantara International B.V) under several reasons;[248] first based on civil procedures, from *judec factie* (district court) did not fail in applying the law, although article 66 of arbitration law does not govern any party may argue during the registration process to obtain recognition and execution of foreign arbitral award, but under principle of Indonesian proceeding, any interested party can defend his or her rights that are infringed or threatened or *"poin't de interest poin't de action"*. This principle gives the parties rights of a rebuttal to the possibility an arbitration award that would hard the party.

Second, from legal substances, non-exequatur by judex factie is relevant, because; (i) the order from arbitration award to discontinue judicial process in Indonesia is a violation of Indonesian sovereignty. There is no foreign power can interfere with legal process in Indonesia, this is clearly violates public order in Indonesia, and (ii) the substances from SIAC award does not fall under the scope of commercial matter, but is included under procedural law. Lastly, the Supreme Court condemned the claimant to pay arbitration process.

[247] *Ibid*, p. 4
[248] Indonesian Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 36-38

5. Decision from Supreme Court of Indonesia No. 877 K/Pdt.Sus/2012

In 2012, Astro Nusantar International B.V with its affiliation filed another cassation to Supreme Court of Indonesia in obtaining the exequatur from SIAC award. However, it has been rejected again by the Supreme Court based on several reasons:[249]

(i) that *judec factie* was not wrong and has properly applied the law, because of the relevant foreign arbitration award can be qualified as a decision contrary to public order,

(ii) whereas the partial award dated October 3, 2009 and the final award dated March 23, 2010 is an intervention of the judicial process in Indonesia, as well as the SIAC award dated May 7, 2009. SSA Clauses articles 17.4 and 17.6 restrict a person's right to file a lawsuit in the court,

(iii) whereas, the award is also contrary to the fundamental principles of the entire legal system, Indonesian society, and has violated the Indonesia sovereignty.

(iv) whereas, SSA clause articles 17.4 and 17.6 and based on SIAC arbitration award, eventhough it is based on the agreement of the parties, but it violates the principle of causal law, as adopted in Indonesian Contract Law. Hence, based on aforementioned reasons, Supreme Court

[249] Supreme Court Decision No. 877 K/Pdt.Sus/2012, p. 51-52

declare to reject cessation submitted by Astro Nusantara and its affiliations and condemned to pay the court process.

6. Reasons for Invalidating Indonesian Courts' Decision

The decision from Jakarta District court and Indonesia Supreme Court is considered invalid under several reasons:

First, SIAC awards do not contravene with Indonesian public order. Indeed that the courts can obviously use Public Order to refuse the awards as stipulated under arbitration law, "International Arbitration Award, as contemplated in item (a), above, may only be enforced in Indonesia if they do not violate public order"[250] and under the New York Convention, "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sough find that (b) the recognition of enforcement of the award would be contrary to the public policy of that country".[251] However, under Indonesian arbitration law, the exact meaning of public order has not been defined, leaving it open to wide judicial interpretation.[252]

There have been many critics for judicial interference with the enforcement of international arbitral awards on the grounds of public order and territorial sovereignty, which are exactly similar with the present case. In the case of *E.D. & F. Man (Sugar) Ltd. V. Yani Haryanto*, the seller had successfully

[250] Arbitration law, article 66 (c)
[251] The New York Convention, article V(2)(b)
[252] Chan Laina, *op cit.*, p. 7

obtained an arbitral award in London, while the buyer sought to District Court of Jakarta argued that the contract was void *abnition* for violation of public order, which violated domestic law on importing sugar. The Court decided that it was a violation of domestic law of Indonesia, thus violating public policy principle.[253]

Other similar case had occurred in in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co., LLC*. The award was rendered in Geneva in favor to Karaha Bodas. While seizing assets of Pertamina, in return Pertamina turned to file a lawsuit of annulment of the award from District Court of Central Jakarta. Pertamina have successfully prevented the enforcement of a $270 million US based on Court decision obliged and cited public policy ground, denial of procedural and substantive fairness, and a violation of natural justice as reasons for annulling the award.[254]

In regard with the present case, none of the courts explained what public order had the SIAC award violated, whereas the awards were made solely based on SSA, an agreement bound by the party to refer to Arbitration in SIAC to settle the dispute. If the award had violated Indonesian law, the courts obliged to provide sufficient evidences to proof the SIAC award had violated Indonesian regulation, as what happened to *E.D. & F. Man (Sugar) Ltd. V. Yani Haryanto*. Moreover, repeating the definition of public order explained by Yahya Harahap, matters that can be included as public order is if the awards had violated

[253] *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*, No. 271/PDT. G/1999/P/JKT/PST.

[254] *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co., LLC.*, Decision of the District Court of Central Jakarta No. 86/PDT. G/2002/PN/JKT/PST.

Indonesian positive law (in the narrow sense) and/or the arbitration awards were proven violating values and principles of the living law in Indonesia. It is contrary to the present case, none of SIAC awards violated Indonesian law nor general principles of Indonesian society.

Second, the award was in the scope of commercial law. This case occurred out of a joint-venture agreement, which stipulated under Subscription Shareholder Agreement. The agreement is on about capital investment between Lippo Group and Astro Group, subjected to services provider for satellite television or renowned as direct vision, radio services and multimedia interactive in Indonesia. Thus, such agreement matter, which is investment undisputedly, falls under the scope of commercial law.[255]

Third, the decision was already final and binding. Supreme court decision on cessation filed by Astro International BV, had rejected the submission based on the finality of the award, the judge held that where a court is prepared to grant enforcement of an award under, it will do so because it has recognized the award as final and binding. Tying recognition of the award to its enforcement, the judge reasoned that in order to resist enforcement, the award debtor must first resist the recognition of the award, as she held "this means that the final and binding effect of a domestic international award is qualified by the ability to set it aside on the grounds prescribed in art. 34 of the model law and para. 24 of International Arbitration Award. Should such grounds exist, this court may refuse to recognize

[255] See the explanatory of Arbitration Law, article 66, scope of commercial law are: trade, bank, finance, investment.

the award in question as final and binding and set it aside instead; enforcement would then be moot."[256] It was accordance also with the New York Convention and Model Law, which provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that-
>
> (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which the award was made[257]

However, the arbitral award in the present case in the preliminary decision is already final and binding, as stipulated by Sir Gordon Langley one of the arbitrator from SIAC dated May 22, 2009:[258]

> We confirm that our award final determined the following issues:
>
> (i) the respondent's challenge to tribunal's jurisdiction which we dismissed
>
> (ii) the joinder of the sixth seventh and eight claimants to this arbitral reference which allowed under rule 24.b of SIAC rules 2007
>
> (iii) the commencement and pursuit of the Indonesian proceeding (case np. 1100/Pdt/G/2008/P.N.JKT.Sel) in the south Jakarta District Court was a breach of clause 17.6 of the SSA as amended and novated insofar those proceeding made claims against the 6th and 8th claimant and Mr. Ralph Marshall
>
> (iv) that the first respondent should for with discontinue the Indonesia proceeding insofar they concern the 6th to 8th claimants and Mr. Ralph Marshall
>
> (v) that the first respondent should for with discontinue the Indonesian proceeding insofar they concern the 6th to 8th claimant and Mr. Ralph Marshall

[256] 2013 SGCA 57, *op cit.*, paras 134-135
[257] New York Convention, art. V (1) (e), UNCITRAL Model Law art. 36 (1)(a)(v)
[258] Indonesian Supreme Court Decision No. 01 K/Pdt.Sus/2010, p. 30-31

> All of the above is apparent from our award and we therefore see no need to produce any further award or order.

It is clearly stated that the preliminary has final and binding decision proven by the email sent by Sir Cordon, one of the arbitrator, it is accordance with the New York Convention, thus district court of Jakarta must have accepted the award.

Fourth, in the matter of jurisdiction of the case, SIAC is competent body to settle the dispute according to Share Subscription and Shareholder Agreement (SSA) that bound both parties since 2005 and was formed from *factum de compromitendo* system.[259] It generally accepted under international commercial arbitration that a party may only enforce an award if that party is able to show the award which it is seeking to enforce was made pursuant to an arbitration agreement between itself and the party in the proceeding. As stated under Model Law art. 35(2) and the New York Convention art. IV(I)(b). As what happened with the case of *IMC Aviation Solution Pty ltd v. Altain Khuder LLC*, where a foreign award was sought to be enforced in Australia, the Victoria Court of Appeal grappled with whether the existence of an arbitration agreement was a precondition for enforcement, or if it was an issue which should be considered under the New York Convention article V. The court mandated to the creditor to show that there was an existing arbitration agreement between the parties, the court stated that:[260]

[259] Khairandy Ridwan, *Pengantar Hukum Perdata International Indonesia*¸ Gama Media Yogyakarta, 1999, p. 48

[260] *IMC Aviation Solution Pty ltd v. Altain Khuder LLC,* (2011), para. 139

> "… if the named parties to an arbitration agreement were X and Y, and an award was made in favor of X against Z, production of the arbitration agreement and the award would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement. This is because, even though the award purported to have been made under the arbitration agreement, the contents of those documents do not provide any evidence that Z was a party to the arbitration agreement."

There is no dispute over the burden of proof on the facts, it is in line under SSA, the two clauses provided that if the parties were unable to resolve any dispute amicably within 30 days, any party could then commence arbitration under the auspices of the Singapore International Arbitration Center (SIAC);

> "Dispute Resolution procedure, if the parties in dispute are unable to resolve the subject matter of dispute amicably within thirty (30) days, then any party in dispute may commence binding arbitration through the Singapore International Arbitration Centre (SIAC) and in accordance, except as therein stated, with the rules of SIAC. The Arbitration proceedings, including the making of an award, shall take place at the Singapore International Arbitration Center and the award of arbitrators shall be final and binding upon the parties.[261]

Based on this contract, the District Court of Central Jakarta does not have any competency to intervene with the case, because according to Indonesian Arbitration Law, "the district court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement"[262]. Since there was a clear written agreement in SSA, this agreement shall eliminate the right of the parties to seek resolution of the dispute or to commence court proceeding to resolve any

[261]SSA, articles 17.4, 17.6
[262] Arbitration law, article 3

dispute arising thereunder, and prohibit the district court to interfere in settlement of any dispute, which has been determined by arbitration.[263]

In addition, based on the arbitration law, all the requirement for the award to be recognized and enforce were also fulfilled, international arbitration award must have been rendered by an arbitrator or arbitration tribunal in a country which, with Indonesia is having bilateral or multilateral treaty on the recognition and enforcement of international arbitration award.[264] Indeed that there was no special regulation for either countries or bilateral agreement on the recognition and enforcement of foreign arbitral award.[265] However, both Indonesia and Singapore are part of multilateral treaty under New York Convention. Proven by Indonesia ratification New York convention on October 10, 1981 through presidential decree and entry into force on January 5, 1982.[266] Whereas, Singapore became contracting state of the New York convention after four years of Indonesia's ratification years in august 21st, 1986 followed by entry into force in November 19, 1986.[267] Moreover, the award is already registered by Indonesian embassy in Singapore dated June 24, 2009[268] which is also accordance with arbitration law; the submission of the file of the application for enforcement, must be accompanied by: (c) a certification from the diplomatic representative of the

[263] *Ibid*, article 11

[264] Arbitration law, article 66(a)

[265] Tony Budidjaja, "Enforcement of Judgments and Arbitral Awards in Indonesia: Overview", *A Q & A Guide to Enforcement of Judgments and Arbitral Awards Law in Indonesia,* 2017, Question 2

[266] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, accessed on January 13, 2018, 09.57 AM.

[267] *Ibid*

[268] Confirmation of international arbitration award according to SIAC regulation No. 062 tahun 2008 (ARB062/08/JL) dated May 7, 2009

Republic of Indonesia in the country in which the international arbitration award was rendered stating that such country and the Republic of Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of international arbitration awards."[269] Since both countries are partying to the convention, hence the issues of enforcement of arbitration awards must receive *exequatur*.

With all the explanations above, in regard with the validity of district court of Jakarta and Supreme Court of Indonesia the Enforcement of SIAC *ARB062/08/JL* is invalid.

[269] Arbitration law, art. 67(c)

CHAPTER IV

CONCLUSSION AND RECOMMENDATION

A. Conclusion.

Recognition and enforcement of foreign arbitral awards in Indonesia is stipulated under arbitration law particularly articles 65 until 69 and in accordance with The New York Convention 1958. First, all the procedures for enforcement of foreign arbitral award under arbitration law had followed the processes under the convention. Second, the annulment of foreign arbitral awards under arbitration law can only be done if the award is proven violate public order, which is line with the New York Convention, even though arbitration law does not define specifically Public Order. Moreover, there is one of the most essential principle under the New York Convention that has not been covered by the law of Indonesian Arbitration, the principle of onerous condition which means burdensome, troublesome or oppressive or more liabilities than benefits to impose significant obligations. This principle is considered to be important, because the domestic courts as the final institution that implement the awards, should facilitate the awards to be implemented as quickly as possible.

In regard with Indonesian Courts' decision in the annulment of SIAC award in case of Astro Group vs. Lippo Group has been proven invalid. First, none of SIAC awards had violated Public Order which has not yet defined under arbitration law and the court had failed to give further explained what are the

public order had violated by the awards. Second, the awards had already final and binding, and the case falls under commercial scope, since the case is about Joint-Venture Agreement. Third, the SIAC awards were already final and binding, it is automatically invalidated Court decision in refusing the award because it said the award was not binding. Lastly, in the matter of jurisdiction, SIAC is a competent body to settle this case based on SSA agreement, thus wave the rights of the courts could to interfere into the case. Therefore with the aforementioned reasons, it is sufficient to conclude that the Courts' decision on the annulment of Case between Lippo v. Astro is invalid.

B. Recommendation.

Indonesian Arbitration Law was enacted in 1990 and has not been changed since twenty-eight years ago. In regard with the recognition and enforcement of foreign arbitral awards had only regulated under article 65 until 69, whereas the case related enforcement of foreign arbitral award had increased along with the investor in Indonesia. It would be necessary for Law Maker to consider amendment of arbitration law in a more comprehensive way. Moreover, there must be at least a general definition of public policy that cab be referred to as a guidance for judges to determine public policy and its scope, so that in the future, public policy cannot be used as an emergency brake to refuse foreign awards.

REFERENCES

National Laws

Arbitration Rules of the Singapore International Arbitration Centre, 6th edition. (2016).

BANI Procedure

French Code of Civil Procedure.

Het Herziene Indonesisch Reglement (HIR)

Julian LEW. "Control of Jurisdiction by Injunctions Issued by National Court", 2006.

Law No. 30 year 1999 about Arbitration and Alternative Dispute Resolution

Presidential Decree Number 34 of 1981 Concerning on Recognition of New York Convention 1958.

Rechtsreglement Buitengewesten (RBG)

Reglemen op de Burgerlijke Rechtsvordering (RV)

Singapore International Arbitration Act,

Supreme Court Regulation No. 1 year 1999 regarding the procedures for the enforcement of Foreign Arbitral Award.

International Law/Treaties

Arbitration Rules of the Singapore International Arbitration Centre, 6th edition. 2016.

Geneva Protocol 1923

Jain, Sankalp. 2015. "Judicial Intervention in Arbitration". *Delhi High Court*.

Julian LEW. "Control of Jurisdiction by Injunctions Issued by National Court", 2006..

Montevideo Convention on the Rights and Duties of States 1933.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The New York Convention 1958

UNCITRAL Model Law 1985

Washington Convention on the Settlement of Investment Disputes between States and National of Other States in 1965.

International Cases

Churcill Mining Plc v. the Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40.

Confirmation of international arbitration award according to SIAC regulation nomor: 062 tahun 2008 (ARB062/08/JL) under District Court of South Jakarta.

E.*D. & F. Man (Sugar) Ltd . vs. Yani Haryanto* Singapore International Arbitration Centre.

E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto, No. 271/PDT. G/1999/P/JKT/PST

IMC Aviation Solution Pty ltd v. Altain Khuder LLC, (2011).

Jurisprudence District Court of Central Jakarta, No. 5/PDT.ARB.INT/2009/PN.JKT.PST.

Jurisprudence of Supreme Court No. 1/K/PDT.SUS/2010, NO. 877/K/PDT.SUS/2012.

Jurisprudence Supreme Court Decision No. 01 K/Pdt.Sus/2010

Nat'l Group for Commc'n & Computers Ltd. v. Lucent Tech. nt'l Inc., 331 F. Supp. 2d 290 (2004).

Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co., LLC., Decision of the District Court of Central Jakarta No. 86/PDT. G/2002/PN/JKT/PST.

Petroleum Dev. v. Sheikh of Abu Dhabi, 1 INT'L & COMP. L. Q., 1952, p. 247, 247; *Saudi Arabia v. Arabian Am. Oil Co*., 27 I.L.R., 1958.

PT First Media TBK v. Astro Nusantara International BV [2014] 1 SLR 430

PT. Asuransi Jasa Indonesia (persero) v. Dexia Bank SA,3 SLR (R), 2007

Ruler of Qatar v. Int'l Marine Oil Co., 20 I.L.R 534, 534 (1953).

SIAC Award ARB 062/08/JL

SIAC Award ARB 062/08/JL.

Singapore Law Reports, [2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng".

Books

Benoust de Alain. 1999. *What is Sovereignty?,* Translated by Julia Kostova from "Qu'est-ce que la Souveraineté? in Élément. No. 96.

Brown Henry and Arnold Simanowitz. 1995. *Alternative Dispute Resolution and Mediation.* Quality in Health care.

Emmanuel Gaillard. 2005. *Anti-Suit Injunctions in International Arbitration.* IAI Series on International Arbitration No. 2 Juris Publishing.

Fisher and Uri. 1991. *Getting to Yes: Negotiating Agreement without Giving in,* second edition Penguin Books.

Fuler. 1971. *Mediation; its Forms and Function,* 44 S. Call. L. REV. 305.

Hutabarat Pheo. 2013. *The dipute Resolution Review: Chapter 26*. Law business research Fifth Edtion.

Hadiputranto, Hardinoto & Partners, *Arbitration in Indonesia Law No. 30 of 1999 Arbitration and Alternative Dispute Resolution*, Dispute Resolution.

Jr. C.E. Merriam. 2001. *History of the Theory of Sovereignty Since Rousseau,* Botoche Books. Kitchener.

Khairandy Ridwan. 1999. *Pengantar Hukum Perdata International Indonesia.* Gama Media Yogyakarta.

Latham and Watkins, *Chapter I: What is arbitration,* Guide to International Arbitration.

Oehmke Thomas H. 2001. *Arbitrating Internatinal Claims – At Home and Abroad,* American Jurisprudence.

Plapinger and Donna Stienstra. 1966. *ADR and Settlement in the Federal District Courts: A sourcebook for Judges and Lawyers,* Federal Judicial Center and CPR Institute for Dispute Resolution.

Stephen B. Goldberg, et al. 1922. *Dispute Resolution: Negotiation, Mediation and Other Processes.* Second edition. Little Brown and Co., New York.

Sudargo Gautama. 1989. *Perkembangan Arbitrase Dagang Internasional di Indonesia.* International Trade Arbitration Developments in Indonesia. Bandung.

Theodor, Bake. 2016. *The International Arbitration Review.* Business Law Research.

Samir Saleh. 1985. *The Recognition and Enforcement of Foreign arbitral Awards in the States of the Arab Middle East*, 1 ARAB L. Q..

William Archibald Dunning. 1953. *A History of Political Theories: from Luther to Montesquieu.* The mac Millan Company.

Journals and Papers

Australian Government Attorney-General's Department. 2012. "Your Guided to Dispute Resolution". *NADRAC.*, Australia.

Bernier Ivan and Nathalie Latulippe. 2012. "Conciliation as A Dispute Resolution Method in The Cultural Sector". *The International Convention on the Protection and Promotion of the Diversity of Cultural Expression*.

Chan Laina. 2015. "International Disputes, The Execution of Foreign Arbitral Awards in The Asia-Pacific and Two Case Studies", 28 *New York International Law Review*.

Charles L. Cochran and Malone. 2014. "Public Policy: Perspectives and Choices". *fifth edition*.

Cheung Christina. 2012. "The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in The United States & Foreign-Related Arbitral Awards Rendered in The People's Republic of China Pursuant to Domestic Law and The New York Convention". 11 *Santa Clara Journal of International Law*.

Cleary Sean J. 1994. "International Arbitration-Foreign Arbitral Awards-Enforcement of Foreign Arbitral Award Refused Under Article V(I)(B) of New York Convention, Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (2d cir. 1992)". *17 Suffolk Transnational Law Review*.

Craig W. Laurence. 2016. "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration". *50 Texas International Law Journal*.

Craig, Park and Paulsson. 2000. "International Chamber of Commerce Arbitration". third edition. *Oceana Publications*.

D'Souza Fiona. 2007. "The Recognition and Enforcement of Commercial Arbitral Awards in The People's Republic of China". *30 Fordham International Law Journal*.

Donahey M. Scott. 1996. "Enforcement of Injunctive Relief and Arbitration Awards Concerning Title to and Enforcement of Intellectual Property Rights in Asia and The Pacific Rim". *19 Hasting International and Comparative Law Review*.

Drahozal Christopher R. 2000. "Commercial Norms, Commercial Codes, International Commercial Arbitration". *33 Vanderbilt Journal of Transnational Law*.

Dye, Thomas R. 1972. "Understanding Public Policy". *Englewood Cliffts*.

Fladjoe. 2004. *Alternative Dispute Resolution: A Developing World Perspective*. Cavendish.

Frank Sander and Stephen Goldberg. 1994. "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting *and* ADR Procedure". *Negotiation Journal*.

Fraser, Henry. 1926. "Sketch of the History of International Arbitration". *Cornel Law Review* 178.

Gaillard Emmanuel. 2002. "The Misuse of Anti-Suit Injunction". *New York Law journal*.

Garner, J.W. 1955. "Political Science and Government". *World Press*.

Goyal Mitakshara. 2016. "Extend of Judicial Intervention in the Arbitral Regime: Contemporary Scenarion". *International Journal of Law*. Haryana India.

Hadiputranto, Hardinoto & Partners. 2012. "Arbitration in Indonesia Law No. 30 of 1999 Arbitration and Alternative Dispute Resolution". *Dispute Resolution*.

Hardock Roger S. & Jane L. Volz. 1996. "Foreign Arbitral Awards: Enforcing the Award against the Recalcitrant Loser". 21 William Mitchel Law Review.

Imelda Onibala, "Ketertiban Umum Dalam Perspecktif Hukum Pedata Internasional", *Vol.I/No.2/April-Juni/2013 Edisi Kusus*

Investment Climate Advisory Services of the World Bank Group. 2011. "Alternative Dispute Resolution Guidelines". *The World Bank group*.

Mills Karen. 2003. "Enforcement Arbitration Awards in Indonesia & other Issue of Judicial Involvement in Arbitration". *Inaugural International*

Conference on Arbitration of the Malaysia Branch of the chartered institute of Arbitrators. Kuala Lumpur.

Neil A Dowers. 2013. "The Anti-suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law". *Cambridge Journal of International and Comparative Law*.

Rajagukguk Erman. 2011. "Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Ground of Public Policy". *Indonesian Law Review*. Volume no.1.

Ray B.N. 2006. "Political Theory: Interrogations and Interventions"., *Published by Authors Press*. Delhi.

Robinson Tyler B. 2013. "The Recognition and Enforcement of Foreign Arbitral Awards as Foreign Judgments in The United States. *24 American Review of International Arbitration*.

Rubins Noah. 2005. "The The Dispute Resolution Review Enforcement and Annulment of International Arbitration Awards in Indonesia". *20 American University International Law Review*.

Salomon Claudia T. 2011. "Enforcement Begins when the Arbitration Clause is Drafted". *22 American Review of International Arbitration*.

Samir Saleh. 2006. "commercial arbitration in the middle east: shari'a, lebanon, syria, and egypt". *Hart Publishing*.

Samir Yona. 2003. "Alternative Dispute Resolution Approached and Their Application". UNESCO. *PCCP Publications*.

Sayre Paul L. 1928. "Development of Commercial Arbitration Law". *35 Yale Law School*.

Shalakany Amr A. 2000. "Arbitration and The Third World: A Plea For Reassessing Bias under The Specter of Neoliberalism". *41 Harvard International Law Journal*.

Shinde Ujawal. 2012. "Conciliation as An Effective Mode of Alternative Dispute Resolving System". *IOSR Journal of Humanities and Social Science (JHSS)*. Volume 4.

Sri Wahyuni. 2014. "Konsep Ketertiban Umum dalam Hukum Perdata Internasional: Perbandingan Beberapa Negara Civil Law dan Common Law", *Supremasi Hukum Vol. 3, No. 1*

Stromberg Winston. 2007. “III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes”. *Loyola of Los Angeles Law Review*.

The Law Society of Upper Canada. 1992. “Short Glossary of Dispute Resolution Terms”. *Research and Planning Committee*. Canada.

Tony Budidjaja. 2017. “Enforcement of Judgments and Arbitral Awards in Indonesia: Overview”. *A Q & A Guide to Enforcement of Judgments and Arbitral Awards Law in Indonesia*.

Wakim Mark. 2008. “Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East”. *New York International Law Review*.

Yaad Rotem. 2010. “The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*”. 10 Chi. J. Int’l L*.

Young Shaun P. 2013. “Evidence-Based Policy-making in Canada”. Don Mills on: *Oxford University Press*.

Zeynalova Yuliya. 2013. “The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?”. *31 Berkeley Journal of International Law*.

Zhou Jian. 2006. “Judicial Intervention in International Arbitration: A Comparative Study of the Scope of The New York Convention in U.S and Chinese Courts”. 15 *Pacific Rim & Policy Journal*.

United Nations Documents

International Arbitration. 2007. Back to Basic?, ICCA Congress Series, Volume 13.

The Organization for Economic Co-operation and Development (OECD). 2016. Economic Survey Indonesia.

UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002.

UNCITRAL Yearbook, vol. XVI: 1985, A/CN9/264.

United Nation Commission on International Trade Law. 2010. UNCITRAL Arbitration Rules.

United Nations Conference on Trade and Development. 2005. Dispute Settlement. International Commercial Arbitration. UN New York and Geneva.

Al-Qur'an

Qur'an surah Al-baqarah, (2; 275- 276)

Qur'an surah An-nisa (4:60).

Websites

An Overview, https://singaporeinternationalarbitration.com/2012/07/25/astro-vs-lippo-an-overview/, accessed at November 5, 2017

Declaration or other notification pursuant to article I(3) and article x(1), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html last accessed January 13, 2018

http://caselaw.findlaw.com/us-5th-circuit/1046829.html, last accessed January 3, 2018

http://nationalunitygovernment.org/pdf/Sovereignty-Guidelines-Alessandro-Pelizzon.pdf

http://seriesseed.in/docs/v1/investment-agreement.pdf

http://siac.org.sg/our-rules/rules/siac-rules-2007#siac_rule24 , last access January 19, 2018

http://study.com/academy/lesson/what-is-public-policy-definition-types-process-examples.html, last accessed January 19, 2018

http://thelawdictionary.org/intervention/, last accessed January 19, 2018

http://www.adr.org/arb_med last accessed November 17, 2017)

http://www.baniarbitration.org/about.php, last accessed on January 31, 2018

http://www.hukumonline.com/berita/baca/hol20086/konflik-astrolippo-kian-memanas

http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html, last accessed November 14, 2017

http://www.kndlawyers.com/component/k2/item/70-enforcement-of-foreign-arbitral-awards-in-indonesia.html, last accessed January 13, 2018.

http://www.newyorkconvention.org/countries, last accessed January 19, 2018

http://www.newyorkconvention.org/in+brief, last accessed January 13, 2018, 7.59 PM.

http://www.nyulawglobal.org/globalex/International_Commercial_Arbitration.htm, last accessed January 19, 2018

http://www.rotlaw.com/legal-library/what-is-an-intervention, last accessed January 19, 2018

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, last accessed January 19, 2018

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html last accessed January 13, 2018

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, last accessed January 13, 2018

https://definitions.uslegal.com/a/anti-suit-injunction/, last accessed January 19, 2018.

https://globalarbitrationnews.com/indonesia-the-risks-of-enforcing-foreign-awards-20150129/, last accessed January 3, 2018

https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx, last accessed January 19, 2018.

https://singaporeinternationalarbitration.com/2012/07/25/astro-vs-lippo-an-overview/, last accessed January 19, 2018

https://www.biicl.org/files/3931_2000_himpurna_and_karaha_bodas_arbitrations.pdf, last accessed January 3, 2018

https://www.biicl.org/files/3931_2000_himpurna_and_karaha_bodas_arbitrations.pdf, last accessed January 3, 2018

https://www.clydeco.com/insight/article/foreign-investment-and-dispute-resolution-in-indonesia, last accessed January 19, 2018

https://www.export.gov/article?id=Indonesia-bilateral-investment-agreements, last accessed January 19, 2018

https://www.thefreedictionary.com/onerous, last accessed January 13, 2018.

https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf,last accessed November 14, 2017)

http://www.hukumonline.com/klinik/detail/lt4e3e380e0157a/apa-definisi-ketertiban-umum-, Last accessed March 7, 2018

The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.newyorkconvention.org/in+brief, last accessed January 13, 2018.

Miscellanous

Speech by Sir Anthony Clarke, Master of the Rolls, "The Future of Mediation" at the second civil mediation council national conference Birmingham